
(1965) 03 PAT CK 0002
In the Patna High Court
Case No : Letter Patent Appeal No. 91 of 1958

Shri Prafulla Chandra Sinha and Others	APPELLANT
Vs	
Chotanagpur Banking Association Ltd.	RESPONDENT

Date of Decision : 16-03-1965

Acts Referred:

Banking Companies Act, 1949 — Section 38, 38(1), 45N
Companies Act, 1956 — Section 434
Evidence Act, 1872 — Section 115

Citation : AIR 1965 Patna 502 : (1966) 36 CompCas 845

Hon'ble Judges : R.L. Narasimham, C.J;S.P. Singh, J

Bench : Division Bench

Advocate : J.C. Sinha, Sudhir Chandra Ghose and Madan Mohan Prasad, for the Appellant; Sreenath Singh and Shankar Kumar, for the Respondent

Final Decision : Dismissed

Judgement

S.P. Singh, J.—This appeal under the Letters Patent has been preferred by Raja Kamakshya Narain Singh, his wife Smt. Lalita Rajyalakshmi and his son Tika Indra Jitendra Narain Singh against an order dated the 21st August, 1958, passed by a single Judge of this Court directing winding up of a bank named the Chotanagpur Banking Association Ltd.

2. It appears that an application was filed in this court on the 6th January, 1958, on behalf of the Bank for an order of moratorium u/s 37 of the Banking Companies Act (Act X of 1949). When the matter was placed before the learned Company Judge, it was found that the application was not accompanied with a report from the Reserve Bank of India as required by Sub-section (2) of Section 37 of the said Act. The learned Judge, however, granted moratorium and also called for a report from the Reserve Bank on the affairs of this bank On the 14th January, 1958. the learned Judge appointed a Special Officer also to take charge of the assets of the bank. In pursuance of his order, the Reserve Bank submitted a report on 14-3-58 stating that there was no reasonable chance of the

Chotanagpur Banking Association Ltd. paying its debts within a period of six months beyond which the order of moratorium could not last.

Soon after, i. e., on the 17th March, 1958, the bank tiled an application proposing a scheme u/s 391 of the Companies Act, 1956, and prayed for the consideration of the same by the creditors and the share-holders at a meeting to be held under the direction of the Court. About a month later, i. e., on the 17th April, 1958, an association called the Chotanagpur Banking Depositors" Association filed an application praying for an order for the winding up of the bank. In view of the Reserve Bank"s report regarding the affairs of the bank the learned Judge rescinded the order of moratorium on the 22nd April, and appointed provisionally a Liquidator with the common consent of the parties on the 13th May, 1958. A number of depositors, however were against the proposal of winding up and supported the scheme. The learned Judge, after taking into consideration the assets and liabilities of the bank, found that it was not in a position to pay the debts and the scheme proposed was not workable in the background of the financial position. Accordingly, lie ordered the winding up of the bank, as contemplated u/s 38 of the Banking Companies Act. It is against this order that six of the depositors, i. e.. Profulla Chandra Sinha and five others, preferred the present appeal challenging the validity of the said order. They impleaded the Official Liquidator as respondent.

During the pendency of this appeal Raja Kamakshya Narain Singh, his wife and son claiming to be the trustees of a religious and charitable trust and having account with the bank in question applied to be impleaded as respondents and their prayer was allowed on 9-4-64. Subsequently on their application they were transposed to the category of the appellants on 7-1-65 by an order of a Bench of this Court. At the time of the hearing of this appeal, the original appellants, namely, Prafulla Chandra Sinha and 5 others, who were being represented by Mr. S.C. Ghose, Advocate, did not press their appeal. Hence, this appeal was heard only on behalf of Raja Bahadur Kamakshya Narain Singh, his wife and son.

3. Before coming to the merits, I shall first dispose of a preliminary objection taken by Mr. Sreenath Singh, Counsel for the respondent, based on the contention that having received dividend after the order of winding up was passed, the appellants have lost the right of appeal and on this short ground alone the appeal must be dismissed. Mr. J.C. Sinha appearing on behalf of the appellants, on the other hand, countered the argument by saying that the right of appeal is a statutory right and acceptance of nay benefit under a decree ami order, in this case the order of winding up, does not preclude the appeal. In support of his contention he relied upon a derision of the Supreme Court in the case of Bhau Ham v. Baijnath Singh AIR 1961 SC 1327.

4. It is not disputed that the order of winding up was passed in August, 1958 and the present appeal was preferred in September. 1958 and that the appellants joined first as respondents in April, 1964 long after the order of winding up was passed and long before they joined as appellants in January, 1965. Admittedly,

they accepted in 1961 a sum of Rs. 868.59 from the Official Liquidator through a cheque drawn on the State Bank of India, Hazaribagh on account of dividend. The important question is whether this acceptance of the dividend debars the appellants from prosecuting the appeal. Mr. Sreknath Singh also relied upon the same decision of the Supreme Court and contended that the present case falls outside the ambit of the principle laid down by their Lordships in the aforesaid decision. I think that the contention of Mr. Singh is correct. Then Lordships of the Supreme Court have observed as follows:

"When an order shows plainly that it is intended to take effect in its entirety and that several parts of it depend upon each other, a person cannot adopt one part and repudiate another. Upon this principle a person who takes benefit under an order de hors the claim on merits cannot repudiate the part of the order which is detrimental to him because the order is to take effect in its entirety. This principle, however, can have no application to the present case where the appellant by withdrawing the pre-emption price has not taken a benefit de hors the merits. Besides, this is not a case where restitution is impossible or inequitable. Further, the existence of a choice between two rights is also one of the conditions necessary for the applicability of the doctrine of approbate and reprobate. There being no such choice before the appellant his act in withdrawing the pre-emption price cannot preclude him from continuing his appeal".

5. Mr. J.C. Sinha has pointed out that the appellants had no option left but to accept the dividend and this cannot be a ground to estop them from challenging the validity of the order in question. On the other hand, Mr. Sreenath Singh has urged that this decision is a clear authority to show that a person having elected to take benefit under an order cannot be allowed to repudiate the same, as has been done by the appellants in the instant case. He has stated that the Supreme Court case was a case of pre-emption in which the decree was passed against the purchaser of the property and Hit-vendors. The decree directed the plaintiff-respondent in that case to pay a sum of Rs. 3000 into court within four months and the amount was deposited by the plaintiff-respondent. Thereafter, the vendee-appellant obtained a special leave from the Supreme Court to appeal against the judgment of the Judicial Commissioner who had passed a decree in favour of the plaintiff-respondent and thereafter he withdrew from court the amount paid by the respondent. The majority judgment of the Supreme Court says that the appellant by withdrawing the pre-emption price did not take a benefit de hors the merits. Furthermore, it was not a case in which restitution was impossible or inequitable nor was it a case in which the appellant had a choice. Mr. Singh's argument is that so far as the present case is concerned, it is much different namely, that the appellant had an option to accept the dividend or not because the order of winding up did not impose any obligation on the creditors to accept the dividend. Furthermore, the appellants had not preferred any appeal against the order of winding up when they accepted the amount in question. According to him, they voluntarily accepted the amount in 1961 whereas they came to be impleaded as respondents in this appeal in April, 1964,

i. e., long after having taken the benefit. Learned counsel's further contention is that the decision of the Supreme Court shows that a person is precluded from challenging the validity of an order if it is found that restitution is impossible or inequitable and in the present case restitution is obviously impossible for the reason that most of the assets of the bank have been sold and the sale proceeds and realisations made so far have been distributed amongst the various creditors

6. After reviewing several English and Indian decisions their Lordships of the Supreme Court have laid down that the doctrine of approbation and reprobation, which has a Scottish origin and is akin to the law of election and estoppel applies to those cases where a person has elected to take benefit otherwise than on merits of the claim in the litigation under an order to which benefit he could not have been entitled except for the order. Another criterion which their Lordships have laid down to the applicability of the doctrine is that the person receiving a benefit under the order must have a choice between two rights and that after the exercise of the choice, restitution was impossible or inequitable. Judging the present case in the light of the principles enunciated by their Lordships we find that the present appellants voluntarily accepted the dividend which they could not have been able to receive but for the winding up order and that at that time they did not challenge the validity or the propriety of the order in question. If was several years after that they applied for being impleaded as respondents and subsequently as appellants.

7. Mr. Sinha has urged that the amount of dividend formed part of the deposits made by the appellants on behalf of the trustees, and as such they, as trustees, were entitled to take the amount of dividend which was paid to them by the official Liquidator. This is not quite accurate. It is plain that the payment of the dividend was due to the result of the winding up order and but for the said order the appellants could not have drawn this amount as a matter of right. In the circumstances, I think, the acceptance of the dividend precludes the appeal. Even assumiug that the estoppel in the sense urged by Mr. J.C. Sinha has no application, the appellants cannot in law prosecute this appeal on a different and a more important consideration. In the intervening lime the situation has so changed to which the appellants also largely contributed by their conduct that in case the appeal succeeds, it will be difficult to reconstitute the bank and effect an equitable restitution. The business of the bank has ceased for years; its undertaking has been broken up, most of the assets have been sold and sale proceeds along with the other assets have been distributed. In the circumstances, its reconstitution is now quite impracticable and it is impossible to visualise the range and extent of the future trouble, if the winding up order were now to be set aside. That being so, assuming even that the winding up order was not justified, by reason of lapse of time and the in tervening events, it has to be maintained.

I am fortified in this view by the observation of their Lordships of the Privy Council in the case of AIR 1932 1 (Privy Council) . Their Lordships have observed

that although the order of winding up of Company passed by the court was not justified, by reason of lapse of time and intervening events, the order must be maintained because it was not possible to reconstitute the company on account of the events that had taken place as a result of the winding up order. The present case stands on a firmer ground and I think on this short point the appeal fails and the appellants cannot be allowed to question the correctness of the said order.

8. On merits also the appellants have no case. Mr. J.C. Sinha contended that the order of winding up was wrong inasmuch as the bank was possessed of sufficient assets to pay its debts. It cannot be doubted that the High Court has powers to order winding up of a banking company on the fulfilment of the conditions laid down in Section 38 of the Banking Companies Act, 1949. There is no denying the fact that the Chotanagpur Banking Association Limited was at the relevant period governed by the provisions of the Banking Companies Act, 1949, and the Companies Act, 1950. Section 2 of the Banking Companies Act, 1949, provides that the provisions of this Act shall be in addition to, and not save as hereinafter expressly provided in derogation of the Companies Act, 1956, and any other law for the time being in force. Section 616(b) of the Companies Act, 1956, provides that the provisions of this Act shall apply to the banking companies except in so far as the said provisions are inconsistent with the provisions of the Banking Companies Act, 1949. It would thus appear that the provisions of the Companies Act will also apply to a Banking Association in so far as they are not inconsistent with the special provisions of the Banking Companies Act. Section 433 of the Companies Act enumerates the circumstances in which a company may be wound up by the Court and one of the circumstances mentioned in Clause (e) of this section is that a company may be wound up by the court if the company is unable to pay its debts. Section 434(1)(c) of this Act provided that a company shall be deemed to be unable to pay its debts if it is proved to the satisfaction of the court that the company is unable to pay its debts and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and the prospective liabilities of the company.

Section 38(1) of the Banking Companies Act provides that without prejudice to the provisions contained in Section 433 or Section 583 of the Companies Act, 1950 and without prejudice to its powers u/s 37, the High Court shall order the winding up of a banking company if it is unable to pay its debts and the High Court shall order the winding up of a banking company if the Reserve Bank applies in this behalf to the High Court. Sub-section (3) of Section 38 provides that without prejudice to the provisions contained in Section 434 of the Companies Act, 1956, a banking company shall be deemed to be unable to pay its debts if it has refused to meet any lawful demand for payment made at any of its offices or branches within 2 working days, if such a demand is made at a place where there is an office, branch or agency of the Reserve Bank, or within 5 working days, if such a demand is made elsewhere, and if the Reserve Bank certifies in writing that the banking company is unable to pay its debts. It is

clear from the relevant provisions mentioned above that while passing an order for the winding up of a banking company, the Court shall take into consideration the relevant provisions of both the Acts and if it is satisfied that the affairs of a banking company are such as to call for an action for winding up, it shall not hesitate to do so, as required u/s 38 of the Act.

The scope and effect of these provisions were the subject matter of consideration in a decision of the Calcutta High Court in the case of Dwarkadas Agarwall Vs. Dharam Chand Jain and Others, in which a Division Bench of that court held as follows:--

".... .in so far as Section 38(1) is concerned its provisions are attracted as soon as it is proved that a company is a banking company and it is unable to pay its debts either within the meaning of Section 163(1) (which corresponds to Section 434 of the new Act), Companies Act, or within the meaning of Section 38(3), Banking Companies Act. So far as Sub-section (3) of Section 38 is concerned, the effect, it seems to me, is only to add a fourth case where also a company, if it is a banking company, shall be deemed to be unable to pay its debts".

In a decision of Andhra Pradesh High Court in the case of State of Andhra Pradesh v. Hyderabad Vegetable Products Co. Ltd. of Hyderabad, AIR 1963 Andh. Pra. 243, his Lordship S. Raju J., while considering the provisions of section 433(e) of the Companies Act, observed that where on the materials placed before the Court the only conclusion possible is that the object for which the company was incorporated and had substantially failed, it is impossible to carry on the business of the company except at a loss and that the existing and probable assets are insufficient to meet the existing liabilities, the court is justified in making the winding up order. In a Lahore case in the matter of, Punjab Flying Club Ltd.. AIR 1933 Lah 301, while considering the provisions of Section 162 of the Companies Act, 1913, (which corresponds to Section 433 of the Companies Act, 1956). his Lordship Tekchand J. observed that in petition u/s 162, the court has to see whether the Company is commercially insolvent, i. e., whether it is unable to meet its current demands although the assets when realised may exceed its liabilities. If the company is commercially insolvent, it may be wound up. It would thus appear that all these authorities show that as soon as the court is satisfied that a banking company is unable to pay its debts, it must order winding up.

9. An argument was, however, advanced that the court should not have taken action on its motion without there being an application either on behalf of some of the depositors or of the Reserve Bank. A perusal of Section 38(1) shows that it does not preclude the court from taking action suo motu if there are sufficient materials before it for taking such action as required under the relevant provisions of the Companies Act and Banking Companies Act. Thus, it was permissible to the learned Judge to take action suo motu.

10. Thus, the only important question that arises for consideration is whether in the instant case, the Chotanagpur Banking Association Limited, was unable to pay its debts so as to justify its winding up. The winding up order was passed u/s 38(1) of the Banking Companies Act, 1949, on account of the fact that the bank was unable to pay its debts. The reason for the learned Judge's holding that the bank was unable to pay its debts was that the liabilities of the bank far exceeded its assets. As already mentioned above, when a petition for an order of moratorium was filed in this court on behalf of the bank and the same was placed before the Company Judge, he in order to find out the financial position of the bank got an enquiry made by a functionary of the Reserve Bank u/s 37(2) of the Banking Companies Act and it appears from the said report dated the 14th March, 1958, that the affairs of the bank were far from satisfactory. After examining the various items of assets and liabilities of the bank it was found that the liabilities of the bank were to the tune of Rs. 1,12,20,000/- whereas the assets did not exceed Rs. 91,45,000/- and the Expert of the Reserve Bank reported that the bank's assets were not sufficient to meet the liabilities payable within the period of moratorium. The learned Company Judge, on a consideration of all the financial aspects and after examining every item of assets and liabilities found that the assets fell short of the liabilities by Rs. 21,35,000/ and that also on a liberal estimate of the assets. Therefore, he came to the conclusion that the bank was unable to pay its debts and as such he had no option but to pass an order of winding up.

Mr. J.C. Sinha did not, however, challenge the report of the Reserve Bank or the finding of the learned Judge relating to the various items. He advanced his argument with reference to only one item of the assets, namely, the premises and other immovable properties which had been estimated at Rs. 7,69,000/-. According to him, the market value of these properties was not less than Rs. 30,84,000/- because of the rise in prices of lands and buildings during the last few years and if this thing had been taken into account, the assets would have been found to be in excess of the liabilities. This aspect of the matter, it will appear, has been dealt with in paragraph 13 of the report of the Reserve Bank and also by the learned Company Judge in an elaborate manner from which it appears that even the estimated book value of the immovable properties shown as Rs. 7,69,000/- was an inflated one because the bank had made several attempts to dispose of some of the properties not required for its use, but had failed. It will further appear that in December, 1957, a house at Ranchi belonging to the bank was sold by it at Rs. 18,000/- as against its book value of Rs. 20,000/- whereas its estimated value had been shown as Rs. 44, 000/-.

Similarly, the value of the bank's property in Dhanbad known as Smith's bungalow and Polo Ground had been shown in the books of the bank at Rs. 2,46,000/-. These properties of the bank were under acquisition by the State Government whereupon the bank had filed a petition before the State Government requesting to pay a lump sum of Rs. 15 lacs as the price of these properties as against the estimated market value of these properties of Rs.

22,44,000. In view of these circumstances. the learned Judge was right in rejecting the estimated market value of the immovable properties and accepting their book value. The learned Judge found, on the basis of the report of the Reserve Bank, that out of Rs. 71,34,000/- shown against the head "Advances", a sum of Rs 34,03,000/- was due only from three parties, namely, K.N. S. (Kamakshva Narain Singh of Ramgarh). S K.G. (Sri Sukumar Gupta) and one C. J. S. It was further found that Rs. 12,82,000/- was due from the bank's employees, directors, their relations and an ex-director incharge and his relations and that more than 82.4 per cent of the total advances were outstanding for a long time and a major portion of them appeared to be quite sticky, i. e., not easily realisable as was evident from the fact that Sri S.K.G. who owed the bank a sum of Rs. 11,40,000/- as a Director of the bank and C. J. S., who owed Rs. 8,15,000/- had not paid anything during the past 12 years and the latter had died long before the winding up order was passed and the whereabouts of his legal heirs were not at all known to the bank. It was also noticed that a sum of Rs. 35,59,000/-. that is, 49.9 per cent of the total advances were iusecured and there were many other undesirable features in the affairs of the bank such us cases ol fraud and misappropriation had also been discovered. From the report of the Reserve Bank it also appealed that about 16 to 17 lacs of the loan advanced and partlv decreed debts had become, unrealisable. The learned Judge, therefore, found that the realisable amount in no circumstance could be more than Rs. 54,65.000/-.

11. It was for these reasons that the learned Company Judge came to the conclusion that the bank was not at all in a position to pay its debts and the scheme which was submitted before him by some of the depositors was on the face of it worthless and unworkable and it was impossible for any agency to run the bank with such a huge deficit. According to the provisions of Section 45 of the Banking Companies Act, 1949, notwithstanding anything contained in any law for the time being in force, no High Court shall sanction a compromise or arrangement between a banking compant and its creditors or any class of them or between such company and its members or any class of them unless the compromise or the arrangement is certified by the Reserve Bank in writing as not being incapable of work and as not being detrimental to the interests of the depositors of such banking company. In the present case, while considering the application of the depositors for a moratorium u/s 37 of the Banking Companies Act, the Court bad already got an enquiry made by the Reserve Bank and on receipt of the report the Court was satisfied that the affairs of the bank and the conducts of its directors were such as not to admit of any scheme u/s 391 of the Companies Act, 1956. We, are, therefore, in full agreement with the finding of the learned Company Judge that the scheme submitted by some of the depositors of the bank did not deserve any consideration and was not at all fit to be given effect to. The only option in the circumstances left to the learned Judge was to order the winding up of the bank as required u/s 88(1) of the Banking Companies Act. It follows, therefore, that on merits also there is no substance in

this appeal,

12. Thus, regard being had to all these circumstances, this appeal fails both in point of law and in point of fact and accordingly it must be dismissed with costs.

Narasimham, C.J.

13. I agree.