Chunnilal Onkarmal and Another Vs Shri Vikram Sugar Mills Ltd.

Court: Madhya Pradesh High Court

Date of Decision: March 23, 1962

Acts Referred: Companies Act, 1956 â€" Section 171

Citation: (1968) JLJ 275 : (1967) MPLJ 788

Hon'ble Judges: T.C. Shrivastava, J; S.P. Bhargava, J

Bench: Division Bench

Advocate: G.M. Chaphekar and P.D. Pathak, for the Appellant; K.A. Chitale and H.C. Dhanda, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

T.C. Shrivastava, J.

This appeal under Clause 10 of the Letters Patent is against the dismissal of an application for grant of leave to continue a suit by Newaskar J.

exercising jurisdiction under the Indian Companies Act, 1913 (hereinafter referred to as the "Companies Act"). References to sections are to the

sections of the Act of 1913.

Vikram Sugar Mills Limited were incorporated as a Limited Company in 1945 in the erstwhile State of Dewas. On 23-1-1950 a petition was filed

for winding up of the Company on various grounds. While this petition was pending consideration, the Appellants filed a petition on 21-7-1950 for

leave to file a suit; but it was rejected, as no winding up order was till then passed. The Appellants then filed the suit on 31-8-1950 (Civil Suit No.

59 of 1950, Court of District Judge, Indore). The Court dealing with the winding up proceedings appointed a provisional Liquidator to take the

assets of the Company on 2-4-1961. Finally, an order for winding up the Company was passed. There after, an application u/s 171 of the

Companies Act was filed for leave to continue the suit. It was dismissed on 6-10-1958 by the order under appeal.

Before we take up the merits of the case, we may refer in some detail to the nature of the plaint in that suit. That suit was against the State of

Madhya Bharat (now represented by the State of Madhya Pradesh) as Defendant No. 1, Maharaja of Dewas (now Maharaja of Kolhapur) as

Defendant No. 2 and the Vikram Sugar Mills as Defendant No. 3. It is alleged in the plaint that in February 1944 the second Defendant promoted

the Company giving various assurances in the prospectus including the fact that the Maharaja, his family and friends had assured to purchase shares

of the value of rupees ten lacs. On 21-3-1944 the first Plaintiff deposited rupees five lacs with the Maharaja which was treated to be a loan for one

year at the end of which it could be invested in shares of the Mills at the option of Plaintiff. In September 1944, the Plaintiff applied for shares of

the face value of rupees ten lacs on the representation of the Maharaja that he would arrange for transfer of the shares of the value of the extra five

lacs to his friends. Later, shares of the value of ten lacs were allotted to the Plaintiff. The Plaintiff alleged that the statements in the prospectus were

false and he was induced by receipt to purchase the shares. On these allegations, the Plaintiff prayed for four relief"s: (a) a decree against the first

two Defendants for Rs. 5,00,000 and interest; (b) a decree for rupees five lacs against the first two Defendants in case the Plaintiff is required to

pay a further sum of rupees five lacs; (c) an order against the company to rectify its register by substituting the names of the first two Defendants in

place of the name of the Plaintiff in respect of the whole lot of shares of the value of rupees ten lacs; and (d) in the alternative, a declaration against

the Company that the shares of the value of the extra five lacs be entered in the name of the first two Defendants. It will thus be seen that the first

two relief"s are, directed against the State and the Maharaja and the latter two relief"s are directed against the Company.

The Learned Counsel for the Appellants submits that his suit does not affect the interest of the Company inasmuch as all that he wants is the

substitution of his name by the names of others. All the same, the Company is a necessary party. He points out that his 3uit cannot proceed without

the leave of the Court u/s 171 of the Companies Act and as the matter involved is such that it must be tried by a separate suit and not by the

winding up Court, leave should have been granted. Shri Dhanda for one of the creditors of the Company contends that as the suit was filed after

the date of the winding up petition, on which date the winding up is deemed to have commenced u/s 168, there was no right to have the rescission

of the contract of purchase of shares. The suit is thus not tenable and leave should be refused. Shri Chitale for another creditor contends that the

third and the fourth relief"s which are directed against the Company can only be tried satisfactorily and conveniently by the winding up Court and

leave cannot therefore be granted. He also pointed out that no prejudice would be caused to the Appellants if the matter is tried by the Company

Court.

Shri Chaphekar admits-indeed it could not be disputed-that u/s 171 of the Companies Act, when a winding up order has been made or a

provisional liquidator has been appointed, there is an automatic stay of all suits then pending against the Company. Leave of the Court was,

therefore, necessary to continue the suit. We have now to see on what principles leave should be granted or refused.

The learned single Judge has quoted the passage from page 499 of Buckley''s Companies Act, 3th Edition, on which Shri Chaphekar relied. It is

as follows:

Leave will be given to proceed with an action against third parties, to which the company is a necessary party, the Plaintiff undertaking not to

enforce against the company any judgment he may obtain, without the leave of the Court:-e. g., where the bill was filed against a company and a

third party for an account of promotion money alleged to have been received by him from the company; so where the bill was filed by a share-

holder in a company to restrain the company from amalgamating itself with another company, which had, since the resolution for amalgamation,

been ordered to be wound up, and both companies were made Defendants; and again, where, in ignorance of winding up resolutions having been

passed, a share-holder commenced an action against the company and the directors for rescission of his contract to take shares, on the ground of

misrepresentation, and for payment and indemnity.

But, in general, leave to institute or proceed with an action will only be given where some question arises which cannot properly be determined in

the winding up, and for whose determination an action is requisite. Thus, where the bill was for an order to strike the Plaintiff off the register on the

ground of misrepresentation, leave was refused.

To the same effect are the observations in Halsbury''s Laws of England, 3rd Edition, Volume 6, page 698.

In Jawahir v. Spinning and Weaning Mills AIR 1918 Lah. 364, it was stated on the basis of three English decisions, viz., Wilson v. Natal

Investment Company (1864) 34 L J Ch. 64, In re Life Association of England (1867) 36 L J Ch. 312 and In re Pooh Firebrick and Blue Clay

Company (1874) 17 Eq. 268 : 43 L J Ch. 447 that as a general rule in England leave is given only where some question arises which cannot

satisfactorily be determined in the winding up proceedings. In the matter of In the matter of: Subhodhaya Publications Ltd., Sachidananda Rao, ,

the principles for granting leave were explained thus:

(1) Cases in which the company is the sole Defendant: As a general rule unless the question at issue in the action or proceeding is one which cannot

be properly determined in the winding up, leave will be refused:-In re Pooh Firebrick Company (1874) 17 Eq 268 : 43 L J Ch. 447 and In

Keynsham Company, (1863) 33 Beave 123. Where, however, the question at issue is such that it cannot be conveniently gone into in the winding

up, leave will generally be given: Wilson v. Natal Investment (1867) 36 L J Ch. 312.

(2) Cases where the company is a necessary party to the action but there are other Defendants as well: In these cases the Courts generally grant

leave: see In re Marine Investment Company (1868) 17 L T 535. The Court usually insists however upon an undertaking by the Plaintiff that he

will not enforce against the company any judgment which he may obtain without the leave of the Court: See Mc Ewen v. London, Bombay and

Mediteranean Bank Ltd. (1867) 15 L T 495 and Hegel v. Currie (1867) WN 75.

In Balkrishna Mahadeo Vartak and Others Vs. Indian Association Chemical Industries Ltd., , the principle is thus stated:

Leave to file a suit should ordinarily be granted, where the question at issue is one which cannot be gone into and decided in the winding up

proceedings.

We have now to see whether leave should be granted for prosecuting the suit filed by the Appellants, and for that we must first decide whether the

matters raised in the plaint are such as can be determined in the winding up Court. As we have already said, the plaint contains two distinct sets of

relief"s. The first set is directed against the promoters on the allegation that they induced the Appellants to purchase the shares by making

misrepresentations in the prospectus. For these misrepresentations the promoters are alleged to be personally responsible and it is pertinent to

observe that it is not said in the plaint that they did so as agents of the Company or that the company is in any way responsible for the

consequences of the statements. The learned single Judge has made it clear that the action so far as it is directed against the promoters can

continue. The other set of relief"s is against the Company and all that is sought is rectification of the register of share-holders by substituting the

names of the first two Defendants for the Appellant against shares of the face value of ten lacs or, in the alternative, for five lacs. It is this relief

which is affected by the refusal to grant leave and we have now to see whether this can be granted in winding up proceedings.

Under Section 184 of the Companies Act ""the Court shall settle a list of contributories with power to rectify the register of members in all cases

where rectification is required in pursuance of this Act"". u/s 38 a right is given to ask for rectification of the register to any person whose name is

fraudulently or without sufficient cause is entered in or omitted from the register of members and the Court can decide the question of title regarding

the claim for entering or omitting the name. This right extends to decision of a dispute between ""members"" and ""alleged members"". While the

winding up proceedings are going on, this power has to be exercised by the winding up Court in settling the list of contributories. A contributory is

defined in Section 158 and includes every person liable to contribute to the assets of the company and any person alleged to be a contributory.

The Appellant desires that his name be omitted from the list of contributories and the name of the first two Defendants be substituted. The prayer

for being exonerated from the liability is covered by Section 184 and so also the prayer for substitution of the names of others as they are alleged

to be contributories. The matter is thus within the jurisdiction of the winding up Court u/s 184, as the rectification is in pursuance of the provisions

in Section 38 of the Companies Act.

Section 467 of the Companies Act of 1956, which corresponds to Section 184 of the Act of 1913, was considered in In the matter of Official

Liquidator ILR 1960 Mad. 290 and the scope of enquiry under that section was explained thus:

In settling the list of contributories the Court is not bound by the register of shareholders, and has authority to rectify the register, and may go into

all questions of law and fact in order to determine the question as to who is the real owner of the shares. The power to rectify the register is not

limited to the time when the Court is settling the list of contributories. The Court may revise the list of contributories at any time before the

dissolution of the Company, and, if necessary, for that purpose, rectify the register.

We may also refer to the observations of Shadi Lal, J. in Amritsar National Banking Company Ltd. v. Mohan Lal AIR 1917 Lah. 391:

It appears that the object of the suit is to obtain a declaration that the Respondents did not in the eye of law become share-holders of the

company. This is, however, a matter which can be satisfactorily determined in the winding up, and no action is necessary for the purpose. Indeed,

the settlement of the list of contributories is an important function of the Liquidation Court, and the business of winding up would come to a

standstill, if each contributory were allowed to institute a regular suit for the determination of his liability.

Turning to the English decisions which were cited at the Bar, we do not find that the view is different. Shri Chaphekar relied on two decisions,

namely, Henderson v. Lacon (1867) LR 5 Eq. Cases 249 and Hall v. Old Talargoch Lead Mining Company (1876) 3 Ch D 749. In the first case,

the action was started before winding up and it was said that the claim for refund of share money on the ground of fraud of directors in inducing the

purchase could be decided by suit; but it was also observed that the matter could be considered by the winding up tribunal as well. The question of

leave was not considered. In the second case, the application of the liquidator to stay a suit for striking of the name of the Plaintiff from the register

was rejected; but the power of the winding up Court to decide such a question was not negatived. In fact, the stay was refused, as the Plaintiff

could not obtain substantial relief against the Company in Chambers under the voluntary winding up. On the other hand, in In re Reese River Silver

Mining Company (Smith''s case) (1866) L R 2 CA 604, leave was refused to Smith to continue his suit which he had filed before the petition for

winding up claiming rescission of a contract to purchase shares on the ground of fraud by the Directors and he then applied to the Master of Rolls

for the same relief. The Master of Rolls refused relief; but it was granted by the Lord Justices of Appeal. The matter was subsequently taken to the

House of Lords. The decision is reported in The Directors of the Reese River Silver Mining Company v. Smith 1870 LJR 39 Ch. 849. The

decision was affirmed. We may refer to the following passage from the speech of the Lord Chancellor:

Many cases have been cited, and many others might be brought forward, in which the list has been corrected by removing a wrong person from it

and putting a right person on it, and the creditors have been in no way damaged either by the one or the other. They have no interest in injustice

being perpetrated, because it is quite as probable that they may be benefited by the right person being put on, and the wrong removed, as it is by

the wrong person being kept on instead of the right.

or the following from the speech of Lord Westbury:

Now, my Lords, it is idle to contend that the register of share-holders is, under the Act of 1862, made final and conclusive. It is no such thing. If it

had been so, it would have been simply necessary to say that all persons who appeared as share-holders on that register at the date of the winding

up order should continue liable to the creditors. No such thing is said; but on the contrary this is said, that those only are liable to the creditors who

have agreed to become share-holders, and whose names appear upon the register. Even that is not strictly accurate, because a man may be made

a share-holder and be liable, who has simply agreed to become a share-holder, although his name is not de facto on the register. Again, it is clear

that the register is not final, because the register after an order may be purged of a number of persons whose names appear there, if it be shown

that their names have been placed there without any authority or any agreement on their parts. But it does not rest there, because the Act of

Parliament contains a provision which not only makes it the duty of the directors to alter the register from time to time, but gives power to the

Court, after an order, to rectify the register in case of default by the directors.

These observations make it clear beyond doubt that the winding up Court can determine the list of contributories and rectify the register of

members by omitting the name of the wrong person and including the name of the right one.

We may also refer to Wilson v. Natal Investment Company (1866) 15 LTR 658 where a sui 1 had been filed before the winding up order by a

share-holder to have his name struck off on the ground of fraud by the Directors. The Plaintiff applied for leave to continue the suit. The report

says:

The Vice-Chancellor refused the application, on the ground that the Act contemplated an application to that branch of the Court in which the order

to wind-up had been made.

This decision is clear that the matter should be determined in winding up Jurisdiction and leave should be refused to continue a suit for the same

purpose.

It was contended by Shri Chaphekar for the Appellants that as third parties are involved in the action, leave should be granted. We have already

said that his claim against the third parties is not prejudiced. It is only the relief against the Company for rectification which is affected by the refusal

to grant leave. For this the winding up Court is the proper forum, as apart from the allegations against the first two Defendants, the matter will have

to be considered in the context of a large body of creditors and contributories. Another ground suggested for grant of leave was that the Company

is a necessary party to the suit. This may be so as regards the relief of rectification; but the claim against other Defendants for damages and

indemnity is independent and does not require the presence of the Company in the action. The relif of substitution is founded on an agreement

alleged in paragraph 4 of the plaint by the defendant No. 2 to purchase shares worth rupees five lacs. This has nothing to do with the

misrepresentation in the prospectus. This part of the case can be decided by the winding up Court.

Shri Chaphekar cited three decisions as instances of grant of leave to continue the suit, in B.M. Vertak v. Indian, Association Chemical Industries

Ltd. AI R 1927 Bom. 167 leave was granted to sue the company for possession of leased premises which the company had sub-leased contrary

to the terms of the lease, as the right could not be adjudicated upon in liquidation proceedings. In Balkrishna Mahadeo Vartak and Others Vs.

Indian Association Chemical Industries Ltd., the suit was to recover a loan and enforce it by a charge. Leave was granted only if the Plaintiff

agreed to abandon the charge and confine to money claim. The reason given is that the debt was a liability of the Directors personally and the

matter could be conveniently determined by a suit. In Punjab Co-operative- Bank Ltd. v. Lyallpur Bank Ltd. AIR 1934 Lab. 328 the suit was by

a third party seeking to enforce a pro-note endorsed in its favour by the bank in liquidation. These decisions indicate that where complicated claims

of third parties are involved, leave may be granted. However, the instant case is not of a third party but of a person wanting to be relieved of his

liability as a share-holder. In such a case, the decision in AIR 1932 240 (Privy Council) , is more apposite. In that case, an order refusing leave to

continue a suit to avoid liability as a share-holder and contributory was upheld by their Lordships of the Judicial Committee.

Shri Dhanda for one of the creditors rested his opposition to the grant of leave on a wider proposition that the contract to purchase shares could

not at all be avoided after the commencement of winding up proceedings. He contended that u/s 168 of the Companies Act the proceedings

commenced on the date of application and the suit was filed after that date with full knowledge of the petition. He relied upon the observations in

Buckley''s Companies Act (13th Edition) on page 275 under the heading ""Effect of winding up"" where the learned author says that the right of

rescission is lost after the winding up proceedings commence, as the contract is only violable and cannot be avoided when equities in favour of

third parties have arisen. The rule is stated on the authority of Oakes v. Turquand and Harding (1867) LR 2 H L 325 at p. 367. In reply, Shri

Chaphekar argued that his suit was filed before the winding up order and the fiction created by Section 168 cannot be extended to the present

context. He pointed out that the rule in Oake''s case (supra) has been modified by the House of Lords in In re Reese River Silver Mining Company

(1866) LR 2 CA 604, to which we have referred earlier. The matter will arise for determination before the winding up Court. We, therefore,

refrain from considering this question in this appeal under the Letters Patent.

In view of what we have said above, we conclude that leave to continue the suit was rightly refused. The appeal is, therefore, dismissed with costs.

Hearing fee is fixed at Rs. 500 only to be divided equally between the two sets of Respondents.

Bhargava, J.

I agree.