

(1963) 12 KL CK 0019
In the High Court Of Kerala
Case No : C.P. No. 8 of 1962

In Re: Malabar Iron and Steel Works Limited

Date of Decision : 06-12-1963

Acts Referred:

Companies Act, 1956 — Section 149(1), 149(4)

Citation : AIR 1964 Ker 311

Hon'ble Judges : P.T. Raman Nayar, J

Bench : Single Bench

Advocate : V.P. Gopalan Nambiar, General, for the Appellant; C. Unikanta Menon, for the Company, for the Respondent

Final Decision : Allowed

Judgement

P.T. Raman Nayar, J.—I need not repeat what I said in my winding up order of the 9th November 1962. That order was based on the finding that the company had not commenced business although very nearly two years had elapsed since its incorporation and that it was not in a position to lawfully commence business in the future. The company had issued a prospectus inviting the public to subscribe for its shares and the sum of Rs. 6 lakhs was specified therein as "the minimum subscription". No proof was adduced of any allotment of shares, but it was stated by counsel for the company that shares of the face value of Rs. 6 lakhs had been allotted and had been fully paid. Even accepting this statement, the subscription fell far short of the minimum subscription, and, there being not even a suggestion that the company would be able to secure the minimum subscription in the foreseeable future, I came to the conclusion that the company would never be in a position to lawfully commence business.

The company appealed against my order, and, in the course of the hearing of the appeal, it was represented on behalf of the company that the statement made by its counsel before me was wrong and that the company had; in fact, already secured the minimum subscription and was in a position to comply with the provisions of Section 149(1) of the Companies Act and commence its business. The company prayed for an opportunity to file an affidavit stating these (acts as

also the reasons for not commencing its business within a year of its incorporation. This opportunity was afforded, and, on an affidavit being filed by the promoter of the company, N. S. P. Iyer by name, to the effect that the company had allotted, subject to payment of the full value in cash, shares to the face value of Rs. 20 lakhs, within a year of its incorporation, the winding up order made by me was set aside and the case sent back to me for fresh disposal.

2. The appellate judgment does not show that this affidavit filed by N.S.P. Iyer was accepted as true. The entire matter is before me and what "I have to decide is whether, in truthm, the minimum, subscription has been secured and whether the company has good reasons for not having commenced business within a year of its incorporation so that it can be said that it will be in a position to commence business within a reasonable time.

3. in view of what was stated before roe at the original hearing, I was not prepared to accept N.S.P. Iyer's affidavit at its face value and 1 called for proof of the statements made in the affidavit and also directed the deponent, namely, N.S.P, Iyer, to appear in person for examination. Three further affidavits dated 8-8-1963, 8-10-1963 and 6-11-1963 were filed by N.S.P. Iyer and he was also examined as a witness. The evidence ha gave is on several material points at variance with the statements in his several affidavits which are themselves mutually contradictory. But it is hardly necessary to go into these contradictions since 1 am satisfied that, these contradictions apart, the evidence is on the face of it unacceptable and that even if accepted in entirety would not make out a compliance with Section 149(1)(a) of the Companies Act which forbids a company from commencing any business which, of course, would include its own business, unless "shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription."

4. N. S. P. Iyer began his evidence with the statement that the company had, on1-9-1961, allotted shares to the face value of Rs. 20.88 laksh subject to the payment of the whole amount in cash, that towards this, an amount of Rs. 20.54 lakhs had been actually paid, the payment being in cash to the extent of Rs. 10,54 lakhs, and, to the extent of the balance of Rs. 10 lakhs by set off of bills for su"pplics effected to the company. But, later in his evidence, he said that, out ot this Rs. 10,54 lakhs collected in cash, Rs. 1.45 lakhs was spent by him for the purchase of land for the company, the purchase being in his own name as promoter of the company and the understanding being that the land would be sold by him to the company at actual costs the price being adjusted towards share money for the shares to be allotted to him. The rest of the money was spent in developing the land, in putting up buildings and compound walls and in preliminary expenses, administration expenses and local purchases, with the result that all that was left was a sum of Rs. 37,000/- which is now in the bank. (This evidence is at variance with the statement in P-6, a statement filed by the company with the Registrar in lieu of prospectus, to the effect that the company

owned no land and that the intention was that N. S. P. Iyer should lease about 40 acres of land and the buildings thereon belonging to him to the company at an annual rent of Rs. 100/- per acre). It is abundantly clear from his evidence that this sum of Rs. 37,000/- was the only amount received in cash--this represents application money paid by the public in respect of which no allotment was made on 1-9-1961--and that the allotment which the witness says was made for actual payment in cash, was for money which, as authorised by the Board, he had obtained from himself and from other directors and friends for the expenses of the company on the understanding that the money so received would be adjusted against the share money for the shares to be allotted to the persons advancing the money or to their nominees, in other words, would be paid back in shares--there never was any promise to repay in cash. Out of the Rs. 10 lakhs and odd so raised, as much as Rs. 6 lakhs was contributed by himself and his first wife Smt. Kamakshi, the money however remaining in their accounts with certain banks and being drawn from time to time by the witness and Smt. Kamakshi for the expenses of the company. And out of the balance, Rs. 3.83 lakhs was raised in the shape, of buildings bridges and other structures put up by a firm called the Kerala Agencies of which the partners were the witness himself and his brother and brother-in-law. (In Ext. D-4 the minutes book of the Board it is stated at page 14 that Smt. Kamakshi is the sole proprietrix of Kerala Agencies).

5. So much for the Rs. 10.54 lakh's stated to have been collected in actual cash. In respect of the balance of Rs. 10 lakhs said to have been collected by set off against bills for supplies effected, the evidence is that Rs. 3.2 lakhs was thus received from Messrs. Kerala Agencies to whom money was due on account of plant, machinery and furniture supplied and Rs. 6.9 lakhs from a concern known as the Nurani Hardware and Electricals (of which the witness's second wife, Smt. Ambujam, was the sole proprietrix) to which the money was due for (he supply of engineering goods, electrical stores and ancillary equipment. (In Ext P.6 the amount due to Nurani Hardware and Electricals is shown as only Rs. 4.9 lakhs). All these supplies were received by the witness on behalf of the company before 30-6-1961, and, although the understanding was that the supplies would be paid for in cash, the firm accepted shares in lieu of cash, payment being thus made by allotment of shares on 1-9-1961.

6. As I have already said even believing this evidence--which it seems hardly necessary to say is very difficult to believe--, for the present purpose, the alleged allotment cannot be regarded as an allotment subject to payment in cash. It is however argued that it can be so regarded by an application of the rule in *Harmony and Montague Tin and Copper Mining Co., Spargo's case* (1873) 8 Ch App 407 . That case and cases like *Huson and Robinson, the Secretaries for the Thodapuzha Rubber Company, Ltd. Vs. The Registrar and Asst. Registrar of Joint Stock Companies*, and *Parshotumdas v. Ishvardas* ILR 16 Bom 161 which followed it were concerned with the question whether payment, by set off against a debt due by the company could be regarded as payment in cash for purposes

such as returns of allotments and enforcement of contributory liability. But, having regard to the prohibition in Sub-section (1) of Section 149 of the Companies Act, against the commencement of business and the exercise of borrowing powers until the minimum subscription has been secured, and the provision in Sub-section (4) that any contract made by a company before the date at which it is, entitled to commence business shall be provisional only, and shall become binding on the company only on that date, I do not think that the rule is applicable in considering whether the requirements of Section 149(1)(a) have been satisfied. It is not without significance that no commentary English or Indian, (excepting perhaps Pandia's, Companies Act, 1956 -- Second Edition at page 144) discusses the rule in Spargo's Case (1873) 8 Ch App 407 u/s 149 of the Companies Act or provisions corresponding to that provision.

7. As observed by Coutts Trotter, J. In the Madras case already referred to (the report is actually of the judgment in appeal affirming the judgment of Coutts Trotter, J. but the judgment of Coutts Trotter, J. is set out in full), in *re Johannesburg Hotel Co.* (1891) 1 Ch 119, Lord Halsbury took no pains to conceal his view that Spargo's Case (1873) 8 Ch App 407 was wrongly decided-- I might add that again in *Ooregum Gold Mining Co. of India v. Roper*: *Wallroth v. Roper* (1892) App Cas 125 at 134 and 135, Lord Halsbury made no attempt at concealment--and Lord Justice Fry said of Spargo's Case (1873) 8 Ch. App 407 that it, in effect, struck the words "in cash" out of the statute. Spargo's Case (1873) 8 Ch App 407 was however rehabilitated by a very strong committee of the Privy Council in *Larocquer v. Beauchemin* (1897) App Cas 358. However that might be, two conditions are necessary for the application of the rule in Spargo's Case (1873) 8 Ch App 407. The first is that there must be a debt due and presently payable by the company; the second that there must be payment for the shares by set off of the debt not an accord and satisfaction of the debt by allotment of the shares, a very fine distinction probably having its origin in the technicalities of English pleading. It seems to me that the first condition can never be satisfied for the purposes of Section 149(1)(a) where the allotment is for money due by the company, since, in view of Sub-sections (1) and (4) of the section, money can be due and presently payable by the company only from the date on which the minimum subscription has been raised. Hence, even if, despite the prohibition in Sub-section (1) of the section, the company incurs debts those debts, being payable only after the minimum subscription is raised, cannot support a plea of payment by set off for the purpose of raising the minimum subscription. And so far as the second condition is concerned, it is clear from the evidence of N. S. P. Iyer, accepting that evidence as true, that out of the total sum of Rs. 20.54 lakhs claimed to have been raised, he raised as much as Rs. 10.54 lakhs and the promise that shares would be allotted for this amount to the persons who advanced the money. This brings the matter directly within the observations of Jessel, M. R. in *Re Stapleford Colliery Co.*, *Barrow's Case* (1880) 14 Ch D 432. There is also the fact that, so far as the land bought for Rs. 1.45 lakhs and the improvements effected upon it at a cost of Rs. 5.53 lakhs are

concerned N. S. P. Iyer still remains the owner and it will be only on the transfer of the land to the company that there will be any liability on the company to pay this sum of Rs. 6.98 lakhs. In no view of the matter can it be said that the minimum subscription of Rs. 19.6 lakhs has been raised.

8. it is hardly necessary for me to state my reasons for viewing the evidence of N. S. P. Iyer with scepticism. For, apart from the contradictions between his evidence and the affidavits filed by him, the evidence is inherently unbelievable. For, it amounts to this: N. S. P. Iyer and his two wives between them found as much as over Rs. 20 lakhs for buying lands for the company, for reclaiming the land and building upon it, and for supplying the company with machinery and other goods. All that is produced in support of this tall claim, apart from N. S. P. Iyer's word of mouth and the sale deeds in respect of the land are Exts. D 15, D 16 and D 17, statements of accounts furnished by the Kerala Agencies and the Nurani Hardware and Electricals with supporting bills, the statement and the bills in Exts. D 15 and D 16 all bearing the date 28-8-1961, and those in Ext. D 17 the date 31-7-1961 and all passed for payment on the same day. If, in fact, the value of the supplies made to the company and the work done for the company was of this magnitude, a commission could have been taken out to prove this-- the fact that the property is now in the hands of a receiver appointed in a suit brought by a bank against N.S. P. Iyer and his first wife personally on the footing that they had borrowed money on the security of the land and the goods, can be no impediment. True there is an inventory (Ext. D2g) prepared by the receiver of the properties that have come to his hands but that inventory does not show the value of the properties. It is said that the construction and other work done for the company was check-measured and passed-for payment by a chartered engineer but this engineer is not a witness. It is claimed that, in his capacity as promoter, N. S. P. Iyer was keeping regular accounts with supporting bills and vouchers for the moneys raised and spent by him on behalf of the company. Yet no accounts have been produced and the excuse that they were taken possession of by the receiver along with the buildings and machinery is a frivolous excuse having regard to the fact that the company had ample opportunity to summon the receiver to produce the books. When the case came back after remand T made it quite clear that I was not prepared to act on the affidavit filed by N. S. P. Iyer before the appellate bench. I directed that N. S. P. Iyer should appear in person for examination and told counsel for the company that I would require documentary evidence, which in the nature of things there must be if that affidavit be true, in proof of the facts set forth in the affidavit. And, by an order dated 9-10-1963, I directed the company to produce or cause to be produced all books and other documents in proof of the alleged debts on account of land bought, work done, and supplies made to the company. No attempt of any kind was made to produce these books although the evidence in the case was closed only more than a month later.

9. The position is what I found it to be in my original order namely, that the company has not commenced business and is not in a position to commence

business in the future.

10. I order that the respondent company be wound up. The direction regarding costs made in my original winding up order will stand so far as costs incurred for the original hearing are concerned. So far as costs incurred by the petitioner after the remand are concerned, these costs will be paid personally by N. S. P. Iyer, but failing recovery from him, will be paid from out of the assets of the company, Advocate's fee Rs. 250/-.