
(1957) 07 CAL CK 0035

In the Calcutta High Court

Case No : Matter Arising in Suit No. 3628 of 1949

Shree Taj Protap Textiles Mills

APPELLANT

Vs

Granaries Ltd. and Others

RESPONDENT

Date of Decision : 16-07-1957

Acts Referred:

Citation : 65 CWN 665

Hon'ble Judges : G.K. Mitter, J

Bench : Single Bench

Advocate : S.C. Sen with S. Tibrewal, for the Appellant; A.C. Mitra with A.C. Bhabra, for the Respondent

Judgement

G.K. Mitter, J.—In this suit a preliminary point has been taken that it is not maintainable. The circumstances in which the suit came to be instituted are as follows: The plaintiff company claims to a creditor of the defendant company the extent of Rs. 1,50,000/- advanced by way of deposit, made on the 9th October, 1946 besides interest amounting to Rs. 27,600 /-. The suit was filed with leave under clause 12 of the Letters Patent. The defendants are three in number. Besides the company Granaries Ltd. alleged to be indebted to the plaintiff Shree Tej Pratap Textile Mills. Sohanlal Murarka and Dwarkadas Bhargava have also been impleaded as defendants. No relief is claimed against Dwarkadas Bhargava. who is alleged to have been appointed provisional liquidator of the plaintiff company by the Alwar High Court in Rajasthan on January 24, 1949. According to the plaint the petition resulting in the said order was false and malicious and the order of appointment is bad and invalid. In paragraph 8 of the plaint it is stated that as in spite of repeated requests by the plaintiff Dwarkadas Bhargava refused to institute this suit, he has been impleaded as a co-defendant with the debtor. The plaint is verified by Shyamsundar Lal Patodia, a director of the plaintiff company, who claims to be acquainted with the facts of this case and has verified the statements contained in all the paragraphs as true to his knowledge.

2. The point taken is that as soon as a provisional liquidator is appointed the

powers of the directors of the company are suspended and it is no longer open to them to institute a suit in the name of the company. For this purpose reliance was placed on several sections of the Indian Companies Act of 1913 and it will be useful to deal with the relevant portions of the sections seriatim.

3. Section 171 of the Act lays down that "when a winding up order has been made or a provisional liquidator has been appointed, no suit or other legal proceeding shall be proceeded with or commenced against the company, except by leave of the Court, and subject to such terms as the Court may impose". This section shows that once the appointment of a provisional liquidator is made it is not open to a person claiming relief against the company either to commence any legal proceedings or to proceed with the same, if already on foot, without the leave of the Court. Section 175, which deals with Official Liquidators, provides by sub-section 2 that "The Court may make such appointment provisionally at any time after the presentation of the petition and before the making of an order for winding up, but shall, before making any such appointment, give notice to the company, unless for reasons to be recorded it thinks fit to dispense with notice." This is the section which enables the Court to appoint an official liquidator provisionally or, to use the more common expression, appoint a provisional liquidator at any time after the presentation of a petition for winding up. Under sec. 177A of the Act, it is the duty of an official liquidator, even if appointed provisionally, to make out and submit a statement as to the affairs of the company, verified in the manner laid down, unless the Court thinks fit to order otherwise. This section shows that the official liquidator, whether appointed provisionally or not, has to make a statement as to the assets of the company, its debts and liabilities, names, residences and occupations of the creditors as also the debts due to the company, the names, residences and occupations of the persons from whom they are due. Under sec. 178 "the official liquidator, whether appointed provisionally or not, shall take into his custody, or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled." By sub-section 2, all the property and effects of the company shall be deemed to be in the custody of the court as from the date of the order for the winding up of the company.

4. This section clearly shows that once the Official Liquidator is appointed, even if provisionally, it is his duty to take into his custody and control all the property, assets, effects and actionable claims of the company and even if he does not take possession as he should, all the property and effects are to be deemed to be in his custody. In my view this clearly establishes the proposition that although the powers of the directors are not permanently severed, the same remain frozen for the time being. The property, effects and actionable claims of the company can not be dealt with or disposed of by the directors so long as they are in the custody of the court: the necessary corollary is that the directors cannot take any steps for the realization of the property, effects or actionable claims to which the company may be entitled. The powers of the Official Liquidator are enumerated in sec. 179 of the Act. A power to institute or defend any suit or

prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company, is one of the powers which the Official Liquidator can exercise with the sanction of the Court, i.e., the mere appointment of an Official Liquidator does not entitle him to institute a suit for realisation of an asset or effect or actionable claim of the company unless the Court appointing him specially sanctions such institution.

5. In view it would not be open to the directors or even to the entire body of shareholders of a company to authorise any one to deal with the assets of the company or dispose of its effects or transfer its actionable claims, once an Official Liquidator is appointed, even if provisionally. The scheme of the Act is that the Official Liquidator alone is to be deemed to be in the custody or control of the assets of the company and no one can be allowed to interfere with his custody, control or management of the affairs of the company.

6. My attention was drawn to sec. 208A, sub-clause (2) and sec. 209B, sub-clause (2) to show that while in a case of voluntary winding up or winding up under the supervision of the Court, the Act expressly lays down that the powers of the directors shall cease on the appointment of a liquidator, no corresponding provision is made in the case of a compulsory winding up. The inference sought to be raised was that the powers of the directors do not come to an end by the mere appointment of the provisional liquidator.

7. Mr. Sen, learned counsel, appearing for the plaintiff, drew my attention to passages from Palmer's Company Precedents, 16th Edn., Vol. 2, p. 133, Buckley on the Companies Act, 12th Edn. p. 508 and Halsbury's laws of England, 3rd Edn., p. 589 in support of his contention that "the appointment of a provisional liquidator is not only provisional but contingent also in the sense, that it operates to protect the property for an equal distribution only in the event of an order for compulsory winding up being made. If no such order is made the appointment ought not to interfere with the rights of third parties." The above is quoted from the judgment in *Re Dry Docks Corpn. of London*, (1) 39 Ch. D. 306 at p. 314. This was a case where the overseers of a parish had levied distress for rates due before the commencement of the liquidation on goods belonging to the company, after the appointment of a provisional liquidator, without the leave of the Court. According to Fry L.J. "the appointment of the provisional liquidator defeated the right of distress", although his Lordship was of opinion that if a proper application had been made the overseers would have been allowed to distrain. My attention was also drawn to the case of, *Dawson's Bank Limited v. Nippon Menkwa Kabushiki Kaisha*, (2) 62 I.A. 100. In this case after the bank had been in liquidation for some time the order of appointment of the liquidator was rescinded but all through the litigation the liquidator remained on the record as if he was one of the parties to the proceedings. Delivering judgment Lord Russell pointed out at p. 114 "Here, indeed, is a comedy of errors, all of which might have been avoided if the Bank had remained throughout the sole co-defendant with Saw Kai. The liquidation could make no difference in this regard, the claim

of the plaintiffs was a claim against the Bank, and not against the liquidators. The change which was brought about by the liquidation in regard to the suit was merely this, that in the conduct of their defence the Bank would, before liquidation, act through the directors, during the liquidation through the liquidators and after termination of the liquidation through the directors once more." The position according to his Lordship was that the proper party to the proceedings was the Bank and the liquidator need not have been joined as a party unless any relief was claimed against him.

8. In *Gosling v. Gaskell and Grocott*, (3) 1897, A.C. 575 Lord Watson summarised the position of the liquidator in the following words:

The company when in liquidation, although by no means defunct, could no longer act by its directors, and appoint or employ agents capable of binding the Corporation or its estate, and was represented by the liquidator, who could not himself carry on the business without the special leave of the Court.

9. To my mind the above go to show that the directors' powers cannot be exercised once the company goes into liquidation or its property and assets come under the custody of the Court under the provisions of the Indian Companies Act 1913 and must, in any event, be held to remain dormant so long as the order of the provisional liquidator is operative. The directors cannot file a suit against a debtor even if the provisional liquidator wilfully refuses to institute a suit for the purpose. The remedy of the directors, should the liquidator cause a loss by refusing to file a suit, would be against the liquidator himself and wilful refusal might be a proper ground for his removal.

10. The question was argued from another point of view by Mr. Sen. This seems to be more substantial than his first point. He contended that even if it was not open to the directors to file a suit so long as the appointment of the provisional liquidator was not cancelled, it is not now open to the defendant to take this point at the hearing of the suit and the proper remedy would have been by way of an application for taking the plaint off the file soon after its institution. For this purpose Mr. Sen relied on the judgment of the House of Lords in *Russian Commercial and Industrial Bank v. D'escmpte De Mulhouse & others*, (4) 1925 A.C. 112. The facts of the case as taken from the head-notes of the said report are as follows:

In 1914 a Russian Bank had its head office and a branch office in London, the manager of which was authorised by a power of attorney to transact business for and bring actions in the name of the bank. By the direction of the Petrograd office the London branch deposited with a London Bank certain Brazilian and Chinese Government bonds to be held to the order and on account of a French Bank as security for a Banker's credit opened by the French Bank for the benefit of the Russian Bank.

In and after 1918 the Soviet Government of Russia by various decrees and orders nationalised banking in Russia by taking over the assets, share capital and

management of all private banks and vesting them in a State Bank, then in a People's Bank and ultimately in a Government Department. Subsequently the manager of the London Branch agreed with the French Bank to pay off the amount due to the latter on the Banker's credit in return for the bonds. The amount was paid, but the French Bank refused to release the bonds.

In an action brought in the name of the Russian Bank by the manager of the London Branch against the French Bank and the London Bank for the return of the Bonds, the defendants by their defence alleged that the plaintiff company had ceased to exist, and disputed the authority of the London Branch Manager to bring the action.

11. It was held by the House of Lords that it was not open to the defendants to raise by way of defence to the action the objection that the London Branch Manager had no authority to bring the action in the name of the plaintiff Bank, but they ought to have moved to strike out the name of the Bank as plaintiff.

12. The various opinions given by the Law Lords in deciding this case do not contain much discussion of this question but they were content to accept the judgment of Atkin L.J. who in his turn relied on a judgment of Warrington, J. in *Richmond v. Branson & Son*, (5) 11-1-1 (I) Ch.. 968.

13. In *Richmond's* case an action was brought by a plaintiff described as "a person of unsound mind not so found" by her next friend against a firm of Solicitors, for delivery up of certain deeds and documents of title, which had been deposited with them by the plaintiff as her solicitors, the statement of claim alleging that the plaintiff was, and had for many years past, been a person of unsound mind not so found. The defendants by their defence stated that "they did not admit that, either at, the time when the deeds and documents came in their possession or at any time since, the plaintiff was, or that she now is, a person of unsound mind." An application was made by the plaintiff to strike out so much of the defence as did not admit the unsoundness of mind of the plaintiff and for judgment on the admissions. According to Warrington, J. "the defendants set up or attempted to set up, as an issue in the action, the question whether or not the plaintiff was in fact of unsound mind. In other words, they dispute the authority of the solicitors instructed by the next friend, and that of the next friend himself, to institute the action. Now is that an issue which it is competent to the defendants to raise at the trial? In my opinion it is not. The action, in whatever form it is brought, is the action of the plaintiff. If a solicitor is acting without authority in an action brought by a plaintiff who is not alleged to be of unsound mind, either the plaintiff or the defendant is entitled to have that action summarily stayed, and to an order that the solicitor should pay the costs of the action as between solicitor and client. * * * But the real question is the authority of the solicitor. Is that a question which can be raised as a relevant issue in the action and at the trial? No authority has been cited in support of the affirmative of such a proposition and in my opinion, it is impossible, according to the ordinary practice and procedure of the Court, to justify that proposition. The

business of this Court could not be carried on if one were not entitled to assume the authority of the solicitor unless and until that authority has been disputed and shewn not to exist in the proper form of proceeding, namely, a substantive application on the part of the parties concerned to stay the proceedings on the ground of want of authority."

14. This judgment is not based on any particular rule or rules of the Supreme Court in England but on good sense and conscience and the practice of the Courts. Incidentally, it may be noted that Warrington, J., during the course of the argument had asked counsel whether they could refer to a single case in which the authority of the plaintiff to the action being brought had been disputed at the trial and counsel were not able to cite any such decision. On the facts of the case it is not disputed now that the provisional liquidator is no longer in charge of the assets of the company. If that be so, the suit in form seems to be unexceptionable, i.e., it is a suit filed in the name of the Company where the plaint is verified by one of the directors, who in the normal course of things would be a proper person to sign and verify the pleading under the provisions of Order 29 of the Code of Civil Procedure. It, certainly, would have been open to the defendants so long as the order appointing the provisional liquidator was operative, to move an application to strike out the name of the company from the records of the suit and to make the solicitor for the plaintiff personally liable for the costs but as the position now is I do not think the plaint is demurrable on the ground that at the time when the suit was filed the director, who verified the plaint herein, had no authority to do so and to give a warrant of attorney to the solicitor who filed the suit. I must, therefore, hold against the defendants in this case and come to the finding that the suit is maintainable.