

**IN THE HIGH COURT AT CALCUTTA**  
Ordinary Original Civil Jurisdiction  
Original Side

Present:

**The Hon'ble Justice Shekhar B. Saraf**

***I.A. G.A. NO. 7 & 8 of 2021***

*in*

***C.S. NO. 77 of 2013***

***CONCAST STEEL & POWER LIMITED***

***Versus***

***SARAT CHATTERJEE AND CO. (VSP) PVT. LTD. & ORS.***

***And***

***I.A. G.A. NO. 8 of 2022***

*in*

***C.S. NO. 77 of 2013***

***CONCAST STEEL & POWER LIMITED***

***Versus***

***SARAT CHATTERJEE AND CO. (VSP) PVT. LTD. & ORS.***

For the Plaintiff/Petitioner

: Mr. Utpal Bose, Senior Advocate  
Mr. Rupak Ghosh, Advocate  
Mr. Chayan Gupta, Advocate  
Mr. Rajesh Upadhyay, Advocate

For the Defendant/Respondent No. 1

: Mr. Reetobroto Mitra, Advocate  
Mr. Pradip Kr. Sarawagi, Advocate

For the Defendant/Respondent No. 2

: Mr. S. N. Mitra, Senior Advocate  
Mr. D. N. Sharma, Advocate  
Ms. Sananda Mukhopadhyay, Advocate  
Mr. S. R. Saha, Advocate

**Heard on** : November 22, 2021, January 18, 2022, January 27, 2022, February 15,

2022, February 18, 2022, February 23, 2022, February 24, 2022 and  
February 28, 2022

**Judgment on : March 8, 2022**

**Shekhar B. Saraf, J.:**

1. In my view, this *lis* is a classic example of making a mountain out of a molehill. It revolves around the principles of abatement in case of a plaintiff having been declared insolvent in the present case by the National Company Law Tribunal. Several arguments have been raised in the present matter and the Court has been educated on several points of law albeit the same were not at all necessary for deciding the present litigation. However, since a lot of time has been consumed in hearing this matter at length, I shall endeavour to deal with the same in some detail.
2. The applicant/defendant no. 2 has filed G.A. No. 7 of 2021 in C.S. No. 77 of 2013 seeking dismissal of the instant suit on the grounds of abatement and further direction upon the Special Officer appointed by the court to restrain him from carrying out the valuation and sale of the concerned goods (10,000 Metric Tons of “Metallurgical Coke” hereinafter referred to as “Met Coke”). G.A. No. 8 of 2021 in C.S. No. 77 of 2013 has been filed by the plaintiff to seek necessary amendment of the plaint to bring the liquidator of the plaintiff company on record to represent it in the instant suit. The issues involved in both the applications emanate

from the same set of facts and events, hence, both the applications were heard together by the Court. The facts of the matter are delineated below:

- a. The present suit was originally instituted by one Dankuni Steels Ltd. In the said suit, the then plaintiff had sought to claim relief, inter alia, in respect of 11,074.09 Metric Tonnes of Met coke lying at Visakhapatnam (hereinafter referred to as “the goods”). By an order dated November 26, 2015 passed by this Hon'ble Court in C.P. No. 1054 of 2014 connected with C. A. No. 555 of 2014, the said Dankuni Steels Limited being the original plaintiff was amalgamated with the present plaintiff company, who was the original defendant no. 4 in the said suit. Subsequently, the original defendant no. 4 was transposed in place of the original plaintiff. In the said suit filed by Dankuni Steels Ltd and in the appeals arising therefrom diverse orders have been passed from time to time both by the Interlocutory Court as well as by the Division Benches of this Hon'ble Court.
- b. The Court passed an interlocutory order dated July 16, 2014 in G.A. No. 898 of 2013 and held that the defendant No.2/applicant has a claim on the goods weighing about 10,000 MTs but the original plaintiff being the said Dankuni Steels Ltd could take delivery of the 11,074.09 MTs of the goods in question from the defendant No.1 only upon securing the value of the said goods by a bank guarantee for a sum of INR 21 Crores in favour of and to the satisfaction of the Registrar, Original Side. Further liberty was

given to the applicant/defendant No.2 to apply for increasing the value of the Bank Guarantee if there was any delay in disposal of the suit.

- c. In an appeal being APO No. 293 of 2014 preferred by the original plaintiff being the said Dankuni Steels Ltd from the said order, a Division Bench of this Hon'ble Court by its order dated 29th July, 2015 held that in view of the vagaries of the market it would be prudent to sell the 10,000 MTs of Met Coke to secure the claim of the defendant No.2/applicant and therefore appointed a Special Officer to take steps to sell the 10,000 MTs of coke. The remuneration of the Special Officer was to be shared equally by both the plaintiff and the defendant no. 2/applicant.
- d. On the basis of the report filed by the Special Officer, a Division Bench of this Hon'ble High Court on May 15, 2017, confirmed the sale of 10,000 MTs of the goods in favour of one Tycoon Suppliers Ltd. although it was pointed out that the price offered by the said Tycoon Suppliers was much less than the reserve price as it was inclusive of all taxes, custom duties, VAT etc.
- e. Being aggrieved by the order dated May 15, 2017 the defendant No.2/applicant preferred a Special Leave Petition wherein the Hon'ble Supreme Court initially on May 25, 2017 was pleased to stay the order dated May 15, 2017 and thereafter by its order dated December 14, 2017 was pleased to set aside the order dated May 15, 2017 and directed the Special Officer to get the valuation done afresh and on that basis to issue a fresh public notice inviting bids

for the goods in question with clear stipulation that the reserve price is exclusive of taxes and to ascertain the exact amount of charges and taxes which is to be indicated in the public notice for the benefit of the intending bidders making their bids.

- f. Thereafter, the plaintiff has gone into liquidation by an order dated September 26, 2018 passed by the National Company Law Tribunal, Kolkata Bench.
- g. In October, 2018, the defendant no. 1 had made an application being G. A. No. 3073 of 2018 in the Appeal being A.P.O. No. 293 of 2014 claiming diverse reliefs in connection with the concerned goods. Such reliefs were sought for by the defendant no. 1 though the defendant no. 1 itself had already filed a suit in this Hon'ble Court being C. S. No. 293 of 2015 against the plaintiff. When the said application came up for hearing on January 21, 2020 before another Division Bench of this Hon'ble Court, it was pointed out on behalf of the applicant that the plaintiff had already gone into liquidation and as such the Company in liquidation can be represented only by the Liquidator and the liquidator was required to be first brought on record and requisite amendment of the pleadings was also necessary.
- h. In the meeting held by the Special Officer on October 19, 2020 and January 13, 2021 the learned Advocate for the plaintiff company in liquidation informed the Special Officer that his client has gone into liquidation and therefore the present plaintiff company will not be able to share any costs since they do not have the funds to do so.

The liquidator was present and took part in the said meeting and supported the submission made by the learned Advocate appearing for the plaintiff company in liquidation.

- i. Thereafter, in the meeting held on September 17, 2021 the Advocate appearing on behalf of the Company in Liquidation submitted that the Special Officer does not have any jurisdiction or power to decide on the issue whether he can proceed with the sale process in view of the fact that the plaintiff company has been ordered to go into liquidation. In the above meeting the Special Officer had decided to proceed with the sale and for such purpose had fixed a meeting on October 5, 2021 on virtual platform for discussing the sale notice and the terms and conditions for sale.
  - j. On October 5, 2021, the representative of the defendant no. 2 had pointed out to the Special Officer that no terms and conditions of sale were forwarded to it and therefore, the meeting cannot be proceeded with. On such submission being made, the Special Officer had adjourned the meeting till October 25, 2021.
3. Mr. Surojit Nath Mitra, Senior Advocate appearing on behalf of the applicant/defendant no. 2 in G.A. 7 of 2021 has placed Order 22 Rule 8, Clauses 1 and 2 before this Court in great detail and relied on several judgments to buttress his argument that in the present case the liquidator has declined, refused and/or neglected to pursue the litigation, and accordingly, the suit has abated in light of the same. He has further submitted that the cost incurred by the defendant should be

paid by the plaintiff for opposing the suit. He has further submitted that as the suit has abated, the sale of the ten thousand metric tons of Met Coke should be stayed and his client should be given possession of the same. The judgments relied upon by him are as follows:

- a) ***Lachu -v- Mohan Lal and Ors*** reported in ***AIR 1936 Lah 83***;
  - b) ***Velji Sivji and another -v- Mathuradas Haridas*** reported in ***AIR 1948 Bom 47***;
  - c) ***Ishar -v- Mst. Soma Devi*** reported in ***AIR 1959 P&H 295***;
  - d) ***The Swadeshi Cotton Mills Co. Ltd. -v- The Government of U.P. and Ors.*** reported in ***(1975) 4 SCC 378***;
  - e) ***State of West Bengal -v- National Builders*** reported in ***(1994) 1 SCC 235***;
  - f) ***Perumon Bhagvathy Devaswom -v- Bhargavi Amma*** reported in ***(2008) 8 SCC 321***;
  - g) ***Entertainment Network Limited -v- Super Cassette Industries Limited*** reported in ***(2008) 13 SCC 30***; and
  - h) ***Balwant Singh -v- Jagdish Singh and Ors.*** reported in ***(2010) 8 SCC 685***
4. Mr. Bose, Senior Advocate appearing on behalf of the liquidator has submitted that the arguments made by the applicant are farcical in nature and premature, to say the least. He has submitted that the liquidator was always acting in the suit as would be evident from the appearance of the liquidator and/or his representatives before the special officer appointed by this Court with regard to the sale of ten

thousand metric tons of Met Coke and also appeared in the Court before the Single Bench and also the Division Bench in this matter. He has, however, submitted that in spite of having assured the Court that an application would be made for addition of the liquidator the same has been made belatedly. He has submitted that in the present case the suit has not abated as there was no direction from the Court and no notice was given to the liquidator with regard to the abatement of the same. He has further submitted that the Court has not directed for any security and, therefore, the question of any security does not arise in the present case. Mr. Bose has relied on ***Khunni Lal -v- Rameshwar and another*** reported in ***AIR 1922 All 361*** and ***Velji Sivji and another (supra)*** to support his argument.

5. At the very outset, I would like to state that the present *lis* is required to be decided primarily on “first principles” and there is no requirement whatsoever to rely on judgments/precedents to support the view that is being taken by me. Since the matter relates to abatement of a suit wherein a corporate entity is the plaintiff, it becomes necessary to state the provision that controls such abatement. Accordingly, Order 22 Rule 8 is delineated below:

**“8. When plaintiff's insolvency bars suit.—**(1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

(2) Procedure where assignee fails to continue suit, or give security.— Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may



apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate."

6. Upon a plain reading of Order 22 Rule 8 it is patently clear that in case of a company that goes into liquidation, the suit **shall not** abate unless the liquidator declines to pursue the said suit. The other conditions prescribed in Rule 1 with regard to security for costs and the procedure enumerated in Rule 8 Clause 2 are in my view not relevant for the present case. What is to be noted in the present case is that the liquidator was appearing before the Receiver with regard to the sale of ten thousand metric tons of Met Coke and had also appeared before the Court, that is, the Single Bench & Division Bench of Hon'ble Calcutta High Court, with regard to the sale of the coke. Undoubtedly, the liquidator even after having assured the High Court that steps would be taken for impleading himself into the litigation failed to do so. Such failure may amount to a lackadaisical approach of the liquidator but cannot under any circumstances be seen as a positive assertion to decline to continue the suit. Impleading the liquidator is a mere technical requirement and nothing more. One must keep in mind that a company that goes into liquidation may at any point of time be able to come out of liquidation and the abatement that takes place would be apropos the liquidator only and not the company. In fact, the next Rule, that is, Rule 9 under Order 22, clearly allows the liquidator and/or the company to apply for setting aside of the abatement or the dismissal of the suit under conditions provided in the said rule. Upon examining the

judgments cited by Mr. Surojit Nath Mitra, I am of the view, with due deference and respect to him, that these judgments are not at all applicable to the present case (apart from one that is cited going forward). One may rely on ***L.C. Quinn -v- Leathem [Coram: Earl of Halsbury L.C., Lord Macnaghten, Lord Shand, Lord Brampton, Lord Robertson, and Lord Lindley.]*** reported in **1901 AC 495** to buttress the point raised by me above. Relevant paragraph of the judgement is presented below:

“.....that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. ....”

In light of the same, I do not intend to distinguish each one of them separately. Suffice it to say, that these judgments have not assisted this Court in the present lis as they are either distinguishable on law or on facts or on both.

7. With regard to the interpretation of Order 22 Rule 8 one may look into paragraph 3 of ***Velji Shivji (supra)*** wherein Justice Chagla has exquisitely described the procedure for abatement in the case of a company that goes into insolvency. The relevant extract is provided below:

“3. We should like to point out as a matter of procedure and in order to guide Judges sitting on the Original Side that, when an order is made under O. 22, R. 8, sub-cl. (1), it is very desirable — indeed it is very necessary — that such an order should not be made without hearing the Official Assignee. If the attention of the learned Judge is drawn to the fact

that the plaintiff had become insolvent, before any order is made, notice should be given to the Official Assignee, and after hearing the Official Assignee, or if after notice is given to the Official Assignee he does not choose to be present, then the proper order should be made under O. 22, R. 8, sub-cl. (1). .....”

8. One may also rely on the case of ***Khunni Lal -v- Rameshwar and Another*** reported in ***AIR 1922 All 361*** wherein it was held by the Hon’ble Allahabad High Court that till an order is obtained under Order XXII, Rule 8, of the Code of Civil Procedure the proceedings cannot abate and must be deemed to continue. Relevant paragraph of the judgement is delineated below:

“There is no limitation provided for the Official Assignee to appear and apply for substitution or for the debtor to appear and apply for the restoration of his name on the record after the adjudication is annulled. Till an order, is obtained under order XXII, rule 8, of the Code of Civil Procedure the proceedings cannot abate and must be deemed to continue. The lower appellate court was therefore right in dismissing the preliminary objection. The learned counsel for the defendant appellant admits that he cannot support the appeal on the merits. The appeal fails and is dismissed with costs.”

9. As discussed above, in the present case there has been no order of the Court seeking an explanation from the liquidator or any order of Court seeking a security for the costs incurred by the defendants. Furthermore, it is very apparent that the liquidator has been acting in the suit with reference to the movable suit property in question and has taken all necessary steps therein. Under these circumstances, I am unable to fathom as to how the Court can come to a conclusion that the liquidator has declined to continue the suit. On the contrary, it is crystal

clear that the liquidator is fighting tooth and nail with regard to this litigation and a mere delay in making an application for substituting his name in the records of the suit would not in any manner lead to an abatement of the suit. In fact, in my view the liquidator has never stopped acting in the suit but has continued diligently to act in the suit for the protection of the goods in the suit which the plaintiff claims to have title on. The very fact of the presence of the liquidator in the meetings held by the Receiver indicate a constant endeavour to protect the interest of the plaintiff in this case.

10. Hence, G.A. No. 7 of 2021 in C.S. No. 77 of 2013 seeking abatement of the suit is **dismissed** and G.A. No. 8 of 2021 in C.S. No. 77 of 2013 seeking amendment of the plaint to bring the liquidator on record is **allowed**. Apropos the dismissal of G.A. 7 of 2021, the Receiver is directed to proceed with the sale of the ten thousand metric tons of coke in accordance with the guidelines and directions provided for in the order dated December 14, 2017 passed by the Hon'ble Supreme Court of India.
11. With the above directions these applications are disposed of.
12. I would like to thank Counsel appearing for both the parties for having assiduously assisted me in this matter.

13. Urgent Photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

**(Shekhar B. Saraf, J.)**