

(2005) 08 CAL CK 0070

Calcutta High Court**Case No:** G.A. No. 219 of 1998, Appeal No. 67 of 1998 and TCS No. 10 of 1993Rafiulla Tea and Industries (P)
Ltd.

APPELLANT

Vs

Hillmen's Tea and Trading Co.
Ltd.RESPONDENT

Date of Decision: Aug. 5, 2005**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 11, 151
- Companies Act, 1913 - Section 171
- Companies Act, 1956 - Section 446, 446(1), 446(2), 446(3)

Citation: (2006) 4 CHN 804**Hon'ble Judges:** Pravendu Narayan Sinha, J; Pinaki Chandra Ghose, J**Bench:** Division Bench

Judgement

Pinaki Chandra Ghose, J.

This appeal is directed against an order dated December 15, 1997 whereby the Hon'ble First Court held that the order dated 7th February, 1991 passed by the learned District Judge, Dhubri, Assam is of no effect and the same was set aside. His Lordship was further pleased to appoint and directed the Official Liquidator as the Receiver over the tea garden to take symbolic possession of the tea garden and the appellant company was given liberty to run the business of the tea garden under the Official Liquidator. The appellant was directed to furnish accounts month by month. On 10th February, 1998, this appeal has been filed and was admitted from the said order.

2. Facts of the case briefly are as follows;

One Hillmen's Tea & Trading Co. Ltd. on 20th March, 1961 sold Maijonga Tea Estate (hereinafter referred to as the said tea garden) to one Sharma and in turn they sold the said tea estate to one Kamini Tea Co. Pvt. Ltd. in 1975. Thereafter, Kamini Tea

Co. Ltd. sold the said tea garden to Rafiulla being the appellant herein in 1975. In or about 1981 Nepal Chandra Banik, one of the Directors of the said Hillmen's Tea claimed to have become the majority shareholder of the said Hillmen's Tea & Trading Co. Ltd. (hereinafter referred to as the Hillmen). The said Hillmen instituted a title suit being Title Suit No. 17 of 1982 before the Assistant District Judge, Dhubri, Assam against the said Rafiulla and others inter alia for declaration that no right, title and/or interest in Majonga Tea Estate had been created in favour of any third party and also prayed for a decree for recovery of possession in respect of the said Majonga Tea Estate.

3. The said title suit was transferred from the Court of the Assistant District Judge, Dhubri to the Court of the District Judge, Dhubri and was renumbered as Title Suit No. 4 of 1983. An ex parte decree was passed on 2nd March, 1983 and was executed and the Hillmen's took the possession of the said Tea Garden. On 28th September, 1983 on an application of the Rafiulla the decree was recalled and by an order dated 16th July, 1984 Rafiulla was put back into the possession.

4. On 20th April, 1985 Rafiulla filed an application for winding of the said Hillmen's in this High Court for the price of manufactured tea leaves removed by the Hillmen's from the said tea garden while the Hillmen's was in possession. On 26th November, 1986 the winding up order was passed by the Court. On 7th February, 1991 the said Title Suit No. 4 of 1983 was dismissed by the Court in Assam, on the application being filed by Rafiulla under Order 7 Rule 11 of the Code of Civil Procedure.

5. An appeal was preferred from the order of winding up passed on 26th November, 1986 by the said Nepal Chandra Banik being APO No. 799 of 1992.

6. On 11th March, 1993 said Banik applied for a declaration that the order dated 7th February, 1991 passed by the Assam Court dismissing the Title Suit No. 4 of 1983 was a nullity and further applied u/s 446 of the Companies Act to transfer the said suit before this Court and also for setting aside of the order dated February 7, 1991 passed by the learned District Judge, Dhubri dismissing the suit. The Hon'ble Division Bench allowed the said application of said Banik and the said order dated 7th February, 1991 passed by the Assam Court was set aside and the records of Title Suit No. 4 of 1983 were transferred before this Hon'ble Court and marked as Extraordinary Suit No. 10 of 1993. A SLP was filed by the Rafiulla against the said order dated 12th October 1993. On 11th November, 1994 the said SLP was disposed of by the Hon'ble Supreme Court holding that in an application u/s 446 of the Companies Act, the Hon'ble Court has no jurisdiction to set aside the said order of dismissal of the suit passed by the Assam Court on 7th February, 1991. The Hon'ble Supreme Court has observed as follows:

... The submission of Shri Ganguli, learned Counsel for the appellant is that the above extracted direction was outside the scope of Section 446 of the Companies Act, even assuming that the order dated 7.2.1991 dismissing the Suit No. 17 of 1982

later on renumbered as Suit No. 4 of 1983 was a nullity. In our opinion the form in which such a direction has been made u/s 446 of the Companies Act is not appropriate. Even assuming that the aforesaid order dated 7.2.1991 dismissing the suit is a nullity, the only course open to avoid the effect thereof is to challenge the same in the appropriate proceeding before the proper forum. in accordance with law prescribing the procedure for assailing the validity thereof. In a collateral proceeding, and that too while making an order u/s 446 of the Companies Act, this could not have been done. However, it does appear to us that this direction, read in the context of the leave granted to the Official Liquidator, should be construed as the grant of leave to the Official Liquidator to assail the validity of the aforesaid order dated 7th February, 1991 in the appropriate proceeding before the appropriate forum.

7. It is further revealed that an application was filed by Banik in the "Transferred Suit", inter alia that the order passed by the Assam Court on 7th February, 1991 be declared null and void and the Receiver be appointed over the said Tea Estate. The Official Liquidator also made a similar application. In or about 9th February, 1995 Banik filed an application for sanction of sale of his shares to one K. K. Singhanian. On 15th December, 1997 the application so filed by the Official Liquidator was allowed by setting aside the said order of the Assam Court dated 7th February, 1991 and the Official Liquidator was appointed as Receiver to take symbolic possession of the tea garden and also permitted Rafiulla to run the tea garden under the Official Liquidator.

8. Rafiulla filed this appeal from the said order dated 15th December, 1997. It is further appeared that the Banik filed an application in or about May, 2003 in other appeal being APO No. 799 of 1992 for an order that the Official Liquidator to take possession of the tea garden. It is submitted that no notice of the said application was served upon Rafiulla.

9. On 25th January, 2005 an ex parte order was passed and the Official Liquidator was directed to take actual physical possession of the said tea garden. On 7th February, 2005 Official Liquidator took actual physical possession of the said tea estate and has put his padlock on the factory, the office and the bungalows of the tea estate after evicting all persons from the said Tea Estate/Garden and on 1st March, 2005 the said application was served on Rafiulla pursuant to the order passed by the Court after evicting Rafiulla.

10. The case of the appellant that the said order dated February 7, 1991 passed by the Assam Court dismissing the suit remains operative and still in force as it would be evident from the order passed by the Hon'ble Supreme Court. It is further pointed out that without appropriate proceedings being instituted before a proper forum for a declaration that the said order dated February 7, 1991 is a nullity and without setting aside the said order the said suit could not be revived and/or restored. It is further stated that the Hon'ble Calcutta High Court has no jurisdiction

to set at naught the order of dismissing the suit passed by the Assam Court. It is further submitted that the transfer of records of the suit in the meantime in the Calcutta High Court pursuant to the order dated October 12, 1993 cannot give a jurisdiction to the High Court to deal with the said matter. It is also submitted that the application which has been filed in the transferred suit by the Official Liquidator is without any basis and without following the norms of the order of the Hon"ble Supreme Court and further the order so passed on December 15, 1997 by this High Court declaring the order dated 7th February, 1991 passed by the Assam Court as a nullity and further appointing the Official Liquidator as Receiver over the tea garden with a direction to take symbolic possession thereof granting a liberty to the appellant Rafiulla to carry on business under the Receiver is totally wrong and without jurisdiction.

11. Mr. Pratap Chatterjee, learned senior Advocate and Mr. Ranjan Dev learned senior Advocate appearing for the appellant contended that the order is bad on the following grounds:

(i) With the setting aside of the Division Bench order dated October 12, 1993 by the Supreme Court order dated November 11, 1994, the order of dismissal of the suit dated February 7, 1991 passed by the Assam Court, was effective and still is in force.

(ii) Unless a fresh order was made by a Competent Court in appropriate proceedings setting aside or recalling the order of dismissal dated February 7, 1991, the suit could not be revived and did not revive.

(iii) The only Court competent to set aside or recall the said order of dismissal was the Assam Court. The Assam Court had not done so.

(iv) So long as the order of dismissal dated February 7, 1991 was not set aside or recalled by a Competent Court, no suit could be said to be "pending".

(v) If no suit could be said to be pending, there could be no transfer of records of such non-existent suit u/s 446 of the Companies Act, 1956.

(vi) Transfer of records of the suit pursuant to the order of the Division Bench passed on October 12, 1993 and before the Hon"ble Supreme Court order was passed was inconsequential and could not stand without revival of the suit.

(vii) The impugned order declaring the said order of dismissal dated February 7, 1991 to be a nullity was against the very teeth of the Hon"ble Supreme Court's order.

(viii) Inasmuch as no suit was or could be said to be "pending", no records could have been transferred of such non-existent suit and no order appointing Receiver could have been passed.

12. In answer to the said grounds Mr. S. B. Mukherjee, learned Advocate appearing on behalf of Banik submitted that in view of the provisions of Section 446 of the

Companies Act, 1956 the suit or proceedings instituted in any Court without the leave of the Company Court may be recorded as ineffective until the leave is obtained. According to Mr. Mukherjee, the company was gone into liquidation prior to the order of dismissal. Hence the said Assam Court had no jurisdiction to decide the matter in respect of the applications filed by Rafiulla u/s 151 of the CPC or under Order 7 Rule 11 of the CPC and no such leave has yet been obtained. In the premises, he further submitted that the said dismissal order dated February 7, 1991 was ineffective and according to him, Calcutta High Court had jurisdiction after the order of winding up passed by this High Court to direct the transfer of the suit from Dhubri to this High Court and thereafter also there is a jurisdiction to proceed in the matter declaring that the said order dated 7th February, 1991 was ineffective and should be set aside. He also relied upon the decisions reported in [Bansidhar Shankarlal Vs. Mohd. Ibrahim and Another](#), and [S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co. Ltd. Vs. V.M. Deshpande, Income Tax Officer, Companies Circle I\(8\), Bombay and Another](#), in support of his contention. He further contended that the application u/s 151 and application under Order 7 Rule 11 of the CPC would attract the expression "other legal proceedings" u/s 446(1) of the Companies Act, 1956. Therefore, according to him, any such proceedings without notice to the Official Liquidator after the company has gone into liquidation for dismissal of the suit would certainly require leave of the Court.

13. Mr. Mukherjee further submitted that if the appeal is allowed in APO No. 799 of 1992 dismissing the winding up order in other appeal, in that event the records of the Title Suit No. 4 of 1983 has to be transferred to the Dhubri Court for disposal.

14. In these circumstances, he submitted that the interim orders now prevailing, should continue for a certain period so that the Dhubri Court can pass appropriate orders in this matter and a status quo as of today to be maintained till the records are sent back to the Dhubri Court.

15. After hearing the learned Counsel for the parties only question arose before this Court whether by the said order dated 15th December, 1997 Court has power to transfer the suit and further can set aside the order of dismissal dated 7th February, 1991 passed by the Assam Court. In deciding the said question we have to find out whether the said application can be entertained by this Court on the grounds that (a) there was no Us pending after such dismissal of the suit before any Court; (b) u/s 446(1) of the said Act an application for leave from the winding up Court to proceed with a suit and other legal proceedings "against" the company in liquidation. Section 446(3) of the said Act contemplates the winding up Court transferring to itself suits or other legal proceedings "by or against" the company in liquidation from any other Court to the winding up Court.

16. u/s 446(3) of the said Act the transfer can be made only in respect of the "pending" suit or other legal proceeding. In the instant case, admittedly there was no suit was pending by virtue of the order of dismissal passed on February 7, 1991

by the Assam Court. It is not specifically stated in Section 446(2) of the said Act which is an enabling provision insofar as exercise of jurisdiction is concerned. It has not been stated that upon a winding up order all suits or all legal proceedings "by or against" the company in liquidation stand automatically transferred to the winding up Court. It is not an exclusive jurisdiction of the winding up Court. The said Section 446(2) of the said Act makes a winding up Court to be competent to entertain or dispose of any suit or other legal proceedings "by or against" a company in liquidation, even if, the winding up Court would not have jurisdiction to do so. This would be clear from the non-obstante clause in the said sub-section. The jurisdiction of the winding up Court is additional but not exclusive.

17. It also appears to us that if such jurisdiction is exclusive, then there was no necessity of the provision of Section 446(3) of the Act. Otherwise said Section 446(3) would be rendered otiose.

18. Generally, in these circumstances and after taking into account of the order so passed by the Hon"ble Supreme Court which has specifically observed that "The only course open to avoid the effect thereof is to challenge the same in appropriate proceedings before the proper forum in accordance with law prescribing the procedure for assailing the validity thereof."

19. We have considered all the decisions cited before us. In [Bansidhar Shankarlal Vs. Mohd. Ibrahim and Another](#), the Hon"ble Supreme Court held that suit or proceedings instituted without the leave of the Court may be regarded as ineffective until leave is obtained, but once leave is obtained the proceeding will be deemed to be instituted on the date of granting leave.

20. Therefore, in the instant case, it appears that without the leave of the Company Court the suit was dismissed by the Assam Court on an application filed by Rafiulla under Order 7 Rule 11 is merely an irregularity and could be cured if leave is obtained.

21. In [S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co. Ltd. Vs. V.M. Deshpande, Income Tax Officer, Companies Circle I\(8\), Bombay and Another](#), where the Hon"ble Supreme Court has held that the expression "other legal proceedings" in Sub-section (1) of Section 446 and the expression "legal proceeding" in Sub-section (2) of Section 446 of the Companies Act convey the same sense and the proceedings in both the sub-sections must be such as can appropriately be dealt with by the winding up Court. The Hon"ble Supreme Court even held that the Income Tax Act is a complete Code and it is particularly so with respect to the assessment and reassessment of Income Tax. The fact that after the amount of tax payable by an assessee has been determined or quantified its realization from a company in liquidation is governed by the Act since the tax is also a debt and shall be at par and/or rank pari passu with other debts due from the company does not mean that the assessment proceeding for computing the

amount of tax must be held to be such other legal proceeding as can only be started or continued with the leave of the liquidation Court u/s 446 of the Companies Act.

22. In the instant case, the Hon"ble Supreme Court held that it would lead to anomalous consequences if the winding up Court were to be held empowered to transfer the assessment proceedings to itself and assess the company to Income Tax.

23. Similarly, in the instant case, in our opinion the Company Court cannot be equated with the Assam Court for recalling of its order which has dismissed the suit. It would only to be held that the said order cannot come under the meaning of "other legal proceedings" which can only be started or continued with the leave of the liquidation Court u/s 446 of the Act. In our opinion, until the Us is pending liquidation Court cannot pass any order to transfer the suit under the said provision of Section 446 before this Court. Therefore, steps have to be followed by the parties to apply before the Court for recalling of the said order and thereafter order of transfer can be passed by the liquidation Court. Furthermore, the application for recalling of the said suit would have been filed with the leave of the Court, although in our opinion it is also not necessary in the present situation.

24. The Full Bench of Allahabad High Court in "Rahmat Ali Fatehullah v. Calcutta National Bank Ltd. (supra) held that the meaning of the words "other legal proceedings" u/s 171(Act of 1913) must not be confined within narrow limits and need not necessarily be proceedings analogous to a suit initiated by means of a petition similar to a plaint. The words "against the company" in Section 171 do not mean that if the company is arrayed as the opposite party, permission of the Company Judge will be necessary whenever any legal proceeding has to be instituted or continued against the company. The words "against the company" mean a proceeding where a liability is intended to be fastened on the company or its assets and not a proceeding commenced by a person with the object of escaping liability arising out of a proceeding commenced by the company itself. If a person wants to file a suit to escape liability on the ground that the company's claim against him is unfounded, it is a proceeding against the company, but where the company has started the proceeding, that is, put forward its claim in a Court of Law, any remedy available by way of defence to escape liability, which the company wants to fasten on him, should not be deemed to be a proceeding commenced or continued against the company and in such a case the question, whether the claim was put forward or the suit was filed by the company before or after the winding up order, should make no difference.

25. Therefore, in our opinion, we cannot treat the steps taken by Rafiulla for dismissal of the suit under Order 7 Rule 11 of the Code of Civil Procedure, which would attract the expression "other legal proceedings" u/s 446 of the Companies Act.

26. Therefore, in our opinion, when there is no Us is pending, the Court cannot pass any order to transfer the said suit before the Court or can set aside an order which in effect dismissed the suit. Therefore, we have to hold that the said order dated December 15,1997 is without jurisdiction and has to be set aside. The parties must take steps for setting aside of the said order dated 7th February, 1991 before the Assam Court or for recalling of the said order. Until the said order is set aside this Court cannot pass any order transferring the said suit.

27. However, in our opinion, at this stage the said point has also lost its relevance since in the other appeal we have set aside the order of winding up and the order so to be passed in this appeal would be nothing but only for an academic purpose. We have allowed the appeal being A.P.O. No. 799 of 1992 Nepal Chandra Banik v. Rafiulla Tea and Industries (P) Ltd. and Anr. and the winding up order has already been set aside, in our opinion, steps have to be taken by the appellant before the appropriate forum for setting aside of the said order dated February 7,1991, if so advised. We have also granted 4(four) weeks time to the Official Liquidator to hand over all the documents, papers, assets etc. whichever are lying under his custody and possession to be delivered to the company.

28. For the reasons stated hereinabove this appeal is disposed of on the above terms.

P.N. Sinha, J.

29. I agree.