

(1947) 05 CAL CK 0015
In the Calcutta High Court

Sailendra Kumar Roy and Others

APPELLANT

Vs

Bank of Calcutta, Ltd.

RESPONDENT

Date of Decision : 26-05-1947

Acts Referred:

Companies Act, 1956 — Section 153A

Citation : AIR 1948 Cal 131

Hon'ble Judges : Ellis, J;Chakravartti, J

Bench : Full Bench

Judgement

Chakravartti, J.—The question of law raised by these appeals appears to be one of first impression. The two appeals are directed against a common order passed in two different execution cases which were started against different judgment-debtors with respect to two different decrees. But both were started by the respondent who claimed to be an assignee from the common decree-holder.

2. The material facts are as follows. It appears that on 22-9-1945, the Jessore Loan Company obtained two final mortgage decrees, one against the appellants in each of these appeals. The preliminary decrees which were made final were new decrees passed under the Bengal Money-lenders Act, but nothing turns on that circumstance.

3. On 4-2-1946, this Court, on its Original Side, made an order u/s 153A, Companies Act, sanctioning a scheme of amalgamation of the Jessore Loan Company with the Bank of Calcutta Ltd., and by the same order provided for the transfer to the latter company of all the assets and liabilities of the former in accordance with the scheme of amalgamation. The order, after stating that the scheme "as set out in the Chairman's Report filed herein and in the schedule hereto" was sanctioned, proceeded to state as follows:

And it is further ordered that the whole of the undertakings, assets and all properties, moveable and immovable, and liabilities of the said transferor Company, Jessore Loan Co. Ltd., do vest in the Bank of Calcutta Ltd., in

accordance with the said scheme of amalgamation.

The relevant clause in the schedule to the order was as follows:

1. That all the outstanding assets of Jessore Loan Company Ltd., except so much as is necessary to pay out the security deposits to its employees, will vest absolutely in the Bank of Calcutta Ltd. on and from the 30th day from the filing of the sanctioned scheme with the Registrar of the Joint Stock Companies.

The time fixed by the order for the filing of the scheme was "fifteen days from the date of filing of this order." It is not disputed that the scheme was duly filed, as directed. Nor can it be disputed that at the date the vesting took place, the two decrees were among the outstanding assets of the Jessore Loan Company.

4. On 16-7-1946 the Bank of Calcutta Ltd., applied for execution of the two decrees, "in place of the Jessore Loan Company Ltd." In col. 11 of the applications for execution, a prayer was inserted for substitution-of the Bank of Calcutta Ltd., as the decree-holder on the basis of the High Court's order u/s 158A, Companies Act.

5. By their petitions of objection filed on 24-12-1946, the judgment-debtors in both the cases took the plea inter alia, that inasmuch as no notice under Order 21, Rule 16, Civil P.C., had been served, the execution proceedings were not maintainable. The respondent company, in its answer to this plea, did not claim that any notice under Order 21, Rule 16 had been served, but its case appears to have been that since there had been no "transfer by assignment", no such notice was necessary.

6. By its order dated 20-1-1947, the Court found in favour of the respondent and held that the case being not one of transfer by assignment but of transfer by operation of law, the respondent was not required to serve any notice under Order 21, Rule 16, Civil P.C. The other pleas taken by the appellants were also overruled and in the result their petitions of objection were dismissed. Thereupon, the present appeals were preferred.

7. The learned advocate, appearing for the appellants, limited himself to the plea under Order 21, Rule 16 and did not seek to re-open the question raised by the other pleas. His sole contention was that in a case like the present, the transfer of the assets of the amalgamated company really took place by virtue of the scheme of composition entered into by that company; in other words, by assignment. The sanction of the Court was only super-added to the contract between the parties, as in the case of compromise decrees, but it was not by the force of the Court's order that the assets were transferred. The learned advocate further contended that the transfer of the assets of a company under a scheme of amalgamation could not be said to be a transfer "by operation of law" and in support of his contention relied upon the decisions in Mahadeo Baburao Halbe Vs. Anandrao Shankarrao Deshmukh, and Mathurapur Zemindary Co. Ltd. Vs. Bhasaram Mandal and Others, .

8. The contention of the appellants is founded on the proviso to Order 21, Rule 16, Civil P.C. The rule provides that where the interest of any decree-holder in a decree is transferred by assignment in writing or by operation of law, the transferee may apply for the execution of the decree. Then comes the proviso which, as amended by the Calcutta High Court, reads as follows:

Provided that where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and judgment-debtor, and until the Court has heard their objections (if any), the decree shall not be executed provided that if, with the application for execution, an affidavit by the transferor admitting the transfer or an instrument of transfer duly registered be filed, the Court may proceed with the execution of the decree pending the hearing of such objections.

9. It was contended on behalf of the respondent that the present case came within the exceptions to the proviso. A copy of the High Court's order u/s 153A had been, it was said, filed along with the application and therefore "an instrument of transfer" had been filed. Besides, the application, which contained a statement as to the transfer, had been verified on behalf of the Bank of Calcutta Ltd., and since, by the amalgamation, the Jessore Loan Company had merged in and become one with the Bank of Calcutta, the verification, it was said, was an "affidavit by the transferor."

10. This contention appears to us to be misconceived. The exceptions to the proviso do not provide that if the requirements mentioned therein are complied with, no notice under Order 21, Rule 16 need be given. All that they provide is that if one or other of them applies, the execution need not be stayed till the objections of the transferor or the judgment-debtor are heard and disposed of, but may proceed and the objections may be heard in the course of execution, the validity of the proceeding abiding the result. This can only mean that on notice being given, the execution may nevertheless proceed, subject to such exceptions as may be taken. The respondent, therefore, could not succeed merely by showing that the case came under one or other of the exceptions for the plea based on non-service of a notice would still not be avoided. It might perhaps be reduced to a weaker plea, for since provision has been made by the Calcutta Amendment for the hearing of the objections in the course of the execution proceedings, non-service of notice under Rule 16 might be treated as no more than an irregularity. But however that may be, on the facts of the present case, we are of opinion that it does not come under either of the exceptions. The respondent's advocate overlooked the fact that by calling the High Court's order an "instrument of transfer," he went perilously near conceding that the transfer was by assignment. We are by no means satisfied that the order can be regarded as an instrument of transfer, but assuming, it can be so regarded, it appears from the record that in fact no copy of the order was filed along with the application. The first exception is thus of no assistance to the respondent. As regards the second exception, it may be pointed out first that a verification is not

an affidavit; and, in any event, we dissent altogether from the proposition that an affidavit by the Bank of Calcutta could be treated as an "affidavit by the transferor" within the meaning of the proviso to Order 21, Rule 16. A rule devised to give an opportunity to the alleged transferor to admit or deny the transfer obviously contemplates the duality of the transferor and the transferee and a statement by the transferee company, even if it had absorbed the transferor, could not possibly do duty for a statement by the latter. We may add that under the terms of the High Court's order, although the assets of the Jessore Loan Company would vest in the Bank of Calcutta on and from the 30th day of the filing of the scheme with the registrar of Joint Stock Companies, the former Company would be dissolved and cease to exist only after its shareholders had been allotted shares in the latter company. There is no evidence when such allotment took place and thus no evidence when the Jessore Company, as a separate entity, ceased to exist.

11. The learned advocate for the respondent also contended that since Order 21, Rule 16 required notice to be given to the transferor and the judgment-debtor and since by reason of the amalgamation, the transferor had ceased to exist, his client was relieved altogether of the duty of giving notice. We can only characterise this argument as extraordinary. Assuming that the Jessore Loan Company no longer existed, it is difficult to see how by reason of that circumstance the judgment-debtors were deprived of their right to receive a notice. If a statute provides that notice must be given to two different parties, it cannot and does not mean that notice must be given to both of them or not at all and that if one of them cannot be served, because he does not exist, the other also forfeits his right.

12. The special contentions of the respondent having thus disposed of, we may now turn to the examination of the main question. On that question the view taken by the Court below is, in our opinion, correct.

13. It is to be observed that Order 21, Rule 16 requires a notice to be given only in a case of transfer by assignment. The real matter for enquiry is therefore whether the transfer in the present case is such a transfer and not whether it is a transfer by operation of law or otherwise. If the transfer was not by assignment, the appellants must fail, in whatever other manner it may have been effected. The argument that the transfer was not by operation of law is relevant only on the footing that a transfer can only be by assignment or by operation of law, so that if it is not the latter, it must necessarily be the former. In our opinion, however, the better method of approach is the direct one and it would be more useful to consider whether the transfer was one by assignment.

14. In order to find an answer to that question, it is not necessary to go beyond Section 153A, Companies Act. That section pre-supposes that an application has been made to the Court u/s 153 for the sanctioning of a compromise or arrangement and enacts that the Court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for certain

matters, provided two conditions are satisfied. The first condition is, to quote only the material part, that

it is shown that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for... the amalgamation of any two or more companies.

It is to be observed that up till then, the compromise or arrangement has only been proposed. The second condition is that it is shown that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as the transferor-company) is to be transferred to another company (in this section referred to as "the transferee company"). It is again to be observed that up till then the property is only to be transferred. There is yet no completed transfer. The section goes on to say that if the conditions mentioned above are satisfied, the Court may, by its order sanctioning the scheme or a further order, provide inter alia for:

(a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company.

15. It is to be observed that the section does not merely say, as does Order 23, Rule 3 in the case of compromises of suits, that the Court "shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith" but directs the making of a further order by the Court on its own account for the transfer of assets in addition to sanctioning the scheme. Even then, it is not left to the order itself to effectuate the transfer by its own force as an order of the Court. It is provided further by Sub-section (2) of the section that:

Where an order under this section provides for the transfer of property... that property shall, by virtue of the order, be "transferred to and vest in... the transferee company.

There, at last, the transfer is accomplished: and the clear statutory provision is that it takes place by virtue of the order passed by the Court. It does not take place by an assignment by the transferor company, for that company makes no assignment at all, either in substance or in form. It only makes a proposal and submits it to the Court. Nor does the transfer take place by the scheme as sanctioned by the Court, so that it may be said that what happens is only that to the scheme, the sanction of the Court is superadded as in the case of ordinary compromise decrees. The actual transfer is brought about by the further order, operating with the force conferred on it by Sub-section (2) of Section 153A, Companies Act. In other words, it is a transfer otherwise than by assignment.

16. In view of our conclusion that the transfer in the present case was not by assignment, it is unnecessary to consider whether it was a transfer "by operation of law." That phrase has been the subject of judicial decisions not all of which are easily intelligible. In most of them, in explaining the meaning of the phrase in a

general way, an interpretation is given which suggests that it would apply only in cases where certain events, not connected with any act on the part of anybody towards making a transfer, happen and the law, operating on those events, brings about a transfer. But in giving illustrations, examples are included which involve acts done to bring about a transfer, though with the aid of the law. Thus, for example, both *Mahadeo Baburao Halbe Vs. Anandrao Shankarrao Deshmukh*, and *Mathurapur Zemindary Co. Ltd. Vs. Bhasaram Mandal and Others*, cited by the appellants, mention transfer on death or by devolution or by succession, but, curiously enough, and purchase at a court sale in execution of a decree. Other cases mention partition or declaratory decrees. The three illustrations of death, devolution and succession are traceable to the decision of the Judicial Committee in *Abidunniessa Khatoon v. Amirunnissa Khatoon* ("76-77) 2 Cal. 327 where their Lordships, after pointing out that no transfer by assignment was pretended in the case before them, observed that no incident had occurred on which the law could operate to transfer the estate from the owner and added there had been no death, no devolution and no succession. The appellants before us contended that these three illustrations were exhaustive and that, in any event, other cases of transfer by operation of law must be of a like character. As to that contention, we would only observe that a decision is not to be read like a statute and reading the observation with reference to its context, we are unable to agree that their Lordships ever intended to lay down what would constitute a transfer by operation of law, not to speak of giving an exhaustive list of possible circumstances. On the other hand, Indian decisions, if we may say so without disrespect, seem to have taken "operation of law" to mean operation of law or the law Courts. If the actual decisions in the Indian cases be any guide to the true meaning of the phrase, there can be no question that the transfer in the present case, being a transfer by virtue of an order of the Court and by the force of Section 153A (2), Companies Act, is a transfer by operation of law.

17. It is, however, sufficient for our present purpose to hold, as we do, that the transfer was not one by assignment and accordingly the appellants were not entitled to a notice under Order 21, Rule 16, Civil P.C. The only contention urged in the appeals thus fails. The appeals are accordingly dismissed with costs, which we assess at 3 gold mohurs for each appeal.

Ellis, J.

18. I agree.