(1933) 05 CAL CK 0005

In the Calcutta High Court

Case No : Appeals from Original Orders Nos. 26 and 66 of 1931

Pabna Dhana Bhandar, Co. Ltd., (in Liquidation) APPELLANT

Vs

Jagneswar Sanyal and Others RESPONDENT

Date of Decision : 08-05-1933

Acts Referred:

Citation : (1933) 05 CAL CK 0005

Final Decision : Dismissed

Judgement

Mitter, J.

Appeal No. 66 of 1931

1. This is an appeal on behalf of the Pabna Dhanabhandar Company, Limited (in Liquidation) against the order of the Subordinate Judge of Pabna, dated the 18th September, 1930, by which he disallowed an objection of the Appellant to the assignment of a decree made by the said Company in favour of the Respondents. A preliminary objection has been raised to the hearing of this appeal. In order to understand the soundness or otherwise of the preliminary objection, it is necessary to state a few salient facts. The Pabna Dhanabhandar Co., Ltd., had a decree against the judgment-debtors Nobin Kishori Chaudhurani and another. The Respondents had certain deposits in the Company. On the 5th of June, 1929, they conveyed the decree to Jagneswar Sanyal, the Respondent to the present appeal. On the 8th of July, 1929, an application was made by one of the creditors of the Bank for winding-up. On the 18th of November, 1929, the High Court in its Original Side passed the winding-up order. On the 5th of July, 1929, the Respondents assignees applied to execute the decree. The petition for execution is to be found at pages 35 and 37 of paper-book in M. A. No. 26 of 1931. The Liquidators of the Bank put in a petition of objection to the assignment (see page 1 of paper-book 66 of 1931) and a miscellaneous case was started. The objection in substance was that the transfer was a fraudulent preference and is not valid. The Subordinate Judge negative this objection of the liquidators and it is against that order that the present appeal has been brought. It is said that there is no

appeal to this Court as the question arises between the decree-holder and his representative The Appellant contends that sec. 47, cl. (3) of the CPC is wide enough to cover such a question and an appeal would, therefore, lie. The Respondent has relied on several cases in support of the preliminary objection. There is a decision of Sir Lawrence Jenkins in the case of Magan Lal v. Doshi Mulji I. L. R. 25 Bom. 631 (1901), where the learned Chief Justice of Bombay was of opinion that a question between the judgment-debtor and his representative is not a question between the party in suit and his representative within the meaning of sec. 244 of the Code of 1882. A similar view has been taken by Mr. Justice Banerjee in Bhagwati v. Banwari Lal I. L. R. 31 All. 82 (F. B.) (1908). On the other hand the Appellant has relied on a decision of the Madras High Court in the case of Bommanapati v. Chinta Kunta I. L. R. 26 Mad. 264 (1902) in support of the opposite view. It is not necessary to decide finally on the preliminary objection as we are of opinion that the appeal should fail on the merits.

2. It appears that by a resolution of the share-holders and depositors of the Company passed on the 28th February, 1926, it was resolved by the majority that if a depositor happens to be a debtor then the said sum may be set off and that the Bank should not go into liquidation and that every attempt will be made to sell it. On the 7th of March, 1926, there was another resolution in a special general meeting of the share-holders and depositors of the Pabna Dhanabhandar Co., Ltd. and it was resolved by a majority that any depositor shall be competent to have his dues set off against the debt of any debtor and on the 14th of March, 1926, at a meeting of the Directors this resolution was confirmed. It is argued by the Appellant that an attempt by the directors and depositors of making an arrangement or set-off can only be done under sec. 153 of the Companies Act, this special procedure was not followed in the present case and that therefore the resolutions are ultra vires. It is to be noticed, however, that this objection was not taken in the petition of objection of the liquidators and nothing was said with regard to the regularity or otherwise of the meetings of the Bank. We are unable, therefore, to give effect to this objection raised for the first time in appeal. If the objection had been taken in the Court below, some answer might have been forthcoming. The meetings of the share-holders were convened with notice to all the share-holders and if some of them did not choose to appear, they must be held to be bound by the resolutions passed by the majority.

3. It is next argued that the assignment is hit by the provisions of sec. 231 of the Companies Act and must be deemed to be a fraudulent preference. The test of fraudulent preference has been laid down authoritatively in several decisions and it is said that the use of the word "preference" implies an act of free will and that would by itself make it necessary to consider whether pressure had or had not been used. See Sharp v. Jackson [1899] A. C. 419. It has been argued in this case that the Subordinate Judge was wrong in holding that there was pressure from the creditors, seeing that the notice given on the 9th of January, 1929 (Ex. " E") referred to a realisation of current deposits and deposits without interest of

a much smaller sum than Rs. 23,000 for which the assignment of the decree was made, and that a fixed deposit for two years of Rs. 5,000 had not become due on the 14th of May, 1929, the date of Exhibit "B." The test is whether there was an overriding intention to prefer one particular creditor or creditors even if the bank had committed the mistake of making the assignment in favour of a particular creditor under the impression that unless that particular creditor was paid, the Company would go into liquidation. It cannot be said that the act was done by the Company''s free will and volition. We are of opinion, therefore, that the Subordinate Judge was right in holding that there was real pressure when the Company made the assignment as opposed to colourable pressure. The test is, as has been laid down by the Privy Council in the recent case of Sime v. The Official Assignee 47 C. L. J. 339 (P. C.) (1927), that where the proper inference to draw from the facts was that the dominant motive actuating the debtor was that in making the transfer to his creditor, he, the debtor, was doing what he felt himself bound or compelled to do, the case is not of fraudulent preference within the statute. Here the object of the Company was to save the Company from liquidation. For all these reasons the appeal must be dismissed.

4. There will be no order as to costs.

Appeal No. 26 of 1931.

5. This appeal is on behalf of the judgment-debtors and arises out of proceedings taken in connection with the assignment of a decree with reference to which the facts have been stated in the judgment which we have just delivered in Appeal from Original Order No. 66 of 1931. It is not, therefore, necessary to re-capitulate the facts in this appeal. The objections taken on behalf of the judgment-debtors are three in number. In the first place it is contended that the proceedings relating to the execution should not have been allowed to go on in view of the provisions of sec. 171 of the Indian Companies Act which requires that leave must be obtained after an winding-up order has been made to commence any suit or other legal proceeding against the Company. It is contended on behalf of the judgment-debtors that such leave not having admittedly been obtained, the execution proceedings cannot go on. It appears, however, that this objection was not taken by the judgment-debtors in the Court of first instance and this objection, in our opinion, does not lie in the mouth of the judgment-debtors. The objection was taken by the Pabna Dhanabhandar Company, Limited (in Liquidation) but was disallowed by the Court of first instance. Whether it was abandoned or not, it does not appear but it was not pressed in this Court by the Pabna Dhanabhandar Company, Ltd. (in Liquidation). It would not be right in our view that the judgment-debtors not having taken the point in the Court below, should be allowed to raise this contention now. The irregularity complained of is an irregularity in the matter of procedure and it does not matter to the representatives of the judgment-debtors whether they pay the money to the Pabna Dhanabhandar Company, Limited or to their assignees. There is, therefore, no substance in this objection.

6. The second objection turns on the construction of the compromise decree at page 4 of the paper-book. It is argued that no time was given for the payment of the second and the third instalments of Rs. 6,663 and that, in these circumstances the decree should be liberally construed and it should be held that those sums have not yet become due. That would be a very unreasonable construction to put upon the decree. The decree recites that the Plaintiff will receive in four equal instalments a sum of Rs. 6,663, the first instalment being payable in December, 1928 and the last instalment in December, 1931. It is obvious that what was intended was that the other instalments were payable in December, 1929, and in December, 1930, respectively and the execution proceedings have been started in July, 1930, after the third instalment had fallen due. There is, therefore, no substance in this objection and it was not even raised in the Court below. It was admitted that the third instalment fell due.

7. The last objection is founded on the provisions of sec. 67 of the Transfer of Property Act read with sec. 99 as it stood before the amendment of the Act by which sec. 99 was repealed. It is said that from the provisions of paragraph No. 4 of the consent decree at page 4 of the paper-book it is clear that the execution proceedings could not terminate in the sale of the properties mentioned in paragraph 4 unless a suit was brought as contemplated by sec. 67. This point was not. taken in the Court below nor was it taken originally in the grounds of appeal; but that ground was served on the Respondent only a short time before the hearing of the present appeal. It appears clear also from paragraph No. 3 of the petition of compromise at page 4 of the paper-book that there was a distinct provision that the Plaintiff would be at liberty to proceed against the Defendants by executing the decree. There does not seem to be any substance in this objection.

8. The result is that all the three objections urged in this appeal fail and the appeal must be dismissed with costs. The Respondents are entitled to get costs from the judgment-debtors Appellants. We assess the hearing-fee at live gold mohurs.

Henderson, J.

I entirely agree.

