(1980) 02 CAL CK 0030

In the Calcutta High Court

Case No : Company Petition No. 359 of 1978

Sonajuli Tea and Industries Ltd. APPELLANT

Vs

Ashkaran Chatter Singh and Others RESPONDENT

Date of Decision : 07-02-1980

Acts Referred:

Companies Act, 1956 — Section 466

Citation : (1982) 52 CompCas 568

Hon'ble Judges : A.N. Sen, C.J;A.K. Sarkar, J

Bench : Division Bench

Advocate : Somnath Chatterjee, for the Appellant; S.B. Mukherjee, for Premchand Jute Mills Ltd., for the Respondent

Final Decision : Dismissed

Judgement

Sen, C.J.—This application has been made by one Mahabir Prasad Agarwalla claiming to be a contributory of Sonajuli Tea & Industries Ltd. (hereinafter referred to as the " appetent company ") in an appeal preferred by the appellant-company against an order of winding up of the appellant-company passed by Roy Cbowdhury J., on the 13th of August, 1979, on an application made by Ashkaran Chatter Singh. The facts material for the purpose of this application may be noted.

2. The appellant-company used to run the Premchand Jute Mills Ltd. as lessee of the said mills. The Premchand Jute Mills Ltd. made an application for the winding-up of the appellant-company on the 14th of November, 1976, on the ground that the appellant-company was unable to pay the amount of rent due and payable by the appellant-company and the amount of rent claimed in the said petition being C. P. No. 387 of 1976 was Rs. 1,92,000 with interest. The said winding-up petition was finally disposed of by an order passed by A.K. Basu J. on February 17, 1977. The learned judge, by his order, directed the said company to deposit a sum of Rs. 1,00,000 in cash with M/s. Orr, Dignam & Co., who acted as the advocates on record for Premchand Jute Mills Ltd. in the said winding-up petition

and the learned judge further directed that in the event of the said deposits being made, the winding-up petition would remain stayed permanently and the company would file a suit for the enforcement of its claim. ''

3. It appears that Premchand Jute Mills Ltd. received a sum of Rs. 1,30,000 from the insurance company in respect of a claim made on behalf of the appellant-company and the said sum of Rs. 1,30,000 was paid in terms of the earlier order dated February 17, 1977, as modified by an order dated 11th March, 1977. Premchand Jute Mills Ltd. filed a suit against the appellant-company for the enforcement of its claim on the 16th of April, 1977. It appears that the appellant-company thereafter on the 17th October, 1977, filed a suit against Premchand Jute Mills Ltd. for recovery of about a crore of rupees on account of alleged loss sustained by the appellant-company, being Suit No. 676 of 1977.

4. In the said suit filed by the appellant-company against Premchand Jute Mills Ltd., the appellant-company, made an application on the very same day the suit was filed for appointment of a receiver. It appears that the case of the appellant-company in the said suit and also in the application was that the appellant-company had determined the said lease and was not in possession of the said mill The said application for the appointment of a receiver was finally disposed of by hon''ble Mrs. Justice Padma Khastgir on the 23rd of November, 1978. It further appears that the learned judge in the order passed by her has recorded the statement made on behalf of the appellant-company that the appellant-company was not in possession of the said mill.

5. It also appears that by the said order the learned judge gave liberty to Premchand Jute Mills Ltd. to run the mill under the receiver appointed by the learned judge. Premchand Jute Mills Ltd. made another application for the winding-up of the appellant-company on the 20th of March, 1979. In this petition the claim of Premchand Jute Mills Ltd. was for a sum of Rs. 6.62 lakhs on account of rent alleged to be payable by the appellant- company to Premchand Jute Mills Ltd. It appears that the defence taken in the said winding-up petition on behalf of the appellant-company was that the appellant-company was not liable to pay any rent to Premchand Jute Mills Ltd. as the appellant-company had terminated the lease and had made over possession thereof to Premchand Jute Mills Ltd. It further appears that other creditors of the company also asked for a winding-up of the appellant-company. The learned company judge made an order on the petition presented by Premchand Jute Mills Ltd. for the winding-up of the company, admitting the said petition for reasons recorded in his judgment delivered on the 9th and 10th July, 1979. The appellant-company had preferred an appeal against the said judgment and order of the learned judge. The appellate court granted a stay of the operation of the said order on conditions mentioned in the order and had made the said application returnable on the 13th of August, 1979. It appears that when the said application for stay of the operation of the order passed by the learned judge in the application of Premchand Jute Mills Ltd. was being heard before the appellate court, an order

for the winding-up was passed by the company court on the application of another petitioning creditor, namely, Ashkaran Chatter Singh. In view of the order of winding-up passed by the learned trial judge it appears that the appellate court passed an order on the said application of the appellant, Sonajuli Tea & Industries Ltd., in its appeal against the order of learned trial judge in Prem-chand''s application by which order the learned company judge had only admitted the petition and directed advertisements giving liberty to Prem chand Jute Mills Ltd. to participate in the winding-up proceedings in view of the winding-up order already passed. Against the order of winding-up passed by the learned judge on the petition of Ashkaran Chatter Singh on 13th August, 1979, the appellant-company preferred the instant appeal on the 11th of September, 1979, and the appellant-company in the instant appeal made an application for stay of operation of the order of winding-up passed by the learned trial judge. On the said application the appellate court passed an interim order on the 13th of September, 1979, directing stay of operation of the order of winding-up on condition that the appellant-company would deposit a sum of Rs. 50,000 with the official liquidator and furnish a bank guarantee for the sum of Rs. 1 lakh and inventory of the assets of the company would also be made within the time mentioned in the said order. It appears that the appellant-company failed to comply with the conditions mentioned in the said order in the matter of deposit of the sum of Rs. 50,000 and also in the matter of furnishing bank guarantee of Rs. 1 lakh and as the appellant-company had failed to comply with the conditions, the interim order for stay of the winding-up stood vacated. It appears that on the 19th of September, 1979, an order was passed by this court vacating the order for stay in view of non-deposit of the sum of Rs. 50,000 and not furnishing the bank guarantee and directions were given with regard to the filing of affidavits.

6. The said application came up for final disposal on the 5th of November, 1979. Nobody on behalf of the appellant appeared on that date and the said application was thereupon dismissed. It may be noted that as the order for stay had stood vacated because of non-compliance with the conditions, by the appellant-company as earlier noted on the 19th of September, 1979, the order for winding-up had become operative and the company is in liquidation.

7. On the 13th of November, 1979, the matter was mentioned before the appellate court and the appellate court had directed the receiver and the liquidator not to part with possession for a week. There appears to be some controversy as to on whose behalf and under what circumstances the matter was mentioned before the court. We shall, however, advert to this aspect later on. The order that was passed which we have earlier recorded is what appears from the minutes of the order. On the 19th November, the present application was moved by the petitioner, Mahabir Prasad Agarwalla, claiming to be a contributory of the appellant-company and in this petition the prayers are:

"(a) Order dated 5th November, 1979, be recalled and/or set aside.

(b) Time to make deposit in terms of the order dated 13th September, 1979, be extended till such time as to this hon''ble court may seem fit and proper.

(c) All further proceedings for winding up including the pending proceedings be permanently stayed.

(d) Injunction restraining the official liquidator, his servants or agents, or nominees or assigns from taking any further steps in furtherance of the winding-up."

8. It appears that on November 19, 1979, on the said application which was moved on notice to the creditors the court directed the petitioner to deposit Rs. 50,000 in cash with the official liquidator and to furnish bank guarantee for Rs. 1 lakh on or before December 4, 1979, and the official liquidator was further directed to make over possession of the office to the company on deposit of Rs. 50,000. It appears that in terms of the said interim order passed by the court on the 19th November, 1979, the petitioner deposited a sum of Rs. 50,000 with the official liquidator and also furnished bank guarantee for the sum of Rs. 1 lakh. On the 29th of November, 1979, Premchand Jute Mills Ltd. made an application for vacating the interim order which was passed by the appellate court on the 19th November, 1979. The said application is also appearing today on the list immediately after this application. It appears that both the said applications, namely, the application by the present petitioner and also the application by Premchand Jute Mills Ltd. for vacating the interim order passed in the present application appeared on the list as new motions on the 5th December, 1979. On that date, after hearing the submissions of the parties, the court directed the petitioner to deposit a further sum of Rs. 50,000 in cash with Rajesh Khaitan & Co. and to furnish a bank guarantee for Rs. 6 lakhs and the court gave directions with regard to the filing of affidavits. Against the said interim order passed by the court on the two applications the petitioner made an application for special leave to appeal to the Supreme Court. The Supreme Court on the 14th December, 1979, made the SLP returnable on the 14th January, 1980, and passed an ex parte order of stay of operation of the order of the Division Bench in so far as it directed to furnish the bank guarantee for the sum of Rs. 6 lakhs. It may be noted that the petitioner had deposited the sum of Rs. 50,000 in cash in terms of the order passed by the Division Bench on the 5th December, 1979, with M/s. Rajesh Khaitan & Co. and it appears that the main grievance was with regard to the further direction of the Division Bench requiring the petitioner to furnish bank guarantee for Rs. 6 lakhs. The SLP was finally disposed of by the Supreme Court on the 14th January, 1980, and the Supreme Court passed the following order:

" SLP is rejected in view of the fact that the application for stay has been fixed for hearing by the Calcutta High Court on 15-1-1980. The application for stay will be taken up for hearing by the Calcutta High Court on 15-1-1980, and will be disposed of on merits, in-eluding the question of maintainability of the application. The petitioners will not, however, be debarred from being heard on the application on the ground that they have not carried out the condition of deposit and of bank guarantee imposed by the ad interim order. No further action pursuant to the winding-up order will be taken until the application for stay is disposed of by the Calcutta High Court."

9. Mr. Chatterjee, appearing in support of this application, has contended that the present application by the contributory is maintainable. It is his argument that the contributory has been given a statutory right u/s 466 of the Companies Act to make an application for the stay of a winding-up proceeding. Mr. Chatterjee has argued that leave of court was granted to the petitioner to make this application. He has submitted that on the 13th November, 1979, the matter was really mentioned on behalf of the petitioner and on the oral application made on behalf of the petitioner the said directions were given and the court also gave liberty to the petitioner to make a formal application within a week, during which period the order passed on the oral application was to remain effective. It may be noted that this part of the submission is disputed on behalf of the respondents. Mr. Mukherjee, appearing on behalf of the Jute Mills Ltd., has drawn our attention to the notice which was served on his advocate-on-record for this mentioning and Mr. Mukherjee has stated that the said notice does not indicate that the matter was going to be mentioned on behalf of any contributory. On the other hand, the said notice was by Rajesh Khaitan & Co. who in fact had been the advocate-on-record for the appellant-company.

10. A copy of the notice is directed to be kept in the records of these proceedings. The minutes of the court were called for. The minutes also do not indicate that the matter was mentioned on behalf of the petitioner. In fact the minutes do not indicate on whose behalf the matter was mentioned. In view of this controversy Mr. Chatterjee very fairly submitted that if no leave had earlier been obtained by the petitioner for making this application and this application has not been made pursuant to any previous leave granted by the court, he is now asking for leave to make the present application. Mr. Chatterjee has argued that any party whose interest is affected is entitled to prefer an appeal against the said order although he is not a party to the said proceeding, with leave of court. It is Mr. Chatterjee''s submission that the contributory of a company is undoubtedly affected by an order of winding-up of the company and the contributory is, therefore, entitled to prefer an appeal against any such order with leave of court. He has further submitted that in the case of any winding-up order the statute has specifically conferred the right upon a contributory to make such an application and he has in this connection referred to Section 466 of the Companies Act. Mr. Chatterjee has argued that if a party is aggrieved he is entitled to prefer an appeal against any order by which be is aggrieved. There should be no reason why a party who would be otherwise entitled to prefer an appeal would not be entitled to make an application in an appeal which has already been filed and which is pending in this court for redress of the grievances. Mr. Chatterjee argues that the petitioner could not possibly make an effective application u/s 466 in the court below, as the pendency of the appeal in

which the validity of the order has been challenged will stand in the way of any effective disposal of any such application and any decision by the trial court in the event of any application u/s 466 being moved before that court is likely to nullify the present appeal. Mr. Chatterjee has submitted that as to which court the application is to be presented is really a matter of procedure. It is his argument that for the ends of justice the court has recognised the right of any party who may not be a party to any proceeding to prefer an appeal against any order which may affect his interest. He contends that applying the same principle the court should in the instant case where the right of a contributory to make an application for stay of winding-up proceeding is further recognised by the statute, grant leave to the petitioner and the petitioner should be allowed to make the present application in the present appeal. Mr. Chatterjee has further argued that if considered necessary the court should add the petitioner as a party to the proceeding. It is his submission that under O. 1, Rule 10 of the CPC the court has ample jurisdiction to add anybody as a party to any proceeding in the interests of justice. Mr. Chatterjee has next contended that this application is really in the nature of an application for extension of time to make the deposit in terms of the order passed by the appellate court on the 13th September, 1979, to make the said order for stay effective. Mr. Chatterjee has argued that the court while passing the order on the 13th September, 1979, must have felt that a case for stay had been made out and must have passed that order on that basis. Mr. Chatterjee submits that as the company had failed to make the deposit, the contributories of the company, to make the said order effective and to revive the company, have now come forward to make the said deposit. Mr. Chatterjee has argued that the contributories have, in fact, pursuant to earlier orders passed by this court, made further deposits and the contributories are also prepared to make a deposit of another Rs. 1 lakh, if the court so directs. Mr. Chatterjee has also submitted that the company is further prepared to go on making deposits of all current rents. Mr. Chatterjee has argued that, on the merits, the case of Premchand Jute Mills Ltd. is an inconsistent one. He contends that Premchand Jute Mills Ltd. seeks to make a case that the lease is continuing and has presented the winding-up petition on the basis that arrears of rent are due and payable by the company on the footing that the lease subsists. It is Mr. Chatterjee''s case that if the lease has already been terminated there could be no question of Premchand Jute Mills Ltd. being entitled to any rent after the termination of the lease and Premchand Jute Mills Ltd. would not be entitled to claim any amount on account of arrears of rent. Mr. Chatterjee has further submitted that so far as the other creditors are concerned, their claims have been fully secured. It has been further submitted that in fact Ashkaran Chatter Singh, the petitioning-creditors on whose application the order for winding-up has been made, has received a payment of Rs. 10,000. Mr. Chatterjee has argued that as the contributories, who are really vitally interested in the company, are desirous of reviving the company, the petitioner should be given an opportunity and the present petition should be allowed on such terms and conditions as the court considers fit and proper. Mr. Chatterjee has further argued that if the order for winding-up is not stayed, various complicated and difficult questions will arise as to what will happen to the lease which had been granted by Premchand Jute Mills Ltd. to the company. Mr. Chatterjee has submitted that the lease granted in favour of the company is a very valuable property. Mr. Chatterjee, in this connection, has also drawn our attention to an application which has been made by the company before the interlocutory court for an order directing the receiver to allow the company to run the said mills. The said application, Mr. Chatterjee points out, remains pending and if the company is wound up the said application will indeed become infructuous. Mr, S. B. Mukherjee, learned counsel appearing on behalf of Premchand Jute Mills Ltd., has mainly argued this application on behalf of the respondents. Mr. Mukherjee has raised the following three principal contentions 1-

(1) The present petition by the contributory is not maintainable.

(2) Even assuming it can be said that the present petition by the contributory with leave of court can be entertained, no grounds have been made out in the petition for granting such leave to the petitioner to present the present petition.

(3) In any event, there is no merit on this application and the application is mala fide.

11. In support of his first contention that the present petition by the contributory is not maintainable. Mr. Mukherjee has argued that the present petition cannot be considered to be a petition u/s 466 of the Companies Act. It is his argument that undoubtedly u/s 460 of the Act, a right has been conferred on the contributory to make an application for a stay of the winding-up of the company after the company had been ordered to be wound up. Mr. Mukherjee argues that a proceeding u/s 466 is an independent proceeding and the basic requirement of the said section is that the contributory must proceed on the basis that there is a valid order for winding up and the company is in the process of being wound up. It is Mr. Mukherjee''s argument that if anybody wants to challenge the validity of the winding-up proceeding, he cannot invoke Section 466 to make an application for stay of the winding-up proceedings. In support of this submission Mr. Mukherjee has referred to the judgment of S.R. Das J. in In re East India Cotton Mitts Ltd. [1949] 19 Comp Cas 61; AIR 1949 Cal 69. He also relied on arts. 1375 and 1376 in Halsbury, Vol. 7, 4th Edn. It may be noted that the passage in the 4th Edn. of Halsbury, Vol. 7, relied on by Mr. Mukherjee is substantially quoted from the earlier edition of Halsbury in the judgment of Das J. Mr. Mukherjee has further argued that necessary averments, which might justify any order u/s 466 of the Companies Act being passed, are not there in the present petition. Mr. Mukherjee has submitted that the present petition proceeds mainly on the basis that the earlier order for stay stood vacated only because of default on the part of the company in complying with the conditions laid down therein and the contributories have now decided to come into the scene for reviving the company and for arranging for furnishing a security in terms of the earlier order passed by this court to enable the order for stay earlier granted by the court to revive and

to continue. Mr. Mukherjee has further argued that the petitioner is a stranger to the proceeding. He has made the application without any prior leave of the court. Mr. Mukherjee has relied on the said decision of Das J. in East India Cotton Mills Ltd., In re [1949] 19 Comp Cas 61 : AIR 1949 Cal 69, in support of his argument that even with leave of court the petitioner will not be entitled to prefer an appeal against the order and/or to maintain the present application. He has further contended that even if it be held that with leave of court the petitioner not being a party to the proceeding could prefer an appeal against the order on the basis of the general principle of law that a person who is not a party to any proceeding may prefer an appeal against an order with leave of the court if the order prejudicially affects his interest, the said principle cannot in any event be applied in the instant case, as the appellant has not asked for leave to prefer an appeal and in fact the appeal has already been filed by the company which is still pending and the petitioner is only seeking to make an application in an appeal in which the appellant is not a party. Mr. Mukherjee has commented that the general principles of law conferring right on a person who is not a party to any proceeding to prefer an appeal with leave of court against an order which might prejudicially affect his interest, cannot be extended to confer right on an outsider to make an application in an appeal already preferred by the party aggrieved when the aggrieved party himself prefers an appeal against the order. Mr. Mukherjee has finally submitted that in any event leave is granted by the court on a proper consideration of the materials. It is his argument that in the instant case there are no materials on the basis of which leave, even proceeding on the basis that such leave could be granted, should be granted by the court and no grounds have at all been made out for the grant of such leave in the petition and there is no prayer for the same. Mr. Mukherjee has also pointed out that if the appellant wanted to prefer an appeal against the order against which the appellant-company has already preferred an appeal, any such appeal by the petitioner would now be barred by limitation. Mr. Mukherjee further submits that the present petition must be held to be incompetent and in any event no leave should be granted by this court to the petitioner to move the present petition. The final argument of Mr. Mukherjee has been that there is indeed no merit in the present application and the present application is mala fide. Mr. Mukherjee has submitted that the appellant has categorically made the case, in the suit filed by the appellant-company in this court, that the company has ceased to be a lessee of the said mill. He has also drawn our attention to the statement which has been recorded in the order passed by Khastgir J., while granting leave to Premchand Jute Mills Ltd. to carry on the business under the receiver. Mr. Mukherjee has argued that even in the winding-up proceeding instituted by Premchand Jute Mills Ltd., the case of the appellant-company has been that the appellant-company has no liability for payment of any rent, as the appellant-company is not the lessee and has made over possession of the mill to Premchand Jute Mills. It is Mr Mukherjee''s contention that now that the jute business is looking up and Premchand Jute Mills Ltd. is taking steps to run the mills, the appellant-company, through the contributory, is trying to come into possession of the said mills and it is only with the said purpose the appellant-company has made an application before the learned trial judge which is still pending. Mr. Mukherjee in this connection has also pointed out that Premchand Jute Mills Ltd. also made an application before the learned trial judge for making over possession of the said mills to Premchand Jute Mills Ltd. and the said application is also pending and this application by Premchand Jute Mills was made as early as 25th July, 1979.

12. Mr. Mukherjee has next submitted that the case sought to be made by the petitioner in the present petition for the reliefs claimed therein is, on the face of it, unacceptable. It is Mr. Mukherjee''s argument that the only ground which has been made in the petition is that the, contributories were not aware of the earlier order for stay of the winding-up on the conditions stipulated therein, passed by this court, and as the contributors were not aware of the earlier order, the petitioner could not take any earlier step for implementation of the said order on the basis of which the order for stay was granted. Mr. Mukherjee has argued that the Agarwallas virtually constitute the company and the petitioner must have been aware of the proceedings right from the beginning including the order that was earlier passed by this court. Mr. Mukherjee has further submitted that the conduct of the petitioner and also of the company clearly go to indicate that the only object of the petitioner is to obtain stay of the operation of the order of winding-up to enable the petitioner to take advantage of the present .condition in the jute market. Mr. Mukherjee in this connection has drawn our attention to the various notices issued by the company and also to the notice dated 6th of November, 1979, which go to indicate that the mills would be run by India Burlap & Laminating Works and the said notice is also signed by one of the Agarwallas who mainly constitute the contributories of the company.

13. Mr. Mukherjee has further submitted that the company is hopelessly insolvent and in support of this submission, Mr. Mukherjee has referred to the statement made by the liquidator which has been mentioned in the affidavit filed on behalf of Premchand Jute Mills Ltd., wherein it has been stated by the liquidator that the company has no assets. Mr. Mukherjee has pointed out that the company has not been in possession of the mills and not been able to run the same in any event since 1977. He has commented that the company has not been able to pay the dues of the other creditors and even when the court by its interim order gave the company an opportunity to have the order of winding-up stayed on the conditions mentioned in the order, the company could not comply with the said order and was not in a position to deposit Rs. 50,000 and/or to furnish bank guarantee for the sum of Rs. 1 lakh. Mr. Mukherjee submits that this application should not, therefore, be entertained and should be dismissed.

14. In our opinion the present petition by Mahabir Prosad Agawalli claiming to be a contributory cannot be said to be competent.

15. Undoubtedly, Section 466 of the Companies Act confers a right on the contributory to present a winding-up petition. The proceeding contemplated u/s

466 is an independent proceeding. An application for stay of the winding-up order in an appeal preferred against the winding-up order cannot be considered to be a proceeding u/s 466 of the Companies Act. To make an application u/s 466 of the Companies Act the company must be in liquidation and the validity of the order of the winding-up has to be accepted and cannot be questioned.

16. To justify an order u/s 466 of the Companies Act, the requirements of the said section have to be complied with and necessary averments must also be there in the petition. The present petition, in our view, cannot be considered to be a petition u/s 466 of the Companies Act. The argument of Mr. Chatterjee that in view of the pendency of the appeal, an application u/s 466 of the Companies Act cannot be made by the contributories, does not impress us.

17. The present petitioner has made this application in the appeal which has been preferred by the company against the order of winding-up passed by the learned judge. The present petitioner was undoubtedly not a party to the present proceeding. The petitioner and also the other contributories had undoubtedly an opportunity of appearing before the company court after the application had been advertised after giving notice in accordance with the Rules, The contributories have not chosen to appear at the hearing of the winding-up petition. The appeal had been preferred by the company against the order of the learned trial judge.

18. The order that was passed on the 13th September, 1979, was only an interim order pending final disposal of the said application by the company for a stay of operation of the order of winding-up in the appeal preferred by the company against the said order. The said application came up for final disposal. The company had not complied with the conditions laid down in the said order. The order for stay stood vacated on the 19th September, 1979, and the court had also passed a specific order on that date to that effect and directed the liquidator to take possession.

19. The application came up for final disposal on the 5th November, 1979. On that date nobody on behalf of the company even appeared in support of the said application.

20. It appears that the company had obviously lost all interest in the proceeding after the interim order for stay stood vacated because of default on behalf of the company in complying with the conditions laid down in the interim order for obtaining stay of operation of the order of winding-up.

21. The first prayer, as we have earlier noticed, in the present petition, is for recalling and/or setting aside the order which was passed on the 5th November, 1979. As we have earlier observed, the petitioner was not a party to the said proceeding. The petitioner is not a party to the appeal and was also not a party to the said application.

22. The principle which governs the granting of leave to a person who is not a

party to a proceeding to prefer an appeal against an order which may prejudicially affect him is not, in our view, applicable in the instant case. In any event, if we could have been persuaded to hold that such leave could be granted and with leave the present petition by the contributory could have been maintained in the appeal preferred by the company, we are of the opinion that there are no materials which would justify the granting of such leave. As we have earlier observed, because of default on the part of the appellant-company, the interim order for stay stood vacated. The appellant-company had thereafter taken no interest and had not even chosen to appear at the time of the final hearing of the application.

23. It is to be noted that the order which was passed by the court on the 13th September, 1979, was only an interim order which was to remain effective till the disposal of the application, provided the conditions on which the said order was made were complied with. After affidavits had been filed, the merits of the application had to be finally adjudicated upon. As we have earlier noticed, at the time of final hearing, nobody on behalf of the appellant-company had appeared to move the said application. The only ground that has been made in the present petition is that the petitioner and the other con tributaries were not aware of the said order and of the default on the part of the company in compliance with the said order. We are unable to accept this ground which appears to be the only ground in the petition. In our view, the petitioner must have been aware of the proceedings right from the beginning and of the orders that had been passed.

24. It appears that the petitioners and the Agarwallas virtually constitute the company. In our view, therefore, even if leave could be granted to the petitioner to present the application and the application could have been entertained with such leave, no such leave in the instant case should be granted and we refuse to grant any such leave to the petitioner.

25. We have, however, already expressed our view that in such a case leave cannot be granted to a party to present an application in an appeal preferred by somebody else for the relief, which the appellant himself was entitled to ask for, had in fact asked for and obtained and had thereafter failed to retain the benefit of the order because of his own default.

26. We must, therefore, hold that the present petition is not competent and we cannot entertain the same. In view of our finding on this question, it does not really become necessary to go into the other questions. As, however, arguments have been advanced at length on the merits, we shall briefly indicate our views on the same,

27. The facts and circumstances of this case, which we have earlier indicated, go to show that no order for stay of the winding-up should be made and that the present'' petition is a mala fide one. The facts and circumstances of this case further go to suggest that the appellant-company which has not been in a position to run the mills for all these years and is not still in a position to run the

mill now, is now trying to have the order of winding-up stayed, not for its own benefit but for the benefit of other parties. The submissions of Mr. Mukherjee, on this aspect impress us.

28. We are, therefore, of the opinion that this application must fail. This application is, therefore, dismissed with costs.

29. Interim orders, if any, are all vacated.

30. The amounts which have been deposited by the petitioner pursuant to earlier orders passed by this court will be refunded to the petitioner.

31. Operation of this order will remain stayed for a fortnight and during this period status quo will continue.

A.K. Sarkar, J.

32. I agree.