

(1983) 05 CAL CK 0010
In the Calcutta High Court
Case No : Company Petition No. 286 of 1982

Deutsche Dampschiffshrts Gessellschaft "Hansa" Bremen	APPELLANT
Vs	
Bharat Aluminium Co. Ltd.	RESPONDENT

Date of Decision : 06-05-1983

Acts Referred:

Companies Act, 1956 — Section 434, 582, 583, 584, 585

Citation : (1984) 55 CompCas 727

Hon'ble Judges : Dipak Kumar Sen, J

Bench : Single Bench

Advocate : S.C. Ukil and S.R. Saha, for the Appellant; Sudipha Saha, for the Respondent

Final Decision : Allowed

Judgement

Dipak Kumar Sen, J.—Messrs. Deutsche Dampschiffshrts Gessellschaft "Hansa" Bremen (hereinafter referred to as "the company") was incorporated under the laws of West Germany. It has its head office at Bremen in West Germany. It is not in dispute that the company carries on business at Mercantile Building 9, Lalbazar Street, Calcutta.

2. Bharat Aluminum Co. Ltd., the petitioner, seeks to wind up the company. The petitioner contends that as the company carries on business within the jurisdiction of this court and has assets in India, this court has jurisdiction to wind up the said company as an unregistered company under Sections 584, 585, 588 and 434 of the Companies Act, 1956.

3. The petitioner alleges that a sum of Rs. 2,58,518.80 is due and owing by the company to the petitioner on account of excess freight paid.

4. It is alleged that the company is being wound up in an appropriate court in Germany.

5. The petitioner alleges that a notice u/s 583 of the Companies Act, 1956, dated

December 2, 1981, was duly served on the company, in spite whereof the dues of the petitioner remained unpaid.

6. At the hearing, learned counsel for the company did not dispute the allegation in the petition that the Company did not file any affidavit-in-opposition thereto. Shaw Wallace & Co. Ltd., the local agent of the company, who, for some reason, appeared in the proceeding and seriously contested the application. The legal and taxation manager of Shaw Wallace & Co. Ltd. has affirmed an affidavit on April 11, 1983, whence it is contended that this court has no jurisdiction to entertain the application inasmuch as there are no assets of the company within the jurisdiction of this court. The company, it is alleged, has no money, fund or any other asset whatsoever which need to be administered.

7. At the hearing, the learned counsel for Shaw Wallace & Co. Ltd. cited the following decisions in support of the contentions of the latter.

(a). *Azoff-Don Commercial Bank, In re* [1954] 1 Ch 315 (Ch D). In this case, it was held by an English court, construing the provisions of the winding up of a foreign company under the English law, that in order to justify the exercise by English courts of its discretionary jurisdiction to wind up a foreign company, it is enough to show the existence of assets of the company in England and the presence in England of persons claiming as creditors. .

(b) *Compania Merabello San Nicholas S.A., In re* [1972] 3 WLR 471 : [1972] 3 All ER 448 (Ch D). This decision was cited for the following observations of Megarry J. sitting singly in the Chancery Division ([1972] 3 WLR 484):

"I would accordingly attempt to summarise the essentials of the relevant law relating to the existence of jurisdiction to make a winding-up order in normal cases in respect of a foreign company as follows: (1) There is no need to establish that the company ever had a place of business here. (2) There is no need to establish that the company ever carried on business here, unless perhaps the petition is based upon the company carrying on or having carried on business. (3) A proper connection -with the jurisdiction must be established by sufficient evidence to show, (a) that the company has some asset or assets within the jurisdiction, and (b) that there are one or more persons concerned in the proper distribution of the assets over whom the jurisdiction is exercisable. (4) It suffices if the assets of the company within the jurisdiction are of any nature ; they need not be "commercial" assets, or assets which indicate that the company formerly carried on business here. (5) The assets need not be assets which will be distributable to creditors by the liquidator in the winding-up ; it suffices if by the making of the winding-up order they will be of benefit to a creditor or creditors in some other way. (6) If it is shown that there is no reasonable possibility of benefit accruing to creditors from making the winding-up order, the jurisdiction is excluded."

8. On the strength of the above authorities, learned counsel for Shaw Wallace & Co. Ltd. contended that in the instant case no assets of the foreign company

being in existence, the winding-up of the said company would be futile and would enure to nobody's benefit.

9. Learned counsel for the petitioner contended to the contrary and submitted that the company admittedly used to carry on business at Lalbazar Street, Calcutta, and still occupies an office room in the said premises. There ought to be furniture and records of the company at the said address and in any event there should be an enquiry whether there are assets of the company in existence or not.

10. The attention of the learned counsel for the petitioner was drawn by the court to the provisions of Section 583 of the Companies Act, 1956, under which the petitioner was required to serve the statutory notice on the foreign company under its hand. It is a matter of record that statutory notice has not been served on the foreign company under the hand of the petitioner but by the advocate-on-record acting on behalf of the petitioner.

11. In view of the said provision, learned counsel for the petitioner conceded that the statutory notice was defective, but he contended that even otherwise the court had jurisdiction to pass an order of winding-up in such a case in the facts and circumstances.

12. He submitted that, admittedly, the company was in the process of being dissolved in Germany. It was also the admitted position that the company had ceased to carry on business in Calcutta. The company was involved in financial circumstances and was unable to pay its just debts and dues. This position was not denied by the company and, therefore, an order for winding-up should follow on the ground that it was just and convenient.

13. The relevant provisions of Sections 582 and 583 of the Companies Act are as follows :

"Section 582. Meaning of "unregistered company"--For the purposes of this Part, the expression "unregistered company"-

(a) shall not include--...

any partnership, association or company consisting of more than seven members at the time when the petition for winding up the partnership, association or company, as the case may be, is presented before the court.

Section 583. Winding-up of unregistered companies.--(1) Subject to the provisions of this Part, any unregistered company may be wound-up under this Act, and all the provisions of this Act with respect to winding-up shall apply to an unregistered company with the exceptions and additions mentioned in Sub-sections (2) to (5).....

(4) The circumstances in which an unregistered company may be wound up are as follows :

(a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs :

(b) if the company is unable to pay its debts ;

(c) if the court is of the opinion that it is just and equitable that the company should be wound up.

(5) An unregistered company shall, for the purpose, of this Act, be deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by leaving at its principal place of business, or by delivering to the secretary, or some director, manager or principal officer of the company, or by otherwise serving in such manner as the court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has, for three weeks after the service of the demand, neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;....

(d) if it is otherwise proved to the satisfaction of the court that the company is unable to pay its debts."

14. In the facts and circumstances, I am inclined to accept the contentions of the petitioner. The petition at this stage and on the facts has to be admitted and advertisements issued. It is also necessary to appoint a provisional liquidator to ascertain if there was any asset of the company in India. In the event it is found that the company has no assets whatsoever in India then final order of winding-up may not be passed, because the court will not exercise its powers in a jurisdiction which would be futile. In any event, the creditor of the company for the purpose of taxes should ascertain the loss suffered or profits caused by them.

15. The petition is admitted. There will be direction for publication of advertisements once in Statesman and once in Jugantar. Publication in Calcutta Gazette is dispensed with. The advertisement will not be published for one-week. The application is returnable four weeks hence.