

BANSIDHAR SHANKARLAL**A**

v.

MOHD. IBRAHIM & ANR.

September 25, 1970

[J. C. SHAH AND A. N. GROVER, JJ.]**B**

Constitution of India, Art. 133(1)(b) and (c)—Supreme Court will not certify appeal when on merits it agrees with High Court.

Companies Act, 1913, ss. 171 and 179—Company in liquidation—Liquidators joining in second appeal against decree ordering ejectment of company from land—Landlord filing application for execution of decree without obtaining permission under s. 171 of Companies Act from Company Judge—Application whether maintainable.

C

The first respondent instituted an action in the Court of the Subordinate Judge Alipore for a decree of ejectment in respect of land occupied by a company. The suit was decreed. Before the decree was passed the company took a loan from the appellant and mortgaged its fixed assets in favour of the appellant. After the passing of the decree the company executed a second mortgage of its fixed assets in favour of the appellant against another loan. The decree obtained by the first respondent against the company was confirmed in first appeal. Thereupon the company and the first appellant filed Second Appeal No. 1380 of 1954 in the High Court of Calcutta. The appellant also filed a suit in the said High Court on its original side to enforce the two mortgages in his favour and obtained a preliminary mortgage decree in the suit. Another creditor of the company applied for and obtained an order directing that the company be wound up. The liquidators of the company and the appellant prosecuted Second Appeal No. 1380 of 1954. The decree of the first appellate court was confirmed by the High Court. The first respondent then instituted an application for enforcement of the decree in ejectment against the company. The appellant resisted the application on the ground that the same was not maintainable since leave of the High Court under s. 171 of the Companies Act, 1913 had not been obtained. Thereafter on the motion of the first respondent the Company Judge granted leave to execute the decree in Second Appeal No. 1380 of 1954. The Subordinate Judge before whom the proceedings were pending dismissed the objections of the appellant against execution of the decree and the order of dismissal was confirmed by the first appellate court and the High Court. The appellant's applications for a certificate for leave to appeal to this Court was also rejected. In appeal by special leave challenging the refusal of certificate.

D**E****F****G**

HELD : (i) The object of s. 171 is plain. It is intended to ensure that the assets of a company ordered to be wound up by the Court shall be administered for the benefit of all the creditors and that some creditors only shall not obtain an advantage over others by instituting or prosecuting proceedings against the company. The section is intended to maintain control of the Court which has made an order of winding up on proceedings which may be pending against the company or may be initiated after the order of winding up, and the Court may remain seized of all those matters so that its affairs are administered equitably and in an orderly fashion. [480 B-C]

H

- A** If sanction of the Court under s. 179 to prosecute the appeal before the High Court was obtained by the liquidators in the present case—and it must be so assumed—the contention raised on behalf of the appellant lost all significance for an execution application is only a continuation of the suit and the control of the High Court enures during the execution proceedings also. It would be giving effect to a technicality divorced from the object of s. 171 of the Companies Act to hold that even in a suit filed or prosecuted with the sanction of the Court the decree may not be enforced by a successful party without leave under that section. [480 E-G]

- B** Even granting that sanction under s. 179 does not dispense with the leave under s. 171 of the Act, to institute a proceeding in execution against a company ordered to be wound up, there is nothing in the Act which makes the leave a condition precedent to the institution of a proceeding in execution of a decree against the company and failure to obtain leave before the institution of the proceedings entails dismissal of the proceeding. The suit or proceeding instituted without 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 granting leave. [480H-481B]

- C** *Har Narain Misra v. Kanhaiya Lal Lohawalla*, I.L.R. [1939] 2 Cal. 425 and *Godavari Sugar and Refineries Ltd. v. Kambhampati Gopalakrishnamurthy & Ors.*, A.I.R. 1960 A.P. 74, disapproved.

- D** *Nazir Ahmed v. Peoples Bank of Northern India Ltd.*, I.L.R. [1942] Lah. 517, *Suresh Chandra Khannabish v. Bank of Calcutta Ltd.* (1950) 54 Cal. W.N. 832 F.B., *Peoples Industrial Bank Ltd. v. Ramchandra Shukul*, I.L.R. 52 All 430, *Roopnarain Ramchandra Private Ltd. v. Brahmapootra Tea Co. (India) Ltd. & Anr.* 65 C.W.N. 1060 and *Suresh Chandra v. The Bank of Calcutta*, 21 Company Cases 110, referred to.

- E** (ii) This Court would not be justified in certifying an appeal in which the only question which may be urged is the one on which it had expressed an opinion against the appellant. [482 A]

- F** CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1927 of 1966.

Appeal by special leave from the order dated December 24, 1965 of the Calcutta High Court in Supreme Court Appeal No. 55 of 1965.

- G** *G. L. Sanghi, Jnanendra Lal and B. R. Agarwala*, for the appellant.

Sukumar Ghose, for respondent No. 1.

The Judgment of the Court was delivered by

- H** *Shah, J.* Mohammed Ibrahim (hereinafter called “the plaintiff”) instituted an action in the Court of the Subordinate Judge, Alipore for a decree in ejectment in respect of land occupied by the Luxmi Spinning & Weaving Mills Ltd. as his tenant. The suit was decreed on October 1, 1953. Before the decree was

passed, the Company had executed on January 31, 1951 a deed in favour of Bansidhar mortgaging its fixed assets for securing repayment of Rs. 1,25,000/-. After the decree of the Trial Court, the Company executed on January 21, 1954 a second deed also in favour of Bansidhar mortgaging the fixed assets for repayment of an additional sum of Rs. 2,00,000/-. The decree of the Subordinate Judge in the plaintiff's suit was confirmed on August 4, 1954. Against that decree the Company and Bansidhar preferred second appeal No. 1380 of 1954 to the High Court of Calcutta. Bansidhar also filed a suit in the High Court of Calcutta on its original side to enforce the two mortgages in his favour and obtained a preliminary mortgage decree in the suit on May 13, 1955. Another creditor of the Company applied for and obtained on August 22, 1955 an order directing that the Company be wound up. The liquidators of the Company and Bansidhar prosecuted the Second Appeal No. 1380 of 1954. The decree of the District Court was confirmed by the High Court in its appellate jurisdiction on February 22, 1958. The plaintiff then instituted an application for enforcement of the decree in ejectment against the Company without obtaining leave of the High Court of Calcutta under s. 171 of the Indian Companies Act, 1913. On December 17, 1958, Bansidhar filed a petition contending that the application for enforcement of the decree was not maintainable without leave of the High Court which ordered that the Company be wound up. On the motion of the plaintiff the Company Judge granted leave to execute the decree in Second Appeal No. 1380 of 1954. The Subordinate Judge before whom the proceedings were pending, dismissed the application filed by Bansidhar, and the order of dismissal was confirmed by the Additional District Judge and by the High Court in Second Appeal. Bansidhar's petition for a certificate for appeal to this Court under Articles 133(1)(b) and (c) of the Constitution was also rejected. Bansidhar then preferred two petitions for special leave to this Court—one against the order of the High Court dismissing his Second Appeal against the order in the execution proceedings, and the other against the order of the High Court refusing to certify the appeal under Art. 133(1)(b) and (c) of the Constitution. This Court dismissed the petition against the order of the High Court in Second Appeal and granted special leave to appeal against the order of the High Court refusing to certify the case.

The order passed by the High Court in Second Appeal having affirmed the order of the District Court unless the appeal preferred to this Court involved some substantial question of law of public or private importance, the case could not be certified under Art. 133(1)(b) even if the proposed appeal involved direc-

A tly or, indirectly some claim or question respecting property of value not less than Rs. 20,000/-. The High Court could not also certify the case as a fit one for appeal under Art. 133(1)(c) unless in the view of the Court it raised a question of some general or public importance.

B Counsel for the appellant says that the Subordinate Judge was incompetent to entertain the application for executing the decree in Second Appeal No. 1380 of 1954 unless the High Court of Calcutta in its company jurisdiction granted leave to execute the decree under s. 171 of the Indian Companies Act, 1913. Counsel urged that leave of the High Court is by the terms of s. 171 of the Indian Companies Act made a condition precedent to the institution of a proceeding against a Company ordered to be wound up by the Court, and that the application for execution of the decree without in the first instance obtaining leave of the High Court was entertained without authority. The question sought to be raised in the proposed appeal, it was urged, was of general or public importance. In any case it was contended that there is conflict of opinion among the Courts in India on the true interpretation of s. 171 of the Indian Companies Act, 1913, and s. 446 of the Companies Act, 1956 (which replaced s. 171 of the Act of 1913), and the High Court was bound to grant the certificate applied for either under s. 13(1)(b) or under Art. 133(1)(c) or both the clauses.

E Our attention is invited to the decision of the High Court of Calcutta in *Har Narain Misra v. Kanhaiya Lal Lohawalla*⁽¹⁾ and of the High Court of Andhra Pradesh in *Godavari Sugar and Refineries Ltd. v. Kambhampati Gopalakrishnamurthy and Others*⁽²⁾. In these cases it was held that leave of the High Court which has ordered winding up of a Company is a condition precedent to the institution of proceedings against a Company in liquidation, and that proceeding initiated without obtaining leave of the Court in the first instance must be dismissed.

F There are, however, other cases which take a contrary view. *Nazir Ahmed v. Peoples Bank of Northern India Ltd.*⁽³⁾; *Suresh Chandra Khannabish v. The Bank of Calcutta Ltd.*⁽⁴⁾. *People's Industrial Bank Ltd. v. Ramchandra Shukul*⁽⁵⁾; *Roopnarain Ramchandra Private Ltd v. Brahmapootra Tea Co. (India) Ltd. & Anr.*⁽⁶⁾.

H Section 171 of the Indian Companies Act, 1913 provided that—

(1) I. L. R. [1939] 2 Cal. 425.

(3) I. L. R. (1942) Lah. 517.

(5) I. L. R. 52 All. 430.

(2) A.I.R. 1960 A. P. 74.

(4) (1950) 54 Cal. W. N. 832 F.B.

(6) 65 Cal. W. N. 1060.

"When a winding up order has been made or a provisional liquidator has been appointed, no suit or other legal proceeding shall be proceeded with or commenced against the Company except by leave of the Court and subject to such terms as the Court may impose."

This section is in terms analogous to s. 231 of the English Companies Act, 1948 (11 & 12 Geo. 6, Ch. 38). The object of s. 171 is plain. It is intended to ensure that the assets of a Company ordered to be wound up by the Court shall be administered for the benefit of all the creditors, and that some creditors only shall not obtain an advantage over others by instituting or prosecuting proceedings against the Company. This section is intended to maintain control of the Court which has made an order for winding up on proceedings which may be pending against the Company or may be initiated after the order of winding up, and the Court may remain seized of all those matters so that its affairs are administered equitably and in an orderly fashion.

When the Second Appeal No. 1380 of 1954 was pending before the High Court of Calcutta at the instance of the Company and Bansidhar against the decree passed by the District Court in ejectment, the Company was ordered to be wound up by order of the High Court of Calcutta and the liquidators were appointed. The liquidators prosecuted the appeal. There is no evidence on the record whether the liquidators obtained the sanction of the Court under s. 179(1)(a) of the Company's Act 1913. But there is no reason to suppose that the liquidators did not obtain the sanction of the Court. If sanction of the Court under s. 179 to prosecute the appeal before the High Court was obtained, and it must be so assumed, the contention raised on behalf of Bansidhar loses all significance for an execution application is only a continuation of the suit and the control of the High Court ensures during the execution proceeding also. If the sanction of the Court has been obtained for the prosecution of the suit, it would be plainly unnecessary to obtain fresh sanction to the institution of execution proceeding at the instance of the successful party. It is true that the sanction obtained by the liquidators is granted under s. 179 of the Companies Act to initiate or enforce a claim of the Company or to defend an action, whereas the leave of the Court to institute or to continue a suit against the Company in winding up is obtained under s. 171. It would be giving effect to a technically divorced from the true object of the section to hold that even in a suit filed or prosecuted with the sanction of the Court, the decree may not be enforced by a successful party without leave under s. 171 of the Act.

Even granting that sanction under s. 179 does not dispense with the leave under s. 171 of the Act, to institute a proceeding in execution against a Company ordered to be wound up, we do

- A not think that there is anything in the Act which makes the leave a condition precedent to the institution of a proceeding in execution of a decree against the Company and failure to obtain leave before institution of the proceeding entails dismissal of the proceeding. The suit or proceeding instituted without leave of the Court may, in our judgment, be regarded as ineffective until
- B leave is obtained but once leave is obtained the proceeding will be deemed instituted on the date granting leave.

In *Buckley on the Companies Act*, 13th Edn., at p. 499 it is observed :

- C/ "Leave to continue after winding up a debenture-holder's action, whether previously or subsequently commenced, will be given unless the liquidator is able and willing to give in the winding up the relief which could be obtained in the action."

- D The Calcutta High Court in *Suresh Chandra v. The Bank of Calcutta*⁽¹⁾ examined the decisions of the English Courts in some details and observed that as regards s. 171 of the Indian Companies Act, 1913, the High Court has jurisdiction to grant leave to proceed with the suit or other proceedings against a Company in liquidation even if such leave was not obtained for its commencement. The proceedings may at best be regarded
- E as instituted on the date on which the leave was obtained from the High Court.

- F Considering the question both on principle and authority we are unable to agree with the view expressed by the Calcutta High Court in *Har Narain Misra's case*⁽²⁾ and in *Godavari Sugar and Refineries Ltd. case*⁽³⁾ by the Andhra Pradesh High Court.

- G Counsel for the appellant, however, urged that this Court is not concerned in this appeal with the correctness of one or the other of the two conflicting views. Counsel says the Court has only to consider the correctness of the view of the High Court refusing to grant the certificate. In our judgment, it would be a futile exercise if we come to the conclusion that the view taken by the High Court on the merits of the case is true, still to certify the case for appeal. The proposed appeal only involves the question about the maintainability of the execution proceeding commenced by the plaintiff and against the Company in liquidation without leave of the High Court which has ordered the company
- H to be wound up. We entertain no doubt that the High Court

(1) 21 Company Cases 110.

(2) I. L. R. 392 Cal. 425.

(3) A. I. R. 1960 A. P. 74.

was right in the view it has taken on the merits and the contentions raised. We do not think that we will be justified in certifying an appeal in which the only question which may be urged is the one on which we have expressed our opinion against the appellant.

The appeal fails and is dismissed. The appellant will pay the costs of the plaintiff in this Court.

G.C.

Appeal dismissed.