
The Company Vs Sir. Rameshwar Singh

App. No. 2 of 1918

Court: Calcutta High Court

Date of Decision: Feb. 5, 1918

Final Decision: Allowed

Judgement

Sanderson, C.J.

This is an appeal by the Company against the judgment of Greaves, J., delivered on the 21st December 1917. On the

13th December 1917 a winding up petition against the Company was presented; on presentation of the petition a day was fixed for the hearing and

directions were given as to the issue of advertisements. On the same day the Company made an application to stay the issue of the advertisements

in order that an application might be made by the Company for the stay of the petition and all proceedings in connection therewith on the ground

that the petition was an abuse of the process of the Court.

2. The learned Judge stayed the issue of the advertisements and on the 14th December a notice was served by the Company on the petitioning

creditor of an application for an order that the petition for the liquidation of the "Company should be removed from the file, that the Applicant

should be restrained from issuing advertisement of the petition and that all proceedings thereunder should be stayed.

3. The learned Judge heard the Company's application and dismissed it, and it is from his judgment in respect thereof that this appeal is brought.

4. The Respondent took a preliminary objection, which was much pressed, that no appeal lay from the judgment of Greaves, J. We held that

having regard to the terms of the order giving effect to the judgment, there was an appeal.

5. The order, as already pointed out in our previous judgment, dealt with two main matters. In the first place it dismissed the Appellant Company's

application to remove the Respondent's petition for liquidation from the file and to restrain the issue of advertisement and to stay all proceedings

thereunder. Secondly, it ordered that the Appellant Company be at liberty to appeal against this order of dismissal upon their undertaking to

expedite the hearing of the appeal; and upon their paying to the Maharaja the Respondent two lacs and nine thousand rupees without prejudice to

their contentions, it was ordered that the petition for winding up be stayed pending the disposal of the appeal, and it then directed that if the appeal

was decreed the Maharaja should return the two lacs and nine thousand rupees to the Company; but if it was dismissed, the Maharaja was to

withdraw the petition for winding up; on which, of course, he would retain the sum so paid.

6. After we had given judgment, basing our decision on the second part of the directions in this order, without deciding what would have been the

case had those directions not been "contained in the order, Mr. Sircar for the Respondent ""said that he would consent to the second part of the

order being reversed. This was done with the view to a contention that if this part of the order was removed, there would be no appeal as regards

the remaining part of the order dismissing the Appellant"s application for stay of winding up proceedings. This proposal was not assented to by

Counsel for the Appellant Company, who contended that the order and the appeal therefrom must be dealt with as a whole. This contention was

right. The Respondent could not, after our judgment had been given, holding that there was an appeal from the whole order, by any such offer as

to part of the order, affect the judgment so as to make it necessary to give a second judgment on the question whether there would or would not

be an appeal had the order been made without the second class of directions which I have referred.

7. We accordingly held that the appeal should be heard on the merits, which has now been done. Sees. 162 and 163 of the Indian Companies

Act, 1913, are applicable to this case.

8. By sec. 162 it is provided that a Company may be wound up by the Court if the Company is unable to pay its debts. Sec. 163 sets out three

sets of conditions under which the Company shall be deemed to be unable to pay its debts : Sub-sec. (3) does not apply, as the learned Judge

found that the Company was solvent, and the arguments of the learned Counsel for the Respondent have not satisfied us that the learned Judge"s

conclusion on this point was wrong. Sub-sec. (2) was not alleged to apply, and it was sub-sec. (1) which was relied on by the Petitioner. Sub-sec.

(1) runs as follows :-

If a creditor, by assignment or otherwise, to whom the Company is indebted, in a sum exceeding five hundred rupees then due, has served on the

Company, by leaving the same at its Registered Office, a demand under his hand requiring the Company to pay the sum so due and the Company

has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor."

9. The demand prescribed by the sub-section was served by the Respondent upon the Appellant Company on the 2nd October 1917 by which a

sum of Rs. 2,41,335 was demanded. That sum not having been paid within the specified time, the petition was presented, as already stated, on the

13th December 1917.

10. The two main grounds on which the Appellant Company relied were 1st, that there was a bond fide dispute as to the indebtedness of the

Company, and (2) that the petition was presented with an ulterior object : viz., to bring pressure on the Company to accept terms of settlement in

litigation which was proceeding between the Company and the ex-directors of the Company, of whom the Respondent was one, and so to bring

such litigation to an end.

11. It appears that in August 1915 the Company filed a suit against the ex-directors of the Company, including the Respondent in this appeal

claiming a sum over six lacs a damages for fraud and negligence. It was stated in the course of the argument that when this suit came on for trial in

August 1917 the charge of fraud against the Respondent was withdrawn.

12. In December 1915 one R. Mookerjee instituted a suit against the Appellant Company and the Respondent for the recover of certain deeds

and securities which the Plaintiff alleged he had pledged to the Appellant Company as security for advances made, and which he alleged were

wrongfully retained by the Respondent, after the Plaintiff had paid off the amount due from him to the Appellant Company.

13. In April 1916 the Respondent instituted a suit against the Appellant Company for the recovery of Rs. 2,83,747 alleged to be due to him in

respect of principal and interest on account of advances made by him to the Company, and this sum comprised the alleged debt upon which the

winding up petition was based. In this suit the Company set up certain defences, amongst them being allegations :-

(1) That the Respondent being a director of the Company was not entitled to contract with the Company and to charge any interest on the deposits

made by him or to make any profit out of any transaction with the Appellant Company, and that he was liable to account in respect of any profits

made by him.

In this connection the Company relied upon a statement in the affidavit of R. Mookerjee, upon which the application to Greaves. J. was based, that

the Respondent while he was a director was paid a much larger rate of interest on deposits made by him than was paid under the rates of the

Appellant Company to the outside public for deposits of a similar nature.

(2) The Appellant Company further alleged that certain securities, pledged with the Company, had been improperly deposited with the Respondent

without the authority of the reconstituted Board of Directors, which had come into existence in May 1914, and that such securities were wrongfully

and improperly withheld by the Respondent, by reason whereof the Company had suffered loss, and they claimed damages in respect thereof to

the extent of Rs. 50,000. In this respect, it was alleged that the Respondent insisted upon the market value of the securities being paid to him in

reduction of his debt, before he would give up such securities.

14. By reason of the aforementioned matters it was alleged that the Company had a setoff against the Respondent's claim, and they also

counterclaimed in respect thereof, and alleged that upon an account being taken hardly any money would be found due to the Respondent.

15. The trial of the Respondent's suit against the Company, although the suit stood in the cause list, dated 9th June 1917, which was shewn to us,

before the Company's suit against the ex-directors, was postponed until after the determination of the Company's suit.

16. There is a dispute as to how this came to be done and as to whether it was with the consent of the Respondent or against his wishes; but the

fact remains that the Respondent's suit has not yet been heard whereas the trial of the Company's suit was begun in August 1917 and now stands

adjourned part-heard, and we were informed that a day in the present month has been fixed for the further hearing.

17. As regards R. Mookerjee's suit, the position is that a decree has been obtained by the Plaintiff in that suit against the Company and the

Respondent, and the question of liability for costs between the two co-Defendants stands over until after the trial of the Company's suit.

18. It is alleged on behalf of the Company that under these circumstances there was a bond fide dispute as to the indebtedness of the Company to

the Respondent, and that the presentation of the winding up petition was an abuse of the process of the Court.

19. There is no doubt that the Court has inherent jurisdiction to stay proceedings where they amount to an abuse of its process : this is a well-

recognised principle.

20. And it was argued that in this case the Company had not "" neglected "" to pay the sum demanded within the meaning of sec. 103 (1) of the

Indian Companies Act.

21. Reliance was placed upon the judgment of Sir G. Jessel, M. R., in London and Paris Banking Corporation (1) in which case he was dealing

with the English statute which is in similar terms to the Indian Act and in which he said "" Negligence is a term which is well known to the law.

Negligence in paying a debt on demand, as I understand it, is omitting to pay without reasonable excuse. Mere omission by itself does not amount

to negligence. Therefore I should hold, upon the words of the statute, that where a debt is bond fide disputed by the debtor, and the debtor

alleges, for example, that the demand for goods sold and delivered is excessive and says that he, the debtor, is willing to pay such sum as he is

either advised by competent values to pay, or as he himself considers a fair sum for the goods, then in that case he has not neglected to pay, and is

not within the wording of the statute.

22. In this case the Company alleged there was a bond fide dispute and they were willing to pay what was found due on the taking of an account.

23. Now in this case we do not think it is necessary for us to decide finally whether there is a "" disputed claim "" in fact; it is sufficient for us to say

that it appears to the Court 19 Eq. Cas, 444 at p. 446 (1874). that on the materials before it there is ground for supposing that there is a bond fide

dispute as to a substantial part of the debt on which the winding up petition was based, and (2) that the Company is solvent :

24. Under such circumstances the proper course is a suit : that course the Respondent, did adopt; and the suit which he instituted to recover the

amount due to him has in fact been postponed until after the hearing of the suit by the Company against him and his co-directors; under these cir-

cumstances we do not think that an order for winding up the Company ought to have been made on the petition until the litigation involved in the

two above-mentioned suits had been disposed of.

25. It follows that in our judgment the learned Judge was not right in dismissing the Company's application in toto.

26. The application was to remove the petition from the file, to restrain the issue of advertisement and to stay all proceedings in respect of the

petition, and in our judgment the proper order to be made, under the circumstances of this case, will be that the winding up proceedings be stayed

until the determination of the two above mentioned suits, viz., the Company's Suit No. (961/15) and the Respondent's Suit No. (454/16), the

question of the costs of the winding up proceedings will be determined by the Judge taking such winding up proceedings; this will include the costs

of the application heard by Greaves, J., which is now the subject of appeal.

27. We have said nothing with regard to the second ground above mentioned, viz., that the petition was presented with an ulterior motive : having

regard to the conclusion are which we have arrived in respect of the first ground, a decision upon the second is rendered unnecessary, and,

inasmuch as there is litigation pending between the parties, it seems to us that it is no t desirable to express an opinion upon any matter involved in

this application unless it ie necessary and material for our judgment. The result will be that the appeal will be allowed, the order of the learned

Judge will be set aside and that the Respondent will return to the Company the sum of two lacs nine thousand rupees, and the order above

mentioned will be substituted for the order of the learned Judge. The Respondent must pay the Appellant's costs of this appeal.

Woodroffe, J.

I agree.