

(1969) 05 DEL CK 0011

In the Delhi High Court

Case No : Civil Original No. 51-D of 1964

Concord Finance (P.) Ltd.

APPELLANT

Vs

Rawalpindi Theatres (P.) Ltd.

RESPONDENT

Date of Decision : 06-05-1969

Acts Referred:

Citation : (1969) 05 DEL CK 0011

Hon'ble Judges : S.K. Kapur, J

Bench : Single Bench

Advocate : P.C. Khanna, for the Appellant; H.R. Sawhney, for the Respondent

Final Decision : Allowed

Judgement

S.K. Kapur, J.—This is a winding up petition filed by the Concord Finance Private Ltd. against the Rawalpindi Theaters (P.) Ltd. The petition was instituted at the instance of Surinder Nath, the managing director of the petitioner company, who claimed that he had been authorised in this behalf by a resolution of the board of directors. In the written statement objections were taken by the respondent company that Surinder Nath was not competent in law to act as the managing director ; that he could not file the winding up petition in view of Section 267(c) of the Companies Act, 1956 ; and that the petitioner company had not passed any valid and legally binding resolution authorising the institution of the present proceedings in this court. In the rejoinder the petitioner company depended on two resolutions of the board of directors of the petitioner company, dated July 31, 1964 (exhibit P.W. 1/8), and dated August 7, 1964 (exhibit P. W. 1/9). The petitioner company's case is that the resolution dated July 31, 1964, which authorised Surinder Nath to institute the petition for winding up, was passed by two directors only which did not constitute a valid quorum and, Therefore, the said resolution was, in the meeting dated 7th August, 1964, in which quorum was present, confirmed. The resolution dated 7th August, 1964, reads :

" Resolved that the proceedings of the meeting held on 31st July, 1964, are

hereby confirmed with Brig. F.J. Dillon not exercising his vote. "

2. In the rejoinder the petitioner company stated that Surinder Nath was authorised " by name to file the petition on behalf of the petitioner company.....The authority to file the petition was given to me (Surinder Nath) as"an individual. The board did not authorise the managing director to file the petition, but authorised me as an individual to file the petition ". I have made a mention of this fact for that relieves me from deciding whether Surinder Nath could, without the aid of authorisation, file the petition in his capacity as the managing director. The rejoinder shows that the petitioner company depended solely on the authority delegated to Surinder Nath for filing the petition and the respondent company had no opportunity to meet the case as to whether or not Surinder Nath, being the managing director, was competent to file the petition. If this case had been set up by the petitioner company it may have been possible for the respondent company to show that Surinder Nath was, in fact, not the managing director and had, Therefore, no authority as such to file the petition. The petition is founded mainly on the allegation that the petitioner company is a creditor in the sum of Rs. 28,000 odd and the respondent company is unable to pay its debts. The petitioner company claims that the said amount has not been paid in spite of the statutory notice of demand and the latest balance sheet of the respondent company, exhibit P.W. 1/7, shows beyond doubt that the respondent company is commercially insolvent and unable to pay its debts. It is alleged that the respondent company admitted the debt due not only in the pleadings but also in the various balance sheets. On the pleadings of the parties the following five issues were framed :

1. Whether Shri Surinder Nath was competent to file this petition on behalf of Messrs, the Concord Finance (Private) Ltd ?
2. Whether the petition is mala fide ? If so, what is the effect thereof ?
3. Is the respondent company unable to pay its debts ?
4. Is it not otherwise in the interest of the company and its creditors that it be wound up by the court ?

5. Relief?"

3. The fourth issue was, however, deleted by order dated 29th October, 1965.

4. The first question that calls for determination is whether Surinder Nath was competent to file this petition on behalf of the petitioner company. The authority to file the petition depends on four resolutions, two being the resolutions by the board of directors and two by the general body of shareholders. I have already mentioned about the two resolutions by the board of directors. The resolutions of the general body of the shareholders are dated 27th June, 1962, and 29th June, 1963. In the first of the two aforementioned meetings quorum of members was not present. In this meeting Brig. F.J. Dillon, a retired director, was re-appointed as a director. It was also resolved that J. E. da Fonseca be taken as a director of

the company. The resolution is stated to have been carried unanimously. Article 47 of the articles of association of the petitioner company, exhibit P.W.1/11, prescribes a quorum of " five members personally present" when the number of members of the company exceeds twelve. The number of members was admittedly more than twelve at that time. Articles 49 and 50 provide that where a quorum of members is not present the meeting shall stand adjourned to the next working day at the same hour and place and if at the adjourned meeting the requisite quorum be not present within half an hour after the time fixed for the meeting, the meeting shall stand dissolved. On 28th February, 1963, a resolution was passed in the board of directors' meeting of the petitioner-company resolving that "it is hereby confirmed that Mr, J. E. da Fonseca has been appointed director of the company with effect from today ". In the annual general meeting dated 29th June, 1963, the proceedings of the general meeting dated 27th June, 1962 ; were confirmed and it was resolved that Mr. W. Williamson proposed the name of Mr. J.E. da Fonseca as director of the company. This was seconded by Ch. Surinder Nath and it was " unanimously resolved that the appointment of Mr. J.E. da Fonseca as director of the company be and is hereby confirmed." It " was noted that Mr. J. E. da Fonseca was appointed as director of the company with effect from 28th February, 1963". Return of directors, exhibit D.W. 8/1, showing the " particulars of the persons who are directors of the company on the day of the last annual general meeting, namely, 27th day of June, 1962, was filed with the Registrar of Companies. Surinder Nath, the managing director of the petitioner-company, admitted his signatures thereon and a note to this effect was recorded by me on 27th November, 1968, while recording the statement of Ram Nath (D.W. 8), an upper division clerk in the office of the Registrar of Companies. In the said document the name of Fonseca is not included among the list of directors. It may be pointed out that the appointment of Fonseca in the general meeting dated 27th June, 1962, figures as the seventh item. Surinder Nath was asked about the absence of the 7th item in a copy of the " record of the meeting held on June 27, 1962, sent to the Registrar of Companies ". There was a controversy at the bar as to whether or not Surinder Nath was confronted with the omission of the name in exhibit D.W. 8/1, Mr. Khanna's suggestion being that he was not so asked. I will reproduce a part of the statement of Surinder Nath in this behalf :

" I see from the minutes book containing the minutes of the general body meeting, that members, Mr. Williamson and myself were present personally in the meeting held on June 27, 1962. It is incorrect that the record of the meeting of the general body dated 27th June, 1962, did not originally contain the matter against "item No. 7 other business ". I do not know whether a copy of the record of the meeting held on June 27, 1962, was sent to the Registrar of Companies. Normally these things were sent by the secretary of the company. I do not know whether in the copy of the record of the meeting held on June 27, 1962, sent to the Registrar of Companies on behalf of the petitioner company, the last item No. 7 was included or not. It is correct that I made a statement on February 10,

1965, that "a copy of the proceedings of this meeting was filed with the Registrar, Joint Stock Companies". The statement containing the record of the meeting held on June 27, 1962, must have been signed by me. It is incorrect that I purposely sent an incomplete copy. It is also incorrect that the writing against item No. 7 was added by me afterwards. The secretary of the company can explain the omission, but to me it appears that it must have been because of negligence on the part of my secretary or some other employee in the office. I did not read the statement although the statement was verified by me as correct."

5. The suggestion of Mr. Khanna, the learned counsel for the petitioner-company, was that cross-examination of Surinder Nath proceeded on the assumption that proceedings of every general meeting had to be sent to the Registrar and whether or not the said 7th item was included in the proceedings so sent, whereas the correct position is that no such proceedings, except a copy of the special resolution, if any, passed at a general meeting, has to be sent to the Registrar of Companies. Mr. Sawhney, the learned counsel for the respondent-company, on the other hand, contended that questions about the copy of the record of the meeting held on 27th June, 1962, had reference to the return of directors, exhibit D.W. 8/1, as well and, in any case, this provided Surinder Nath with an opportunity to explain why the name of Fonseca was not included in the return sent to the Registrar, but he failed to render any proper Explanation. A copy of the return of directors was on the record and Surinder Nath had stated that he signed the statement containing the record of the meeting dated 27th June, 1962. He also stated that he did not purposely send an incomplete copy. His Explanation was that the secretary alone could explain the omission. From this it clearly appears that attention of the witness was drawn to the omission but he failed to render any proper Explanation. Mr. Khanna strongly emphasized the fact that the minutes of the meeting dated 27th June, 1962, bore the signatures of Rajinder Nath both at the top of the minutes and at the end and that Rajinder Nath (D.W. 9) was admittedly inimically disposed towards Surinder Nath and he had admitted that " my relations with Ch. Surinder Nath are bad ". From this Mr. Khanna wanted me to deduce that the meeting of 27th June, 1962, must have been held. It is not clear whether Rajinder Nath's relations with Surinder Nath were, at the relevant time, good or bad. It is not impossible that in June, 1962, they may be good and he may have signed the minutes. Rajinder Nath admitted on oath that item No. 7 was correctly recorded. At the time he was giving his evidence he was admittedly inimical towards Surinder Nath. He admitted : " It is correct that in the meeting of 27th June, 1962, Mr. W. Williamson proposed that Mr. Fonseca be taken as a director of the company. The proposal was seconded by Sh. Surinder Nath and was unanimously accepted. Item No. 7 of the proceedings is correct. " Rajinder Nath made no effort to explain how and in what circumstances the resolution of 27th June, 1962, strongly challenged by the respondent-company, came into being.

6. A few facts about the proceedings of the general meeting dated 27th June,

1962, may be stated. On 10th February, 1965, Surinder Nath, in the course of his statement, said that Fonseca was elected as a director in the general meeting dated 27th June, 1962. D. K. Mahajan J. of the Punjab High Court directed the petitioner to, file a copy of the proceedings of the said general meeting. The respondent-company then moved an application dated 14th March, 1967 (C.A. No. 52 of 1967), pointing out that a copy of the proceedings had not been filed and asserting that Fonseca had not been elected as a director in the general meeting held on 27th June, 1962, and Surinder Nath had taken that position to save the petition from dismissal. It was prayed that the petitioner be directed to file in this court a true copy of the proceedings of the said general meeting. On 28th March, 1967, a copy of the resolution was filed and the respondent-company again filed an application, being C.A. No. 71 of 1967, alleging that the resolution was fabricated to save the dismissal of the petition. I have mentioned these facts because the Explanation rendered by Mr. Sawhney to Mr. Khanna's objection that forgery had nowhere been alleged in the written-statement and the allegation in the written-statement was confined merely to a statement that no valid and legal resolution authorising Surinder Nath to institute the proceedings had been passed depended on these circumstances and said that the respondent-company could not have raised a more specific objection in the absence of a copy of the resolution which the petitioner company had deliberately kept back. Mr. Sawhney also said that in C.A. 71 of 1967 a positive allegation of fabrication had been made. The onus of this issue was on the petitioner company. It had, Therefore, to prove that Surinder Nath was competent to file the petition. No allegation about fabrication had been made in the written statement. No specific issue was claimed on that point. I am disinclined to uphold a plea of fabrication on what may be said to emerge in the course of evidence. I rest my decision not on the positive finding that the minutes of the meeting of 27th June, 1962, were forged but on the negative finding that the petitioner company has failed to prove that Fonseca was appointed a director on 27th June, 1962. The return of directors, exhibit D.W. 8/1, weighs heavily in my mind in coming to this conclusion. Mr. Khanna suggested that the name of Fonseca was not included in the return because Fonseca, though appointed on 27th June, 1962, as a director, had not agreed to act as such and this fact he wanted me to deduce from the proceedings of the board of directors" meeting dated 28th February, 1963. I am unable to spell out that Explanation from the said proceedings. That takes me to the board of directors" meeting dated 28th February, 1963. The said resolution merely confirms that " Mr. J. E. da Fonseca has been appointed director of the company with effect from today ". Mr. Khanna did not argue that Fonseca was, in any case, co-opted as a director by the board of directors on 28th February, 1963, and I need not, Therefore, elaborate on this resolution.

7. That takes me to the resolution dated 29th June, 1963. Only four persons, who admittedly constituted a quorum, were present in the said meeting. The proceedings of this meeting were confirmed in the meeting dated 30th

September, 1964, in which quorum of members was present. This meeting resolved that " the appointment of Mr. J. E. da Fonseca as director of the company be and is hereby confirmed ". True that the resolution further noted that Fonseca was appointed as director of the company with effect from 28th February, 1963, but still, subject to the other objections to the validity of the meeting, I have no doubt in my mind that at least from 29th June, 1963, Fonseca was appointed as a director. The resolutions authorising Surinder Nath to file the petition were passed by the board of directors on July 31, 1964, and August 7, 1964. The petition for winding up was filed on 13th August, 1964. If Fonseca was appointed as a director in the general meeting dated 29th June, 1963, he would be a properly appointed director at that time.

8. I will now deal with the objections to the validity of the meeting dated 29th June, 1963, and they are two--(i) there was no quorum present ; and (ii) as admitted by Surinder Nath in his statement recorded on 25th September, 1968, the meeting had been originally summoned to be held at the registered office of the petitioner company but was actually held at 1, Man Singh Road, New Delhi, the residence of D. Fonseca. With respect to the second of the said objections, Surinder Nath stated that the decision to change the venue of the meeting was taken on the morning of the date of the meeting and the outside members could not be informed about the change of the venue. According to him, however, one man had been posted at the registered office of the company " to direct any member attending the meeting to the address, 1, Man Singh Road, New Delhi. " He further stated that " at the time of this meeting there were more than 30 members. Some of the members were living outside Delhi ". I will assume that this meeting suffered from the irregularities mentioned hereinbefore. That brings in Section 290 of the Companies Act which provides :

" Acts done by a person as a director shall be valid, notwithstanding that it may afterwards be discovered that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in this Act or in the articles :

Provided that nothing in this section shall be deemed to give validity to acts done by a director after his appointment has been shown to the company to be invalid or to have terminated. "

9. The proviso does not require that the invalidity must be established in a court of law. If the irregularity Constituting invalidity is brought to the notice of the director that will satisfy the requirements of the proviso. This section treats the acts of the directors valid when the appointment of one or some of them turns out to be invalid. The acts of a de facto director are treated as valid both vis-a-vis outsiders and vis-a-vis members. In *Kanssen v. Rialto (West End.) Ltd.* [1944] Ch. 346 [1945] 15 Comp. Cas. 23 Lord Greene M.R., while dealing with Section 143 of the Companies Act, which reads, "the acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification ", decided that the section will

protect the acts even though the parties concerned knew the facts but were not conscious of the defect. In other words, the section will come into operation if knowledge of the defect be not present in the mind of the board of directors at the relevant time and the knowledge of the facts will be indifferent. It was also held that the section could not come to the aid of the persons put to enquiry but failing to do so. The matter went to the House of Lords and is reported in [1946] A.C. 459 (Morris v. Kanssen [1946] 16 Comp. Cas. 186 (H.L.)). Lord Simonds observed :

" Do the facts that I have stated establish a defect in the appointment or qualification of Cromie or Strelitz ? There is, as it appears to me, a vital distinction between (a) an appointment in which there is a defect or, in other words, a defective appointment, and (b) no appointment at all. In the first case it is implied that some act is done which purports to be an appointment but is by reason of some defect inadequate for the purpose ; in the second case there is not a defect ; there is no act at all. The section does not say that the acts of a person acting as director shall be valid notwithstanding that it is afterwards discovered that he was not appointed a director. Even if it did, it might well be contended that at least a purported appointment was postulated. But it does not do so, and it would, I think, be doing violence to plain language to construe the section as covering a case in which there has been no genuine attempt to appoint at all. "

10. I do not find from the judgment of the House of Lords either affirmance or rejection of the various propositions laid down by Lord Greene M.R. It is not necessary in this case to deal with the consequences that will ensue if the term of office of a director has expired but he nevertheless continued to act as a director and the impact of the words in the section dealing with that situation in Section 290, as that problem does not arise before me. I will only indicate that the termination contemplated by Section 290 is restricted to termination " by virtue of any provision contained in this Act or in the articles". What is the position in this case. There was a purported appointment. The resolution was confirmed in the subsequent general meeting and the directors had been acting as such for several years. If there is a purported appointment and the persons concerned were neither put on enquiry nor were they conscious of the defect, Section 290 will apply. The only evidence brought out to show that the directors were conscious of the defect and the same was brought to their notice is the statement of Rajinder Nath (D.W. 9). It is not possible to place any faith on that statement for more than one reason :

(1) He admitted enmity with Surinder Nath.

(2) He admitted his signatures on the proceedings of the meeting dated 27th June, 1962.

(3) According to this witness, one receipt book of the company is still lying in an almirah in the premises in which the office of the company used to be situate and

that almirah belongs to Ch. Bhagat Ram and Sons, a firm belonging to Surinder Nath and his four brothers, Rajinder Nath being one of them, and from which premises Surinder Nath has been excluded since November, 1962. At least one book of the company is, Therefore, being withheld and Rajinder Nath is a party to it. He also admitted that he used to sign the balance-sheet as secretary of the company and that it was no business of his to point out to the auditors that the meetings were being held without quorum. He had no documentary proof about having pointed out the defect to Surinder Nath.

11. I am, Therefore, of the opinion that, in any case, the acts of Fonseca would be valid after 29th June, 1963. In this view I am also supported by a judgment of Dua J. (as he then was) in Karnal Distillery Co. Ltd. Vs. Ladli Parshad Jaiswal and Another, As to the effectiveness of the two resolutions dated July 31, 1964, and August 7, 1964, passed by the board of directors of the company, the power was, in my opinion, properly delegated. Even if the first of the aforementioned two meetings be invalid, the second meeting confirmed the proceedings of the first meeting, which clearly authorised Surinder Nath to institute proceedings. The petition, Therefore, must be held to have been instituted by a competent person duly authorised by the petitioner-company.

12. That takes me to the merits of the case. The latest balance-sheet on the record is for the period ended March 31, 1962 (exhibit P.W. 1/7). The financial position of the company, as disclosed by that balance-sheet, is far from satisfactory. The paid up capital of the company is Rs. 1,32,000 odd. Rs. 2,250 have been paid in advance on account of calls. The total brought forward loss is about Rs. 2,30,000 and the profit during the year, Rs. 810. The main assets, shown of the value of about Rs. 3,00,000, consist of old pictures, which can have a very little value, if at all, at present. Admittedly, no balance-sheet has been issued by the respondent-company after 1962 though the blame is sought to be laid for this on Surinder Nath, who is alleged to be withholding account books and various other documents of the respondent-company. Joginder Nath appeared as a witness (D.W. 7) and admitted :

" On account of this petition the company has suffered so much that it is now in a miserable condition and the only staff is one peon. When this petition was filed, the respondent-company had a credit balance, but I do not know the amount. The credit balance now-a-days may be Rs. 100 or Rs. 200. The last agreement entered into between the respondent-company and the producers was in respect of " Naya Qanun " and this was in 1963.....The losses as given in the last balance-sheet as on 31st of March, 1962, have been reduced by about Rs. 35,000 or more. I have presently no document in support of this. "

13. No effort was made to establish the financial soundness of the respondent-company. It appears to me that the respondent-company is clearly commercially insolvent. Commercial insolvency may arise not merely because the company is not possessed of sufficient assets but also where the assets are so locked up that they cannot be easily realised and used. In this case the balance-sheet on the

record shows that the company is not only commercially insolvent in the sense mentioned by me but is also in a bad financial state. As to the amount claimed by the petitioner-company, the loan has been acknowledged in the balance-sheet, exhibit P.W. 1/7. A note under that loan given in the balance-sheet is : " Secured against picture " Musafir " Concord Finance Private Limited, Delhi, in which one of the directors is interested ". In his evidence also Joginder Nath said :

" The amount in dispute paid to Messrs. Rawalpindi Theatres (P.) Ltd. by Shri Surinder Nath on behalf of Messrs. Concord Finance (P.) Ltd. was not because the money was really required by Messrs. Rawalpindi Theatres (P.) Ltd., but it was to enrich himself out of the profits from the picture " Musafir ". The amount in dispute was advanced by him to the respondent-company without any agreement, without any letter and without any condition whatsoever, in the hope that he would recover back the amount when realisations were made from the exhibition of the picture. The picture, however, flopped and recovery was not possible and to safeguard his position with Messrs. Concord Finance (P.) Ltd. he manipulated to get those letters, exhibits P.W. 1/1 and P.W. 1/3A, from Shri Washeshar Nath. These two letters were written at the time letter, exhibit P.W. 1/5A, was written."

14. He, however, admitted in cross-examination that there was no documentary evidence to show that the real intention of Surinder Nath " in making the advance was to benefit from the picture " Musafir " " ; that " the amount was not returned to Messrs. Concord Finance (P.) Ltd., because the picture " Musafir ", in which the amount was invested, had flopped " ; and that " the sum of Rs. 32,000 paid by the petitioner-company may have been utilised for obtaining the draft for payment to the producers of the picture " Musafir " ". Mr. Sawhney, the learned counsel for the respondent-company, raised various objections to the genuineness of the letters dated 2nd July, 1957 (exhibit P.W.1/1), dated 6th July, 1957 (exhibit P.W. 1/2), dated 10th July, 1957 (exhibit P.W. 1/3) and dated 10th July, 1957 (exhibit P.W. 1/3A). I need not, however, elaborate on these objections as it is sufficiently established from other evidence that the loan was taken by the respondent-company. Joginder Nath admitted the execution of exhibit P.W.1/5A. W.N. Choudhry who signed the letter was the secretary of the respondent-company and, as I have mentioned already, the amount is shown in the balance sheet. Even Joginder Nath's statement goes to support the petitioner company.

15. I should not be understood as saying that if a petitioner by imposing legal proceedings on a company reduces it to financial insolvency it would, in all cases, justify winding up of the company for it is well established that a person cannot be allowed to take advantage of his own wrong. If, Therefore, I were satisfied that the respondent company has been reduced to its present unsound position by reason only of the petition, I would have declined to wind up the respondent company. I am, however, satisfied that, apart from the effect of the petition, the

position of the respondent company has been far from satisfactory and it was and is commercially insolvent.

16. Mr. Sawhney, the learned counsel for the respondent-company, contended that the petition was mala fide, which was evident from the fact that Surinder Nath was a surety to the loan claimed by the petitioner company. He drew my attention to the balance-sheet of the petitioner company, exhibits D.W. 4/2A and D.W. 4/2B. In the said balance-sheets the loan in question has been considered good against the personal guarantee of the managing director. I am not impressed with the argument. If Surinder Nath is a co-debtor with the respondent company it would increase his jeopardy if the company is wound up, for, then, the matter will be in the hands of the official liquidator. Surinder Nath being a co-debtor with the respondent company places no other impediment in the way of the petitioner company filing the petition for winding up.

17. In view of this, I allow the petition and order the respondent-company to be wound up. I appoint the official liquidator as the liquidator of the company. The Registrar shall forthwith send to the official liquidator of the court notice as required by Rule 109 of the Companies (Court) Rules, 1959. It will be the duty of such of the officers as are liable to make out or concur in making out the company's statement of affairs u/s 454 to attend on the official liquidator at such time and place as he may appoint and to give him all information he may require. The order for winding up shall be drawn up by the Registrar and two certified copies thereof shall be sent to the official liquidator as required by Rule 111. Any notice required to be served on the petitioner company of further proceedings in liquidation shall be served on its counsel. The order shall, within 14 days, be advertised by the petitioner company in one issue each of The Indian Express and Vir Arjun Delhi.

18. The parties will bear their own costs.