Shyamapada Chakrabertty And Others vs The Controller Of Insurance, ... on 13 December, 1961

Equivalent citations: 1962 AIR 1355, 1962 SCR SUPL. (2) 130

Author: A.K. Sarkar

Bench: A.K. Sarkar, P.B. Gajendragadkar, K.N. Wanchoo, K.C. Das Gupta, N. Rajagopala Ayyangar

PETITIONER:
SHYAMAPADA CHAKRABERTTY AND OTHERS

Vs.

RESPONDENT:
THE CONTROLLER OF INSURANCE, GOVERNMENT OF INDIASIMLA AND OT

DATE OF JUDGMENT:
13/12/1961

BENCH:
SARKAR, A.K.
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SARKAR, A.K.
GAJENDRAGADKAR, P.B.
WANCHOO, K.N.
GUPTA, K.C. DAS
AYYANGAR, N. RAJAGOPALA

CITATION:
1962 AIR 1355 1962 SCR Supl. (2) 130

ACT:
Insurance-Business-Transfer by one company to another, when permissible-Insurance Act, 1938 (4 of 1938), ss. 35(3), 36 (1)-Indian Companies Act, 1913 (7 of 1913), ss. 10, 12, 186H.

HEADNOTE:
In an application under Art. 226 of the Constitution, to challenge the validity of the transfer of a life insurance company's business to another company under s. 36 of the Insurance Act, 1938:-
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Held, the transfer though it brought about an abandonment of the business of the company was not bad as resulting in an alteration of the memorandum of the company without recourse to s. 12 of the Indian Companies Act, 1913. The Company's memorandum of association contained a power to sell its undertaking and an exercise of that power does not amount to alteration of the memorandum. The transfer was not a winding up of the company without following the procedure laid down in the Companies Act and hence invalid. It was effected under the provisions of the Insurance Act.

Bisgood v. Hendersons Transval Estate, [1908] 1 Ch. 734, distinguished.

An agreement by the directors of a company to transfer its undertaking subject to confirmation by the company in general meeting did not offend s. 86H of the Companies Act.Section 55 and the connected sections of the Companies Act do not contemplate reduction of share capital brought about by loss of assets and loss of assets does not amount to reduction of share capital.

Section 44 of the Insurance Act does not prevent an insurance company from dealing with its assets though as a result thereof no asset was left out of which the agents of the company might be paid commission to which they are entitled under the Insurance Act.

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Section 36 of the Insurance Act does not offend Art. 14 of the Constitution. That section applies to all insurance companies which in general meeting agree to a transfer.

Even if it is assumed that under s. 36 (1) of the Insurance Act only that scheme of transfer of which notice under s. 35 (3) of the Act had been given could be sanctioned and not a modified version of it, there would be power to sanction a modified version where the scheme itself or the resolution of the company approving of it, gave power to the directors to accept modifications of that scheme on behalf of the company suggested by the controller of Insurance before final sanction by him.

Mihirendrakishore Datta v. Brahmanbaria Loan Co.,(1934) I.L.R. 61 Cal. 913, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 300 of 58.

A. N. Sinha, N. H. Hingorani and P. K. Mukherjee, for the appellants.

C. K. Daphtary, Solicitor-General of India, R. Ganpathy Iyer and R. H. Dhebar, for respondent No. 1.

C. K. Daphtary, Solicitor-General of India and K. L. Hathi, for respondent No. 3.

1961 December 13. The Judgment of the Court was delivered by SARKAR, J.-This appeal raises certain questions as to the validity of an order made under s. 36 of the Insurance Act, 1938, sanctioning the transfer of its life insurance business by one insurance company to another. The appellants had challenged that order by a petition field under Art. 226 of the Constitution in the High Court of Punjab. The High Court having dismissed the petition they have come to this Court in appeal.

There are three appellants, one of whom is a shareholder of the transferor company, another a policy-holder in it and the third, one of its agents who claims to have become entitled under the Insurance Act to receive from it commission on renewal premiums paid on life insurance business introduced by him. They complain that their respective rights have been adversely and illegally affected by the sanction.

The transferor company is the India Equitable Insurance Company Ltd. and the transferee company, the Area Insurance Company Ltd. Under the transfer all the life insurance business including liabilities issued and all the life fund of the transferor company were taken over by the transferee company. It is said-and perhaps that is the correct position-that as a result of the transfer all the transferor company would vest in the transferee company and the transferor company would really become defunct.

The first point argued by Mr. Sinha for the appellants is that the transfer offends ss. 10 and 12 of the Companies Act. The Companies Act with which we are concerned, is the Companies Act of 1913 as it stood in 1954. Section 10 of the Companies Act provides that a company shall not alter the conditions contained in its memorandum except as provided in that Act. Section 12 states that a company may by special resolution alter the provisions of its memorandum with respect to its objects but that the alteration shall not take effect until it is confirmed by court on petition. The contention of the learned Advocate is that the arrangement of transfer really amounts to abandonment of the business of the transferor company and therefore to an alteration of its memorandum without following the procedure laid down in s. 12 and this cannot be done. The obvious answer to this contention is that the transfer does not effect any alteration in the memorandum of the transferor company. Clause 3(27) of the memorandum of the transferor company gives it the power to sell its undertaking. The transfer in this case is an exercise of this power and hence within the objects of the company. An exercise by a company of a power given by its memorandum cannot amount to an alteration of the memorandum at all.

It is then said that clause only authorised a sale and that a sale is a transfer for a consideration. It is contended that in the present case there was no consideration moving from the transferee company and, therefore, the transfer was not by way of a sale. This, it is contended, was, therefore, a transfer

without any power in that regard in the memorandum and hence in substance amounts to unauthorised alteration of it. We were referred to various balance-sheets and other figures in support of this contention. This point as to want of consideration was not taken in the petition and the High Court did not permit it to be raised. We have, therefore, to proceed on the basis that the transfer was a sale. We wish however to make it clear that we are not deciding what is enough consideration for a sale, nor whether a transfer not authorised by the memorandum would amount to an alteration of the memorandum. What we have said furnishes enough answer to the contention raised.

Mr. Sinha then contends that the result of the transfer was a virtual winding up and that it was not one of the corporate objects of a company to wind it up. The contention was that the winding up could be effected only under the provisions of the Companies Act. We were referred to Bisgood v. Henderson's Transvaal Estates Ltd(1) as authority for this proposition. We think, this contention is misconceived. What was done in this case was done under the provisions of the Insurance Act and not by way of carrying out a corporate object of the transferor company. Now, s. 117 of the Insurance Act provides that nothing in that Act would affect the liability of an insurance company to comply with the provisions of the Indian Companies Act, in matters not otherwise specifically provided for by it. Section 36, of the Insurance Act, which has for the present purpose to be read with s. 35 of that Act, makes certain specific provisions which, as we shall presently show, override the provisions of the Companies Act. The objection based on Bisgood's case(1) is ill founded. There a company was sought virtually to be wound up and its assets distributed in purported exercise of a power to sell the undertaking and other cognate powers contained in its memorandum of association, and this the Court said could not be done as it would make the provisions for winding up in the Companies Act ineffective. In the present case the thing has been done under express statutory power. No question here arises of a corporate power in the sense it arose in Bisgood's case (1). Further there is not here, as there was in Bisgood's case (1), a distribution of the assets of the transferor company after its undertaking had been transferred. Hence we have here no winding up really.

The next contention of Mr. Sinha is that the arrangement for the transfer had been made by the directors and the directors had no power in view of s. 86H of the Companies Act, to transfer the undertaking of the company. That section gave the directors power to transfer the undertaking with the consent of the company in a general meeting. In the present case, what had happened was that an agreement between the two companies for the purpose of the transfer had been made by the directors and it was subsequently approved by the shareholders of the transferor company at a general meeting by about 82 per cent, majority. It was after such approval that the transfer had been sanctioned under s. 36 of the Insurance Act, and may be, though we do not have this on the record, the transfer was effected by proper documents executed between the companies. An agreement only to transfer the undertaking by the directors clearly does not violate s. 86H for it is merely tentative subject to final approval by the Company in general meeting. This we think is by itself sufficient answer to Mr. Sinha's present contention.

Mr. Sinha however says that the approval by the Company at its general meeting was of no use because the defect in the original agreement, namely, that the directors had no power to transfer in view of s. 86H, was not pointed out at that meeting to the shareholders. It is somewhat difficult to

appreciate this point. There was no defect in the directors' making the agreement to transfer; such agreement did not effect the transfer. Even assuming that the agreement was beyond the power of the directors, it cannot be said that the approval of it by the shareholders had been without any knowledge of the defect. The defect was of the want of the directors' power to transfer in view of the provisions of s. 86H of which the shareholders cannot be heard to deny knowledge. The case of Permila Devi v. Peoples Bank of Northern India Ltd.(1) on which Mr. Sinha relied for the present purpose is of no assistance to him. There certain shares had been illegally forfeited but it was contended that the shareholders had ratified the forfeiture. It was held that the ratification, if any, was of no use because it had not been shown that the attention of the shareholders and creditors had been drawn to the illegality which depended on facts of which no knowledge by the shareholders could be presumed. In the present case, the defect, if any, arose from a statutory provision itself of which the shareholders must be deemed to have had knowledge.

Mr. Sinha then says that the transfer was bad as it involved a reduction of share capital of the transferor company. His point is that as all the assets were gone there was necessarily a reduction of its share capital. He says that a reduction of share capital can be effected only as provided in s. 55 and the succeeding sections of the Companies Act. This contention is, in our view, wholly misconceived. Reduction of share capital under these sections, is not brought about by loss of assets. A bare perusal of the sections, we think, is enough to establish that. The disappearance of the assets of the Company, for whatever reason, does not cause a reduction of the share capital.

Another point raised by Mr. Sinha is that the transfer was bad it offended s. 44 of the Insurance Act. Under that section certain insurance agents have been given certain rights against their employer companies to receive commission in respect of renewal premiums paid. We will assume for the present purpose that the petitioner who is an agent, had acquire such a right against the transferor company under s. 44. We do not however see that such rights are in any way affected by the transfer. The right of the petitioner agent against the Company remains. It may be that he cannot realise the amount due, by enforcing that right because the transferor company has no assets left after the transfer out of which to pay the commission. But s. 44 does not say that an insurance company shall not be entitled lawfully to deal with its assets where the effect of such dealing might be that nothing is left out of which the agents can be paid their commission. Further, more it has to be remembered that what has been done in this case has been done under the same Act. Section 36 of the Insurance Act does not say that a transfer shall not be sanctioned if the effect of it is to leave no assets with the transferor company. Reading the two sections together, as we must do, it is not possible to take the view that transfer cannot be sanctioned under s. 36 if the result of that is to denude the transfer or company of all its assets out of which an agent can be paid his commission.

A further point is based on Art. 14 of the Constitution. It is said that there were other insurance companies in the same insolvent position as the transferor company and that the policy- holders of the latter company alone were being made to suffer. It may be stated here that the transfer involved a condition affecting slightly adversely the rights of the policy-holders. It does not seem to us however that any question of discrimination arises in the present case. The transfer was sanctioned with the assent of the shareholders of the two companies concerned. The sanction was given after the policy-holders of the transferor company were heard. Again, s. 36 of the Insurance Act applies to

the insurance companies where the companies in general meeting agree to a transfer. No action under s. 36 can be taken except on the initiative of the companies concerned. It is done in the best interests of the policy-holders.

Then it is argued that the terms of ss. 35 and 36 had not been complied with. It is necessary now to be set out the relevant portions of the sections and some of the facts of this case. S. 35. (1) No life insurance business of an insurer specified in sub-clause (a)(ii) or sub-clause (b) of clause (9) of section 2 shall be transferred to any person or transferred to or amalgamated with the life insurance business of any other insurer except in accordance with a scheme prepared under this section and sanctioned by the Controller.

(2) Any scheme prepared under this section shall set out the agreement under which the transfer or amalgamation is proposed to be effected, and shall contain such further provisions may be necessary for giving effect to the scheme.

(3) Before an application is made to the Controller to sanction any such scheme, notice of the intention to make the application together with a statement of the nature of the amalgamation or transfer, as the case may be, and of the reason therefor shall, at least two months before the application is made, be sent to the Controller and certified copies, four in number, of each of the following documents shall be furnished to the Controller, and other such copies shall during the two months aforesaid be kept open for the inspection of the members and policy- holders at the principal and branch offices and chief agencies of the insurers concerned, namely.

[Here certain documents are specified.] S. 36. (1) When any application such as is referred to in sub-section (3) of section 35 is made to the Controller, the controller shall if for special reasons he so directs, notice cause, of the application to be sent to every person resident in India who is the holder of a policy of any insurer concerned and shall cause statement of the nature and terms of the amalgamation or transfer, as the case may be, to be published in such manner and for such period as he may direct and after, hearing the directors and such policy- holders as apply to be heard any other persons whom he considers entitled to be heard, may sanction the arrangement, if he is satisfied that no sufficient objection to the arrangement has been established and shall make such consequential orders as are necessary to give effect to the arrangement, including orders as to the disposal of any deposit made under section 7 or section 98:

> It would appear from the terms of s. 35 (3) that it contemplates the following steps:
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> (a) A notice of the intention to make an application to the Controller of Insurance for sanction of the transfer has to be given to him.
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> (b) Thereafter, together with the notice, certain specified documents have to be kept open for the inspection of the shareholders for two months.
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> (c) After the expiry of the period of two months, an application has to be made to the controller of insurance for sanction of the transfer.

Now, what had happened in this case was that the notice contemplated by s. 35 (3) was given on July 27, 1951, and the necessary documents were kept open for inspection. Before the application to the Controller was made, the directors of the companies were in touch with the Controller in regard to the proposed transfer and the latter suggested various modifications in the proposed scheme which was one of the documents which had to be kept open for the inspection of the shareholders. On October 30, 1951, an application to sanction the transfer was made under s. 35 (3) of Insurance Act Subsequently, also further modifications were suggested by the Controller. On July 28, 1952, the transferor company in its general meeting considered the suggestions of the Controller and approved of the scheme with certain modifications, to the details of which it is not necessary to refer. The scheme so modified contained the following clause:

> CL. 16. That this arrangement is conditional upon the sanction on a subsequent date either with or without any modification of the terms hereof imposed or approved by the Controller and accepted by the parties here to and subject as aforesaid, the provisions as mentioned herein shall be operative on and from the thirty-first of December 1950.
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> It was this scheme which was approved by the Company in its general meeting by the following resolution: "Read, considered and thoroughly discussed the proposed scheme of transfer..... and resolved that the proposed transfer..... having been found to be arranged by the directors of the Company in the best interests of the Policy-holders, the same be and are hereby approved and confirmed, and resolved further that the directors be and are hereby authorised to make and accept further modifications and alterations in the scheme if any suggested by the Controller of Insurance." It appears that certain further modifications in the scheme were thereafter made. The Controller directed notice to be issued to all policy-holders giving them full information of the scheme and fixed a date for hearing. All policy-holders desiring to be heard, were heard. Before however the Controller passed his order sanctioning the scheme, the petition, out of which this appeal arises was filed on February 13, 1954. Apparently, on this date further hearing of the matter by the Controller was pending. On March 8, 1954, the controller gave his sanction to the scheme as modified. Thereafter, the petitioners on May 14, 1954, filed a supplementary petition asking for writ quashing the order, the first petition having only for asked a writ to quash the proceeding then pending before the Controller.
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> Mr. Sinha points out-and in this he is right- that after notice under s. 35 (3) had been issued, the scheme of transfer had been modified and it was such modified scheme that was sanctioned by the Controller. Mr. Sinha's point is that under s.

36 the Controller could only sanction the scheme of which notice had been given under s. 35. He, therefore, contends that the sanction granted by the Controller in this case was not in terms of the section and hence a nullity. The learned Solicitor-General appearing to oppose the appeal contends that on a proper construction of the sections the Controller had power to sanction a scheme modified after notice under s. 35 (3) had been issued. It is however unnecessary in this case to

decide the question so raised.

We will resume for the present purpose that under s. 36 (1) only the scheme of transfer in respect of which notice under s. 35 (3) had been given could be sanctioned and not a modified version of it. The scheme and the resolution of the shareholders of the transferor company approving it, however both provided for its modification later at the suggestion of the Controller and gave power to the directors to accept the modifications on behalf of the Company. The modifications were pursuant to the terms of the scheme as approved by the share-holders of the transferor Company. Therefore, in substance, it was the scheme of which notice had been given under s. 35 (3) which was sanctioned.

A similar view was taken in England in regard to ss. 153 and 154 of the English Companies Act, 1929. Those sections dealt with compromises with creditors and for reconstruction and amalgamation of companies. These could be effected by an order of court after the relative scheme had been approved by the companies or creditors concerned. It was generally felt that the court could either sanction the scheme approved by the shareholders or reject it but had no power to modify it. The contention of Mr. Sinha in the present case it will be remembered, is substantially the same. To remove the doubt as to the power to modify the scheme after it had been approved by the share- holders of the companies concerned, the author of Palmer's Company Precedents appears to have recommended the device of inserting in the scheme a clause giving power to the court to modify the scheme and the directors to accept the modification. In the 16th Edition of this well known book the following passage appears at p. 844, "It is more than doubtful whether, if a particular scheme is agreed to at a general meeting of creditors, the court can sanction that scheme with modifications, unless there is some provision in the scheme providing for possible modifications. In cases whether has no such provision, and some modification has been thought expedient, the court has required the calling of a second meeting to consider the scheme as modified; but to avoid this inconvenience it has for some time past been usual to insert in schemes a clause (originated by the author) expressly empowering the liquidator to assent to any modifications or conditions approved or imposed by the court, and this provision was approved by Chitty J. in Dominion of Canada, etc. Co., 55 L.T. 347 and has frequently been acted on.

This practice seems to have obtained approval in our country to : see Mihirendrakishore Datta v. Brahmanbaria Loan Company Ltd., (1) turning on s. 153 of the Companies Act, 1913, which corresponded to the sections of the English Act earlier mentioned.

Mr. Sinha contends that the authorities on the Companies Act earlier referred to had no application to the present case. He says that the sections of the Companies Acts on which these authorities turned were not pari materia with ss. 35 and 36 of the Insurance Act. His contention is that the object of these sections of the Insurance Act was to protect the shareholders and policy holders of the Company and that they would be deprived of that protection if a scheme modified subsequently to the issue of the notice under s. 35 (3) could be sanctioned. We do not think that this contention is well founded. So far as the policy-holders are concerned, they have nothing to do with the approval of the scheme. The scheme of transfer was agreed to between the shareholders of the companies concerned in the deal. Assume, as Mr. Sinha says, that under the Insurance Act, as it is under the the Companies Act, it is the shareholders who must agree to the scheme. In the cases falling under the

Companies Act, it is for protecting the shareholders that it has been held that the court cannot modify the scheme unless the scheme itself gives the court the power to do so. On the assumption made we think it perfectly clear that the position under the Insurance Act is the same. If Mr. Sinha is wrong and under the Insurance Act it is not for the shareholders to sanction the scheme, then there would be less reason for saying that what could be done under the Companies Act, cannot be done under the Insurance Act. The intention of ss. 35 and 36 of the Insurance Act would on the basis of Mr. Sinha's contention, be to protect the shareholders from having to accept a scheme to which they have not agreed. Such protection however may be given up by shareholders by inserting in the scheme approved by them, a clause empowering the directors to modify it. So far as the policy-holders are concerned, their protection is left in the hands of the controller. That is the policy of the Insurance Act and, hence, the Controller hears them. In the present case, he actually heard policy holders. Therefore it does not seem to us that it can be contended with substance that ss. 35 and 36 of the Insurance Act are not pari materia with the sections of the Companies Act to which we have earlier referred. The last point of Mr. Sinha must also fail.

The result is that this appeal must be dismissed with costs and we order accordingly. There will be one set of hearing costs.

Appeal Dismissed