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OFFICIAL LIQUIDATOR

v.

DHARTI DHAN (P) LTD.

February 10, 1977

B [M. H. BEG, C.J. AND P. S. KAILASAM, J.]

Companies Act, 1956—*Sections* 442, 446—*Power to stay proceedings, whether discretionary—Meaning of the word "may" occurring in s.* 442.

Constitution of India, 1950—*Article* 136—*Appeal by special leave—Interference by Supreme Court—Scope of.*

C The Company Judge in the Bombay High Court directed on 3-1-1970 advertisement of the winding up petition filed by the Registrar of Companies in Maharashtra against the respondent company, one of the debtors of the Golcha company to the extent of Rs. 11,69,043/-. The respondent company appealed against the decision of the Company Judge and obtained an order dated 3rd February, 1970, from a Division Bench staying the operation of the order of advertisement of the winding up petition. As the respondent company defaulted in the payment of two of its instalments, as agreed to between the Golcha company and the respondent company by agreements dated 25th June 1966 and 17th January 1967, the Official Liquidator of the Golcha company made a claim D under s. 446(2) of the Companies Act for the recovery of a sum of Rs. 5 lac before the Company Judge of the High Court of Rajasthan. The respondent company after obtaining an order of stay of the proceedings against it in the Bombay High Court made another application under s. 442(b) of the Companies Act in the Rajasthan High Court for staying of proceeding against it under s 446 (2) made by the appellant on the ground that a compulsory winding up petition was pending against it in the Bombay High Court. The Company Judge rejected the application under s. 442(b) of the Act on 9-5-1974. But, the Division E Bench of the Rajasthan High Court allowed the appeal against the stay order and ordered a conditional stay of proceedings u/s. 446 (2) of the Act against the respondent company.

On appeal by special leave, the Court,

HELD : (1) The clear object of s. 442 is that claims in suits and proceedings pending elsewhere which have a bearing on the company's liabilities may be stayed only until the winding up order is made, because, after the winding F up order has been passed, s. 446 begins to operate so as to automatically transfer with certain exceptions, proceedings against the company being wound up to the court exercising the jurisdiction to wind it up. [968 B-C]

(2) Sections 442 and 446 of the Act have to be read together. It is only where the object of the two sections, when read together, is served by a stay order that the stay order could be justified. That object is to expeditiously decide and dispose of pending claims in the winding up proceedings. A stay is not to be granted if the object of applying for it appears to be merely to delay adjudica- G tion on a claim, and, thereby, to defeat justice. In other words, a stay order under s. 442 cannot be made mechanically or, as a matter of course, on showing fulfilment of some fixed and prescribed conditions. It can only be made judiciously upon an examination of the totality of the facts which vary from case to case, It follows that the order to be passed must be discretionary and the power to pass it must, therefore, be directory and not mandatory. [969 B-D]

(3) The word "may" used before stay u/s. 442 of the Companies Act really H means "may" and not "must" or "shall" in such a context. In fact, it is not quite accurate to say that the word "may" by itself acquires the meaning of "must" or "shall" sometimes. This word, however, always signifies a conferment of that power. That power may, having regard to the context in which it occurs and the requirements contemplated for its exercise have annexed to it

an obligation which compels its exercise in a certain way on facts and circumstances from which the obligation to exercise it in that way arises. In other words, it is the context which can attach the obligation to the power compelling its exercise in a certain way. The context both legal and factual may impart to the power that obligatoriness. [969 D-F]

(4) Thus, the question to be determined in such cases always is whether the power conferred by the use of the word "may" has annexed to it an obligation, that, on the fulfilment of certain legally prescribed conditions to be shown by evidence, a particular kind of order must be made. In such a case, it is always the purpose of the power which has to be examined in order to determine the scope of the discretion conferred upon the donee of the power. If the conditions in which the power is to be exercised in particular cases are also specified by a statute, then, on the fulfilment of those conditions, the power conferred becomes annexed with a duty to exercise it in that manner. [969 F—970 G-H]

Frederic Guilder Julius v. *The Right Rev. The Lord Bishop of Oxford* : *The Rev. Thomas Thelusson Carder* 5 A.C. 214, quoted with approval.

Bhaiya Punjalal Bhagwandin v. *Dave Bhagwatprasad Prabhuprasad* [1963] 3 SCR 312 : *State of Uttar Pradesh* v. *Jogendra Singh* [1964] 2 SCR 197; *Sardar Govindrao & Ors.* v. *State of M. P.* [1965] 1 SCR 678; *Shri A. C. Aggarwal, Sub-Divisional Magistrate, Delhi & Anr. v. Smt. Ram Kali etc.* [1968] 1 SCR 205; *Bashira* v. *State of U.P.* [1969] 1 SCR 32 and *Prakash Chand Agarwal & Ors.* v. *M/s. Hindustan Steel Ltd.* [1972] 1 SCR 405, applied.

(5) In s. 442 of the Companies Act the power to stay a proceeding is not annexed with the obligation to necessarily stay on proof of certain conditions although there are conditions prescribed for the making of the application for stay and the period during which the power to stay can be exercised. The question whether it should, on the facts of a particular case, be exercised or not will have to be examined and then decided by the court to which the application is made. If the applicant can make out, on facts, that the objects of the power conferred by ss. 442 and 446 of the Act can only be carried out by a stay order, it could perhaps be urged that an obligation to do so becomes annexed to it by proof of those facts. That would be the position in case the word "may" itself must be equated with "shall", but because judicial power has necessarily to be exercised justly, properly and reasonably to enforce the principle that rights created must be enforced. [971 B-D]

(6) In such cases, the only right which could be said to have been created is the right to get speedier adjudication from the court where the winding up proceeding is taking place. That is the object of the provisions. On facts disclosed, if it be found that the application has been made with the object of delaying decisions on claims made, the application should be rejected outright. [971 D-E]

(7) In the instant case the object of the respondent company appears to be to obtain an indefinite stay of proceedings against it in both High Courts. This being a correct inference, the stay application under s. 442(b) of the Companies Act could not be a *bona fide* one, but an abuse of the processes of the court. [966 F-G]

(8) It is true that the Supreme Court does not, as a rule interfere with interlocutory orders. The powers of interference under Art. 136 of the Constitution by the Supreme Court are not confined to those in respect of final orders, although finality of an order is a test which the Supreme Court generally applies in considering whether it should interfere under Art. 136 of the Constitution with it. [972 B-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 126 of 1976.

(Appeal by Special leave from the Judgment and Order dated the 11th October, 1974 of the Rajasthan High Court in D.B. Special Appeal No. 111 of 1974)

L. N. Sinha, Sol. Gen. and *Suresh Sethi,* for the appellant.

C. K. Garg, S. S. Khanduja and *C. L. Sahu,* for respondent.

A The Judgment of the Court was delivered by

BEG, C.J.—The Official Liquidator attached to the High Court of Rajasthan, in-charge of the liquidation of Golcha Properties (Pvt.) Ltd., (hereinafter referred to as 'Golcha Company'), has come up in appeal to this Court by special leave against a judgment and order of a Division Bench of that High Court, passed on a Special Appeal B from the judgment and order of a single Judge of that Court. On petitions presented on 4th July 1966 and 30th July 1966 by the creditors of Golcha Company, the High Court had made a compulsory winding up order on 10th May 1968; and, on that very date, the appellant was appointed liquidator of the Golcha company. The Dharti Dhan (Pvt.) Ltd., (hereinafter referred to as the 'Dhan Company'), with its registered office at Bombay, was said to be one of the C debtors of the Golcha Company to the extent of Rs. 11,69,043/- together with interest and commission which was said to be still due on 1st August 1969. Agreements dated 25.6.66 and 17.1.67 between the two companies regulated the method of repayment by annual instalments of Rs. 2,50,000/- according to the appellant. As the respondent, Dhan Company, is said to have defaulted in the payment of two of its instalments, a claim under section 446(2) of the Com- D panies Act (hereinafter referred to as 'the Act') for the recovery of a sum of Rs. 5,00,000/- was made before the Company Judge of the High Court of Rajasthan by the appellant.

On 20th September 1969, the Registrar of Companies in Maharashtra had to file a winding up petition against the respondent Dhan Company in the Bombay High Court. The Company Judge in E the Bombay High Court on 3rd January, 1970, directed advertisement of the winding up petition. The respondent Dhan Company appealed against the decision of the Company Judge and obtained an order, dated 3rd February, 1970, from a Division Bench staying the operation of the order for advertisement of the winding up petition. An appeal against that order is said be still pending so that a stay of those proceedings operates.

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After obtaining an order of stay of the proceedings against it in the Bombay High Court, the Dhan Company made an application under s. 442(b) of the Act in the Rajasthan High Court for stay of proceedings against it u/s. 446(2) on the ground that a compulsory winding up petition was pending against it in the Bombay High Court. The object of the respondent Dhan Company appeared to be to obtain G an indefinite stay of proceedings againsts it in both High Courts. If this is a correct inference, as it appears to us to be, the stay application under s. 442(b) of the Companies Act would not be a *bona fide* one. It looks more like an abuse of the process of the Court. It is, therefore, not surprising that the learned Company Judge of the Rajasthan High Court rejected the Dhan Company's application under s. 442(b) of the Act on 9th May 1974. It is, however, some- H what surprising that a Division Bench of that High Court should have allowed an appeal from the judgment of the Company Judge and ordered stay of proceedings under s. 446(2) of the Act against the respondent Dhan Company, even though this was subjected to the

condition that "the appellant Company produces the entire documentary evidence inclusive of account-books, vouchers, files and other documents and papers in its possession or power relating to the claim in question, as it may desire to produce or the Official Liquidator desires to summon or as the learned Company Judge may direct in his discretion and also produces a list of witnesses that the appellant company may desire to examine in its defence in respect of the claim in question along with an affidavit of what each witness is likely to depose". Thus, the Division Bench had, while making the stay order, attempted to safeguard the interests of the Golcha Company by making an order which, in the opinion of the Division Bench, would prevent valuable evidence from being lost due to either the death or the fading memory of a witness or other causes.

Learned Solicitor-General, appearing for the appellant, Official Liquidator of the Golcha Company, gave up the objection, taken in the special leave petition, to the maintainability of an appeal to a Division Bench from the order of the Company Judge in view of the provision of section 483 of the Act, which lays down :

> "483. Appeals from any order made or decision given in the matter of the winding up of a company by the Court shall lie to the same Court to which, in the same manner in which and subject to the same conditions under which, appeals lie from any order or decision of the Court in cases within its ordinary jurisdiction".

The Solicitor-General, however, submits that, on merits, the order of the learned Company Judge, dismissing the application of the Dhan Company for stay of proceedings under s. 442(b) of the Act, deserves to be restored as no grounds for interference with the proper exercise of his discretion by the learned Company Judge existed at all. We highly appreciate the brevity of this submission, after the Solicitor-General had, very rightly and properly, conceded that he could not urge that the Division Bench had not jurisdiction to hear the appeal before it. No effective answer could be given to the Solicitor-General's submission by the learned counsel for the respondent. We will, however, deal with the strenuous arguments advanced on behalf of the respondent even if it be to disclose how untenable they are.

Firstly, learned counsel for the respondent contends that the power to stay proceedings, contained in s. 442(b) of the Act, is bound to be exercised when certain conditions, said to be found in the case before us, are fulfilled. This submission rests on a misapprehension of the object of s. 442 which lays down :

> "442. At any time after the presentation of a winding up petition and before a winding up order has been made, the company, or any creditor or contributory, may—
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> (a) where any suit or proceeding against the company is pending in the Supreme Court or in any High Court, apply

A to the Court in which the suit or proceeding is pending for a stay of proceedings therein; and

(b) where any suit or proceeding is pending against the company in any other court, apply to the Court having jurisdiction to wind up the company, to restrain further proceedings in the suit or proceeding;

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and the Court to which application is so made may stay or restrain the proceedings accordingly on such terms as it thinks fit".

The clear object of the section is that claims in suits in and proceeding pending elsewhere which have a bearing on the company's C liabilities, may be stayed only until the winding up order is made, because, after the winding up order has been passed, section 446 begins to operate so as to automatically transfer with certain exceptions proceedings against the company being wound up to the Court exercising the jurisdiction to wind it up. Section 446 reads :

"446.(1) When a winding up order has been made or D 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.

E (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;

F (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;

G (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company;

whether such suit or proceeding 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 H 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 anything 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".

Sections 442 and 446 of the Act have to be read together. It is only where the object of the two sections, when read together, is served by a stay order that the stay order could be justified. That object is to expeditiously decide and dispose of pending claims in the course of winding up proceedings. A stay is not to be granted if the object of applying for it appears to be, as it does in the case before us, merely to delay adjudication on a claim, and, thereby to defeat justice. In other words, a stay order, under section 442, cannot be made mechanically, or, as a matter of course, on showing fulfilment of some fixed and prescribed conditions. It can only be made judiciously upon an examination of the totality of the facts which very from case to case. It follows that the order to be passed must be discretionary and the power to pass it must, therefore, be directory and not mandatory. In other words, the word "may", used before "stay" in section 442 of the Act really means "may" and not "must" or "shall" in such a context. In fact, it is not quite accurate to say that the word "may", by itself, acquires the meaning of "must" or "shall" sometimes. This word, however, always signifies a conferment of power. That power may, having regard to the context in which it occurs, and the requirements contemplated for its exercise, have annexed to it an obligation which compels its exercise in a certain way on facts and circumstances from which the obligation to exercise it in that way arises. In other words, it is the context which can attach the obligation to the power compelling its exercise in a certain way. The context, both legal and factual, may impart to the power that obligatoriness.

Thus, the question to be determined in such cases always is, whether the power conferred by the use of the word "may" has, annexed to it, an obligation that, on the fulfilment of cretain legally prescribed conditions, to be shown by evidence, a particular kind of order must be made. If the statute leaves no room for discretion the power has to be exercised in the manner indicated by the other legal provisions which provide the legal context. Even then the facts must establish that the legal conditions are fulfilled. A power is exercised even when the Court rejects an application to exercise it in the particular way in which the applicant desires it to be exercised. Where the power is wide enough to cover both an acceptance and a refusal of an application for its exercise, depending upon facts, it is directory or discretionary. It is not the conferment of a power which the word "may" indicates that annexes any obligation to its exercise but the legal and factual context of it. This, as we

A understand it, was the principal laid down in the case cited before us : *Frederic Guilder Julius* v. *The Right Rev. The Lord Bishop of Oxford; The Rev. Thomas Thellusson Carter.*(1)

Dr. Julius, in the case mentioned above, had made an application to the Bishop of Oxford against the Rector of a parish, asking the Bishop to issue a commission under the Church Discipline Act to B enquire against certain unauthorised deviations from the ritual in a Church by the Rector. The relevant statute merely conferred a power by laying down that "it shall be lawful" to issue a commission. The Courts of Queens Bench and of Appeal in England had differed on the question whether a *mandamus* from the Court could go to the Bishop commanding him to issue a commission for the purpose of making the enquiry. The House of Lords held that the power to C issue the commission was not coupled with a duty to exercise it in every case although there may be cases where duties towards members of the public to exercise a power may also be coupled with a duty to exercise it in a particular way on fulfilment of certain specified conditions. The statute considered there had not specified those conditions. Hence, it was a bare power to issue or not to issue the D commission. Lord Blackburn said : (at p. 241) :

> "I do not think the words 'it shall be lawful' are in themselves ambiguous at all. They are apt words to express that a power is given ; and as, *prima facie,* the donee of a power may either exercise it or leave it unused, it is not inaccurate to say that, *prima facie,* they are equivalent E to saying that the donee may do it; but if the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power, to exercise it for the benefit of those who have that right, when required on their behalf. Where there is such a duty, it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee F must exercise it. It by no means follows that because there is a duty cast on the donee of a power to exercise it, that *mandamus* lies to enforce it : that depends on the nature of the duty and the position of the donee".

The principle laid down above has been followed consistently by this Court whenever it has been contended that the word "may" G carries with it the obligation to exercise a power in a particular manner or direction. In such a case, it is always the purpose of the power which has to be examined in order to determine the scope of the discretion conferred upon the donee of the power. If the conditions in which the power is to be exercised in particular cases are also specified by a statute then, on the fulfilment of those conditions, the power conferred becomes annexed with a duty to H exercise it in that manner. This is the principle we deduce from the cases of this Court cited before us : *Bhaiya Punjalal Bhagwandin* v.

(1) 5 A.C. 214.

Dave Bhagwatprasad Prabhuprasad,(1) *State of Uttar Pradesh* v. *Jogendra Singh,*(2) *Sardar Govindrao & Ors.* v. *State of M.P.,*(3) *Shri A. C. Aggarwal, Sub-Divisional Magistrate, Delhi & Anr.* v. *Smt. Ram Kali etc.,*(4) *Bashira* v. *State of U.P.,*(5) and *Prakash Chand Agarwal & Ors.* v. *M/s. Hindustan Steel Ltd.*(6)

In the statutory provision under consideration now before us the power to stay a proceeding is not annexed with the obligation to necessarily stay on proof of certain conditions although there are conditions prescribed for the making of the application for stay and the period during which the power to stay can be exercised. The question whether it should, on the facts of a praticular case, be exercised or not will have to be examined and then decided by the Court to which the application is made. If the applicant can make out, on facts, that the objects of the power conferred by ss. 442 and 446 of the Act, can only be carried out by a stay order, it could perhaps be urged that an obligation to do so has become annexed to it by proof of those facts. That would be the position not because the word "may" itself must be equated with "shall" but because judicial power has necessarily to be exercised justly, properly, and reasonably to enforce the principle that rights created must be enforced.

In the case before us, the only right which could be said to have been created is the right to get speedier adjudication from the Court where the winding up proceeding is taking place. That is the object of the provisions. On facts disclosed in this case, we find that the application seems to have been made with the object of delaying decisions on claims made. In such a case, there could be no doubt that the application should be rejected outright as the learned Company Judge did.

Secondly, an attempt was made to urge that the power to grant or not to grant or to grant a stay upon certain conditions, assuming the power to be discretionary, is to be exercised by the Courts in which that discretion is vested, this Court should not interfere with the exercise of discretion by the Division Bench to which an appeal from the order of the Company Judge lay. The effective answer to this contention is that, where the learned Company Judge had himself exercised his discretion on a correct appreciation of the object of the provisions of ss. 442 and 446 of the Act, even though he did not state the object or refer to all the facts, the Appellate Court should not have interfered by granting a conditional stay without giving sufficient reasons to over-ride the discretion of the learned Company Judge to refuse stay. We think that a question of general

(1) [1963] 3 S.C.R. 312.
(2) [1964] 2 S.C.R. 197.
(3) [1965] 1 S.C.R. 678.
(4) [1968] 1 S.C.R. 205.
(5) [1969] 1 S.C.R. 32.
(6) [1972] 1 S.C.R. 405.

A principle arises in this case which has to be clarified so that an interference by this Court under Article 136 of the Constitution, in order to vindicate a correct principle and to meet the ends of justice, is called for.

Thirdly, learned counsel for the respondent submitted that the order under appeal before us is not final so that we need not interfere B under Art. 136 of the Constitution for this reason. It is true that, this Court does not, as a rule, interfere with interlocutory orders. It is not necessary for us to embark on this occasion on a discussion of the meaning of a "final" order. That is certainly a question fraught with difficulties. It is sufficient for us to observe that our powers of interference under Art. 136 of the Constitution are not confined to those in respect of final orders, although finality of an C order is a test which this Court generally applies in considering whether it should interfere under Art. 136 of the Constitution with it. We think that we have indicated sufficiently why, despite the fact that an order staying proceedings under s. 442(b) of the Act may not, strictly speaking, be final, yet, a question of general principle of wide application, as to the circumstances in which an apparently discretionary power may become annexed with a duty to exercise it D in a particular way, having arisen here, we consider this to be a fit case for interference under Article 136 of the Constitution.

Consequently, we allow this appeal and set aside the judgment and order of the Division Bench and restore that of the learned Company Judge. The parties will bear their own costs.

S.R. *Appeal allowed.*