

OC-15

**IN THE HIGH COURT AT CALCUTTA
COMMERCIAL APPELLATE DIVISION
ORIGINAL SIDE**

**APOT/30/2025
WITH EC/278/2022
CS/258/1992
IA-No.GA-COM/1/2025**

GRASIM INDUSTRIES LIMITED

-VERSUS-

PREM KUMAR CHOWDHURY AND ORS.

BEFORE:

The Hon'ble JUSTICE DEBANGSU BASAK

-AND-

The Hon'ble JUSTICE MD. SHABBAR RASHIDI

For the Appellant : *Mr. Pratik Ghosh, Adv.
Mr. Avishek Roychowdhury, Adv.*

For the Respondent No.1 : *Mr. Jishnu Chowdhury, Sr. Adv.
Mr. Aniruddha Agarwalla, Adv.
Ms. Ujjaini Chatterjee, Adv.
Ms. Priyanka Garain, Adv.*

For CITI Bank : *Ms. Ankita Singh, Adv.*

HEARD ON : 04.12.2025

DELIVERED ON : 04.12.2025

DEBANGSU BASAK, J.:-

1. Appeal is at the behest of the defendant no.2 in CS 258 of 1992 and directed against IA No.GA-COM/2/2024 passed in EC/278/2022.

2. Learned advocate appearing for the appellant submits that, the appellant suffered the decree dated July 30, 2007 passed by the suit Court. He draws the attention of the Court to the fact that, the defendant no.1 in the suit suffered an order of winding up dated May 4, 1998. He refers to Section 446 of the Companies Act, 1956 and submits that, no leave under such Section was obtained either by the Official Liquidator or any parties to the suit for the suit to proceed till the passing of the decree. The decree was passed on July 30, 2007 subsequent to the order of winding up without leave under Section 446 of the Act of 1956 being obtained.
3. Relying upon **(2005) 10 SCC 331 (State of J & K vs. UCO Bank & Ors.)** learned advocate appearing for the appellant submits that, the decree cannot be executed till such time requisite leave under Section 446 of the Act of 1956 was obtained. In this context, he draws the attention of the Court to **AIR 1962 Cal 192 (Roopnarain Ramchandra Pvt. Ltd. vs. Brahmapootra Tea Co. (India) Ltd. & Anr.)** which was considered by **State of J & K. (supra)**.
4. Learned senior advocate appearing for the decree-holder submits that, the suit was filed on May 30, 1992. The order of winding up was passed subsequently on May 4, 1998. The decree was passed on July 30, 2007.
5. Learned senior advocate appearing for the appellant relies upon **Roopnarain Ramchandra Pvt. Ltd. (supra)** and submits that, the Court passing the decree possessed requisite jurisdiction to pass such decree.

Simplicitor on the ground that no leave under Section 446 of the Act of 1956 being obtained, the decree cannot be classified as nullity. At the highest, it is voidable and that too at the instance of the Official Liquidator of the defendant no.1.

6. In this regard he also relies upon **ILR (1977) 1 Del 337 (Official Liquidator of M/s. United India General Finance Pvt. Ltd. (in liqn) vs. Shri Satya Dev Awasthi & Ors.)**. He points out that **Roopnarain Ramchandra Pvt. Ltd. (supra)** along with Madras and Patna decisions were taken note of by the Delhi High Court while holding about the scope and effect of leave under Section 446 of the Companies Act, 1956 not being obtained.
7. Relying upon **(2001) 6 SCC 534 (Dhurandhar Prasad Singh vs. Jai Prakash University & Ors)**, learned senior advocate appearing for the appellant submits that, there is a distinction between a void and a voidable decree. He also contends that, there are limitations to the exercise of powers under Section 47 of the Code of Civil Procedure, 1908. He submits that, in the facts and circumstances of the present case, the parameters for exercise of powers under Section 47 of the Code of Civil Procedure, 1908 were not satisfied.
8. The respondent no.1 herein filed a suit being CS 258 of 1992 as against several entities including the respondent no.2 and the appellant on May 30, 1992. The suit was for declaration, injunction and damages. Essentially, the respondent no.1 herein as the plaintiff was claiming

right, title and interest in respect of specified first and second series convertible debentures of the appellant held by the respondent No.2 in the appellant upon payment of certain portion of the price thereof by respondent No.1 to the respondent No.2.

9. During the pendency of such suit, respondent no.2 herein suffered an order of winding up dated May 4, 1998. Suit filed by the respondent no.1 was decreed on May 30, 1992.
10. Order of winding up dated May 4, 1998 in respect of the respondent no.2 herein is admitted. None of the parties applied for and obtained leave to proceed with the suit in which the decree dated May, 30, 1992 was passed is also admitted.
11. Respondent no.1 put the decree dated May 30, 1992 into execution. In such execution proceeding, the appellant filed an application under Section 47 of the Code of Civil Procedure, 1908 resulting in the impugned judgment and order.
12. Scope of Section 47 of the Code of Civil Procedure, 1908 was considered in **Dhurandhar Prasad Singh** (*supra*). It is of the following view:

“24. The exercise of powers under Section 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus it is plain that executing court can allow objection under Section 47 of the Code to the executability of the decree if it is found that the same is void ab initio and a nullity, apart from the ground that the decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a

decree inexecutable after its passing. In the case on hand, the decree was passed against the Governing Body of the College which was the defendant without seeking leave of the court to continue the suit against the University upon whom the interest of the original defendant devolved and impleading it. Such an omission would not make the decree void ab initio so as to invoke application of Section 47 of the Code and entail dismissal of execution. The validity or otherwise of a decree may be challenged by filing a properly constituted suit or taking any other remedy available under law on the ground that the original defendant absented himself from the proceeding of the suit after appearance as he had no longer any interest in the subject of dispute or did not purposely take interest in the proceeding or colluded with the adversary or any other ground permissible under law.”

13. Therefore, an objection under Section 47 of the Code of Civil Procedure, 1908 can be allowed, if it is established that :
 - i) The decree is void ab initio and a nullity; or
 - ii) The decree is not capable of execution under law either because the decree was passed in ignorance of a provision of law; or
 - iii) Law was promulgated making the decree inexecutable after its passing.
14. As noted above, the fact that the defendant no.1 in the suit suffered an order of winding up is admitted. The fact that, no leave under Section 446 of the Act of 1956 was obtained is also admitted. In fact, there is no leave under Section 446 of the Act of 1956 as on date.

15. The cause title of the decree and of the appeal demonstrate that the company which is in liquidation continued not to be described to be in liquidation despite the plaintiff to the suit becoming aware of the passing of the order of winding up in respect of such company. In law, therefore, proceedings are being continued with, as against a company in respect of whom there subsists an order of winding up, without the official liquidator in respect of such company, being made a party, and no leave being obtained from the Court passing the order of winding up.
16. **Roopnarain Ramchandra Pvt. Ltd.** (*supra*) considered an application for setting aside of an ex parte decree passed in respect of a company which was subsequently found to suffer an order of winding up. It is in such factual matrix, the Court held that in appropriate cases, leave under Section 446 of the Act of 1956 can be given even retrospectively if circumstances of the case so justified.
17. **Roopnarain Ramchandra Pvt. Ltd.** (*supra*) along with other authorities of Patna and Madras High Courts were considered by the Delhi High Court in **Shri Satya Dev Awasthi** (*supra*). It is of the view that an order of winding up being passed under Section 446 of the Act of 1956, operates as a statutory stay of proceedings. However, if a suit is continued without leave under Section 446 of the Act of 1956, the decree passed in such a suit is not void but voidable at the instance of the liquidator.

18. Provisions of Section 446 of the Act of 1956 and the failure to obtain leave thereunder, prior to institution of the suit, was considered in **State of J & K** (*supra*). It is of the view that, failure to obtain leave prior to institution of the suit would not debar the Court from granting such leave subsequently. The only consequence would be that the proceedings will be regarded as being instituted on the date on which the leave was obtained from the High Court.
19. Obtaining leave under Section 446 of the Act of 1956 to proceed with the suit or the execution proceeding is sine qua non and that is the unanimous view of the three authorities noted above.
20. In the facts and circumstances of the present case, no leave under Section 446 of the Act of 1956 was obtained till date.
21. Application under Section 47 of the Code of Civil Procedure, 1908 filed by the appellant is to be tested on the parameters of **Dhurandhar Prasad Singh** (*supra*). In our view, the appellant satisfies the requirement that, the decree is not capable of execution under law since the same was passed in ignorance of a provision of law. In the present case, the statutory bar under Section 446 of the Act of 1956, without the requisite leave thereunder being granted, operates as a statutory stay on the suit subsequent to the order of winding up being passed as also the execution proceeding. The decree passed in the suit did not take such factum into consideration. The decree, therefore, remains inexecutable till such time requisite leave under Section 446 of the Act of 1956 is obtained.

22. In view of the discussions above, the impugned judgment and order dated January 6, 2025 is set aside.
23. IA No.GA-COM/1/2025 in APOT/30/2025 is allowed.
24. APOT/30/2025 is disposed of accordingly without any order as to costs.

(DEBANGSU BASAK, J.)

25. I agree.

(MD. SHABBAR RASHIDI, J.)

A/s.