

Rahmat Ali Fatehullah vs Calcutta National Bank Ltd. on 11 November, 1954

Equivalent citations: AIR1955ALL169, [1955]25COMPCAS112(ALL), AIR 1955 ALLAHABAD 169

Author: V. Bhargava

Bench: V. Bhargava

JUDGMENT

Malik, C.J.

1. On a difference of opinion between brothers Desai and Brij Mohan Lall, the following point of law was referred to a larger Bench for decision:

"Where a winding up order was made in respect of a company after it had obtained a decree in a suit instituted by it and after an appeal preferred by it against an order allowing defendant's objection under Section 47, Civil P. C., had been decreed, can an application for review of the .aforesaid judgment of the appellate Court be made by the defendant without obtaining leave of the Company Court under Section 171, Companies Act (VII of 1913)?"

2. It is not necessary to set out the facts in detail. All that we need mention is that the Calcutta National Bank Ltd. had brought a suit against Qudratulla and his son Rahmat Ali Fatehulla for recovery of a large sum of money on the allegation that the principal debtor was the father and the son had guaranteed repayment of the debt. During the pendency of the suit the bank had applied for and had got certain aerocraps attached before judgment. Rahmat Ali Fatehulla had claimed that those aerocraps belonged to him exclusively and that he had been carrying on a separate business. The objection to attachment of the property was, however, dismissed. The learned Judge ultimately decreed the suit against the father but, on a finding that it had not been proved that the son was a guarantor, the suit against Rahmat Ali Fatehullah was dismissed.

When in execution of the decree the bank proceeded to sell up the aerocraps which had been attached Rahmat Ali Fatehullah filed an objection in the execution Court claiming the property to be his own. He also filed an application in the suit that, since the suit had been dismissed against him, the attachment before judgment stood discharged, as the property had belonged to him. Both these applications were disposed of by the same order, the decision being in favour of Rahmat Ali

Fatehullah. The bank filed an appeal which was allowed by a Bench of this Court. After the appeal was allowed an order was passed by the Calcutta High Court winding up the bank. Thereafter an application was filed for review, of which notice was issued, and, when it came up for hearing, a preliminary objection was taken that no review application could be filed without the sanction of the Company Judge under Section 171, Companies Act.

3. Section 171 provides that after an order for winding up is passed no suit or other legal proceeding shall be instituted or continued against the company without the permission of the Company Judge.

4. The words of the section appear to be simple enough but a great deal of argument has been advanced as regards their exact meaning. One view which has appealed to brother Brij Mohan Lall, and for which there is some authority, is that if a suit is filed by a company, other later proceedings in that suit are not 'other proceedings' against the company but are defensive actions by the defendant who has been called upon to defend a suit filed by the company itself. If this view is accepted then the word 'suit' would mean "everything connected with it right up to the last stage". For example, if a suit has been filed by a company, even though the later proceedings may have been initiated by the other side, they are not other proceedings against the company; in other words, if the suit was decreed by the trial Court and an appeal was to be filed by the defendant after the winding up order then that appeal would be supposed to be a continuation of the suit itself and not a proceeding against the company but a defensive action in the suit filed on behalf of the company.

5. The other view taken by brother Desai, and for which also there is some authority, is that the crucial date is the date of the winding up order and one has to see who is the party who initiated the proceedings pending on that date. For example, if a suit was filed by the company and the suit was decreed after the winding up order then the defendant can file an appeal without the permission of the Company Judge as, on the date of the winding up order, there was no proceeding against the company but the proceeding pending was the suit filed by the company itself. If, on the other hand, the suit was decreed before the winding up order and the defendant has to file an appeal or continue an appeal already filed then permission of the Company Judge under Section 171 is required.

6. Section 171 does not bar the institution or continuation of a suit or other legal proceeding by the company but against the company. Some difficulty has arisen with regard to the meaning of the words 'or other legal proceeding'. They have been interpreted in some cases to mean "other original proceedings like a suit in the Court of first instance".

7. In -- 'Benaras Bank Ltd. v. Sashibhushan Misra', AIR 1948 Pat 398 (A), Manohar Lall and Mukherji JJ. followed the view of Tek Chand J. in the Full Bench decision of the Lahore High Court in -- 'Smt. Shukantla v. Peoples' Bank of Northern India Ltd.'. AIR 1941 Lah 392 (B) that:

"This expression 'legal proceeding' in this section (S. 171) is coupled with 'suit' and obviously means proceedings 'ejusdem generis', that is to say, original proceedings in a Court of first instance, analogous to a suit, initiated by means of a petition similar to a plaint. It does not include proceedings taken in the course of the suit nor proceedings arising from the suit and continued in a higher Court like an appeal from

an interlocutory or final order passed in the suit."

8. The other view which was taken by Braund J. in -- Raj Kumar Singh v. Benares Bank Ltd., Benares', AIR 1941 All 154 (C) was that an appeal or a revision can be treated as a legal proceeding.

The same view was taken by him in -- 'Kishore Khanna v. Benares Bank', AIR 1941 All 335 (D).

He was of the opinion that even if the proceeding had been started on behalf of the company, if the company had gone into liquidation, no appeal could be filed without the sanction under Section 171, Companies Act.

9. In -- 'Shiromani Sugar Mills, Ltd. v. Governor-General in Council', AIR 1945 All 354 (E), the learned Judges, Iqbal Ahmad C. J. and Braund J. held that--

"the expression 'suit or other legal proceeding' in Section 171, Companies Act, ought not to be given an artificially narrow construction by confining it to proceedings of the technical nature of a 'suit'."

The proceedings in that case were, however, not proceedings arising out of a suit but proceedings under Section 46, Income-tax Act commenced by the Income-tax Department and the question was whether those proceedings were legal proceedings.

10. In -- 'Governor-General in Council v. Shiromani Sugar Mills Ltd.', AIR 1946 FC 16 (F), the decision of the Allahabad High Court in --'Shiromani Sugar Mill's case (E)' was approved and the learned Judges disagreed with the Lahore view that 'other legal proceedings' must mean "original proceedings in a Court of first instance, analogous to a suit, initiated by means of a petition similar to a plaint". They observed:

"Section 171, must, in our judgment, be construed with reference to other sections of the Act and the general scheme of administration of the assets of a company in liquidation laid down by the Act. In particular, we would refer to Section 232. Section 232 appears to us to be supplementary to" Section 171 by providing that any creditor (other than Government) who goes ahead, notwithstanding a winding up order or in ignorance of it, with any attachment, distress, execution or sale, without the previous leave of the Court, will find that such steps are void. The reference to 'distress' indicates that leave of the Court is required for more than the initiation of original proceedings in the nature of a suit in an ordinary Court of law.

Moreover, the scheme of the application of the company's property in the 'pari passu' satisfaction of its liabilities, envisaged in Section 211 and other sections of the Act, cannot be made to work in co-ordination, unless all creditors (except such secured creditors as are 'outside the winding up' in the sense indicated by Lord Wrenbury in his speech in -- 'Food Controller v. Cork', 1923 AC 647 at p. 671 (G)), are subjected as to their actions against the property of the company to the control of the Court.

Accordingly, in our judgment, no narrow construction should be placed upon the words 'or other legal proceedings' in Section 171. In our judgment, the words can and should be held to cover distress and execution proceedings in the . ordinary Courts, In our view, such proceedings are other legal proceedings against the company, as contrasted with ordinary suits against the company."

In view of the observations of spens C. J. in --'Shiromani Sugar Mill's case (E)' it is no longer necessary to refer to various decisions in which a contrary view was taken. Since, however, they were cited at the Bar we may briefly refer to them.

11. In -- 'Milawa Ram v. People's Bank of India', AIR 1916 Lah 24 (H), it was held that a revision application filed against a company was other legal proceeding and it was not maintainable without the permission of the Company Judge. This view was overruled in -- 'Kishen Singh v. Industrial Bank of India', AIR 1918 Lah 181 (I), where it was held that an appeal or an application for revision against an order passed in a proceeding initiated by the company did not come under Section 171. Reliance was placed on a case of the House of Lords in -- 'Humber v. John Griffiths Cycle Co.', (1901) 85 LT 141 (J).

12. In -- 'Jiwan Dass v. People's Bank of Northern India', AIR 1937 Lah 926 (K), it was held by Addison and Din Mohammad JJ. that in an action brought by the company an appeal could be filed without the permission of the Company Judge.

13. The same view was taken by Tek Chand J. in -- Simla Banking and Industrial Co., Ltd., Lahore v. Indo Swiss Trading Co., Ltd., Calcutta', AIR 1938 Lah 754 (L).

14. In AIR 1941 Lah 392 (B) the same' view was affirmed on a different interpretation of the words 'legal proceeding'. It was held that "A suit under Order 21, Rule 63 against a company in liquidation being a suit within the meaning of Section 171, Companies Act, cannot be commenced without the leave of the Court which had ordered the winding up."

15. In AIR 1948 Pat 398 (A) Manohar Lall J., dissented from the view expressed by Braund J., in AIR 1941 All 154 (C) and purported to follow the observations of Tek Chand J., in AIR 1941 Lah 392 (B), which view, however, had been; overruled by the Federal Court in the year 1946.

16. After the decision of the Federal Court it must now be held that the meaning of the words 'other legal proceedings' must not be confined within narrow limits and need not necessarily be proceedings analogous to a suit initiated by means of a petition similar to a plaint.

17. Whenever a matter comes up before a court and an objection is taken, that leave under Section 171, Companies Act had not been obtained, the Court has to decide whether it is a suit or other legal proceeding against the company, If the words 'against the company' merely mean' that the company is arrayed as the opposite party, as was held by Braund J., permission of the Company Judge would be necessary whenever any leagl proceeding has to be instituted or continued against the company. That this could not be the meaning is obvious from the fact that where the company has come to

Court and has instituted the proceeding, which it can do without the leave of the Company Judge, the defendant will be required to take his permission to institute or continue any legal proceeding to defend himself. To hold that would put the defendant in a difficult position and it would be necessary, before he can take any proceeding against the company even by way of defence or to disprove the company's claim or to get some order passed in favour of the company vacated, to take the permission of the Company Judge.

The words 'against the company' must mean a proceeding where a liability is intended to be fastened on the company or its assets and not a proceeding commenced by a person with the object of escaping liability arising out of a proceeding commenced by the company itself. It would probably be useful to clarify the position a little further. If a person wants to file a suit to escape liability on the ground that the company's claim against him is unfounded, it is a proceeding against the company, but where the company has started the proceeding, that is, put forward its claim in a court of law, any remedy available by way of defence to escape liability, which the company wants to fasten on him, should not be deemed to be a proceeding commenced or continued against the company and in such a case the question, whether the claim was put forward or the suit was filed by the company before or after the winding-up order, should make no difference.

18. In (1901) 85 LT 141 (J), Lord Davey said:

"It was the respondents who themselves proceeded with the action after the winding-up order, by prosecuting their appeal in the Court of Appeal, and when once an action by the company itself has been proceeded with, there is no necessity for the defendants in that action to obtain leave for any defensive proceeding on their part."

Braund J. distinguished these observations and confined them to a case where the action had been taken by the company and proceeded with after the winding-up order. As Lord Davey was merely stating the facts of the case before him, he should not be understood to have meant that if the appeal had been filed and proceeded with by the company before the winding-up order, his decision would have been the other way.

19. This appears to us to be also just and proper as in such a case it is the company which wants to fasten the liability while the person against whom such liability is attempted to be fastened, in a legal proceeding pending in a court, wants to escape that liability. Liquidation proceedings under the Companies Act are for making available the assets of the company in 'pari passu' satisfaction of its liabilities, and if persons, other than secured creditors, are allowed to enforce their claims without any control exercised by the Company Judge, it may defeat or delay that object. But where a company has initiated a proceeding in a court of law whether before or after the winding-up order, no permission of the Company Judge should be needed for anything done by the defendant or the opposite party to escape the liability thus intended to be fastened on him.

If, however, the proceedings in a court of law are started by a person other than the company, either with the object of fastening a liability on the company or with the intention of escaping a liability in respect of a claim which has not been brought into Court by the company itself, the permission of

the Company Judge is required for the institution or the continuance of the proceedings. For instance, if a person files a suit for a declaration that the company owes to him a certain sum of money or that he does not owe the company any sum of money, the permission of the company Judge is necessary. If, however, the company has instituted a suit or other proceeding to enforce a claim, any action taken by the defendant or the opposite party by way of defence, or if the company has obtained a decree or order, any defensive action by way of appeal, revision, review or setting aside of an 'ex parte' decree or order should not require the permission of the Company Judge.

If the proceedings have been instituted or continued on behalf of the Company after the winding-up order, according to the view taken by Braund J. the subsequent proceedings by way of defence would come under the rule laid down by Lord Davey. There does not appear to us, with great respect to the learned Judge, to be any good reason for coming to the conclusion that the result should be otherwise where the proceedings had been instituted and continued by the company before the winding-up order, specially as under Section 171, Companies Act the company is not required to obtain the permission of the Company Judge for the institution or the continuance of a legal proceeding.

20. In our view, therefore, in a case like the present, where the company has obtained a decree, an application to have that decree reviewed by reason of some error apparent on the face of the record is not a legal proceeding commenced against the company within the meaning of! Section 171, Companies Act and no leave of the Com-pany Judge was necessary.