

ORIGINAL CIVIL.

Before Panckridge J.

HAR NARAIN MISRA

v.

KANHAIYA LAL LOHAWALLA.*

1939

May 1;
June 12.

Company—*Company in winding-up, Suit against—Leave of the Court—Indian Companies Act (VII of 1913), s. 171.*

Where, after a company has been ordered to be wound up, a suit is instituted against it without leave of the Court, the Court has no jurisdiction to grant leave to the plaintiff to continue his suit.

In such a case, the Court has inherent jurisdiction to dismiss the suit on an interlocutory application.

Re: *Steel Construction Co., Ltd.* (1) followed.

APPLICATION by the liquidator of the defendant company for dismissal of the suit.

The facts of the case appear fully from the judgment.

S. N. Banerjee (Jr.) for the applicant. As leave of the Court has not been previously obtained the suit is bad and should be dismissed. Re: *Steel Construction Co., Ltd.* (1).

R. S. Bachawat for the plaintiff respondent. The proper penalty for failure to obtain leave of the Court is to stay the suit. The section does not lay down the consequences of such failure and in England the practice is to stay the suit. *Palmer's Company Precedents*, Vol. II (15th Ed.), p. 390. *Ram Saran Das v. Bhagwat Prasad* (2). This is also indicated by the marginal note of the section which may be considered.

It is still open to the winding-up Court to grant leave to continue the suit and so cure the defect. *People's Industrial Bank, Limited v. Ram Chandra Shukla* (3).

*Application in Original Suit No. 1976 of 1938.

(1) (1935) 40 C. W. N. 312.

(2) (1928) I. L. R. 51 All. 411.

(3) (1929) I. L. R. 52 All. 430.

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Re: *Steel Construction Co., Ltd.* (1) is clearly distinguishable, as there the winding-up Court used its discretion and dismissed the suit as no leave to continue the suit had been asked for. The observation that the suit is a nullity is *obiter dictum*.

Under the Indian Companies Act, the Court in which a suit is filed, if it not be the winding-up Court, has no jurisdiction to stay or dismiss the suit. Section 2(3) of the Indian Companies Act. The only manner in which a suit may be dismissed on an interlocutory application is under O. VII, r. 11 of the Code of Civil Procedure. This does not apply as the suit is good as against the defendant Lohawalla. *Raghubans Puri v. Jyotis Swarupa* (2).

Even if the Court has a power to dismiss such a suit, its discretion must be exercised in the same way as discretion to stay the suit is exercised in England. In this case the main relief is claimed against the defendant Lohawalla and for this purpose the Company is a necessary party. In such circumstances the Court should refuse to stay or dismiss the suit.

PANCKRIDGE J. This application raises a question of some importance. In December last year the plaintiff filed a suit against Kanhaiya Lal Lohawalla and the Rajputana Films Co., Ltd. It now appears that, prior to the institution of the suit, that is to say, on October 6, 1938, an order was made at the instance of a creditor by the District Judge of Ajmere for the compulsory liquidation of the defendant company. The plaintiff states that, at the time when the suit was instituted, he was unaware of the order for compulsory liquidation, and, accordingly, he made no application to the Court, having jurisdiction in the winding-up proceedings, for leave under s. 171 of the Indian Companies Act to sue the company. The liquidator now applies that the suit should be dismissed against the company as being incompetent on account of the plaintiff's failure to ask for and obtain leave to sue.

(1) (1935) 40 C. W. N. 312.

(2) (1907) I. L. R. 29 All. 325.

The position, when a suit has been instituted against a company after an order for its compulsory liquidation without the leave of the Court, was considered by me in *Re : Steel Construction Co., Ltd.* (1). In that case the winding-up order has been made by this Court, and an application was made by the liquidator to restrain a suit subsequently instituted in the Court of the first Subordinate Judge of Comilla. It appears from the report that the suggestion was made that the application to restrain the proceedings in the Comilla suit should be adjourned, in order to give the plaintiff an opportunity of regularising his position by asking for and obtaining leave under s. 171. As to that I observed :—

In my opinion if such application were made, the Court would have no jurisdiction to grant it. As I read s. 171 it means that leave to proceed with a pending legal proceeding can only be granted where that proceeding has been instituted prior to the winding-up order. I do not consider that the Court has jurisdiction to give the plaintiff leave to continue a suit instituted without leave subsequent to the winding-up order.

It has been pointed out to me that the opposite view has been taken by the Allahabad High Court and by the Bombay High Court, though it seems that my view has commended itself to the Lahore High Court.

There is clearly no authority binding on me which compels me to modify the opinion I expressed in *Re : Steel Construction Co., Ltd.* (*supra*). On the authority of that case I feel constrained to accede to the liquidator's application. On the assumption that the plaintiff had no knowledge of the winding-up order, my decision is undoubtedly productive of hardship. I suggested that a solution might be found if the plaintiff were to make an application to withdraw this suit with leave to institute a fresh suit on the same cause of action, and thereafter were to apply to the Court in which the company is being wound up for leave to commence fresh proceedings. That suggestion, however, did not commend itself to the plaintiff, and there may be very good reasons for this.

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It has been urged that there is no rule which specifically empowers the Court to dismiss a suit on an interlocutory application in circumstances such as the present. That indeed must be conceded, but it is by no means uncommon for the Court to make orders in interlocutory proceedings dismissing a suit, where it is clear that there is no jurisdiction to entertain it. In my opinion, the Court has inherent jurisdiction to take such a course, and if the Court considers that at some stage or other it will be compelled, because of the absence of leave under s. 171, to dismiss a suit as against a defendant company, I cannot see that any harm is done by taking this course at the earliest opportunity. I have been referred to cases in England where it has been held that the Court will not stay proceedings where the company is a necessary party to a suit framed against it and other defendants. I will assume, though a perusal of the plaint does not convince me of this, that if the company is dismissed from the suit, the Court cannot grant relief against the other defendant. However, I do not think that this is a consideration which ought to influence me in view of my previous decision.

In these circumstances, the suit must be dismissed as against the company with costs, including the costs of this application. At the same time if the liquidator is willing to entertain the plaintiff's claim, nothing that I have said should affect his decision, whether, if the main claim is maintainable, the plaintiff should be allowed to add to it any of the costs which he has incurred in respect of these proceedings.

Application allowed. Suit dismissed.

Attorneys for the liquidator: *Khaitan & Co.*

Attorney for plaintiff: *M. G. Poddar.*

S. M.