

Appellant Vs. Respondent

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Court : Kolkata

Decided On : Nov-21-2012

Judge : Sanjib Banerjee

Appellant : Appellant

Respondent : Respondent

Judgement :

IN THE HIGH COURT AT CALCUTTA ORIGINAL JURISDICTION
M/S.M/S.M/S.M/S.M/S.M/S.M/S.M/S.IN THE MATTER OF: CP No.683 of 2011
SETH CHEMCAL WORKS PVT.AND IN THE MATTER OF: SHIKHA SETH & CP
No.684 of 2011 SETH CHEMCAL WORKS PVT.AND IN THE MATTER OF:
DIKSHA SETH & CP No.685 of 2011 SETH CHEMCAL WORKS PVT.AND IN
THE MATTER OF: MRS.ISHA SETH & CP No.686 of 2011 SETH CHEMCAL
WORKS PVT.AND IN THE MATTER OF: SUMAN SETH & CP No.687 of 2011
SETH CHEMCAL WORKS PVT.AND IN THE MATTER OF: MRS.SAVITA SETH
& CP No.688 of 2011 SETH CHEMCAL WORKS PVT.AND IN THE MATTER OF:
SAMISHA SETH & CP No.689 of 2011 SETH CHEMCAL WORKS PVT.AND IN
THE MATTER OF: NIDHI SETH & CP No.690 of 2011 SETH CHEMCAL WORKS
PVT.AND IN THE MATTER OF: RAKESH SETH &
LTD.LTD.LTD.LTD.LTD.LTD.LTD.LTD.CP No.691 of 2011 M/S.SETH CHEMCAL
WORKS PVT.AND IN THE MATTER OF: RAKESH SETH (HUF) & CP No.692 of
2011 M/S.SETH CHEMCAL WORKS PVT.AND IN THE MATTER OF: RAASHI
SETH & CP No.695 of 2011 M/S.SETH CHEMCAL WORKS PVT.AND IN THE

MATTER OF: BRIJ MOHAN SETH (HUF) &].CP No.696 of 2011 M/S.SETH CHEMCAL WORKS PVT.AND IN THE MATTER OF: SMT.

SAVITA SETH & ORS.& CP No.697 of 2011 M/S.SETH CHEMCAL WORKS PVT.AND IN THE MATTER OF: MRS.GEETA SETH LTD.LTD.LTD.LTD.LTD.BEFORE: The Hon'ble JUSTICE SANJIB BANERJEE
Date : November 21, 2012.

Appearance: Ms.Masnju Agarwal, Adv...for the petitioneRs.Mr.K.Bhattacharya, Adv...for the company.

The Court : These several claims by the petitioning creditors are by the heirs of one Brijmohan Seth, deceased.

Brijmohan Seth, it is admitted by the parties, was one of the founders of the Seth family business which was ultimately continued in the name and style of Seth Chemical Works PVT.LTD.Brijmohan died sometime in the year 2007.

It appears from the submission of the parties that Brijmohan substantially controlled the affairs of the company till his death and immediately after his death, his sons Rakesh and Suman came to control at least the Calcutta branch of the company.

Rakesh and Suman appear to have not been ousted from the family business and several creditors winding-up petitions have been filed on account of monies lent and advanced by the branch of the family once headed by Brijmohan to the company.

Typically, these petitioning creditors rely on the confirmation of accounts signed on behalf of the company for the years 2007-08 and 2008-09.

The petitioners do not attempt to say how the money was put into the company and suggest that it is irrelevant to enquire into such aspect since it is evident from the companys admission as contained in the documents relating to the two financial years that specific amounts remain due and owing from the company to the several petitioning credit ORS.The substance of the defence is that the

company was family owned, run and managed and members of the family put in monies therein; that it was discovered sometime late in 2009 that Brijmohans sons Rakesh and Suman had withdrawn monies from the companys bank accounts and had failed to justify such withdrawals; that it would be inequitable in such circumstances for entities or persons belonging to Brijmohans branch to be paid any money without Rakesh and Suman accounting for the monies withdrawn by them from the company.

The petitioning creditors suggest that though the companys affidavits rely on the minutes of a meeting of the board of directors of the company held on October 28, 2009 at which only two of the directors were present, the minutes do not record the extent of alleged defalcation or alleged wrongful withdrawal of money by the sons of Brijmohan.

In any event, the petitioners say that the petitioners are distinct and separate entities and though one or more of them may be HUFs headed by Rakesh or Suman, the children of Rakesh or Suman or their wives or mother should not be prejudiced on account of the companys perception that Rakesh or Suman had misappropriated companys funds.

The petitioners point out that the company has not taken any steps either against Rakesh or against Suman.

The petitioners also refer to an order made on a similar claim on July 20, 2012 by which the claim in several other creditors petitions stood relegated to a civil suit upon the company being directed to furnish substantial security.

The companys defence cannot be altogether brushed aside without affording it an opportunity to establish the same.

The documents of admission that the petitioning creditors rely on pre-date the board meeting of October 28, 2009 and the only documents executed by the company in respect of the loan transactions are the TDS certificates for the period upto March 31, 2009 furnished by the company to the petitioning creditors sometime in the year 2010.

The mere furnishing of the TDS certificates for a concluded financial year would not carry the petitioners claim herein any further.

In the minutes of the board meeting of the company held on October 28, 2009 it was recorded that since Rakesh and Suman had not accounted for monies withdrawn by them, their accounts would be debited to such extent and the money lying to the credit of Brijmohan Seth would also be appropriately adjusted.

Though the company has not indicated the extent of the alleged misappropriation or defalcation by Rakesh and Suman, there are documents which have not been disclosed in a supplementary affidavit which reveal substantial withdrawals having been made by the two.

As to these petitioning creditors being distinct and separate from Rakesh and Suman, such argument is difficult to accept in the Indian context given the manner in which family companies are run in this country.

It is not unusual for the head of the family running a family business or for the adult male members of such family managing the business to be in control of the bank accounts and income tax files of all members of the family to arrange the affairs so that the incidence of taxation is the least and the maximum benefit is derived by the business.

It would, then, be inequitable to single out any one person and treat such person as distinct from the immediate relatives or the rest of the family for an independent claim to be entertained in this jurisdiction on account of money shown to have been loaned by such person to the company.

The petitioners have not made out a case of the minutes of the board meeting of October 28, 2009 having been fabricated or ante-dated.

It is, therefore, evident that the company, or those in control thereof in 2009, had perceived that Rakesh and Suman had misappropriated company funds.

The perception may be wrong, or even malafide, but it cannot be said on affidavit evidence that the claim is bogus.

Also, the mere fact that A has a claim against B and takes not steps to enforce it will not preclude A to resist Bs claim against A on such ground or set off Bs claim against As.

The final aspect canvassed by the petitioner is equally of no effect since the previous order of July 20, 2012 was passed, as the fiRs.sentence of the order would indicate, upon the agreement and at the invitation of the parties.

The company has an arguable defence and though it may still fail in a regularly constituted action, it cannot be said on affidavit evidence that the defence is altogether moonshine or utterly devoid of merit.

Once it is perceived that the defence should be permitted to be carried to a protracted action, the company Judge in this jurisdiction has no authority to direct security to be furnished.

Accordingly, these several creditors winding-up petitions, C.P.No.683 of 2011, C.P.No.684 of 2011, C.P.No.685 of 2011, C.P.No.686 of 2011, C.P.No.687 of 2011, C.P.No.688 of 2011, C.P.No.689 of 2011, C.P.No.690 of 2011, C.P.No.691 of 2011, C.P.No.692 of 2011, C.P.No.695 of 2011, C.P.No.696 of 2011 and C.P.No.697 of 2011 are permanently stayed with liberty to the petitioning creditor in each case to carry the claim by way of regular civil action.

There will be no order as to costs.

Urgent certified photocopies of this order, if applied for, be given to the parties subject to compliance with all requisite formalities.

(SANJIB BANERJEE, J.) A/s.

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