
Shyamapada Chakraborty and Others Vs The Controller of Insurance, Government of India Simla and Others

Appeal (civil) 300 of 1958

Court: Supreme Court of India

Date of Decision: Dec. 13, 1961

Acts Referred:

Companies Act, 1913 " Section 10, 12, 153, 55#Constitution of India, 1950 " Article 14, 226#English Companies Act, 1929 " Section 153, 154#Insurance Act, 1938 " Section 117, 35, 35(3), 36, 36(1)

Citation: AIR 1962 SC 1355 : (1962) 32 CompCas 258 : (1962) 2 SCR 130 Supp

Hon'ble Judges: P. B. Gajendragadkar, J; N. Rajagopala Ayyangar, J; K. N. Wanchoo, J; K. C. Das Gupta, J; A. K. Sarkar, J

Bench: Full Bench

Final Decision: dismissed

Judgement

Sarkar, J.

This appeal raises certain questions as to the validity of an order made under s. 36 of the Insurance Act, 1938 - Section 36,

sanctioning the transfer of its life insurance business by one insurance company to another. The appellants had challenged that order by a petition

filed 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.

2. 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.

3. 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.

4. The first point argued by Mr. Sinha for the appellants is that the transfer offends Sections 10 and 12 of the Companies Act. The Companies Act

with which we are concerned, is the Companies Act of 1913 - Sections 10 and 12 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

be special resolution alter the provisions of its memorandum with respect to its objects but that the alternation 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.

5. It is then said that 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 was 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.

6. 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.[1908] 1 Ch. 743, 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 [1908] 1 Ch. 743 is ill founded. There a company was sought

virtually to be wound up and its assets distributed in purported exercise of 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 Bisgoods case [1908] 1 Ch. 743. Further there is not here, as there was in Bisgood's case [1908] 1 Ch. 743, a distribution of the assets

of the transferor company after its undertaking had been transferred. Hence we have here no winding up really.

7. 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 one 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.

8. 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 director's power to transfer in view of the provisions of s. 86H of which

the shareholders cannot be heard to deny knowledge. The case of AIR 1938 284 (Privy Council) 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.

9. 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.

10. Another point raised by Mr. Sinha is that the transfer was bad as 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 acquired 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 transferor company of all its assets out of which an agent

can be paid his commission.

11. 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 all 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.

12. Then it is argued that the terms of Sections 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 as 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 therefore 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 a 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 and 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 u/s 7 or section 98 :

14. It would appear from the terms of s. 35(3) that it contemplates the following steps :

(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.

(b) Thereafter, together with the notice, certain specified documents have to be kept open for the inspection of the shareholders for two months.

(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.

15. 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 :

16. Clause 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.

17. 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 an 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 a writ quashing the order, the first

petition having only for asked a writ to quash the proceeding then pending before the Controller.

18. 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 is 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.

19. 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.

20. A similar view was taken in England in regard to Sections 153 and 154 of the English Companies Act, 1929 - Section 153 and 154. 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 share-holders 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

shareholders of the companies concerned, the author of of Palmer's Company Precedents appears to have recommended the device of inserting in

the scheme of clause giving power to the court to modify the scheme and the directors to accept the notification. 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.

21. This practice seems to have obtained approval in our country to : see *Mihirendrakishore Datta v. Brahmanbaria Loan Company Ltd.*

I.L.R(1954) . 61. Cal. 913] turning on s. 153 of the Companies Act, 1913, which corresponded to the sections of the English Act earlier

mentioned.

22. 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 Sections 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 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 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 Sections 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

Sections 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.

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

24. Appeal Dismissed.