

(1935) 04 BOM CK 0008
In the Bombay High Court
Case No : I.C. No. 6 of 1935

In Re: Strauss and Co. Limited; In Re: Bhimraj Harlalka

Date of Decision : 16-04-1935

Acts Referred:

Companies Act, 1913 — Section 270, 271

Citation : (1936) 38 BOMLR 1080

Hon'ble Judges : Rangnekar, J

Bench : Single Bench

Judgement

Rangnekar, J.—This petition raises a somewhat difficult and important question under Sections 270 and 271 of the Indian Companies Act, 1913. In form the question is whether this Court has jurisdiction to make a winding up order against an unregistered foreign company not consisting of more than seven members.

2. The facts which do not seem to be in dispute are briefly as follows : The respondent company was incorporated in England with limited liability under the English law. It carries on business in India and its principal place of business in India is situate in Bombay. It was stated in the petition that the company consisted of more than seven persons, but it is now admitted that that statement was made, inadvertently and that the company consists of five members only. The petitioning creditor is a creditor in the sum of about Rs. 60,000 and admittedly there are other creditors whose claims exceed that of the petitioning creditor. The petition is founded upon the allegation that the company has stopped payment and has ceased to carry on business, and this is not disputed. From the affidavits made at a later stage of the hearing of this petition, it appears that a winding up petition was presented against the company in England on January 29, 1935, and an official liquidator was appointed. The actual winding up order was made on February 11, 1935, that is five days after the presentation of the present petition to this Court. From the report made by the official liquidator in England it appears that there are heavy liabilities of the company and a heavy deficit, and that the unsecured creditors in England are not likely to get even half a shilling in a pound. The company has more than forty

branches in India and used to carry on extensive business in Bombay, Karachi, Madras and other places in India.

3. The main question which is raised is as regards the jurisdiction of this Court.

4. The material sections are Sections 270 and 271. Section 270 is in these terms :-

270. For the purposes of this Part, the expression "unregistered company" shall not include a railway company incorporated by Act of Parliament or by an Act of the Governor General in Council, nor a company registered under the Indian Companies Act, 1866, or under any Act repealed thereby, or under the Indian Companies Act, 1882, or under this Act, but save as aforesaid, shall include any partnership, association or company consisting of more than seven members.

Section 271 provides that subject to the provisions of this Part, (i.e. Part IX), 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 certain exceptions and additions, to which it is not necessary to refer. These two sections are placed in Part IX of the Act, the heading of which is " Winding up of unregistered companies." The expression " company" is defined in Section 2 (2) as meaning a company formed and registered under this Act or an existing company. Sub-section (7) defines " existing company " as follows :-

(7) "existing company" means a company formed and registered under the Indian Companies Act, 1866, or under any Act or Acts repealed thereby, or under the Indian Companies Act, 1882 :

Having regard to the definitions, it seems to me to be clear that the expression " company" under Sections 270 and 271 has a wider meaning.

5. Under the English Act of 1862, Section 199, it was held that an unregistered company could not be wound up under that Act unless there were more than seven members: In re Bowling and Welby's Contract [1895] 1 Ch. 663. Then came the Act of 1908, which by Section 267 gave a definition of the expression " unregistered company " materially different from that contained in Section 199 of the Act of 1862. The Act of 1908 was followed by the Act of 1929, and the corresponding section in that Act is Section 337, which is in the terms following :-

337. For the purposes of this Part of this Act, the expression " unregistered company" shall include any trustee savings bank certified under the Trustee Savings Bank Act, 1863, and any partnership, whether limited or not, any association and any company with the following exceptions :-

(1) a railway company incorporated by Act of Parliament, except in so far as is provided by the Abandonment of Railways Act, 1850, and the Abandonment of Railways Act, 1869, and any Acts amending them;

(2) a company registered in any part of the United Kingdom under the Joint Stock Companies Acts or under the Companies Act, 1862, or under the

Companies (Consolidation) Act, 1908, or under this Act;

(3) a partnership, association or company which consists of less than eight members and is not a foreign partnership, association or company;

(4) a limited partnership registered in England or Northern Ireland.

As observed by Palmer in his *Company Precedents*, Vol. II, 14th Edn., at p. 48, the definition of "unregistered company" in this Act differs from that contained in Section 267 of the Act of 1908, especially in providing that a partnership, association or company which consists of not less than eight members is not an unregistered company unless it is a foreign partnership, association or company. Section 270 of the Indian Companies Act is in the same terms as Section 267 of the English Act of 1908.

6. Section 270, I think, consists of two parts. It begins by stating what will not be included in the expression "unregistered company", and the excepted bodies are : a railway company incorporated by Act of Parliament or by an Act of the Governor General in Council, or a company registered under the Indian Companies Act, 1866, or under any Act repealed thereby, or under the Indian Companies Act, 1882, or under the Indian Companies Act of 1913. If the section had stopped there, it is clear that the respondent company, which is a foreign unregistered company, could not be brought within the exception, and would be included within the expression "unregistered company". The marginal note of the section is : "Meaning of "unregistered company." "

In my opinion, the section, as far as it goes and confined to what I called the first part of it, is a definition of the expression "unregistered company." Then the second part does not tell us what bodies will fall within the expression "unregistered company", but that some particular kinds of bodies would be included within the expression. As a matter of construction it is clear that the section is not exhaustive. The words "shall include" do not amount to "shall mean and include". It is well established that the word "include" in the interpretation clauses is intended to be enumerative and not exhaustive. It has an extending force and it does not limit the meaning of the term to the substance of the definition. When it is intended to exhaust the signification of the word interpreted, the word "means" is used. Therefore, this part of the section merely says that a partnership, association or company consisting of more than seven members is an unregistered partnership, association or company. It is clear, therefore, that other partnerships, associations or companies may be included within the expression "unregistered company".

7. The scheme of the Act seems to me to be clear. The first part tells us as to what is not included within the expression "unregistered company", and generally speaking it brings within the exception bodies incorporated under the Acts specified, that is to say, bodies which have a corporate existence. If the section had stopped there, it follows that bodies which are not incorporated under any of the Acts thus specified must be included within the expression "

unregistered company ", as far as the Act is concerned, A foreign company, though registered outside British India, but which is not registered under this Act, will then be an unregistered company under the Act. The procedure for getting such companies registered under this Act is laid down in Section 277. Then in juxtaposition to this part the second part tells us what would be included within the expression " unregistered company". Taking these, namely, a partnership, association or a company consisting of more than seven persons, it must mean that they refer to bodies which are unincorporated bodies but carrying on business and having no corporate existence. It was clearly necessary to include such bodies within the expression " unregistered company ". If this had not been done, a partnership or association of say nineteen persons carrying on a business other than banking, or of nine persons carrying on the business of banking (see Section 4), would be able to carry on its business without the creditors being entitled to have its affairs wound up under the Act.-a relief to which they would be entitled if such bodies fell within the expression " unregistered company ". In my opinion, therefore, " company " in this part of the section can only mean and must mean a body which has no corporate existence not being registered under the Act. But a foreign company is a corporate body and a legal entity, and under the law it can sue and be sued here as such. The words " shall include" in the second part of the definition will not exclude a foreign company not registered under the Act, and such a company must fall within the expression " unregistered company ". If I am right in holding that the words " partnership, association or company " in the second part of the section refer to an agglomeration of individuals which is not incorporated or registered in India, then it must follow that a foreign company which is not registered here is included within the expression " unregistered company ". It seems to me that the whole scheme of the section is this that all bodies having corporate existence under the Acts in force in India do not come within the meaning of unregistered company; but all bodies having no corporate existence under; those Acts are included within the expression " unregistered company ". The second part of the section has merely an extending force. Therefore, in my judgment, a foreign company whatever the number of its members may be, which is not registered here, will come within the second part of the section and will " be an unregistered company for the purposes of this part of the Act.

8. I may also refer to Section 107 of the Presidency-towns Insolvency Act. The effect of that section is that an insolvency petition cannot be presented against a company incorporated and registered under any Act in force. Therefore a foreign company not registered in India can be proceeded against in insolvency. But the relief in insolvency is less wide than that available if a company is wound up under the Companies Act, and I see no reason nor any principle why an unregistered foreign company should not be wound up under the Indian Companies Act.

9. In Palmer's Company Precedents, Vol. II, 13th Edn., at p. 64, the learned author with reference to Section 267 of the Act of 1908 observes that the

position under the old Act of 1862 was clear that an unregistered company could not be wound up under that Act unless there were seven members at least, but not so under the Act of 1908, for the expression "shall include" does not necessarily import "shall mean and include" though it may have that meaning.

10. There is no reported decision u/s 267 of the Act of 1908, but Mr. Jinnah relies on an unreported case mentioned at p. 48 by Palmer in his *Company Precedents*, Vol. II, 14th Edn., *Halle Penis Trading Corpn.*, No. 00463 of 1920, in which Ashbury J. held that there was no jurisdiction under the Act of 1908 to wind up a foreign company unless it had more than seven members. Palmer then observes that this decision appears to be overruled by the new section, that is Section 337 of the Act of 1929. The facts of this case are not known nor the ratio decidendi. Mr. Jinnah also relies on an obiter dictum of Scrutton L. J. at p. 658 in *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* [1923] 2 K.B. 630. In that case the principal question was whether a Russian Bank which had a branch in England and was carrying on business in England had ceased to exist by reason of certain decrees and orders passed by the Russian Republic, and it was held that the Russian Bank had ceased to exist. Lord Justice Scrutton, after dealing with this question, observed (p. 658) :-

I think it very doubtful whether the effect of the Russian legislation was not that if at the time of the winding up orders there was a company at all, it was an unregistered company with less than seven shareholders, which the English Court had no jurisdiction to wind up.

The case went to the House of Lords, and on the question of the effect of the Russian legislation to which Lord Justice Scrutton refers, it was reversed by the House of Lords in [1925] A. C. 112. The relevancy of the winding up order in that case is not clear, and I find no trace of any argument relating to the effect of winding up order of the Russian Bank in the arguments of the learned counsel. Mr. Jinnah also relies on foot-note (b) to paragraph 1463 in *Halsbury*, Vol. V, 2nd Edn., p. 845- The foot-note is to the following effect :-

Prior to the Act of 1929, the requirement that an unregistered company should consist of at least eight members in order that it could be wound up applied to a foreign company;...

I am unable to hold that these authorities are conclusive of the question I have to determine. On the other hand, there is also the obiter dictum of Swinfen Eady J. in *New York and Continental Line* (1919) 54 S.J. 117, where, after pointing out the difference between Section 199 of the Act of 1862 and Section 267 of the Act of 1908, the learned Judge held that under the Act of 1862 the Court had no jurisdiction to wind up a foreign unregistered company not consisting of more than seven members, and then observes as follows :-

In his "Lordship's" view, as at present advised, there was much to be said for the construction of that Act which the petitioners set up.

Mr. Jinnah also relies on a Rangoon case in *V. E. R., M. Chettyar Firm v. J., Hormusji* ILR (1930) Ran. 658. In that case it was held that the Court has jurisdiction to wind up a partnership, association or company u/s 271 only if at the date of the petition such partnership, association or company consists of more than seven members. With all respect to the learned Judges who decided that case, I am unable to agree with the decision, and it seems to me, with respect, that the contrary view taken in the lower Court by Cunliffe J. (I.L.R. & Ran. 409) is more correct. It is difficult to see where the anomaly to which Sir Arthur Page refers comes in. Upon the whole matter I have reached the conclusion that this Court has jurisdiction to wind up an unregistered foreign company irrespective of the number of its members under Sections 270 and 271.

11. The next question is whether it is expedient to wind up this company here. The principles on this question are quite clear. A Court has jurisdiction to wind up as an unregistered company a foreign company whatever the number of its members, if it has an office and assets within its jurisdiction, and the mere fact that the order for winding up the company has been made by a competent Court of the place of the company's incorporation cannot make any difference to the jurisdiction of this Court. In such a case the order will sometimes be restricted and the sanction of the Court will be required if further proceedings are taken, and the liquidation here will be ancillary to the Court where the company is incorporated. But in spite of its desire to assist the foreign Court the Court here will not give up the forensic rules which govern the conduct of its own liquidation. See *In re English, Scottish, and Australian Chartered Bank* [1893] 3 Ch. 385.

12. As this question was raised somewhat half-heartedly in the argument and it was conceded that the affidavits filed were not sufficient to enable me to reach a conclusion, I stood the petition over at the request of counsel so as to enable the parties to present their respective cases. This they have now done.

13. In my opinion, the case made out before me is sufficiently strong to enable me to hold that it is expedient that the order for winding up should go, and this, is fairly conceded by Mr. Vakeel on behalf of one of the opposing creditors. But I should like to summarise briefly the position appearing from the affidavits.

14. In the first place there are certain alleged secured creditors whose claims run into several lacs of rupees, and who are in possession of a very large part of the goods and assets of the company as secured creditors. These claims are not admitted by the petitioning creditor, who says that the letters of hypothecation upon which the claims rest are invalid and not binding on the company. Whatever the position may be, the fact is that these letters of hypothecation were executed in Bombay, and the evidence of the whole of these transactions is in Bombay. These claims will have to be investigated, and can only be satisfactorily investigated in Bombay.

15. Then the second point is that the company has assets in several parts of this country, and a considerable part of such assets is in several Native States. It

appears the Courts in the Native States have made winding up orders as regards the company within their jurisdiction, and it would be convenient for a liquidator appointed here to deal with the position arising as the result of these winding up orders.

16. Then the claim of the opposing creditor would also require investigation. His claim is seriously challenged by the petitioning creditor, according to lowborn instead of his being a creditor of the company in the sum of rupees three lacs he is a debtor, and for this purpose the petitioning creditor relies upon the evidence contained in the books of the company, of which he has taken inspection for the purposes of this petition. The opposing creditor's case on the other hand is that though it may appear from the books in the position in which they are that he is a debtor, if the books are balanced properly he would be a creditor of the company to a very large extent, and that certain sums to which he is entitled as a creditor are not entered in the books. This would require investigation which seem to me to clearly fall within the jurisdiction of this Court.

17. Then, again, the claims of the unsecured creditors, as to which the whole of the evidence is here, I think, can more properly be dealt with by this Court, and I see no reason why these hundreds of small creditors, if a further investigation of their claims is necessary, should be driven to a Court thousands of miles away from here.

18. Then there are suits to which the company is a party pending in India and the question as to whether these suits should be stayed or not can only be answered by this Court.

19. I do not wish to go into the various other points made in the affidavits in view of the fair attitude taken by the learned counsel on behalf of the opposing creditor, and I am satisfied that it is expedient and in the interests of all parties concerned that the winding up order should go.

20. The question then remains as to the exact form in which the order should be made. As I have stated, the winding up here must be to a great extent ancillary to the work of liquidation which is carried on by virtue of the order made by the English Court. Mr. Desai on behalf of the petitioning creditor has referred to a case in *In re Commercial Bank of South Australia* (1886) 33 Ch. D. 174, which deals with this question, and following that precedent, I think the order in this case must be to some extent of the same character. The winding up order will, therefore, be made on the petition presented on February 6, 1935, and I appoint Official Liquidator liquidator of this company and direct him not to act without the special directions¹ of the Judge in Chambers except for the purpose of getting in Indian assets and settling the list of creditors in India, and advertising the order and the appointment of the Official Liquidator once in the Bombay Government Gazette, the Times of India and the Bombay Samachar. The liquidator to open a separate account herein with the Imperial Bank of India, Ltd. As to what other directions should be given must depend upon the course of liquidation which the

Official Liquidator under the English winding up order would take in future. The petitioner and the opposing creditor would be entitled to taxed costs to come out of the assets. Taxed costs shall include instruction charges.