

(1924) 11 CAL CK 0036
In the Calcutta High Court

(Sir) Hukumchand Kasliwal and Another	APPELLANT
Vs	
Radhakissen Chamaria and Others	RESPONDENT

Date of Decision : 11-11-1924

Acts Referred:

Companies Act, 1956 — Section 171

Citation : AIR 1925 Cal 916

Hon'ble Judges : Sanderson, C.J;Buckland, J

Bench : Full Bench

Judgement

Sanderson, C.J.—These two appeals, which are Nos. 88 of 1924 and No. 89 of 1924, have been argued one after the other. They arise out of an application made by the Respondents Radhakissen Chamaria and Motilal Chamaria, which was disposed of by my learned brother Mr. Justice C.C. Ghose on the 1st of April 1924.

2. In Appeal No. 83 the appellants are Sir Hukumchand Kasliwal and another and, in appeal No. 89 the appellants are Bilasroy Hurdut Roy.

3. The facts, which have been stated both by the learned Advocate General who appeared for the appellants in Appeal No. 88 and by the learned Counsel who appeared for the Appellants in Appeal No. 89, are as follows:

4. It is alleged that on the 14th of February 1920 Sir Hukumchand Kasliwal and Harkissen Das Bhattar entered into an agreement with the Pioneer Mills Limited (which was a joint-stock Company having its registered office in Calcutta and carrying on business as refiners, manufacturers and dealers in sugar at Unao in the United Provinces of Agra and Oudh) by which Messrs. Hukumchand Harkissen-Das were to be the banians of the Company; and, it was alleged that the Appellants advanced Rs. 1,50,000 to the Company upon condition that this sum should be secured upon the factory, plant and machinery of the Company and its stock-in-trade at Unao. It was further alleged that after the sum of Rs. 1,50,000 had been advanced the Company wrongfully put an end to the

agreement and a suit was eventually Instituted by Messrs. Hukumchand Kasliwal and Harkissen Das Bhattar against the Pioneer Mills, Ltd., the Tata Industrial Bank Limited, Bilasroy Hurdut Roy, Radhakissen Chamaria and Motilal Chamaria, the second, third and fourth Defendants being joined on the ground that) they alleged that they were also mortgagees of the properties of the Company. The relief which was asked for in that suit was, amongst other things, a declaration that the Defendant Company's factory at Unao together with the machineries, implements, building and structures and its stock-in-trade should stand charged with the payment of the amount which might be found due to the Plaintiffs for the advances made by them to the Company.

5. The next date which is material is that on the 16th of April 1920 the Company entered into a banianship agreement with Messrs. Bilasroy Hurdut Roy: and, it was alleged by Bilasroy Hurdut Roy that on the 10th of August 1922 the Company executed a mortgage in their favour for the sum of rupees 4 lacs and on the same date executed a mortgage in favour of the Tata Industrial Bank Limited.

6. It was further alleged that on the 31st) of August; 1922 the Company executed a mortgage in favour of Messrs. Chamarias.

7. On the 21st of September the Chamarias' mortgage was registered but Bilasroy Hurduti Roy's mortgage was not registered until the 21st of November 1922, leave having been obtained to extend the time. It was further alleged that on the 2nd of January 1923 the Tata Industrial Bank Limited assigned their mortgage to Messrs. Chamarias. The date on which Hukumchand Kasliwal's suit, to which I have already referred, was instituted, was the 10th of February 1923.

8. Bilasroy Hurdut Roy also instituted a suit; and, the Defendants in that suit were the Company and Messrs. Chamarias. Messrs. Hukumchand Harkissen Das were not joined as a party in that suit. The relief claimed was a decree in favour of the plaintiffs for Rs. 4,00,000 as principal and Rs. 18,666-10-0 as interest together with costs and that the Plaintiffs should be declared entitled to withdraw the decretal amount from the sale-proceeds of the Pioneer Mills Sugar Refinery and Distillery which was in deposit with the Imperial Bank of Calcutta under the orders of the Calcutta High Court. That last prayer, as I understand, was added by way of amendment. The exact date on which that suit was instituted has not been stated to this Court but it has been taken that it was instituted before the data on which the High Court at Calcutta made an order for the winding up of the Company, which was on the 4th of June

9. On the 6th of August 1923, an order was made on Bilasroy Hurdut, Roy's petition and with the consent of Messrs. Chamarias that the property of the Company which was subject to the alleged mortgages and charges to which I have already referred, should be sold by the winding up Court. The bids were not to be accepted without the order of this Court and it was ordered that kids should be invited for the sale of the property subject to the incumbrances and

that bids should be further invited for the sale of the property free of all incumbrances.

10. On the 13th of August 1923, my learned brother Mr. Justice Greaves made an order giving leave to Messrs Bilasroy Hurdut Roy to continue their suit of S. Unao Court. That order was necessary because of Section 171 of the Indian Companies Act, VII of 1913, which provides as follows:-- When a winding up order has been made, no suit or other legal proceeding shall be proceeded with or commenced against the Company except by leave of the Court, and subject to terms as the Court may impose." That order was made by my learned brother in the presence of Messrs. Chamarias

11. In September 1923, my learned brother Mr. Justice C. C. Ghose sanctioned the sale of the property free from incumbrances to a Purchaser, whose name is not material for my present purpose. The property was sold free of incumbrances and the proceeds, as I have already mentioned, were deposited in the Imperial Bank Limited by the order of the learned Judge.

12. On the 21st of November 1923, my learned brother Mr. Justice Ghose made an order on the 18th of December 1923. Messrs Chamarias filed their written statement in the suit which was brought by Messrs Hukumchand Harkissen Das in the Unao Court, and, in that written statement, amongst other defences, they set up the case that the Plaintiffs had no charge or mortgage over the properties of the Defendant Company described in the plaint. They also alleged that the mortgage which was relied upon by Bilasroy Hurdut Roy and which purported to have been executed by the Defendant Company, was a collusive transaction and was invalid and inoperative in law. An order was made in Messrs. Hukumchand's suit in the Unao Court that on the 26th March 1924 the parties should appear and that issues should be settled. Before that date arrived, viz., on the 5th of February 1924, the application which gave rise to these proceedings was made before my learned brother Mr. Justice Ghose.

13. In the application which related to Hukumchand Harkissen Das's matter the prayers in the petition were that the Liquidators should be directed to pay a certain sum to the Petitioners, that the claims of Bilasroy Hurdut Roy and Sir Hukumchand Kasliwal and H. Bhattar to rank in priority to the petitioner's claim might be adjudicated and that pending such adjudication the suits Nos. 28 and 87 of 1923 (which were the suits brought by Hukumchand Harkissen Das and Bilasroy Hurdut Roy respectively in the Subordinate Judge's Court at Unao) might be stayed, and if necessary the leave granted to Bilasroy Hurdut Roy to proceed with their suits in the Unao Court might be revoked.

14. Upon this application coming before my learned brother Mr. Justice Ghose the following order was made:--"It is ordered that the said Hukumchand Kasliwal and Harkissen Das Bhattar and Bilasroy Hurdut Roy, the Plaintiffs in suits Nos. 28 of 1923 and 37 of 1923 respectively filed in the Court of the Subordinate Judge at Unao, do not continue further these suits in the said Court: and it is further

ordered that this application be set down for hearing in this Court for the purpose of determining the question of priority of the respective claims of the said mortgagees and such other incidental questions as may arise on the contentions of the parties.

15. It is from the learned Judge's judgment and his order that these two appeals have been preferred by Hukumchand Kasliwal and Harkissen Das, and Bilasroy Hurdut Roy.

16. I propose to deal in the first instance with the appeal by Hukumchand Kasliwal and Harkissen Das.

17. In this case, as in the other, it has not been disputed that the mortgagee, or the person on who claims to be the mortgagee, in the ordinary course would be entitled to enforce his rights by means of a suit, irrespective of the winding up Court, and, it was upon that basis, I assume, that the learned Judge on the 21st of November 1923 made his order that Messrs. Hukumchand Harkissen Das should be at liberty to proceed with the suit which they had instituted. It has been argued however on behalf of the Respondents that that principle does not apply to these cases because the property in question has been sold by the order of the learned Judge presiding over the winding up Court and that the two suits in question are no longer mortgagees suits in the ordinary acceptance of the term.

18. It was further argued that the Appellants should not be allowed to approbate and reprobate in the sense that the Appellants having taken advantage of winding up proceedings to have the properties sold, cannot object to the order which has been made by my learned brother Mr. Justice Ghose.

19. I am not prepared to accept that argument. It seems to me that the facts of the case with which I am now dealing (No. 88) that it must have been the intention of the parties that the property should be sold by the winding up Court without prejudice to the rights of those who claimed to be secured creditors, and without prejudice to such proceedings as the secured creditors might ordinarily be entitled to take for the purpose of enforcing their securities. It is not necessary for me to deal in detail with the facts which induce me to come to that conclusion. It is desirable, however, to draw attention to the fact that in Hukumchand Harkissen Das's case, the sale had actually taken place before the learned Judge gave leave to proceed with the suit, that Messrs. Chamarias subsequently filed their written statement in that suit and that an order was made that the parties should appear to settle the issues in that suit.

20. Having regard to those facts I have no doubt that the sale of the property by the winding up Court was a proceeding, which was carried out for the sake of convenience and with the object of getting the property sold at a time and in a place where a good price might be obtained for it. There is no doubt in my mind that it was not intended that the 9): Plaintiffs should thereby be debarred from enforcing their rights in the usual way if they were so advised.

21. It is also desirable to point out that the Defendants-Respondents have not in any way, as far as I know, changed their position for the worse by reason of the property having been sold which was done with their consent under the order of the winding up Court.

22. The position in this case, therefore, is that the Plaintiffs are alleging that they are entitled to charge. The Defendants are denying that the Plaintiffs are entitled to the charge. That issue ought in the ordinary course to be decided in a suit. The learned Judge in fact made an order that the suit, which had been instituted, should be continued; and certain proceedings were taken by the Defendants in the suit.

23. The question then arises, in my opinion, whether the order, which the learned Judge made on the 21st of November 1923 was a correct one. In my judgment it was.

24. That being so, I cannot find that anything has occurred since the 21st of November 1923 which would justify that order being set aside by the learned Judge. It seems to me that the position was practically the same, when the matter came before my learned brother in April 1924, as it was, when the matter was before him on the 21st of November 1923. There does not appear to have been with respect to the learned Judge any real ground for departing from the order which he made in November 1923.

25. It has been argued by the learned Advocate-General and by Mr. Langford James that the learned Judge had no jurisdiction to set aside his previous order or to make an order which would in effect revoke the previous order which had been made giving the Plaintiff leave to continue the suit.

26. In my judgment, it is not necessary for this Court to express any opinion upon that point, because the matters to which I have already referred are, in my opinion, sufficient to dispose of this appeal.

27. The result is that in my judgment the appeal of Hukumchand Kasliwal and Harkissen Das Bhattar must succeed.

28. Then the question arises whether there is anything in the appeal of Bilasroy Hurdut Roy which would induce me to come to a different decision from that at which I have already arrived in the appeal of Hukumchand. The facts, as I have already stated, are not quite the same but upon the question as to what was the intention of the parties, when the property was sold by the winding up Court, it seems to me that it is even more clear in this case that the parties had only the intention, which I have already stated. As I have already mentioned, on the 6th of August an application was made by the Appellants with the consent of Messrs. Chamarias that the properties should be put up for sale and on the 13th they applied that the suit which they had instituted in the Unao Court should be continued and they obtained an order from the learned Judge in the presence of Messrs. Chamarias to that effect,

29. With the exception that the properties were sold under the circumstances to which I have already referred, there does not seem to me to have been any real difference between the position of affairs when the master was before my learned brother Mr. Justice Greaves on the 13th of August 1923 and when the matter was before my learned brother Mr. Justice Ghose in April 1924; and, in as much as the order made by my learned brother Mr. Justice Greaves was made in the presence of the respondents the Chamarias, the facts in this respect present a strong case in support of the Appellants' contention.

30. The question which is in dispute between the parties in Bilasroy's appeal is not the same as the question between the parties in Hukumchand Harkissen Das's appeal. In this case the defence set up by the Respondents was that Bilasroy's mortgage was invalid and was obtained by certain fraudulent representation. Sir Binode Mitter who argued the case for Messrs. Chamarias stated that his clients would not rely upon the alleged fraud but that they intended to call upon the Appellants to prove the consideration for their mortgage and they would rely upon the point raised in connection with the delay in registering the mortgage.

31. The learned Counsel for the Appellants however, urged that whether the dispute is a large one or a small one, there is a material dispute between the parties in respect of this mortgage, and that being the case, it seems to me that the principle to which I have already referred, applies to this case as well as to Hukumchand's case and that the order which my learned brother Mr. Justice Greaves made on the 13th of August 1923 giving the Plaintiffs leave to continue the suit was a proper one and I see no reason why it should be departed from or set aside.

32. There is one other matter to which I must refer and that is the case which was mentioned by my learned brother in his judgment, the case of *In re Pacaya Rubber and Produce Company, Limited* [1913] 1 Ch. 218. It is not clear as I read the learned Judge's Judgment whether the learned Judge placed any real reliance upon the decision in that case and whether it affected his mind in coming to his judgment, because all that the learned Judge said was:

Reference is also made to Rule 95 of the Rules of the Court under the Companies Act and it is claimed that in accordance with the practice which obtains in England [see in this connection, *In re Pacaya Rubber and Produce Company Limited* [1913] 1 Ch. 218] the actions pending in Unao should be stayed and the question of the priority of the claims should be gone into in this Court where the winding up proceedings are pending.

33. But inasmuch as the case was mentioned by the learned Judge, I think, it is right to say that in my judgment, that decision does not seem to affect the question which is now before us. In the cited case the question was whether the learned Judge of the winding up Court had power to transfer to that Court an action by or against the Company which at the date of the winding up was

pending in another Court when it appeared that the action which was sought to be transferred extended to other parties as well as the Company as Defendants: it was held by the appeal Court that the learned Judge of the winding up Court had power to transfer such as action under Rule 42 of the Companies (winding up) Rules, 1909. It was merely a question of transferring a suit from one Court to another and no question of staying a suit arose in that case: I do not see how it has any bearing upon the question which is now before us.

34. For these reasons, in my Judgment, both the appeals must be allowed and the order of the learned Judge of the 1st of April 1924 should be set aside and the application of Messrs. Chamarias, in respect of which this appeal arises, must be dismissed.

35. Having heard learned Counsel on the question of costs the order which we make is that Messrs. Chamarias do pay the casts of Bilas Roy Hurdut Roy and of Hukumchand and his partner in respect of the proceedings before Mr. Justice Ghose and that the Respondents Messrs. Chamarias do pay the costs of the Appellants in each appeal in this Court.

Buckland, J.

36. It is well established that a secured creditor has prima facie a clear right to apply for and obtain leave to enforce his security.

37. The Appellants have filed suits to enforce their securities and the question Is whether or not the order re-calling leave should be allowed to stand.

38. The appeals have been argued on several grounds and I will say at once that I am not impressed by the argument that the Court has no power to recall leave once granted, nor by that which suggests that the machinery at the disposal of the Judge in the winding up would be inadequate to enable him to decide the questions which may arise In the suits should they come before him. Possibly the want of authority on these points is due to the fact that the circumstances are unusual. There is, however, no need to decide them for, the appeals can be disposed of upon other grounds.

39. On behalf of the Chamarias the argument substantially is based- and, I think, exclusively-upon sale of the properties. This has been put in many ways, but it comes to this, that by reason of the sale of the properties there has been a change in the position of the parties of which they are entitled to take advantage.

40. Now, first one must consider what was the order under which the securities were sold. It is well-known that on the Original side of this Court, when a property eventually will have to be sold such property frequently is sold under conditions which may promptly secure the best possible price, entirely without prejudice to all rights and contentions of the parties of any kind whatsoever, the object being to obtain the best value for the property when conditions are most favourable and to allow such contentions as may arise to be argued at leisure thereafter. It has been argued that though the sale may have been without

prejudice to the contentions of the parties, it was not without prejudice to the rights of the secured creditors as regards procedure. I can only say that if there was any reservation made at the time I should have expedited that to have appeared either in the order in the minutes or somewhere where my attention could be drawn to it. I think that the order must be taken-and it is the only way in which one can Sake it- as without prejudice to any of the parties whether as to their rights to any property or whether as to their rights to enforce such rights. However, be that as it may, what do we find? The Chamarias made no reference to such change of position, if any, as was induced by that sale until this application was made, Sir Hukumchand Kasliwal and his partner moved ex parte and leave was granted ex parte. Beyond all question leave so granted could have been revoked but so far from making any application to revoke it I find that the Chamarias filed their written statement in the Court at Unao. It may be-as to this we have no in-formation-that at that time they were not aware of the leave granted; but that seems improbable; at all events, it is not so asserted. Thirdly, as has been pointed out by my Lord, even if it is to be taken that this position was changed it certainly has not been suggested that the change was in any degree to the prejudice of the Chamarias. On the contrary I think one may take it that so far as any benefit has been derived from sale of the properties such benefit will enure to the Chamarias if they have any rights against the funds in Court. The Appellants are entitled to insist upon their rights, and upon this ground in my judgment, the appeals will have to succeed and upon the ground that the Appellants are entitled to rely upon their right to enforce their securities by suits.

41. It is unnecessary to make any differentiation between the two Appellants; but I must say that I have come to my conclusion with considerable reluctance because I cannot but feel that the balance of convenience and expedition is entirely in favour of dismissal of these appeals. These are not, however, sufficient grounds for disposing of a case, when the Appellants have rights, which they seek to enforce and I agree with the order which my Lord has proposed to make.