

(2001) 10 CAL CK 0010
In the Calcutta High Court

Case No : C.P. No. 142 of 1992 and C.A. No. 242 of 2001

Ramanlal Madanlal

APPELLANT

Vs

Beni Ltd.

RESPONDENT

Date of Decision : 16-10-2001

Acts Referred:

Companies Act, 1956 — Section 466

Citation : (2002) 110 CompCas 620

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : Sakti Nath Mukherjee, Joydeep Kar, Jisnu Saha and K. Siddhu, for the Appellant; Anindya Mitra, Shyam P. Sarkar, G. Roychowdhury and Biswapati Das, for the Respondent

Judgement

Amitava Lala, J.—This is an application u/s 446 of the Companies Act, 1956, read with the Companies (Court) Rules, 1959 ("the Act"). This application is made by way of a judge's summons with a supporting affidavit by one Sri Daulal Fomra on behalf of Raman Lal Madanlal, a registered partnership firm having its registered office at Ezra Park, Kamarhatty, P.S. Baranagar, 24 Parganas (North).

2. There was a suit being Title Suit No. 71 of 1960 before the Subordinate Judge (the designation then was) District Court, Alipore, 24 Parganas, for ejectment of the applicant by the official trustee as owner of the premises, being numbered 117, Barrackpore Trunk Road, Kamarhatty, 24 Parganas(N), inter alia, on the grounds that the official trustee as owner of the premises leased out 40 bighas of land to one known as Beni Engineering for a period of 51 years and also let out the front portion of the premises with effect from 1-6-1950 on the terms and conditions set out in the letter relevant for the purpose. It was alleged that Beni Engineering had sublet the said front portion to the applicant herein and, thus, the said official trustee sought eviction of the applicant herein along with Beni Engineering from the said front portion of the said premises. By a judgment and order dated 28-2-1972, the Court was pleased to dismiss the suit of contest with

costs. The official trustee preferred an appeal being Title Appeal No. 429 of 1972 in the Court of the Second Additional District Judge, 24, Parganas, Alipore. A cross-objection was also filed by the lessee-company. The appeal was allowed but the cross-appeal/ objection was rejected. The suit was decreed on contest. The applicant and the company were given time up to 31 -5-1973, to vacate the premises with their structures erected by them and deliver vacant possession of the suit premises to the plaintiff. Liberty was also granted to demolish the structures erected by the defendants therein in the suit premises.

3. Being aggrieved thereby, a second appeal was preferred in this High Court being No. 276 of 1974. Initially the decree was stayed. Subsequently, the suit was dismissed for non-prosecution on 8-8-1990. Thereafter an application for restoration was filed which was disposed of on 17-7-1998, by recalling the appeal and restoring it in original position.

4. During the interregnum period between 1990 and 1998 as aforesaid, the lessee-company had gone into liquidation. Now, by making this application u/s 446 of the Companies Act, the applicant sought for leave to proceed with the second appeal. The trustee and the beneficiary under the trust opposed this application by saying that before the application for recalling the order passed by the Division Bench was made, no leave was obtained by the party from the Court having company jurisdiction and as such the order of restoration passed by the Division Bench is nullity. Now there is no scope of rectification of the order already held as nullity.

5. As per Sub-section (1) of Section 446, when a winding up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced or, if pending at the date of the winding up order, shall not be proceeded with against the company except by the leave of the Court and subject to such terms as the Court may impose.

6. Therefore, there are two parts of the section : (a) No suit or legal proceeding shall be commenced, (b) If pending on the date of winding up, order shall not be proceeded with against the company except by the leave of the court.

Both the parts as aforesaid are disjunct by the word "or". Therefore, it appears that leave cannot be granted in respect of commencement of legal proceeding. Leave can only be granted when a matter is pending but cannot be proceeded due to such technical impediment. Therefore, pendency of the second appeal is the key point to come to a conclusion. The facts reveal that on the date of the winding up of the company, the original order of dismissal of the second appeal was subsisting and such order of dismissal was revived in its original position subsequently without the leave of the court having company jurisdiction.

7. On the other hand, if I proceed with the civil court's jurisdiction, I have to explain certain other points which are relevant for the purpose of coming to a conclusion. Firstly, this application is not made by or against the company gone into liquidation but by the lessee or tenant-firm under the company against the

superior landlord. Therefore, this application is basically in the form of condonation of defects. The official liquidator appointed over the company has no objection in granting such leave. Therefore, the governance of the civil court cannot be ruled out in that situation, particularly when the second appeal was not dismissed on the merits. Moreover, by the order of restoration, the original position of the lis before the company had gone into liquidation has been restored into the file. One may say that the Companies Act being a special Act should prevail over the CPC being a general Act, therefore, the civil court had no jurisdiction in entertaining such application without leave being granted by the court having company jurisdiction. To that I may only add that special enactment will definitely prevail over general enactment in respect of those who are primarily responsible for obtaining such leave but the same may not be similarly placed with those who are not primarily responsible for obtaining such leave. To them it might be mere formality.

8. In the instant case, since the appeal was dismissed for default prior to the company's going into liquidation and restored subsequent thereto, the original position which was subsisting prior to the company's going into liquidation has been restored by a Division Bench of this Court. Hence, for the sake of judicial comity neither is it desirable that this Court sitting singly should declare such order a nullity nor defect will be removed without being tested by a larger Bench whether the same is mere formality or not.

Therefore, it would be appropriate to refer the matter to the Chief Justice to form a larger Bench or send the matter to the appropriate Appellate Court having determination over the company matters to come to a definite conclusion on these two issues :

- (a) whether leave can be granted subsequent to the order passed by the appeal court in regularising the appeal ?
- (b) If not, what would be the fate of the order of the appeal court already existing ?

Let the matter be placed before the Chief Justice for the said purpose of formation of appropriate Bench or for appropriate assignment or for taking appropriate steps.

Xeroxed certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisites for drawing up and completion of the order and certified copy of this judgment.

9. Department and all parties are to act on the signed copy minutes of the operative part of this judgment on the usual undertaking and subject to satisfaction of the officer of the court in respect as above.