Basanti Cotton Mills (1998) Private Limited and Gopal Navinbhai Dave and Others Vs Nirendranath Kar and Another

Court: Calcutta High Court

Date of Decision: Oct. 17, 2012

Acts Referred: Companies Act, 1956 â€" Section 10F, 3, 3(1)(3), 3(5), 460

Citation: (2012) 116 SCL 613

Hon'ble Judges: Shukla Kabir Sinha, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: S.N. Mukherjee, Mr. Debangshu Basak, Mr. Aniruddha Roy and Mr. Deepak Jain, for the Appellant; Ratnanko Banerjee, Advocate, Ms. Swapna Chowdhury, Advocate and Mr. Anshuman Gupta, Advocate For the Respondent No. 1, Mr. Utpal Moitra, Advocate For the Respondent No. 2 and Mr. Biswanath Chatterjee, Advocate For the Intervener, for the Respondent

Judgement

Ashim Kumar Banerjee, J.
Basanti Cotton Mills (1998) Private Limited was incorporated on August 12, 1998 under the provisions of the

Companies Act 1956. The Directors were Gopal Navinbhai Dave, Nikhil Vasantlal Merchant and Paresh Vasantlal Merchant as per the Articles

and Memorandum of Association. The last annual return and audited accounts were filed with the Registrar of Companies (hereinafter referred to

as ROC), West Bengal for the financial year 2002-2003. On January 27, 2006 ROC struck off the name at the instance of the Directors named

above. One Nirendranath Kar claiming to be a Director applied for restoration of the name u/s 560(6) of the Companies Act, 1956. The ROC

filed affidavit-in-opposition. They asserted, the company was not functioning. They filed Annual Return up to 2003 that would also depict; the

company was not carrying on any business. Hence, the Registrar rightly struck off the name from the register that would not call for any

interference. The learned Single Judge allowed the application vide judgment and order dated October 6, 2010. His Lordship observed as

follows:-

It has been admitted in the affidavit in opposition filed by the Central Government, that the procedure u/s 560(6) of the Companies Act, 1956, has

not been followed before striking off the name of the company from the register of the Registrar of the Companies.

Three notices are contemplated in such Section and the sub-Sections thereunder before such action can be taken.

In view of the above procedural irregularity, the decision to remove the name of the company from the register is set aside.

However, this will not preclude the Registrar from taking fresh action in accordance with law, as is available to him.

Being aggrieved, three private individuals namely Gopal Navinbhai Dave, Nikhil Vasantlal Merchant and Paresh Vasantlal Merchant filed an

application for recall of the order dated October 6, 2010. The judgment and order of the learned Single Judge appearing at page 200-205 would

depict, the name was struck off on January 27, 2006, for good reasons as the company was not doing any business and its assets and liabilities

were nil. The learned Judge further observed, prayer for recall made after four years should not be entertained. Moreover, there was serious

dispute as to who was in control of the company. The learned Judge however, asked the Registrar to hear the parties and decide the issue within

the stipulated period.

2. The Division Bench set aside the judgment and order of the learned single Judge dated March 22, 2011 and remanded the matter back to His

Lordship by observing, the learned Company Judge was to determine the issue and not the Registrar. Accordingly, learned Judge heard the parties

afresh and disposed of the application vide judgment and order dated August 8, 2012. His Lordship allowed the application and restored the name

of the company that became the subject matter of the present appeal. The learned Judge held, on a combined reading of Sub-Section 1, 2, 3 and 5

of Section 560 it would infer, the company would only be defunct if it would not reply to the notice or would admit in reply that it was not carrying

on business. Otherwise the name could not be struck off under the said provision. Since the Director of the company prayed for recall and the

requisites were complied with, the Registrar''s order could not be sustained. His Lordship allowed the application of the appellants by setting aside

and/or recalling the order dated October 6, 2010 passed at the instance of the respondent. Hence, this appeal.

3. At the commencement of the final hearing of the appeal, Mr. Ratnanko Banerjee, learned counsel appearing for the respondent took the plea of

the maintainability of the appeal. According to him, Section 560(6) was a superintending and/or appellate power of the learned Company Judge

over a quasi-judicial decision of the Registrar. Such decision of the learned Single Judge would not be available to judicial scrutiny in an intra-court

appeal that would be barred by law. As and by way of alternative submission, Mr. Banerjee contended, no finality arrived at by the order of the

learned Single Judge, at least to the extent that was appealed from. Hence, the appeal would not be maintainable. He relied on the decision in the

case of A.P. State Financial Corporation -vs- Mopeds India Ltd. (In Liquidation) reported in 2007 Volume-139 Company Cases Page-514

(Andhra Pradesh) and in the case of Kamal Kumar Dutta & Another -vs- Ruby General Hospital Limited And Others reported in 2006 Volume-

VII Supreme Court Cases Page-613.

4. Replying to the preliminary issue, Mr. S.N. Mukherjee learned senior counsel contended, the decision of the Registrar to strike out a name, was

an administrative act. Any person aggrieved by such action was entitled to approach the learned Company Judge u/s 560 that would be amenable

to scrutiny before the Division Bench u/s 483 of the of the said Act of 1956. Assuming Section 483 would have no application, a decision of a

Single Bench would always be available for an intra-court appeal under Clause 15 of the letters patent or under the CPC without having a specific

statutory bar contained in any law of the land including the Companies Act 1956.

5. Mr. Mukherjee distinguished the Andhra Pradesh judgment in the case of A.P. State Financial Corporation -vs- Mopeds India Ltd. (In

Liquidation) (supra) by referring to Rule 163 and 164 of the Company (Court) Rules 1959 and contended, the adjudication by the Official

Liquidator was available for judicial scrutiny of the learned Company Judge through the process of appeal whereas Section 560 should be

construed as an original proceeding to be initiated before the learned Company Judge against any decision of the Registrar striking off the name of

a company u/s 560. Hence, the said decision would have no application.

6. Resuming his argument on the next day Mr. Mukherjee contended, Section 560 would pre-suppose an application before the learned Company

Judge by a shareholder or a company or a creditor. Hence, it was the duty of the applicant to prove, he would fall under any of the said three

categories. The learned Judge did not decide such issue.

7. Coming to the factual matrix, Mr. Mukherjee contended, the name was struck off on January 27, 2006. The applicant being the respondent no.

1 herein for the first time approached the Registrar of Companies filing DIN (Director Identity Number) in 2008. The Registrar disclosed records

appearing at pages 39 to 77 (Volume-II) of Paper Book that would show, as per the records of the Registrar the name of the respondent was

conspicuously absent at the relevant time. He approached the Registrar for the first time on October 10, 2008 when he filed the DIN that could

only be filed by the person himself. Form 32 was however conspicuously absent. On the strength of the DIN filed in 2008 about two years after

the Company''s name was struck off, the respondent applied for restoration that the learned Judge allowed vide order dated October 6, 2010. On

coming to know the appellant applied for recall. The Division Bench asked the learned Judge to decide on the issue that was remanded back to the

Registrar. The learned Judge ultimately decided the issue by judgment and order dated August 8, 2012 appearing at pages 321-333 of the paper

book. Mr. Mukherjee strenuously disputed the transfer deeds appearing at page 251 onwards in the second volume of the paper book. According

to him, the Company had no relationship with the respondent no. 1 whose claim was based upon forged and fabricated documents. The learned

Judge failed to appreciate, without deciding on his locus the application would not be maintainable. He relied on the following decisions to support

his above contention.

i) Shah Babulal Khimji -vs- Jayaben D. Kania & Another reported in All India Reporter 1981 Supreme Court Page-1786

ii) Special Deputy Collector (LA) -vs- N. Vasudeva Rao And Others reported in 2007 Volume-14 Supreme Court Cases Page-165

iii) Vijay Kumar Darwa -vs- Official Liquidator, Rohtas Inds. ltd. reported in All India Reporter 2008 Supreme Court Page-1613

8. Mr. Mukherjee lastly contended, Section 3(1)(3) defined private company having a minimum paid up capital of Rs. 1 lack, whereas Section

3(5) would provide, a private company failing to enhance the paid up capital to the minimum one would be deemed to be a defunct company

within the meaning of Section 560 and its name shall be struck off from the register by the Registrar.

9. Mr. Utpal Moitra, learned advocate appearing for the ROC contended, the Registrar did not follow the scheme particularly Clause 9 and 10.

He would however dispute the locus of the respondent no. 1 as according to him the ROC did not have contemporaneous records to support the

status of the respondent no. 1.

10. Per contra, Mr. Banerjee would submit, Section 560 could not be said to be an original proceeding. According to him, even if the

interpretation of the provision as contended by Mr. Mukherjee could be held as correct The Company Court could not have more power than the

original power that was being enjoyed by the Registrar. According to him, if no finality arrived at by the order passed u/s 560 by the learned

Company Judge no appeal could be maintained before the Division Bench that would support the other interpretation as advanced by him. He

would put emphasis on the word ""aggrieved"" as contained in the said provision that would be synonymous with the word ""appeal"". Mr. Banerjee

distinguished the decision in the case of Modi Korea Telecommunication Ltd. -vs- Appcon Consultants Pvt. Ltd. reported in 1999 Volume-II

Calcutta High Court Notes Page-107 and in the case of Liverpool & London S.P. & I Association Ltd. -vs- M.V. Sea Success I And Another

reported in 2004 Volume-IX Supreme Court Cases Page-512 to contend, unless finality arrived at no appeal under Clause 15 of the Letters

Patent could be maintained.

11. On factual matrix he contended, the documents appearing at pages 243 onwards of the second volume of the paper book particularly page

267 where ROC asked the respondents 1 to 5 to file return, would prima facie support his status as Director of the Company. Hence, the learned

Judge did not commit any illegality directing restoration of the company''s name that did not finally decide the respective rights of the parties

warranting invocation of appellate court''s power under Clause 15 of the Letters Patent. According to Mr. Banerjee, he was a Director since

1998. He filed document to the said extent. The Registrar did not dispute such document.

12. On the interpretation of Section 3, Mr. Banerjee would contend, there could not be any automatic removal of name from the record of the

Registrar. The procedure laid down u/s 560 was required to be followed. Having not done so, the Registrar faulted in striking out the name that

was rightly restored by the learned Judge. Mr. Banerjee lastly contended, his writ petition on the subject issue was dismissed, if today the name of

the company was allowed to be struck off he would be remediless. Having no apparent error on the face of the order the Court of appeal should

not interfere with the order of the learned Single Judge. He also contended, under Clause 2(4)(i) of the exit scheme this scheme would not be

available when there was a management dispute.

13. Section 560 is quoted below :-

560. Power of Registrar to strike defunct company off register.-

(1) Where the Registrar has reasonable cause to believe that a company is not carrying on business or in operation, he shall send to the company

by post a letter inquiring whether the company is carrying on business or in operation.

(2) If the Registrar does not within one month of sending the letter receive any answer thereto, he shall, within fourteen days after the expiry of the

month, send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received and that, if

an answer is not received to the second letter within one month from the date thereof, a notice will be published in the Official Gazette with a view

to striking the name of the company off the register.

(3) If the Registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within

one month after sending the second letter receive any answer, he may publish in the Official Gazette, and send to the company by registered post,

a notice that, at the expiration of three months from the date of that notice, the name of the company mentioned therein will, unless cause is shown

to the contrary, be struck off the register and the company will be dissolved.

(4) If, in any case where a company is being wound up, the Registrar has reasonable cause to believe either that no liquidator is acting, or that the

affairs of the company have been completely wound up, and any returns required to be made by the liquidator have not been made for a period of

six consecutive months, the Registrar shall publish in the Official Gazette and send to the company or the liquidator, if any, a like notice as is

provided in sub-section (3).

(5) At the expiry of the time mentioned in the notice referred to in sub-section (3) or (4), the Registrar may, unless cause to the contrary is

previously shown by the company, strike its name off the register, and shall publish notice thereof in the Official Gazette; and on the publication in

the Official Gazette of this notice, the company shall stand dissolved:

Provided that-

(a) the liability, if any, of every director, 1[***] manager or other officer who was exercising any power of management, and of every member of

the company, shall continue and may be enforced as if the company had not been dissolved; and

(b) nothing in this sub-section shall affect the power of the Court to wind up a company the name of which has been struck off the register.

(6) If a company, or any member or creditor thereof, feels aggrieved by the company having been struck off the register, the 2[Tribunal], on an

application made by the company, member or creditor before the expiry of twenty years from the publication in the Official Gazette of the notice

aforesaid, may, if satisfied that the company was, at the time of the striking off, carrying on business or in operation or otherwise that it is just that

the company be restored to the register, order the name of the company to be restored to the register; and the 2[Tribunal] may, be the order, give

such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if

the name of the company had not been struck off.

14. Under Sub-Section 1 the Registrar was empowered to strike out a defunct company from the register if he had a reasonable cause to believe,

the company was not carrying on business or in operation. Under Sub-Section 1 he was to send notice to the company enquiring about its

function. Under Sub-Section 2 he was empowered to strike out the name in case no reply was forthcoming within one month from the date of

receipt of such notice. However he was to send another notice within fourteen days from expiry of one month period and would wait for another

month to get a reply and in case reply was not forthcoming he would be entitled to strike off the name. Under Sub-Section 3 the Registrar in case

of any answer having been received to the extent that the company was not in operation and not having any reply to the second letter, would be

entitled to strike off the name after three months. Similar provisions were made when the company was being wound up for striking off the name.

Under Sub-Section 6 a party aggrieved by any such order of striking off was entitled to approach the learned Company Judge who would be in a

position to issue such direction and make such provision as seem just for placing the company and all other persons in the same position as nearly

as may be as if the name had not been struck off.

15. Hence, on a combined reading we would find authority of the Registrar to strike out a name after offering opportunity to the persons being in

control of the company to justify existence and being satisfied that the company was defunct. Similarly, the aggrieved party was given right to

challenge such action before the learned company Judge. The learned company Judge was competent to issue ""such direction"" and/or make ""such

provision"" as seen just and proper. The learned Judge initially restored the name having been satisfied that the pre-requisites were not fulfilled.

Another learned single Judge recalled the said order upon hearing rival contentions. His Lordship did so after being satisfied that the order could

not be interfered with on the available materials placed before His Lordship and that too after inordinate delay. Hence, the status quo should

remain having the name struck off from the register. His Lordship however observed that such order would not preclude any one to approach the

Registrar for restoration. The Division Bench set aside the order by pointing out, it was the court to decide the issue and not the Registrar. The

learned Judge again upset the order of ROC and restored the company''s name on the roll.

16. In the case of A.P. State Financial Corporation (Supra), the learned Single Judge considered an order passed by the official liquidator under

Rule 163 of the Company Court Rules settling a claim of a creditor in a company in liquidation. The power of the learned company Judge to

scrutiny the order of the official liquidator was an appellate power. While doing so, His Lordship observed that such power being an appellate

power an intra-court appeal from the said order would not lie before a Division Bench.

17. In the case of Kamal Kumar Dutta and Another (Supra) the Apex Court held that an appeal from the order of the Company Law Board u/s

10-F would lie before a Single Bench being the learned Company Judge and no intra-court appeal was permissible either under Letters Patent or

otherwise as second appeal was not contemplated.

18. In the case of Modi Korea Telecommunication Ltd. (Supra), the Division Bench of this Court construed Clause 15 of the Letters Patent and

observed, where a question of jurisdiction of the court to entertain or proceed with a suit or proceeding is involved and a decision on that question

is given such decision is ""judgment"" within the meaning of Clause 15 Letters Patent and is appellable.

19. In the case of Liverpool & London S.P. & I Association Ltd. (Supra) paragraph 124 being relied upon is quoted below :-

124. Clause 15 of the Letters Patent is not a special statute. Only in a case where there exists an express prohibition in the matter of maintainability

of an intra-court appeal, the same may not be held to be maintainable. But in the event there does not exist any such prohibition and if the order

will otherwise be a ""judgment"" within the meaning of clause 15 of the Letters Patent, an appeal shall be maintainable.

20. On this issue Mr. Mukherjee also relied upon Shah Babulal Khimji (Supra) being the parent judgment on the issue. Paragraphs 113, 145 and

152 were relied upon. The Apex Court observed, a judgment that decides all questions or issues in controversy and leaves nothing else to be

decided that would be a final judgment available for an intra-court appeal in case the former one was delivered by the Single Bench. However such

appeal would not be maintainable in case of being specifically barred under the statute.

21. Mr. Mukherjee relied on Vijay Kumar Karwa (Supra) wherein the Apex Court observed, ""every order which may reasonably be considered

to be a judicial order as distinct from merely administrative order is appealable in terms of Section 483 of the Act"".

22. In the case of Special Deputy Collector (LA) (Supra), the order was rendered in a contempt proceeding that the Apex Court observed,

Letters Patent appeal would not be maintainable.

23. Any order passed by a learned Single Judge, would always be appealable in absence of a statutory bar, if any, by the laws of the land.

Whether an appeal would be maintainable, would however, lie on the nature of the order, that would be appealed from. In case the order does not

decide any right of a party, or a controversy, the same would not be available for scrutiny by the Court of Appeal. In case the same would affect

any party such decision would definitely be appealable at his instance to the Division Bench under Clause-15 of the Letters Patent. Hence, it is the

nature of the order that would be relevant to maintain an appeal, unless it is statutorily barred by law.

24. On a combined reading of the aforesaid decisions two issues would emerge -

i) Could the application u/s 560 be termed as ""appeal""? If so, would an intra-court appeal to the Division Bench be maintainable?

ii) Would the order of the learned Single Judge impugned herein be termed as ""judgment"" within the meaning of Clause 15 of the Letters Patent

being available for judicial scrutiny by the Division Bench in an intra-court appeal.

25. To decide the first issue we would seek help from similar provisions u/s 460 and 10F of the said Act of 1956. The first one would provide for

an appeal from the order of the Official Liquidator whereas the later one would extend power to the learned Company Judge to hear appeal from

any order passed by the Company Law Board. If we closely examine the said two provisions and the rules framed thereunder we would find the

word ""appeal"" was very much present that was however absent in Section 560 and the rules prevalent therefore. Mr. Banerjee would however

contend, Section 560 would relate to ""grievance"" which was synonymous with ""appeal"". Both Mr. Mukherjee as well as Mr. Banerjee were ad

idem on one issue. Registrar, if satisfied reasonably that a company was not functioning, would write to the Company asking to show cause why

their name would not be struck off. Three eventualities would follow; either the Company would not reply or the Company would say, they are

carrying on business or they are not. In the first and third eventuality the Registrar would be competent to strike out the name. However, in case of

second eventuality the Registrar would have no power to examine the veracity of such assertion, at least Section 560 does not extend so. Mr.

Banerjee would rightly contend, the learned Company Judge could not have any power under this provision wider than the original power the

Registrar had. Hence, in case of any grievance the learned Company Judge would only examine whether the Registrar rightly applied his mind

within the four corners of the said provisions meaning thereby -

i) Has he given notice as contemplated?

ii) Has he waited for the statutory period to get a reply?

iii) In case he receives a reply would the reply suggest striking off as contemplated in the said provision? or,

iv) Has the Registrar ignored the company''s assertion that they were carrying on business?

26. The Company Court would also not be in a position to examine as to the veracity of the assertion, if any, made by the Company. In short, the

power of the Company Court is to examine the administrative action of the Registrar so envisaged u/s 560. If the Court acts within the four corners

of the said provisions and does not step out the Court''s action would not be available for appeal as no finality would arrive. Hence, ordinarily no

appeal would lie from an order of the company Court u/s 560 not because what Mr. Banerjee would contend, a second appeal would not be

maintainable. It would not be maintainable because such exercise of power in that event would not be a ""judgment"" within the meaning of Clause

15.

27. Would all the orders u/s 560 be not available for appeal? The answer would ordinarily be "No". There could be a peculiar situation like the

present one that would make the order appealable.

28. The invocation of the power of the learned Company Judge is stipulated under Sub-Section 6 that would enable a company or any member or

a creditor feeling aggrieved by the company"s name being struck off, to approach the learned Judge. Hence, the learned Judge would have to be

satisfied that pre-requisites were fulfilled meaning thereby the applicant must be either of a company or a shareholder or creditor, any person not

falling under any of the three categories would not be entitled to invoke this provision. Hence, the learned Company Judge, to receive an

application under Sub-Section 6, must satisfy himself that the petitioner had locus to approach. In case any error was committed on that score that

order would definitely be available for appeal as it would reach finality with regard to the locus of the petitioner. In other words, once the learned

Judge would entertain the application on merit the status of the petitioner would get established that would be a finality on that score as no one

would hence be entitled to question his status. In the present case, the status of the respondent no. 1 was very much in dispute. Learned Judge

possibly overlooked that aspect. The learned Judge by judgment and order dated March 22, 2011 relegated the issue to the Registrar. The

Division Bench set aside by observing, the learned Judge would have to decide the issue. Hence, learned Judge could not ignore such issue.

Hence, on that score the appeal would be maintainable as it would be a ""judgment"" within the meaning of Clause 15 that would be available for

intra-court appeal.

29. We thus hold the present appeal maintainable.

30. In a case of the like nature when there was dispute with regard to the status of the petitioner it would be safe for the Court to rely upon the

admitted records being the records maintained by the Registrar. From the records produced by ROC appearing at pages 39 to 77 of the paper

book (Volume-II), we would find, as on the date of the striking off not a single document would show the nexus of the respondent no. 1 with the

company. He came in picture in October 2008 through filing of DIN. Documents filed after 2008 would also show, he was Director since 1998 as

claimed by him. Such dispute would have to be resolved in an appropriate forum. Section 560 would not give power to the Court to adjudicate as

to such dispute. The court would be relying upon the admitted records that would clearly show, respondent no. 1 did not feature in the records.

His belated plea would also keep him at bay. His prayer for restoration would wait for a decision in his favour on his status by a competent civil

court or any other appropriate forum. The learned Judge should not have restored the name of the company at the instance of someone whose

identity is yet to be established.

31. We are not sure, who is correct or who is wrong that is to be established at the appropriate forum. So long he cannot establish his status he

would not be entitled to invoke the provision of Section 560.

32. The Registrar would admit, the procedural lapses occurred while striking off the name. It is for the Registrar to correct their mistake. Our

judgment would not preclude so. We cannot issue any direction at the instance of someone whose locus is yet to be established.

33. The appeal succeeds and is allowed. The judgment and order of the learned Single Judge impugned herein is set aside. The appeal is disposed

of without any order as to costs.

34. This order would not otherwise prejudice the right of the respondent no. 1 to establish his locus before the Civil Court and thereafter ventilate

his grievance u/s 560 or any other appropriate provision in an appropriate proceeding at the appropriate moment. Our observations made herein

would certainly not debar him to do so.

35. Urgent certified copy of this judgment, if applied for, be given to the parties on their usual undertaking.

Shukla Kabir Sinha, J.

I agree.