

(1968) 08 PAT CK 0025
In the Patna High Court
Case No : A.F.O.O. No. 56 of 1964

Smt. Bhagwati Devi Bubna and Others	APPELLANT
Vs	
Dhanraj Mills Private Ltd. and Others	RESPONDENT

Date of Decision : 20-08-1968

Acts Referred:

Companies Act, 1956 — Section 446, 537

Citation : AIR 1969 Patna 206 : (1969) 17 BLJR 787 : (1969) 39 CompCas 1023 : (1969) PLJR 75

Hon'ble Judges : S.C. Misra, Acting C.J.; B.D. Singh, J

Bench : Division Bench

Advocate : Lal Narayan Sinha and Harilal Agarwal, for the Appellant; Jageshwar Prasad Sinha, for the Respondent

Final Decision : Partly Allowed

Judgement

B.D. Singh, J.—This miscellaneous appeal has been filed by the decree-holder appellants against the order in Misc. case No. 14 of 1963 which was filed by the judgment debtor in the following circumstances:

The appellants obtained a money decree on 24-6-59 from the Court of 1st Subordinate Judge, Patna against Dhan-raj Mill (Pvt.) Ltd. for Rs. 89,632.50 paise and as cost Rs. 2,724.88 paise. When the decree holders filed execution proceeding in order to execute the decree, an objection was filed by the judgment-deb-tor-company mainly on the following two grounds:

- (i) That the execution case was barred by limitation.
- (ii) That the Bombay High Court had passed orders on 21-1-1959 for winding up the said company and appointing an official liquidator.

After the said objection was filed in the execution case. Misc. Case No. 14 of 1963 was registered and after hearing both the parties the learned Additional Subordinate Judge, Patna passed the following two main orders:

(1) That the Patna Court had no jurisdiction to pass the decree after the Bombay High Court had passed orders on 21-1-59 for winding up of the company and appointing the official liquidator. Therefore, he held that the decree is nullity and void ab initio.

(2) That the execution case is barred by time, at least by four days.

Being dissatisfied with the aforesaid order the present miscellaneous appeal has been filed in this court by the decree-holders.

2. Learned counsel appearing on behalf of the decree-holder-appellants has attacked the finding of the court below only on point No. 1, According to learned counsel, the decree is not void but it is voidable at the instance of the liquidator. It not being a nullity the executing court cannot go behind the decree. On the other hand, learned counsel appearing on behalf of the respondent company, has urged that obtaining leave of the court is a condition precedent and if leave is not obtained the judgment and the decree are void and they are nullity.

3. To appreciate the main points Involved in this case it will be necessary to refer to Section 446 of the Indian Companies Act. 1956 (Act No. I of 1956). The relevant portion of the section reads as follows :--

"When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or 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."

In the instant case it is admitted case of the parties that the winding up order was passed on 21-1-1959 and the money decree in question was passed on 1-7-1959. Therefore, the suit was proceeding against the company without the leave of the court, i. e. the Bombay High Court It is also admitted that leave has not been obtained in this case. Therefore, the only question which falls for consideration is whether in such circumstances the decree passed should be considered as void or voidable. No doubt, in the section the word "shall" is used, but now it is well established that "shall" may be read as "may". It depends upon legislative intent and the object for which the safeguard has been made in the section. The object of this section is to prevent all litigations against a company which is being wound up except with the sanction of the court. The policy is to protect the assets for equitable distribution among those entitled, and to prevent the administration being embarrassed by a general scramble of creditors.

4. This section may be compared with Section 537. the relevant portion of which reads as follows :--

(1) Where any company is being wound up by or subject to the supervision of the court --

(a) an attachment distress or execution put in force, without leave of the Court,

against the estate or effects of the

company, after the commencement of the winding up; or

(b) any sale held, without leave of the court, of any of the properties or effects of the company after such commencement, shall be void,

(2) Nothing in this section applies to any proceedings for the recovery of any tax or impost or any dues payable to the Government."

From this it appears that in Section 537 "any sale held, without leave of the court shall be void." So here the legislative intention is quite clear that in the circumstances indicated in this section, if no leave is obtained from the court, any action taken shall become void; but no such word "void" has been used in Section 446. That also indicates that non-compliance of the provisions contained u/s 446 will not result in the suit or the decree being void but it will be merely voidable at the instance of the liquidator.

5. Reliance was placed on behalf of the appellants on a decision of a single Judge of the Calcutta High Court in *Roopnarain Ramchandra Private Ltd. Vs. Brahmapootra Tea Co. (India) Ltd. and Another*, . This relates to Section 448 of the new Act and his Lordship has held at page 194 as follows :

"The court has full jurisdiction to entertain suits and to pass decree 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 ts 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 or 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."

6. Section 446 corresponds to Section 171 of the Previous Indian Companies Act. 1913 and the relevant portion of Section 171 also reads 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 the leave of the court, and subject to such terms as the court may impose."

7. The corresponding section of the English Companies Act, 1908 was Section 142 which ran as follows :--

"When a winding up order has been made, no action or proceeding shall be proceeded with or commenced against a company except by leave of the Court, and subject to such terms as the court may impose.

Section 171 of the Indian Companies Act, 1913 was admittedly borrowed from the English Statute Law on the same subject. The only difference is that the word "suit" has been substituted for the word "action". The company law is not a part of the indigenous law of India. It has come from England. It is, therefore, permissible in construing sections of the Indian Statute to refer to the English case law on the subject. In *Nazir Ahmad v. Peoples Bank of Northern India Ltd.* AIR 1942 Lah 289 their Lordships of the Full Bench quoted with approval the following passage of Mr. Solomon Judah at pp. 280-281 of his commentary on the Act :--

"If a suit is continued without leave obtained under the section the decree is not binding on liquidator. Where a suit was instituted against a company in liquidation without leave of the Court it was held that leave subsequently obtained was not to be treated as a nullity and the suit should not be dismissed, specially as the liquidator had not contested the order granting leave. Whenever proceedings are commenced without leave, the proper course for the liquidator is to apply to the court for stay of the proceedings, and not to plead the omission to obtain leave as a bar to the further maintenance of the proceedings, as in practice, the section has always been worked out by applying to stay the proceedings."

This portion of his comment is based upon four English cases, viz (1893) 2 QB 346 : (1866) LRICP 694; (1891) 1 Ch. 305 : (1892) 1 QB 77.

8. In *Gray v. Eaper* reported in the aforesaid (1866) LRICP 694 the relevant fact was that after action was brought an order was obtained for winding up under the English Companies Act, 1862, and proceedings under that order were taken in the county court. Section 202 of the Companies Act, 1962, enacts that where an order has been made winding up an unregistered company, no suit or other legal proceedings shall be commenced or proceeded with against any contributory to the company, in respect of any debt of the company except with the leave of the court. The plaintiff had not obtained leave to proceed. Their Lordships held ;

"the omission to obtain such leave could not be taken advantage of by plea to the further maintenance of the action; but only, if at all, by application to the court in which the proceedings under the winding up order were being pursued."

The question is thus merely one of interpretation, i. e. whether Section 171 of the Companies Act was intended to entail as a necessary consequence the dismissal of a suit instituted without leave or whether it was intended that the suit should be stayed until leave was obtained. It was held in the Full Bench decision AIR 1942 Lah 289 (*Supra*) at page 290 as follows :--

"As already indicated, the words used were borrowed from the English law where they had a recognised legal meaning attached to them, and I can see no reason why they should have been intended to convey an entirely new meaning as such as they were incorporated in an Indian Statute."

Their Lordships of the Lahore High Court after a full survey of both English and Indian cases have further held at page 296 :--

"On the whole, it seems to me that having regard to the course of decisions in England under the English Companies Act and under the English Bankruptcy laws and the fact that the provisions of Section 171, Indian Companies Act, an analogous provision of the Presidency Towns Insolvency Act and the Provincial Insolvency Act, were taken bodily from the corresponding English Statutes, it must be held that the words in question had acquired a technical meaning in England and that when these words were brought into use in the corresponding Indian Statute they must be deemed to have been given the same meaning here as in England. In this aspect of the matter, I would hold that a suit instituted against a company in liquidation without the leave of the court should not necessarily be dismissed even if the leave was granted after the period of limitation for the institution of the suit had expired. Each case must be dealt with on its own merits."

9. A similar view was taken in a Bench decision in the case of Suresh Chandra Khasnabish Vs. The Bank of Calcutta Ltd., wherein their Lordships have followed the decision of the Full Bench of the Lahore High Court and have held at page 840 as follows :--

"We, therefore, hold that the court has jurisdiction to give leave to proceed with a suit or other legal proceeding against a company in liquidation, even though such leave was not obtained before its commencement.""

10. In view of all these decisions and the above considerations, in my opinion, the orders of the Court below, so far point No. 1 is concerned, cannot stand. The decree in the execution is not void but it is only voidable at the instance of the liquidator. Learned counsel appearing on behalf of both the parties have urged that no order need be passed so far point No. 2 is concerned, i. e. regarding the limitation, because now this will be decided by the appropriate court where the liquidation of the company is pending.

11. In the result, the appeal is allowed in part and the order passed by the court below is set aside so far point No. 1 is concerned, i. e. regarding the decree being void and it is held that the decree was not void as held by the court below. In the circumstances of the case, there will be no order as to costs of this Court.

Misra, A.C.J.

12. I agree. I may only add that the present case is one where no objection was raised before the court passing the decree as to the commencement of the winding up proceeding, and a decree was passed. This case is thus

distinguishable from all the other decisions to which our attention was invited. In fact, there is an observation in a Calcutta case *Nabin Kishori Choudhury Vs. Jagdishwar Sanyal and Others*, that if no objection is raised before the court of first instance the decree is not defective in any sense. But in view of the provision in Section 537 of the present Companies Act, 1956, the decree cannot be executed as against the effects or properties of the Company in liquidation, without the leave of the court, which, of course, means the winding up court. Such a case is, therefore, covered by the comment of Solomon J. on the Act and quoted with approval by the Lahore High Court in AIR 1942 Lah 289 to the effect that if a suit is continued without leave obtained under the said section, the decree is not binding on the liquidator. Hence the decree under execution in the instant case is not binding on the liquidator and hence proceedings in execution cannot continue. The matter has, therefore, to be taken to the winding up court for further order. Any observation made by the executing court regarding the nature of the decree or its executability must be ruled out as being of no effect.