

**(2011) 07 CAL CK 0024****Calcutta High Court****Case No:** C.A. No. 491 of 2009 C.P. No. 2 of 1965

Smt. Anupam Khosla

APPELLANT

Vs

The Official Liquidator High  
Court Calcutta

RESPONDENT

**Date of Decision:** July 20, 2011**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 41
- Companies (Court) Rules, 1959 - Rule 291, 292, 6, 9
- Companies Act, 1956 - Section 446(2), 469(3)
- Contract Act, 1872 - Section 70
- Presidency Towns Insolvency Act, 1909 - Section 47

**Citation:** (2011) 109 SCL 131**Hon'ble Judges:** Ashoke Kumar Dasadhikari, J**Bench:** Single Bench**Advocate:** A.C. Kar, for the Appellant; Debojyoti Dutta and M. Sen, for the Respondent**Final Decision:** Dismissed**Judgement**

Ashoke Kumar Dasadhikari, J.

This application has been filed by one Smt. Anupam Khosla, one of the daughter of Banshilal Dhiman, since deceased and grand-daughter of Late Dharam Chand Dhiman. It was contended that D.C. Dhiman & Bros. Limited (hereinafter referred to as "the company") was directed to be wound up by an order dated September 7, 1965 and thereafter the Official Liquidator took out an application for misfeasance against Dharam Chand Dhiman, Kissen Chand Dhiman, Meher Chand Dhiman and Keher Chand Dhiman together with Banshilal Dhiman, son of Dharam Chand Dhiman. In the said proceeding an ex-parte decree was passed on 7th February, 1974 for a principal sum of Rs. 14,17,948/- together with interest thereon @ 6% per annum from 7th November, 1965 until repayment.

2. On 5th August, 1979, the Official Liquidator filed an application under Order XXI Rule 41 of the CPC for examination of the judgment-debtors. On the said application an order was passed on 5th December, 1979 whereby the said application was disposed of directing the said application to be treated as an application u/s 446(2) of the Companies Act, 1956.

3. The relevant portion of the order dated December 5, 1959 reads as follows:

It appears to me that the Respondents are simply trying to deprive the Official Liquidator representing the company in whose favour the said misfeasance decree was passed against the Respondents, who are the delinquent directors by all possible ways and dilatory process. Be that as it may, I am of the view that having regard to the fact that the properties have been disclosed by the Respondents particularly the Respondent No. 5 with details and the Official Liquidator is now in a position to execute the said Order and/or decree passed in the said misfeasance Summons against the judgment-debtors and No. useful purpose will be served by proceeding with the examination of judgment-debtors as in this proceedings. It has resulted in the disclosure of the said properties with sufficient particulars to enable the Official Liquidator to sell the same and to prevent multiplicity of proceedings and expedite the winding up of the Company and dissolution of the Company. I treat this matter as an application u/s 446(2) and an order is made directing the Official Liquidator to be appointed Receiver over the properties which are described in the letter dated 27th November, 1979 written by A.C. Kar appearing on behalf of the Respondent No. 5 Bansilal Dhiman and direct him to sell the same after taking appropriate direction from the court for the purpose of valuation, advertisement and sale by public auction after advertisement. The Official Liquidator will get direction for appointment of valuer for valuation of the said properties in Chamber next Friday and also for direction for advertisement and sale. The Respondents are also given liberty to bid at the time of the sale to be held by this Court by the Official Liquidator as Receiver of the said properties.

This order is made in exercise of power u/s 446(2) read with Rules 6 and 9 of the Companies (Court Rules to prevent multiplicity of proceedings and expedite the winding up proceedings and dissolution of the Company.

The Official Liquidator will retain the casts of this application out of the assets in his hand assessed at 30 C.M. and the list furnished by Mr. A.C. Kar on behalf of the Respondent No. 5 is filed in the record being the letter dated 27th November, 1979 addressed to Mr. P.K. Sen Barat. These properties would be included in the order as a Schedule on which the Receiver is appointed. The Official Liquidator is appointed Receiver for the purpose of sale in terms of this order. The costs of the Official Liquidator is assessed at 50 G.M. to be realised out of the assets in his hand.

The Official Liquidator as Receiver will take possession of the said properties forthwith on a signed copy of the minutes.

4. The Official Liquidator has sold the assets of the judgment debtors under the misfeasance decree. It was claimed that the decree passed by this Court had been satisfied upon payment of the decreetal dues. It was submitted that at the time of determination of decreetal dues the rent realized by the Official Liquidator have not been accounted for nor the said recovered amount was disclosed. It was an obligation of the Official Liquidator to show of the rent he has collected. It was further claimed that various payment which was shown as due in the balance sheet dated 31st March, 1958 had already been paid and, therefore, those amounts specially amounts noted on liability side against Omprakash Mohta, Mohta Brothers, D.C. Dhiman should have been removed and the decreetal dues should have been corrected. It was submitted that the letter dated May 11, 2009 issued by the Official Liquidator with an intimation that still a sum of Rs. 35,37,261.85P is due and payable, is prima facie wrong being based on improper calculation. Moreover, in the said calculation rents realized by the liquidator from the assets by the judgment debtor was not taken into account. It was submitted that the rents realized should have been deducted from the decreetal dues. The applicant is entitled to get set off u/s 47 of the Presidency Town Insolvency Act. It was also claimed that the amounts payable from the Mohta Brothers and Omprakash Mohta have already been paid and credit should be given for those amounts with interest thereon and those amounts should be directed to be paid to the Petitioner or the heirs of D.C. Dhiman. It was also contended that the Petitioner be given an opportunity to pay the dues to be settled accordingly. Upon payment, all the properties in phillaur be released which has been directed to be sold by the Liquidator as per direction by the Appeal Court. Mr. A.C. Kar, learned Senior Counsel appearing for the applicant refer Section 47 of the Presidency Insolvency Act and submitted that at any point of time, even after the decree is passed and satisfied set off can be given. Mr. Kar submitted that there is No. time limit prescribed under the aforesaid section and, therefore, the claim of the Petitioner could be entertained at any stage. It was submitted that the Official Liquidator ought to have deducted the amounts which were already paid by the company. He referred Section 70 of the Contract Act in support of his contention. Mr. Kar also cited a decision reported in AIR 1962 Supreme Court Page 779 Para 14 which reads as follows:

It is plain that three conditions must be satisfied before this section can be invoked. The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. When these conditions are satisfied Section 70 imposes upon the latter person, the liability to make compensation to the former in respect of or to restore, the thing so done or delivered. In appreciating the scope and effect of the provisions of this section it would be useful to illustrate how this section would operate. If a person delivers something to another it would be open

to the later person to refuse to accept the thing or to return it; in that case Section 70 would not come into operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again Section 70 would not apply. In other words, the person said to be made liable u/s 70 always has the option not to accept the thing or to return it. It is only where he voluntarily accepts the thing or enjoys the work done that the liability u/s 70 arises. Taking the facts in the case before us, after the Respondent constructed the warehouse, for instance, it was open to the Appellant to refuse to accept the said warehouse and to have the benefit of it. It could have called upon the Respondent to demolish the said warehouse and take away the materials used by it in constructing it; but, if the Appellant accepted the said warehouse and used it and enjoyed its benefit then different considerations come into play and Section 70 can be invoked. Section 70 occurs in Chapter v. which deals with certain relations resembling those created by contract. In other words, this chapter does not deal with the rights or liabilities accruing from the contract. It deals with the rights and liabilities accruing from relations which resemble those created by contract. That being so, reverting to the facts of the present case once again after the Respondent constructed the warehouse it would not be open to the Respondent to compel the Appellant to accept it because what the Respondent has done is not in pursuance of the terms of any valid contract and the Respondent in making the construction took the risk of the rejection of the work by the Appellant. Therefore, in cases falling u/s 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract nor ask for damages for the breach of the contract for the simple reason that there is No. contract between him and the other person for whom he does something or to whom he delivers something. All that Section 70 provides is that if the goods delivered are accepted or the work done is voluntarily enjoyed then the liability to pay compensation for the enjoyment of the said goods or the acceptance of the said work arises. Thus, where a claim for compensation is made by one person against another u/s 70, it is not on the basis of any subsisting contract between the parties, it is on the basis of the fact that something was done by the party for another and the said work so done has been voluntarily accepted by the other party. That broadly stated is the effect of the conditions prescribed by Section 70.

5. The learned Counsel appearing for the Official Liquidator submits that it is settled principle of law that under No. circumstances this Court should go beyond the decree passed by this Hon"ble Court which has already been satisfied. It was submitted that the company has gone in liquidation on 7th September, 1965 and misfeasance decree was passed on 7th February, 1974. and the Petitioner was claiming some deduction on the basis of a balance sheet prepared in 1958, much prior to the date of liquidation. It was submitted that the applicant have never challenged the decree or misfeasance decree passed by this Court and, therefore,

the executing Court cannot go beyond the decree. and cannot also reopen the same. It was submitted that the two claimants being O.P. Mohta and Mohta Brothers being the two claimants have not come before this Court or submitted that they were paid. Therefore, the claim of the applicant should not be entertained at all. It was submitted that after payment of 62 lakhs all properties were released so the submissions made in Paragraph 16 of the petition is redundant or obsolete. It is practically an abuse of process of the Court. This Hon"ble Court should not pass any order on the said petition. It was submitted that the rent which was realized amounting to Rs. 34,650 is lying of the Official Liquidator. Upon payment of the secure creditors if any amount is left in that event the same would be returned to the applicant. The learned Counsel for the Official Liquidator also referred the Company Court Rule 291 and 292 and Section 469 Sub-section (3) of the Companies Act, 1956 in support of his contention. It was also submitted by learned Counsel for the Official Liquidator that the applicants do not pray for any variation before the Court when the order dated 15th March, 2010, was passed. They have never pointed out these claims on 15th March, 2010 when it was directed that the judgment debtors is now required to pay the amount of the decreetal debt less the money recovered from the sale proceeds of the Punjab property plus the amount expended on account of guarding the Punjab property to rid the remaining properties of the order of attachment. The relevant portion of the order dated 15th March, 2010 is quoted hereunder:

Since the applicants herein have not questioned the expenses incurred by the Official Liquidator in the accounts at page 9 of the affidavit-in-reply to CA No. 51 of 2010, it is evident that the applicants have No. manner of grievance as to the Official Liquidator's assertion of the amount expended by the Official Liquidator for guarding the Punjab property. Since the Official Liquidator says that such amount adds up to Rs. 27,20,436/-, the judgment debtors are now required to pay the amount of the decreetal debt less the money recovered from the sale of the Punjab property plus the amount expended on account of guarding the Punjab property to rid the remaining properties of the order of attachment. After giving credit to the money received on account of the sale of the Punjab properties, a sum of Rs. 34,40,061.13/- remains due as at February 22, 2010 under the misfeasance decree. A sum of Rs. 27,20,436/- has to be added to such figure on account of the security expenses incurred in respect of Punjab property.

In the event the applicants pay off a total sum of Rs. 62 lakh (round off) by March 31, 2010, the order of attachment in respect of the properties belonging to the applicants or their predecessors in interest will stand vacated and the decree will stand satisfied.

In default of such payment being made within the time permitted CA No. 51 of 2010 and CA No. 52 of 2010 (which is an application of similar import) will stand dismissed.

In the event the applicants in CA No. 51 of 2010 or the applicants in CA No. 52 of 2010 make payment of the entire amount as indicated herein, it will be open to such applicants to claim the proportionate share of the decreetal debt from the other judgment debtors under the decree of February 7, 1974.

CA No. 683 of 2008 is an application seeking division of the properties which were attached in the execution proceedings. The applicants say that they do not insist on any division and in CA No. 51 of 2010 and CA No. 52 of 2010 the applicants are desirous of making the payment.

Upon this order being made, the applicants in CA No. 51 of 2010 and CA No. 52 of 2010 seek time till April 7, 2010 to make the payment. In view of such submission, the time to make payment of Rs. 62 lakh is extended till April 7, 2010.

CA No. 683 of 2008 and CA No. 51 of 2010 and CA No. 52 of 2010 are disposed of without any order as to costs.

The Official Liquidator will not make any payment on account on the security expenses said to have been incurred in guarding the Punjab property without disclosing fullest particulars thereof to Court and without obtaining previous leave of the Court.

6. Heard the submissions made by the respective Counsel appearing for the parties and considered the submissions made by them. In my opinion this Court have No. authority and/or power to reopen the decree. The decree has become final and binding upon all the parties. In my opinion Section 47 of the Presidency Insolvency Act do not authorize this Court to reopen decree nor give any authority to adjust the aforesaid amount of rent. Section 70 of the Contract Act have No. application in the present case of the Petitioner. The judgment cited by Mr. Kar is also not applicable in the facts and circumstances of this case. It is evident that the applicant did not pray for any variation before the Court when the order dated 15th March, 2010 was passed.

7. In my opinion the rent collected by the Official Liquidator could be refunded only after the payments were made to the secure creditOrs.

8. The claim of the Petitioner, on the basis of the balance sheet prepared in 1958 is also not acceptable to the Court in view of the fact that the order of winding up was passed on September 7, 1965 and, therefore, there is No. scope today to consider the balance sheet of 1958, which was lost all its relevance. Further more, the claim made by the applicants as regards payment of decreetal dues to the Mohta Brothers & O.P. Mohta are disputed questions of facts and there is nothing record before this Court to come to a conclusion on the same either. Therefore, the claim of making payments to the said O.P. Mohta & Mohta Brothers are also rejected.

9. In view of the aforesaid findings I do not find any merit in this application. The said application is rejected.