

(1961) 03 CAL CK 0018
In the Calcutta High Court
Case No : Suit No. 527 of 1960

Roopnarain Ramchandra Private Ltd.

APPELLANT

Vs

Brahmapootra Tea Co. (India) Ltd. and Another

RESPONDENT

Date of Decision : 10-03-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Companies (Court) Rules, 1959 — Rule 117, 118(3)
Companies Act, 1956 — Section 446, 450

Citation : AIR 1962 Cal 192 : 65 CWN 1060

Hon'ble Judges : A.N. Ray, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. This is an application for setting aside an ex parte decree passed on December 12, 1960. The application has been made by Brahmapootra Tea Co., (India) Ltd. The notice of Motion is addressed to Messrs. Roopnarain Ramchandra Private Ltd., the plaintiff.

2. The petitioner company states that in the month of July, 1960 the Registrar of Companies, West Bengal, presented a petition for winding up of Brahmapootra Tea Co. (India) Ltd., on the ground that the petitioner company had made default in delivering the Statutory Report. An order was made on November 15, 1960 for winding up the company. On November 19, 1960 it is alleged that the petitioner came to know of the said petition as well as the order for winding up. It is further alleged that the petitioner was not served with any notice and had no knowledge of the presentation of the winding up petition. On or about November 28, 1960 the petitioner made an application for setting aside the winding up order. On December 5, 1960 the winding up order was set aside. On the same day the Official Liquidator was appointed as Provisional Liquidator and the Provisional Liquidator was directed to take possession of all books, papers and documents and assets of the petitioner. The directions for advertisements were given and

the application was made return, able on January 9, 1961.

3. On January 11, 1961 the petitioner's solicitors received a letter from the plaintiff's solicitors intimating that the latter had received instructions from Messrs, Roopnarain Ramchandra Private Ltd. of Kanpur to support the winding up application. On January 12, 1961 the petitioner's solicitors obtained a copy of the affidavit affirmed on behalf of Messrs, Roopnarain Ramchandra Private Ltd., and from the said affidavit the petitioner came to know of the suit filed by the plaintiff against the defendant company, and also that a decree had been obtained in the suit on December 12, 1960.

4. In paragraph 8 of the petition it is alleged that the company had no knowledge of the institution of the suit and of the decree passed therein. In paragraph 9 of the petition it is alleged that the writ of summons was served by publication of the substance of the writ of summons in the Statesman on September 22, 1960 and in the Sanmarg on September 17, 1960. These facts came to the knowledge of the petitioner from the perusal of the affidavit of service filed in this suit.

5. The petitioner states that the Board of Directors of the company had no knowledge of the agreement alleged in the suit. It is further alleged that the petitioner's Board of Directors never passed any resolution for borrowing any sum of money from the plaintiff company.

6. In paragraph 11 of the petition it is alleged that when the decree was passed on December 12, 1960 the Official Liquidator was already appointed Provisional Liquidator and as such it was not competent for the plaintiff to proceed with the suit without obtaining leave from this court. In paragraph 12 of the petition it is submitted that the ex parte decree is a nullity. The petition has been verified by one Gopikrishna Vyas, the constituted attorney of Brahmapootra Tea Co. (India) Ltd.

7. On behalf of the company there is a supporting affidavit affirmed by Tulsidas Mundhra on January 24, 1961. In the said affidavit it is stated that one Haridas Mundhra was all times the Chairman of the Board of Directors of the defendant company and was in sole charge of the management and administration of the affairs of the company. Thereafter it is alleged that the Board of Directors never authorised Haridas Mundhra to negotiate for any loan or that if Haridas Mundhra made any agreement with the plaintiff company he did so on his own behalf and the agreement is not binding on the company or its Board of Directors. In paragraph 4 of the said affidavit it is stated that in the year 1958 an application was made by Indra Investors Private Ltd. for winding up of the defendant company. On September 16, 1958 an order was made for winding up of the defendant company, and the Official Liquidator was appointed the Liquidator of the company. The order for winding up was set aside by the Appellate Court on March 23, 1960.

8. On behalf of the plaintiff there is an affidavit affirmed by Amir Chand. He is the manager of the plaintiff company. The deponent sets out in paragraph 8 the

circumstances under which an order was made for substituted service of the writ of summons. In paragraph 9 of the affidavit he sets out the circumstances giving rise to the suit. In paragraph 10 of the affidavit he says that at the time of the passing of the ex parte decree the plaintiff did not know about the presentation of the application for winding up or of the order dated November 15, 1960 and the Order dated December 5, 1960. He further says that if the plaintiff had known the aforesaid facts the plaintiff would have obtained leave from court to continue the suit.

9. The affidavit in reply has been affirmed by Gopikrishna Vyas. In the affidavit in reply there is no denial of paragraph 10 of the affidavit in opposition, in other words, it is not the case of the company that the plaintiff was aware of the presentation of the petition for winding up or of the appointment of the Provisional Liquidator.

10. Counsel on behalf of the applicant contended that the decree was a nullity, and that the court had no jurisdiction to pass a decree by reason of the provisions contained in Sections 446 and 450 and rules u/s 446. The contention on behalf of the applicant is that by reason of the provisions contained in Section 446, when winding up order has been made and the Official Liquidator has been appointed as Provisional Liquidator no suit or other legal proceedings, if pending at the date of the winding up order, shall be proceeded with against the company except by leave of the court and subject to such terms as the court may impose. u/s 450 where a Provisional Liquidator is appointed by the court, the court may limit and restrict his powers by order binding him or by subsequent order, but otherwise he shall have the same powers as Liquidator.

11. Rule 117 states that an application u/s 446(1) for leave of the court to commence or continue any suit or proceeding against the company shall be made upon notice to the Official Liquidator and the parties to the suit or proceeding sought to be commenced or continued. Rule 118(3) states that upon making of the order for winding up suits and proceedings by or against the company then pending or thereafter instituted in the court or transferred to the court shall be assigned or placed in the list of Judge for the time being exercising jurisdiction under the Act.

12. The draft order of the appointment of the Provisional Liquidator was placed before me. The relevant order is as follows: The application of the Registrar of Companies for winding up of the Company be heard on its merits. It is further ordered that the Official Liquidator attached to this court be and is hereby appointed Provisional Liquidator of the above-named Brahmapootra Tea Co. (India) Ltd., having taken (?) or have taken (sic) into his custody and control of the books, papers and documents as also of the assets and other properties pending the final disposal of the application for winding up.

13. The only contention on behalf of the applicant was that the decree was a nullity by reason of the court having no jurisdiction to pass the decree and by

reason of the appointment of the Provisional Liquidator. I am unable to accept the contention. The court has full jurisdiction to entertain suits and to pass decrees where the company is a party to the suit and such company is in the course of liquidation. It is true that the provisions in the Companies Act and the rules thereunder contemplate that if the suit is pending on the date of the presentation of the winding up petition or on the date of the winding up order the suit or proceeding is not to be continued except by leave of the court. Leave to proceed with the suit in such circumstances is not similar to leave under Clause 12 of the Letters Patent. In the absence of leave under Clause 12 the court has no jurisdiction. The existence of jurisdiction depends upon leave under Clause 12. In suit or proceeding against the company in the course of liquidation the absence of leave to continue or proceed does not, in my opinion, deprive the court of the jurisdiction to pass any decree. The court has jurisdiction to hear such suits. The existence of jurisdiction does not depend upon any such leave. It is the court which hears the suit, also confers leave to proceed with the suit when leave is asked for. If leave has not been obtained, the decree does not become a nullity for lack of jurisdiction. Leave is asked for to continue the suit. In the present case the plaintiff was not aware of any winding up order and therefore could not ask for any leave. In my opinion the absence of leave is not fatal as to render the decree a nullity. In appropriate case leave can be given, even retrospectively if circumstances of the case justify.

14. Counsel on behalf of the respondent, in my view, rightly contended that the application was not maintainable. The application was not made by the Provisional Liquidator. If the company sought to uphold and rely on the appointment of the Provisional Liquidator, Counsel for the respondent contended, then the Provisional Liquidator was the only competent person to make an application. Counsel on behalf of the petitioner contended that inasmuch as the company was not accepting the winding up order and has already preferred an appeal therefrom, the company could not ask the Provisional Liquidator to make an application. To my mind that is not an answer to the contention on behalf of the respondent. The only person competent to make an application after there has been appointment of the Provisional Liquidator is such person and not the company.

15. Counsel on behalf of the petitioner raised the contention that there was no proper service. There was an order for substituted service. I am not called upon to express any opinion on the propriety of that order. In any event Counsel for the petitioner did not press the application on the ground that the petitioner was prevented by any sufficient cause from defending the suit. As I have already indicated his only contention is that the decree was a nullity.

16. AS I am delivering the judgment it is now being said by counsel for the petitioner that he did not argue any other point because a preliminary objection was taken and argued by Counsel for the respondent that the company had no locus standi to make the application.

17. The only points argued on behalf of the petitioner were, first, that the decree was a nullity, and secondly that the court was bound to restore the suit as the decree was a nullity.

18. I have already indicated that the decree is not a nullity. The court had jurisdiction to pass the decree. I am also of opinion, that the company is not competent to make this application.

19. This application is dismissed with costs.