

Ram Saran Sharma and another v. Bank of India and others  
(J. S. Sekhon, J.)

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full ownership and if he stated that he was seeking a declaration from the Civil Court of his title as permanent lessee of such a character, there would, of course, be no question of his setting up a title in himself in derogation of the landlord's."

There is no substance in the submission made by the learned counsel and the same is repelled.

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S.C.K.

Before J. S. Sekhon, J.

RAM SARAN SHARMA AND ANOTHER,—*Petitioners.*

*versus*

BANK OF INDIA AND OTHERS,—*Respondents.*

Civil Revision No. 2905 of 1987

September 5, 1988.

*Companies Act (I of 1956)—Ss. 446 and 537—Code of Civil Procedure (V of 1908)—O. 21 Rl.2—Company in liquidation—Creditor bank filing suit for recovery of loan—Leave to prosecute suit granted by Company Judge—Suit decreed—Execution of decree—Sale of property of company in liquidation—Fresh leave of Company Judge—Whether necessary for execution of decree—Sale of property by auction without attachment—Whether proper.*

*Held*, that once the permission of the Company Judge during the pendency of the parent suit against the Company under liquidation is taken under the provisions of section 446 of the Companies Act, 1956, no fresh sanction for execution of the decree passed in such suit is required under Section 537 of the Act. It cannot be said that the leave of the Company Judge taken under Section 446 of the Act during the pendency of the parent suit will not enure during the execution proceedings of the decree passed in that suit.

(Paras 6 & 10).

*Held*, that in view of the factum that the property being already under simple mortgage or hypothecated with the bank decree-holder, there was no necessity of fresh attachment of the property. Hence

it has to be held that the property of the company in liquidation can be put to auction to satisfy a decree without first attaching the property.

(Para 11).

*Petition Under Section 115 C.P.C. for revision of the order of the Court of Shri J. R. Singla, P.C.S. Sub Judge Ist Class, Kharar, dated 22nd August, 1987, ordering that the property to be put to auction as per dates given below:—*

*Notice before the court premises on 5th September, 1987, Manadi at the spot on 20th September, 1987, sale at the spot on 9th October, 1987 and report be called for 24th October, 1987 besides the routine publicity be also made got in the Daily Tribune and the Indian Express also.*

N. K. Sodhi, Sr. Advocate with S. K. Hiraji and Nitin Kumar, Advocates, for the Petitioner.

L. M. Suri, Advocate, for the Respondents.

#### JUDGMENT

*Jai Singh Sekhon, J.*

(1) This civil revision is directed against the orders 22nd July, 1987 and 22nd August, 1987 of the Executing Court appointing the Receiver of the property of the judgment-debtor company and rejecting the objection of the petitioners that the sale of the property cannot be held without its attachment. Subsequently, Civil Revision No. 3036 of 1987 was directed only against the rejection of the above referred objection,—*vide* order dated 22nd August, 1987, on the notion that a joint civil revision against two orders may not be maintainable. Both these revision petitions shall be disposed of by this order.

(2) In brief, the facts are that M/s. Sudha Pharmaceuticals (hereinafter called the 'Company'), a private limited company leased out,—*vide* lease-deed dated 20th September, 1982, its premises along with office-cum-machinery, etc. in favour of Ajeet Kumar Jain and delivered its possession. The Company was ordered to be wound up by order dated 3rd November, 1983 of the Company Judge of this Court in Company Petition No. 100 of 1982 and the Official Liquidator was directed to take possession of the assets of the Company. The Company, before it went into liquidation, had taken some loans

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from the Bank of India, which instituted civil suit No. 118 on 31st March, 1983, against the Company as well as against the aforesaid Shri Ajeet Kumar Jain the lessee and the firm M/s. Jaysons Pharmaceuticals. The requisite permission of the Company Judge under the provisions of section 446 of the Companies Act, 1956 to prosecute the suit was taken during its pendency and the suit was ultimately decreed on 4th June, 1986, in the sum of Rs. 63,92,247.84 paise with future interest against the Company in liquidation as well as against its erstwhile Directors. The plaintiff-Bank then filed an application dated 22nd January, 1987 for the execution of the decree, under Order XXI, Rule II of the Code of Civil Procedure, without obtaining the leave of the Company Judge of this Court under section 537 of the Companies Act. In the course of those execution proceedings, the Executive Court on the basis of the consent of the parties appointed Shri Harbans Lal as Receiver,—*vide* order dated 22nd July, 1987. The objector-petitioner filed objections that the sale of the property of the Company in liquidation could not be held without attachment and the Executing Court,—*vide* its order dated 22nd August, 1987, ordered that the property be put to auction as per directions given in the said order.

(3) The learned counsel for the parties agree that the impugned order of the trial Court dated 22nd July, 1987, is not legally sustainable being contrary to the provisions of section 453 of the Companies Act, which specifically debars the appointment of a Receiver of the assets of the Company in liquidation which are in the hands of the liquidator except by or with the leave of the Company Court. Admittedly, no such leave was taken from the Company Court before the appointment of the above referred official liquidator. Under these circumstances, the above referred order had to be set aside.

(4) The main controversy between the parties is whether a fresh leave of the Company Court regarding sale of the property of the Company in liquidation as required under the provisions of section 537 of the Companies Act, even though such leave was obtained for prosecuting the parent suit under the provisions of section 446 of the Act. Mr. N. K. Sodhi, learned counsel for the petitioners, by relying upon the findings of the Andhra Pradesh High Court in *Godavari Sugar and Refineries Ltd. v. Kambhampati Gopalakrishnamurthy and others* (1), contended that a fresh leave for levying

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

execution of decree is necessary under the provisions of section 537 of the Companies Act even though leave was obtained for prosecuting the suit under section 446 of the Companies Act. He has also relied upon the findings of the Karnataka High Court in *K. S. Shivappa v. State Bank of Mysore and others* (2), in support of the proposition that the provisions of section 537 of the Companies Act would apply in all those cases where execution is sought to be levied after the commencement of the winding up proceedings of the Company. That provisions of Sections 446 and 537 of the Companies Act operate in different fields.

(5) Mr. L. M. Suri, learned counsel for the respondents, on the other hand, maintained that the execution proceedings being a continuation of the suit, no fresh leave under section 537 of the Companies Act was required, as leave in the present suit was already obtained from the Company Court under the provisions of section 446 of the Companies Act. He has also relied upon the decision of the Bombay High Court in *Dhanraj G. Bhatia v. Janata Works P. Ltd.* (3). The findings of the Supreme Court in *Bansidhar Shankarlal v. Mohd. Ibrahim and another* (4), were also referred in this regard.

(6) For the proper understanding of the controversy between the parties, it would be worthwhile to reproduce the provisions of sections 446 and 537 of the Companies Act. Section 446 runs as under:—

“(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Court and subject to such terms as the Court may impose.

(2) The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of—

(a) any suit or proceeding by or against the company.

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(2) (1986) 60 Com. Cas. 229.

(3) (1984) 56 Com. Cas. 229.

(4) (1971) 41 Com. Cas. 21.

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- (b) any claim made by or against the company (including claims by or against any of its branches in India);
  - (c) any application made under section 391 by or in respect of the company;
  - (d) any question of priorities or any other question whatsoever, whether the law or fact, which may relate to or arise in course of the winding up of the company; whether such suit or proceedings has been instituted or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.
- (3) Any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up of the company is proceeding may, notwithstanding any thing contained in any other law for the time being in force, be transferred to and disposed of by that Court.
- (4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court."

While, the provisions of section 537 of the Companies Act, run as under:—

- (1) Where any company is being wound up by or subject to the supervision of the Court—
  - (a) any attachment, distress or execution put in force, without leave of the Court against the estate or effects of the company, after the commencement of the winding up; or
  - (b) any sale held, without leave of the Court, of any of the properties or effect of the company after such commencement; shall be void.
- (2) Nothing in this section applies to any proceedings for the recovery of any tax or impost or any dues payable to the Government."

A joint perusal of the provisions of sections 446 and 537 of the Companies Act leaves no doubt that the provisions of section 446 are general in nature in their application to all the suits and other legal proceedings, including the execution proceedings, confirmation of sales, etc. etc.; commenced after the winding up order of a Company has been made or the Official Liquidator has been appointed by the Company Judge, besides to proceedings already pending at the date of such winding up order; whereas the provisions of section 537 are attracted even prior to the passing of the order of winding up of a company, but after the commencement of such proceedings and relating to a particular class of classes, i.e. attachment, distress or execution of a decree against the estate or effects of the company. It also makes the sale of the property without the leave of the Court to be void; whereas under section 446 of the Companies Act, there is no such provision which makes the judgment or decree or order passed in a proceeding or suit void *ab initio* even though the leave of the Company Judge has not been taken. Thus, in a way it can be well said that the operation of the provisions of both these sections operate in different fields, the breaking point being the commencement of the proceedings of winding up of a Company before the Company Judge and the passing of the winding up order in such proceedings. The Legislature had safe-guarded the interest of the creditors and share-holders of the Company regarding which winding up proceedings had commenced by providing under section 437 of the Act the prior leave of the Company Judge regarding the sale or distress against the property of the company under liquidation, but after the order of winding up has been passed, the provisions of section 446 will cover all such fields in the matter of obtaining sanction of the Company Judge before the filing of the suit or the commencement of the proceedings or during the pendency of such proceedings. Under these circumstances, it appears more logical that once the permission of the Company Judge during the pendency of the parent suit against the Company under liquidation is taken under the provision of section 446 of the Act, no fresh sanction for execution of the decree passed in such suit is required under section 537 of the Act.

(7) The Division Bench of the Andhra Pradesh High Court in *Godavari Sugar and Refineries's case* (supra) had taken the view that fresh leave for levying execution of the decree under the provisions of section 232 of the Companies Act, 1913 is necessary even though a leave was earlier obtained for continuing the parent suit under the provisions of section 171 of the Companies Act, 1913, which corresponds to the provisions of section 446 of the present Act, on

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the ground that the main purpose and object of the provisions of section 232 of the old Act seems to be that there should be one agency for the distribution of the assets of the Company and if individual creditor is permitted to execute his decree and realise its fruits, it might result in detriment to the other creditors. A similar view was taken by the Karnataka High Court in *K. S. Shivappa's case* (supra), besides holding that the provisions of sections 446 and 537 of the Companies Act operate in different fields, inasmuch as the provisions of section 446 are general provisions dealing with all suits and legal proceedings which are yet to commence and are pending on the date of the winding up order, whereas section 537 of the Companies Act deals with the limited class of cases pertaining to the attachment or sale of the properties of the Company without the leave of the Company Court and cover the interval between the commencing of winding up proceedings and the winding up order. It was further held that the sale of the property hit by the provisions of section 537 without sanction being *void ab initio*, no *ex post facto* sanction of the Company Court can validate the same.

(8) On the other hand, the Bombay High Court in *Dhanraj G. Bhatia's case* (supra) the Liquidator had held that once leave to prosecute the Company in liquidation has been obtained under section 446 of the Companies Act, no further leave is required to be obtained to execute the decree in suit. It was further held that the provisions of section 537 of the Companies Act necessarily would apply only to those cases where execution is sought to be levied after the order of winding up, of a decree obtained before the order of winding up is passed. Reliance in that case was placed on the findings of the Supreme Court in *Bansidhar Shankarlal's case* (supra). Though the Supreme Court had not considered the provisions of section 232 of the old Act, analogous to the provisions of section 537 of the new Act, but of the Supreme Court judgment to the following effect was quoted in *extenso*, which runs as under :—

“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 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

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of all those matters so that its affairs are administered equitably and in an orderly fashion.”

It was further held—

“If sanction of the Court under section 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.”

The perusal of the above referred judgment of the Supreme Court in *Bansidhar Shankarlal's case* (supra) as well as of the Bombay High Court in *Dhanraj G. Bhatia's case* (supra) clearly shows that in enacting the provisions of sections 446 and 537 of the Companies Act, the Legislature intended that the Company Judge before whom liquidation proceedings of the Company are pending should have control over the assets of the Company obviously in order to safeguard the interest of its share-holders, creditors, etc. No doubt, the Supreme Court in *Bansidhar Shankarlal's case* (supra) has not specifically considered the import of the provisions of section 537 of the Companies Act, which are analogous to the provisions of section 232 of the old Act, but while considering the provisions of section 171 of the old Act, it had held that the leave obtained from the Company Court during the pendency of the suit will enure during the execution proceedings also, as the latter are proceedings in continuation of the suit. Under these circumstances, there is no option but to conclude that the view of the Bombay High Court in *Dhanraj G. Bhatia's case* (supra) stands on a sound footing and in line with the intention of the Legislature in enacting the provisions of sections 446 and 537 of the new Companies Act.

(9) The Full Bench of the Lahore High Court in *Nazir Ahmad and others v. Peoples Bank of Northern India Ltd. and others* (5), had clinched the controversy whether the leave of the Company Judge obtained through an application filed within the period of limitation



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and the leave granted after the expiry of period of limitation would cure the illegality and the suit should not be dismissed for not taking leave of the Court before filing the same, even though the Company went into liquidation before the institution of such suit.

(10) Moreover, in the present case, the property of the Company sought to be sold,—*vide* impugned order dated 22nd August, 1987, of the Executing Court being under simple mortgage with the Bank decree-holder, the latter had the first charge upon this property *qua* the remaining creditors of the Bank but except the arrears of tax etc. due to the State. The Liquidator appointed by the Company Judge is taking active steps in these execution proceedings on behalf of the Company. Under these circumstances, it cannot be said that the leave of the Company Judge taken under section 446 of the Companies Act during the pendency of the parent suit will not enure during the execution proceedings of the decree passed in that suit.

(11) There is no force in the next contention of the learned counsel for the petitioners that the sale of the property in dispute without attachment was bad-in-law, as the above referred property sought to be sold being already under simple mortgage and hypothecated with the Bank against loan, there was no necessity to do so. The findings of the Lahore High Court in *Gauri v. Ude and others* (6), to the effect that attachment of the property is a necessary preliminary to sale as the object of such attachment is to give notice to the judgment-debtor not to alienate his property and to the public not to accept any alienation from him are not attracted to the facts of the present case in view of the factum that the property being already under simple mortgage or hypothecated with the Bank decree-holder, there was no necessity of fresh attachment of the property.

(12) The last contention of the learned counsel for the petitioner that the decree should be first executed against the mortgaged property and thereafter against the guarantor, is based on the assumed apprehension as there is nothing in the order of the Executing Court to the effect that the decree is being executed against the guarantors also. The Supreme Court in *Union Bank of India v. Manku Narayana* (7), had clearly laid down that where the decree is against

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(6) A.I.R. (29) 1942 Lah. 153.

(7) A.I.R. 1987 S.C. 1078.

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the principal debtor, guarantor and also against the mortgaged property, the decree-holder should proceed against the mortgaged property first and then against the guarantor. It is, however, remarked that the Executing Court shall keep this legal situation in view during the execution proceedings.

(13) For the foregoing reasons, Civil Revision 2905 of 1987 partly succeeds to the extent of setting aside the impugned order dated 22nd July, 1987 of the Executing Court regarding the appointment of the Receiver only. Both these revision petitions *qua* the order of the Execution Court dated 22nd August, 1987 are, however, dismissed, but the parties are left to bear their own costs in view of the peculiar circumstances of the case.

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R.N.R.