The Rajah Of Vizianagaram vs Official Receiver, Vizianagaram on 6 November, 1961

Equivalent citations: 1962 AIR 500, 1962 SCR SUPL. (1) 344, AIR 1962 SUPREME COURT 500, 1962 32 COM CAS 1 1962 2 SCJ 237, 1962 2 SCJ 237

Author: Raghubar Dayal

Bench: Raghubar Dayal, J.C. Shah, J.R. Mudholkar

PETITIONER:
THE RAJAH OF VIZIANAGARAM

Vs.

RESPONDENT:
OFFICIAL RECEIVER, VIZIANAGARAM

DATE OF JUDGMENT:
06/11/1961

BENCH:
DAYAL, RAGHUBAR
BENCH:
DAYAL, RAGHUBAR
SUBBARAO, K.
SHAH, J.C.
MUDHOLKAR, J.R.

CITATION:
1962 AIR 500 1962 SCR Supl. (1) 344
CITATOR INFO :
RF 1973 SC 602 (73)

ACT:
Winding up-Company Incorporated in England-Unregistered company-Foreign creditors-If can prove their claims-Indian Companies Act, 1913 (VII of 1913), ss. 270 to 276.

HEADNOTE:
The company was incorporated in England. The company took lease of certain land from the appellant. On the application of the appellant the company was being wound up as an unregistered company. Certain foreign creditors of the company

filed proofs of their claim before the official liquidator. The appellant objected to their claims being entertained on the ground that these liquidation proceedings were only for the benefit of the Indian creditors, and that the foreign creditors were not entitled to prove their debts in these proceedings. The official liquidator rejected these objections and allowed the foreign creditors to prove their claims.

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Held, that both on account of specific provisions of the Act and of the general principles, foreign creditors can prove their claims in the winding up of an unregistered company.

The order of winding up of an unregistered company operates in favour of all the creditors and of all the contributories of the company. There is no reasonable basis for depriving the foreign creditors from participating in the distribution of the assets collected by the official liquidator in the winding up proceedings in India. All the creditors including the foreign creditors will get rateably out of the assets of the company which have been collected. When that company itself is wound up, all of them would be entitled to

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similar rateable share in the assets collected during the winding up proceedings of the company in the country where it is incorporated. The liquidation of the company in countries other than where the company is incorporated and has its principal office, is just ancillary to the simultaneous liquidation of that company in the country of its domicil or any winding up of the company in future.

The rights and liabilities of the creditors and contributories respectively when a company is wound up in the country of its domicil will be limited to their original rights and liabilities after taking into consideration how much of those rights and liabilities have been already satisfied during the winding up proceedings of its offices in other countries.

The Courts of a country dealing with the winding up of a company can ordinarily deal with the assets within their jurisdiction and not with the assets of the company outside their jurisdiction. It is therefore necessary that if a company carries on business in countries other than the country in which it is incorporated, the courts of those countries too should be able to

conduct winding up proceedings of its business, in their respective countries. Such winding up of the business in a country other than the country in which the company was incorporated is really an ancillary winding up of the main company whose winding up may have been taken up already in that country or may be taken up at the proper time.

In re Commercial Bank of South Australia, L. R. [1886] 33 Ch. D. 174; In re Hibernian Merchants Ltd., L. R. [1958] 1 Ch. D. 76; In re English, Scottish, and Australian Chartered Bank, L. R. [1893] 3 Ch. D. 385; Russian and English Bank v. Baring Bros. [1936] 1 All. E. R. 505 and Re Azoff-Don Commercial Bank, [1954] 1 All E. R. 947, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 225 of 1961.

Appeal from the judgment and order dated February 9, 1951, of the Madras High Court in A. A. O. No. 249 of 1949.

R. Thiagarajan and P. Ram Reddy, for the appellant.

K. Bhimasankaram and T. V. R. Tatachari, for respondent No. 1.

D. N. Mukherjee and B. N. Ghosh, for respondent No. 2.

1961. November 6. The Judgment of the Court was delivered by RAGHUBAR DAYAL, J.-This is an appeal on certificate granted by the High Court of Madras. The question for determination in this appeal is whether foreign creditors of a firm which was in corporated in England and carried on business in India can prove their claims in the winding up proceedings of the firm as an unregistered company in India.

The facts leading to the appeal are that the Vizianagaram Mining Co. Ltd., hereinafter called the company, was incorporated in England, under the English Companies Act then in force, on December 8, 1894, the object of the company being to mine manganese ore and some other minerals in India. Its principal place of business in India was at Kodur, Vizagapatam District.

The company took certain land on lease from the Rajah of Vizianagaram, the appellant. Its business did not prove profitable and it was not in a position to pay the rent to the lessor or to pay its creditors. On the application on behalf of the Rajah Vizianagaram, orders for the winding of the company were passed by the High Court on March 6, 1945. The Official Receiver of Vizagapatam was appointed Official Liquidator of the company. Thereafter, the liquidation proceedings were

transferred to the District Court of Vizagapatam. The Official Liquidator realised about two lakhs of rupees from the assets of the company in India. Certain foreign creditors of the company filed proofs of their claims before the Official Liquidator. The appellant objected to their claims being entertained on the ground that these liquidation proceeding were only for the benefit of the Indian creditors and that foreign creditors were not entitled to prove their debts in these proceedings. The Official Liquidator rejected these objections and allowed the foreign creditors to prove their claims.

The appellant then filed an application under s. 183 of the Indian Companies Act, 1913 (Act VII of 1913), hereinafter called the Act, for the expunging of the proofs of all foreign creditors and for deleting their names from the certificate of the Official Liquidator filed under rule 90 of the rules framed under the Act, in the Court of the District Judge, Vizagapatam. The application was dismissed by the District Judge. Against this order the appellant filed an appeal, C. M. A. 249 of 1949, in the High Court. The High Court dismissed the appeal holding that the foreign creditors could prove their claims in the proceedings. Thereafter, the appellant applied for a certificate under Art. 133 of the Constitution. The High Court granted the certificate and hence this appeal.

Learned counsel for the appellant has supported the contention that foreign creditors cannot prove their debts in a winding up of the company in India, on three grounds. They are:

> (i) the winding up of a company incorporated outside India as an unregistered company, in pursuance of the provisions of sub-s. (3) of s. 271 of the Act is really the winding up of the unregistered company as an independent and separate entity from that of the main company incorporated outside India, and is therefore limited to the realisation of Indian assets and their distribution to Indian creditors;
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> (ii) as the Liquidator appointed by the Court in India cannot get at the foreign assets and contributories, it is just that foreign creditors be not allowed to prove their debts here;
>
> (iii) even if foreign creditors can prove their debts in such winding up proceedings they should be allowed to prove only such debts which have some relation to the business of the company in India.

On the other hand, it is contended for the respondents that the Indian creditors are free to prove their claims in foreign countries and therefore no prejudice is caused to them by allowing foreign creditors to prove their claims in the winding up proceedings in India, that the Act made no distinction between foreign and Indian creditors for the purpose of the proceedings under the Act and that in reality it is the main company which is being wound up though only with respect to the business conducted by it through its offices in India and therefore there should be no bar to the proving of their claims by the foreign creditors. We are of opinion that the High Court took the correct view of the legal position in holding that the foreign creditors could prove their claims in these winding up proceedings.

Section 270 of the Act defines unregistered company' and it includes any partnership, association or company consisting of more than seven members and does not include certain companies which come within the companies excluded by the section. This definition of 'unregistered company' is for the purpose of Part IX of the Act, which consists of ss. 270 to 276 and deals with the winding up of unregistered companies. Sub- section (3) of s. 271 provides that where a company incorporated outside India which has been carrying on business in India ceases to carry on business in India, it may be wound up as an unregistered company under Part IX, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated. It is in pursuance of the provisions of this sub-section that the company is being wound up as an unregistered company.

Sub-section (1) of s. 271 which deals with the winding up of unregistered companies, provides that any unregistered company may be wound up under the Act and all the provisions of the Act with respect to winding up shall apply to the unregistered company, with the exceptions and additions specified in the sub-section. This makes all the winding up proceedings subject to the provisions in other parts of the Act as well. Clause (iii) of sub. s. (1) mentions the circumstances in which an unregistered company may be wound up.

Section 272 deals with the contributories with the winding up of unregistered companies, and does not make any distinction between the persons who can be contributories on the ground of their being Indian nationals or foreigners. All persons who are liable to make certain payments are considered contributories. Similarly other provisions of the Act which have a bearing on the winding up proceedings makes no distinction between Indian or foreign creditors or between debts with respect to the business carried on in India or with respect to the business of the company outside India.

Section 156 provides, in its sub-section (1), that every present and past member would be liable to contribute to the assets of the company to any amount sufficient for payment of its debts and liabilities when a company is being wound up. Section 158 defines the expression 'contributory' which means 'every person liable to contribute to the assets of the company in the event of its being wound up.

Section 166 provides for an application to the Court for the winding up of a company. Any creditor or contributory is entitled to apply for the winding up of the company. No distinction is made between the creditors resident in India or outside India. Section 167 specifically states that an order for winding up of a company shall operate in favour of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory. It is not possible therefore, to urge successfully, that the order of winding-up of an unregistered company does not operate in favour of all the creditors and of all the contributories of the company. All the creditors of the company can take advantage of the winding up of the company as operating in India when it has ceased to carry on business there. There is no reasonable basis for depriving them from participating in the distribution of the assets collected by Official Liquidator in the winding proceedings. All the creditors including the foreign creditors will get rateably out of the assets of the company which have been collected. When that company itself is wound up, all of them would be entitled to similar

rateable share in the assets collected during the winding up proceedings of the company in the country where it is incorporated.

Likewise, s. 211, provides that the property of a company shall, on its winding up, be applied in satisfaction of its liabilities pari passu and subject to such application, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company, and thus make it clear that all the creditors of the company have to get a rateable share out of the property of the company and that surplus, if any will be distributed among the members of the company.

Section 228 provides that in every winding up all debts payable on a contingency and all claims against the company shall be admissible to proof against the company. No exception is made. All the debts against the company in the winding up can be proved. Such claims can include the claims of foreign creditors.

It is therefore clear that no support can be found for the contention for the appellant from the provisions of the Act.

The Courts of a country dealing with the winding up of a company can ordinarily deal with the assets within their jurisdiction and not with the assets of the company outside their jurisdiction. It is therefore necessary that if a company carries on business in countries other than the country in which it is incorporated, the Courts of those countries too should be able to conduct winding-up proceedings of its business, in their respective countries. Such winding up of the business in a country other than the country in which the company was incorporated is really an ancillary winding up of the main company whose winding up may have already taken up in that country or may be taken up at the proper time.

It appears that so long as the company as such is able to carry on business profitably and be in a position to meet its liabilities, neither the company nor its creditor nor its contributory would think of the winding up proceedings even if the company ceases to carry on business in any particular country. The persons interested in the company will be getting their proper return on the amount lent or contributed. Ordinarily, the winding up of the company will be proceeding simultaneously in the various countries where it carried on business whenever the business of the company has ceased to be profitable and the company is reduced to a position in which it is not expected to make good its liabilities.

It is the company incorporated outside India which is really wound up as an unregistered company in this country. In fact, there is no separate un-registered company which is being wound up here. The various branch offices of the company in India cannot be deemed to be the branches of an independent unregistered company. Sub-section (3) of s. 271 itself says that the company incorporated outside India may be wound up as an unregistered company when it ceases to carry on business in India. Further, there are no separate creditors or contributories of the so called unregistered company. There are no separate creditors or contributories of the offices or branches of the company in India. All the creditors and contributories are really creditors and contributories of

the company incorporated outside India and therefore all of them, on principle, should be able to do what creditors and contributories resident in India can do in the winding up proceedings.

There has been case law with respect to the nature of winding up proceedings in the various countries and the procedure followed in such winding up.

In In re Commercial Bank of South Australia(1) a company incorporated in Australia carried on business in England where it had a large number of creditors and a large number of assets. A petition for winding up was made in England. Subsequently, proceedings for the winding up of the company were also taken in Australia. The jurisdiction of the English Court to continue the winding up proceedings was questioned. In considering this question, North J., said at page 178 :

> "I think, therefore, that the English creditors are entitled to have a winding-up order made by this Court. I do not think it would be right to insert any special directions in the order; this is not the proper time for giving such directions. But I will say this, that I think the winding-up here will be ancillary to a winding-up in Australia, and, if I have the control of the proceedings here, I will take care that there shall be no conflict between the two Courts, and I shall have regard to the interests of all the creditors and all the contributories and shall endeavour to keep down the expenses of the winding-up so far as is possible.....I do not think that I ought to insert any special directions in the order. But I think that the liquidator ought not to act without the special directions of the Judge in Chambers, except for the purpose of getting in the English assets and settling a list of the English creditors."

This order was construed in In re Hibernian Merchants Ltd. (1) to be not a restriction of the rights of the liquidator to deal with the English assets alone for the benefit of the English creditors only, but to be a direction for the English Liquidator to take directions of the Judge when he had to take action with respect to the other assets and when settling a list of creditors other than the English creditors. It is to be noticed that North J., himself said that he would have regard to the interest of all the creditors and of all the contributories which means that the winding-up proceedings were not concerned with respect to the English creditors alone.

In In re English, Scottish, and Australian Chartered Bank (2) a chartered banking company, the principal business of which was in Australia, stopped payment, and was ordered to be wound up in England. Meetings of the shareholders and creditors were held under the orders of the Judge to ascertain their wishes as to the proposed scheme of reconstruction. The wishes of the creditors resident in Australia were obtained through proxy papers which were sent to those creditors. The creditors recorded their views on those papers and deposited them at the offices of the company at the principal cities in Australia. The particulars and number of the proxies for and against the scheme were then telegraphed to the Official Receiver in England. It was found that if the votes of the Australian creditors were taken into consideration, the scheme had the necessary majority in its favour, but if they were excluded, the majority were against the scheme. The Judge sanctioned the scheme. On appeal, objection was taken to the proceedings on several grounds. The objections did not include an objection similar to the one before us for determination, but considering the various

objection, it was said at page 394 :

> "One knows that where there is a liquidation of one concern the general principle is-ascertain what is the domicil of the company in liquidation; let the Court of the country of domicil act as the principal Court to govern the liquidation; and let the other Courts act as ancillary, as far as they can, to the principal liquidation. But although that is so, it has always been held that the desire to assist in the main liquidation-the desire to act as ancillary to the Court where the main liquidation is going on-will not ever make the Court give up the forensic rules which govern the conduct of its own liquidation."

This makes it clear that the liquidation of the company in countries other than where the company is incorporated and has its principal office, is just ancillary to the simultaneous liquidation of that company in the country of its domicil or any winding up of the company in future. That is to say, the winding up of the company in those countries is just complementary to the winding up of the company in the country of its domicil. The rights and liabilities of the creditors and contributories respectively when a company it wound up in the country of its domicil will be limited to their original rights and liabilities after taking into consideration how much of those rights and liabilities have been already satisfied during the winding up proceedings of its offices in other countries.

In Russian and English Bank v. Baring Brothers the facts were that the Bank incorporated in Russia under Russian law, with its head office at Petrograd, was dissolved sometime in January 1918. This Bank had a branch in England. The London branch of the Bank had two large sums of money with Baring Brothers. On March 23, 1921, the Bank brought an action against the Baring Brothers in the Chancery Division of the High Court of Justice for the recovery of those sums. The Baring Brothers prayed that all further proceedings in the action be stayed on the ground that the action had been commenced or, at all events, was being continued in the name of a plaintiff who was non- existent. In considering this matter, Lord Atkin said:

> "The legislature has provided that a dissolved foreign corporation may be wound up in accordance with the provisions of the Companies Act. The provisions of the Companies Act as to winding up are only applicable to corporations which are in existence. Are we to say that the legislative enactment is completely futile : or is there another solution? My Lords, I think that we are entitled to imply, indeed I think it is a necessary implication, that the dissolved foreign company is to be wound up as though it had not been dissolved and therefore continued in existence. This seems to me with respect the necessary result of saying that it shall be wound up in accordance with the provisions of the Act.....I see nothing incongruous in the legislature saying in effect, we accept the existence of a foreign corporation coming to trade in this country; we shall only impose a condition of registration. But if the corporation does trade here, acquires assets here, and incurs debts here, we shall not accept its dissolution abroad without a stipulation that if desirable it may be wound up here so that its assets here shall be distributed amongst its creditors (I do not stay to consider whether its English creditors or creditors generally) and for the purpose of the

> winding up it shall be deemed not to have been dissolved: for that event would defeat our municipal provisions for winding up a corporation. This does not appear to me to be re-creating or reconstituting a new corporation: it is for particular and limited purposes refusing to recognise the dissolution of the old."

It is clear from these observations that the winding up of the dissolved company incorporated in Russia was deemed to be the winding up of that very company and not of any factitious company composed of the branch of that company in England. The main question before us however was deliberately left open for consideration later. The observations however go against the appellant's contention that the so called un- registered company which is being wound up should be deemed to be a separate entity from the original company incorporated in England.

In Re Azoff-Don Commercial Bank proceedings for the winding up of a Russian company which had been carrying on business in England was taken in England. This company had been dissolved prior to the proceedings under the laws of the Union of Soviet Socialist Republics. The petitioners for the winding up of this company were certain Norwegian Banks who were creditors of the company. The petition was opposed by the Crown and another person who was held to have no locus standi to object. Of the grounds on which the Crown objected to the petition, one was that the Court should not make a winding up order at the suit of foreign creditors in respect of debts payable in Norwegian kroner, but that it should leave the Crown to get in the English assets with a view to the Crown being in a position to make exgratia payments among English creditors in respect of rouble debts. In considering this objection it was said at page 956 :

> "The object of a winding-up order is to ensure distribution of the assets among the whole body of creditors. No other basis of distribution would be fair."

In In re Hibernian Merchants Ltd. a creditor applied for the winding up of a company incorporated in the Republic of Ireland and having a place of business and assets in the United Kingdom. A request was made that the winding up order should include the expression `that the Liquidator shall not act in pursuance of the order except for the purpose of getting in the English assets and settling the list of the English creditors without applying to the Court for directions'. It was held that the provisions of the Companies Act, 1948, do not provide for making such exceptions in the winding up order.

We are therefore of opinion that both on account of the specific provisions of the Act and of the general principles, the view taken by the Court below that foreign creditors can prove their claims in the winding up of the unregistered company is correct.

We therefore dismiss the appeal with costs. Appeal dismissed.