

(1978) 07 CAL CK 0026
In the Calcutta High Court
Case No : Company Petition No. 87 of 1978
In Re: Standard Brands Ltd.

Date of Decision : 20-07-1978

Acts Referred:

Companies Act, 1956 — Section 439(5)

Citation : (1980) 50 CompCas 75

Hon'ble Judges : Salil K. Roy Chowdhury, J

Bench : Single Bench

Advocate : A.C. Law, S.B. Mukherjee, for the Appellant;

Judgement

Salil K. Roy Chowdhury, J.—This is a winding-up application filed by the Additional Registrar of Companies, West Bengal, after obtaining sanction of the Regional Director, Company Law Board, Calcutta, under Section 439(5) of the Companies Act, 1956. The grounds alleged are that the company has suspended its business for a whole year within the meaning of Clause (c) of Section 433 of the Companies Act, 1956, and it is just and equitable that the company should be wound up under Clause (f) of Section 433 of the Companies Act, 1956.

2. It appears that the company was incorporated on the 18th January, 1941, as a public limited company and its registered office is situate at No. 22, Chittaranjan Avenue, Calcutta. The objects of the company, inter alia, are to acquire and hold shares, stocks, debentures, debenture-stocks, bonds, obligations and securities issued or guaranteed by the company and to carry on, inter alia, all kinds of agency business and to take part in management, supervision and control of the business of any other company association, firm and persons and to act as managing agents, agents, secretaries, directors or sole director, etc., and to carry on business as bankers, confectioners, butchers, milk sellers, butter sellers, etc. It appears that the company is a habitual defaulter in filing its statutory documents and returns under the Companies Act with the Registrar of Companies and did not hold annual general meetings. The company and directors were prosecuted, convicted and fined year after year for the years ending 31st December, 1963, 31st December, 1964, 31st December, 1965, 31st

December, 1966, and 30th June, 1967. It also appears that the directors of the company were prosecuted u/s 614A(2) of the Companies Act for non-filing of the balance-sheet for the period up to 31st December, 1966, and annual return up to 30th June, 1967, and were convicted. It further appears that the company and its directors were also prosecuted for non-filing of the balance-sheets and profit and loss accounts for the years ending 31st December, 1967, 31st December, 1968, and 31st December, 1969, which ended in conviction.

3. It is alleged in para. 8 of the petition that the company did not file its balance-sheets and annual returns for the years ending 31st December, 1963, onwards and the company did not carry on any business from 1951 to 1960. It is further alleged that, as the company has not carried on business since 1962, there is no use in allowing the company to continue and be a drain on public fund and, therefore, it must be held that the company has suspended its business for a whole year within the meaning of Clause (c) of Section 433 of the Companies Act and it is just and equitable that the company should be wound up as provided in Clause (f) of Section 433 of the Companies Act, 1956.

4. It appears that in view of the state of affairs, the Registrar of Companies applied before the Regional Director, Company Law Board, Calcutta, for sanction under Sub-section (5) of Section 439 of the Companies Act for presenting the petition for winding up against the company to the court. It appears that the Regional Director after giving an opportunity to the company for making any representation within one month from the date of service of the notice, dated 27th October, 1972, by an order dated 8th January, 1973, accorded sanction to the petition under the provisions of the second proviso to Sub-section (5) of Section 439 of the Companies Act, 1956, read with the Government of India, Ministry of Finance, Department of the Company Affairs, and Insurance, notification No. G.S.R. 71 dated 1st January, 1966, to present this petition for winding up.

5. The present winding-up petition was presented on the 27th February, 1978, and was made returnable on the 6th March, 1978. On the returnable date notice was directed to be served on the company along with a copy of the petition and it was made returnable on the 13th March, 1978. On the 13th March, 1978, the company appeared and took leave to file the affidavit and the petitioner also took leave to file affidavit-in-reply. Thereafter from time to time the date for filing the affidavit-in-opposition and affidavit-in-reply by the Registrar was extended and also leave was given to the parties to file supplementary affidavits.

6. The company, through one Arun Kumar Jhajharia, one of the directors, took several objections firstly that the company has not suspended its business and in fact it has carried on its business and earned substantial amounts by way of profits and the company is a solvent company. It is further alleged that the company is a subsidiary company of Messrs. James Wright Ltd. which also has its registered office at the same place at No. 22, Chittaranjan Avenue, Calcutta. It is further alleged that the company's books, papers and documents were seized by

the Enforcement Department during 1962-63 and, therefore, the company was not in possession of those books for those years, as a consequence of which the company could not file its statutory returns and documents due to factors beyond its control. It is further alleged that the company has prepared its balance-sheets from 1970 onwards and the same have been duly audited by Messrs. George Read & Co., a firm of chartered accountant of Chowranghee Square, Calcutta, and the statements of accounts and reports have been prepared by the said auditors for the years 1970-71, 1971-72, 1972-73 and 1973-74, which have been given to the company for consideration by its shareholders. It is further alleged that the company through the sincere efforts of its directors to enhance its business has taken up quite substantial business for the last few years from 1970 to 1974, and is making substantial profits as set out in para. 6 of the said affidavit of Arun Kumar Jhajharia affirmed on 18th March, 1978. It is further alleged that the company is a very much running concern and is financially solvent. It had to pass through great difficulties due to reasons beyond its control and now it has been successfully able to overcome the crisis. It is further alleged that the company has never suspended its business and is carrying on its business smoothly. It is further alleged that the sanction of the Regional Director under Sub-section (5) of Section 439 of the Companies Act was accorded under quite different factual circumstances and as such the winding-up petition cannot be filed on the basis of sanction accorded 5 years ago and on the basis of facts and circumstances -prevailing at that time which have undergone substantial changes. It is further alleged that the application is not maintainable and is a mala fide one and should be dismissed with costs.

7. It appears that the said Arun Kumar Jhajharia filed another affidavit affirmed on 20th March, 1978, inter alia, alleging that the company has sundry creditors to the extent of Rs. 5,18,000 and they are opposing the winding-up application, i.e., Jhajharia Trading Co. P. Ltd., a sister concern of the company and one, R. P. Agarwalla & Bros. P. Ltd. It was further alleged that the accounts for the period 1970 to 1974 had been duly prepared and were approved at the annual general meeting of the company alleged to have been held in June, 1977, and the said accounts were tendered for filing in July, 1977, with the Registrar of Companies but the same was refused on the ground of delay although, the company was willing to pay any additional fees, as required or imposed for the purpose of filing. As in the said supplementary affidavit allegations were made against the Registrar for not accepting the balance-sheets and annual returns for those years in spite of tendering the same along with the additional fees, if any, on the 5th April, 1978, I granted leave to the petitioner to file a supplementary affidavit-in-reply thereto. Pursuant to such leave an affidavit affirmed on 25th May, 1978, by one, Kanchan Kumar Dhar, Additional Registrar of Companies, the petitioner, was filed, inter alia, denying that the company tendered for filing the balance-sheets and annual returns for the years 1970 to 1974, as alleged. It was further submitted in the said affidavit that the present application is not an application by a creditor or a contributory for compulsory winding-up, but has been initiated

by the Registrar of Companies pursuant to a sanction accorded by the Company Law Board and the same has been done in public interest. It was further pointed out in the said supplementary affidavit of the petitioner that the said Jhajharia Trading Co. P. Ltd. and James Wright Ltd. are companies controlled by the said Jhajharia and, therefore, they would naturally come forward to oppose the winding-up petition. It was specifically made clear in the said supplementary affidavit that the application has been made on two specific grounds, i.e., suspension of business for one year and it is just and equitable and, therefore, the creditors' view on the proposed winding-up petition is not material.

8. Mr. A.C. Law, appearing for the petitioner, submitted that from the records of the Registrar, that is, the balance-sheets and other documents filed by the company, it appears that the company is not carrying on any business for more than one year and the company is a habitual defaulter in filing its balance-sheet and profit and loss account and annual returns and its directors have been prosecuted year after year and even then the company had not filed any such balance-sheet and profit and loss account regularly. Therefore, it must be held that the company had suspended its business for more than one year within the meaning of Clause (c), Section 433 and it is just and equitable to wind up the company u/s 433(f) of the Companies Act, 1956. Mr. Law cited a decision of the English Court in *Re Lubin, Rosen and Associates Ltd.* [1975] 1 All ER 577 (Ch D), where the Secretary of State presented a petition for a compulsory winding-up order pursuant to Section 35(1) of the English Companies Act, 1967. In the facts of that case, it was held that the petition presented by the Secretary of State is in somewhat different category from a petition presented by a creditor or contributory since the latter petition in their own interest is a class, whereas the Secretary of State petitions under a special statutory provision which comes into operation only when it is expedient to him in public interest that the company should be wound up and it was further held that in such cases, the court, without abdicating any of its judicial and discretionary powers ought to give weight to the Secretary of State's views. Relying on the said decision, Mr. Law submitted that in the present case, the court should give weight to the Registrar's views for presenting the winding-up petition after obtaining sanction of the Company Law Board under Sub-section (5), Section 439 of the Companies Act, 1956. He further submitted that in the facts and circumstances of the case it must be held that the company has suspended its business for more than one year and it is only after the present application has been made that the affidavits have been filed alleging that the company is carrying on business and earning profits. He referred to the various decisions of this court on the question whether the company can be said to have suspended its business or the substratum has gone : *Muralidhar Roy v. Bengal Steamship Co.* [1920] ILR 47 Cal 654 ; AIR 1920 Cal 722, *Oriental Navigation Co. v. Bhanaram Agarwalla* ILR 1922 Cal 399 ; AIR 1922 Cal 365 , *In The Matter of: Dhootpapeshwar Sales Corporation Private Limited*, and, lastly, the Supreme Court decision in *Mohan Lal and Another Vs. Grain Chamber Ltd., Muzaffarnagar and Others*, .

9. Mr. Law submitted that in the present case although there is some delay in filing the winding-up petition after obtaining the sanction under Sub-section (5) of Section 439 of the Companies Act, 1956, for the public interest it is just and equitable that the company should be wound up and particularly having regard to the fact that all sorts of statements have been made in the affidavit filed on behalf of the petitioner regarding the carrying on of the business although no balance-sheet, profit and loss account, or returns have been filed by the company since 1963. Therefore, at this stage, it cannot be said that the presentation of the winding-up petition could be an abuse of the process of the court, and, therefore, it must be admitted.

10. Mr. S.B. Mukherjee appearing for the company submitted, firstly, that there is no ground whatsoever as to the factual basis of obtaining sanction. Secondly, the present application is barred by limitation under Article 137 of the Limitation Act, 1963, as the present application has been admittedly filed more than five years after the sanction under Sub-section (5) of Section 439 was obtained. Thirdly, there are alternative remedies available to the petitioner against the company for defaults alleged to have been committed by the company under the Companies Act as the winding-up petition is filed on just and equitable ground. And lastly, the inordinate delay in presenting the petition has made the winding-up petition liable to be dismissed. Mr. Mukherjee cited the recent decision of the Division Bench of this court in *Kumarapuram Gopal Krishnan Ananthakrishnan Vs. Burdwan-Cutwa Railway Co. Ltd.*, where it has been held that Article 137 of the Limitation Act applies to an application for winding-up of a company and the limitation starts from the date of accrual of right to apply. The right of the Registrar to apply for winding-up of the company accrues on the date when the sanction is obtained under Sub-section (5) of Section 439 of the Companies Act, 1956, and, therefore, Mr. Mukherjee rightly submitted that the present application is admittedly filed long beyond three years from the date of sanction accorded under Sub-section (5) of Section 439 of the Companies Act for presenting the winding-up petition. Therefore, the application on the face of it is barred by limitation and it must be taken off the file.

11. Mr. Mukherjee also relied on a decision of A.N. Ray J. (as he then was) in *Re: Bengal Flying Club Limited*, where it has been held that as the petition was filed about three years after the alleged claim of the petitioning creditor arose, such a delay would suggest that the winding-up petition was not bona fide and the discretion of the court could not be exercised in the facts and circumstances of that case. Mr. Mukherjee relied on the said principle and submitted that in the present case the delay of more than 5 years in presenting this petition must be held not bona fide and the court's discretionary power should not be used in favour of admitting the said petition.

12. Lastly, Mr. Mukherjee cited a decision in *Lokenath Gupta and Others Vs. Credits Private Ltd.*, where it has been held that when the company carried on the business it could not be said that the substratum of the company had

completely gone and the court should refuse to make an order of the winding up. Relying on the said decision, Mr. Mukherjee submitted that the present application is not maintainable as it is mainly on the ground which does not exist on the date of presenting the winding-up petition and on stale grounds, and secondly, the petitioning-creditor has ample and adequate alternative remedy to proceed against the company and its directors for non-compliance with the statutory provisions and the winding-up petition is not the proper remedy in the facts and circumstances of this case. He relied on the provisions of Section 233(2) of the Companies Act which gave ample power to the petitioner to proceed under various other sections of the Companies Act against the company if there is any ground for the same. Mr. Mukherjee rightly submitted that in any event the present application is barred by limitation, as has been specifically held by the appeal court decision in *Kumarapuram Gopal Krishnan Ananthakrishnan Vs. Burdwan-Cutwa Railway Co. Ltd.*, . Therefore, Mr. Mukherjee submitted that the present application should be dismissed.

13. Mr. Mukherjee also drew my attention to *Gore-Browne on Companies*, 43rd edn., Articles 30-20.

14. In *Gore-Browne on Companies*, 43rd edn., Articles 31-20, where the said decision of the English court in *Lubin, Rosen & Associates Ltd.* [1975] 1 All ER 577 (Ch D) has been noted and it appears that the Secretary of State for Trade presenting a petition on the basis of an inspector's report u/s 168 for public interest, the question of court's consideration of the said, petition is on a different basis than those of the creditors and contributories. The provisions of the English Act are quite different from the provisions under which the present petition is presented.

15. Mr. Mukherjee drew my attention to Section 237 and Section 243 of the Companies Act where provisions have been made for investigation and report can be filed and the winding-up petition can be presented on the basis of such report by the Central Government. This is not an application of that nature and, therefore, the question of the petitioner being in a different category than the creditors and contributories cannot arise. Mr. Mukherjee, therefore, submitted that the present application should be dismissed.

16. Considering the matter very carefully and giving my anxious thought over the matter as it relates and involves the vital question of administration of the companies under the Companies Act and the function of the Registrar of Companies, I cannot but dismiss the present application on the ground that the application is barred by limitation under Article 137 of the Limitation Act of 1963, on the face of it. Admittedly, the sanction obtained by the petitioner under Sub-section (5) of Section 439 of the Companies Act is dated the 8th January, 1973, and the winding-up petition was presented on the 27th February, 1978, i.e., more than five years from the date of obtaining the sanction. Therefore, according to the decision of the appeal court in the case of *Burdwan-Cutwa Railway Co.* reported in [1978] 48 Comp Cas 611 (Cal), the right to apply

accrued on the 8th January, 1973, and it has become barred three years thereafter under Article 137 of the Limitation Act, 1963. The said decision is binding on me and the application must be held to be bar-red by limitation.

17. Apart from this fact it appears to me that prima facie the nature of the company's business and the way it has been conducted by its directors, gives rise to grave suspicion as to the nature of its business and the mode in which it is carried on. Further it appears that the company is consistently violating the provisions of the Companies Act by not filing its annual return, profit and loss account and the balance-sheets and the Registrar as a routine matter prosecuted the company and its directors year after year and obtained convictions. In spite of such convictions it appears that the company has not regularised the matter and has not complied with the provisions of the Companies Act yet. Further it also appears to me that the Registrar, on the one hand, on the basis of a sanction obtained under Sub-section (5) of Section 433 of the Companies Act on the ground that the company has suspended its business for more than one year and it is just and equitable to wind up the company, and on the other hand went on mechanically prosecuting the company and its directors for non-filing of the balance-sheets and profit and loss accounts year after year under the provisions of the Companies Act. I am finding it difficult to understand how such an inconsistent stand can be taken by the Registrar as, in one breath, he is alleging that the company has suspended its business and it is just and equitable to wind up the company and, in the next breath, he is proceeding against the company for non-filing of the balance-sheets and profit and loss accounts as if the company is alive and has committed default in filing its statutory returns and documents under the Companies Act. Further, from the affidavit of Arun Kumar Jhajharia, a director of the company, which has been filed in this application, it is alleged that the company is carrying on substantial business and as a subsidiary of James Wright & Company Ltd. is earning substantial profit for the last few years. Further, the company has a large number of creditors who appear to be its sister concerns, and therefore, the company seems to be interlocked with several companies and having mutual transactions.

18. Prima facie, it appears to me that the nature of the company is somewhat dubious and mysterious and the Registrar seems to have been mechanically proceeding under the Companies Act, on the one hand obtaining sanction to present a winding-up petition under Sub-section (5) of Section 433 of the Companies Act and, on the other hand, prosecuting the company and its directors for non-filing of the balance-sheets and profit and loss accounts for the subsequent years. It further appears that for the period between 1970 and 1972, the Registrar has not proceeded against the company and its directors. The company is alleged to have violated the provisions of Section 210 of the Companies Act for so many years, year after year, and in the affidavit filed on behalf of the Registrar, sufficient doubt has been expressed as to the bona fide nature of the company's business which are alleged in the affidavit-in-opposition in this application. From the way the Registrar has proceeded in presenting this

petition, it reveals utter lack of responsibility and sense of duty on the part of the Registrar. He has not realised his functions under the Companies Act which is primarily to act as a watchdog to keep control and supervision over the functioning of a company by due compliance of the provisions of the Companies Act. By merely mechanically obtaining a sanction and keeping the same in cold storage for five years and then trying to use the same by presenting a winding-up petition shows utter lack of sense of duty and responsibility on the part of the petitioner in this case being the Assistant Registrar of Companies, West Bengal.

19. The application, as I have already held, is barred by limitation on the face of it but the facts revealed in this proceeding, clearly show that there are sufficient grounds for the Registrar to proceed u/s 234 of the Companies Act and take appropriate steps for investigation into the affairs of the company under the provisions of the Companies Act. I am also prima facie satisfied from the materials which have been brought to the notice of this court in the affidavits filed on behalf of the company and the Registrar that there are very good grounds for suspicion as to the nature of the business of the company and the manner in which it is conducted which requires to be probed into and investigated according to the provisions of the Companies Act or any other provision of law. Further, it appears that the books, papers and documents of the company up to the year 1963, were seized by the C.B.I. and that itself gives an indication that the company's affairs are not conducted in a proper manner.

20. In these circumstances, the Registrar is directed forthwith to take appropriate steps to discharge his duties and functions for proper investigation of the affairs of the company under the provisions of the Companies Act.

21. In the result, I cannot but hold, that the present application is barred by limitation on the face of it and, therefore, the winding-up petition is to be taken off the file. There will be no order as to costs.