
(1993) 12 AP CK 0024

In the Andhra Pradesh High Court

Case No : Company Petition No. 13 of 1990

Malini Rao

APPELLANT

Vs

Hotel Dwaraka and Others

RESPONDENT

Date of Decision : 02-12-1993

Acts Referred:

Companies Act, 1956 — Section 582, 583, 583(4)

Citation : (1994) 1 ALT 36 : (1997) 90 CompCas 179

Hon'ble Judges : S. Parvatha Rao, J

Bench : Single Bench

Advocate : S. Ravi, R. Raghunandan Rao and A. Sanjay Kishore, for the Appellant; T. Anil Kumar, for the Respondent

Judgement

S. Parvatha Rao, J.—This company petition is presented by the petitioner under sub-section (4) of section 583 of the Companies Act, 1956 (hereinafter referred to as "the Act"), for the winding up of Hotel Dwaraka, respondent No. 1 herein, under the provisions of the Act contending that clauses (a), (b) and (c) of the said sub-section (4) are satisfied.

2. The petitioner states that the partnership firm, Hotel Dwaraka, was first constituted under an unregistered partnership deed dated August 23, 1979, and that it was subsequently reconstituted under another partnership deed dated April 14, 1984, and that the said partnership was also unregistered. Respondent No. 1 in the present company petition is the partnership firm constituted under the said partnership deed dated April 14, 1984. A copy of the said partnership deed marked as annexure "A" is filed as an enclosure to the company petition. The petitioner states that respondents Nos. 2 to 12 along with her, "originally constituted" the first respondent firm and since there are more than seven partners, section 582 of the Act is attracted. Therefore, the first respondent firm can be wound up under the Act as an "unregistered company".

3. The petitioner states that two other persons, namely, Sri B. Sitarama Rao and Sri B. Mohana Rao, were also partners of the first respondent the former was her

father and the latter was her brother. The former died on October 2, 1985, and the latter died on March 9, 1988. According to the petitioner, the first respondent firm was a partnership at will and, therefore, it stood dissolved on the death of her father on October 2, 1985, and alternatively on March 9, 1988, on the death of Sri B. Mohana Rao.

4. The petitioner contends that because the first respondent firm stood dissolved, it was incumbent on respondents Nos. 2 to 12, to settle the accounts and execute a dissolution deed and that they failed to do so. The object of the first respondent firm was to carry on business as hoteliers and caterers. It set up a restaurant with the boarding and lodging sections and also acquired considerable wealth. Without settling the accounts of the petitioner, the respondents have been continuing the business in the name and style of Hotel Dwaraka. The petitioner is, therefore, entitled to her share in the profits earned by respondent No. 1 right from April 14, 1984, i.e., the date when the first respondent firm was constituted, up to date.

5. The petitioner made several oral demands in vain for settlement of her accounts. The petitioner also got issued legal notices dated July 5, 1988, and October 10, 1988, to respondents Nos. 2 to 12 for furnishing accounts of respondent No. 1 and also for payment of her share. The petitioner submits that even if it is assumed though not admitted that respondent No. 1 was not dissolved on the death of Sri B. Seetharama Rao or B. Mohana Rao, it stood dissolved on the issuance of the legal notices by her. But no action was taken by the respondents pursuant to the legal notices got issued by her. The petitioner further states that respondents Nos. 2 to 12 are guilty of preventing the petitioner from participating in the business of respondent No. 1 and in not permitting her to inspect the books of account. She, therefore, submits that it would be just and equitable to wind up respondent No. 1 u/s 583 of the Act. The petitioner also contends that u/s 50 read with section 16 of the Indian Partnership Act, 1932, respondents Nos. 2 to 12, who are carrying on the business of the dissolved first respondent, are liable to account for the said business so conducted by them. As the amounts due to her were not paid by respondent No. 1, it should also be dissolved on the ground that it is unable to pay its debts. Thus, the petitioner contends that the circumstances mentioned under each of clauses (a), (b) and (c) of sub-section (4) of section 583 are satisfied and, therefore, the petitioner prays for the winding up of the first respondent company under the provisions of the Act stating that "since the petitioner was a partner until the death of one of the partners on which the company stood dissolved, the petitioner has signed this petition in the capacity of a partner as the company is carrying on business in the very name and style and the shares, etc., of the petitioner has not been settled."

6. This company petition was filed on February 28, 1990, and notice before admission was ordered therein on March 2, 1990. On December 30, 1990, the company petition was admitted as a prima facie case was made out that the first

respondent firm was dissolved. On that date none appeared for the respondents even though service was effected on them. The petition was advertised as directed by this court in the Hyderabad editions of the English daily Deccan Chronicle, dated January 22, 1992, and of the Telugu daily Eenadu, dated January 22, 1992. Subsequently, learned counsel, Mr. T. Anil Kumar, filed his appearance for the various respondents on different dates. As no appearance was filed initially for respondent No. 9, he was set ex parte on November 6, 1992. Company Application No. 273 of 1992 was filed by him represented by Mr. T. Anil Kumar on December 18, 1992, for setting aside the said ex parte order and the said application was allowed on July 9, 1993. He adopted the counter-affidavit filed on behalf of the other respondents.

7. Respondent No. 10 filed the counter-affidavit dated September 18, 1992, on behalf of the respondents. It is stated therein that the petitioner was not at all concerned with the original partnership of the firm, Hotel Dwaraka, constituted under the partnership deed dated August 23, 1979. Subsequently, under the partnership deed dated April 14, 1984, the petitioner and B. Mohana Rao were admitted as partners with effect from April 1, 1984. The shares of the partners as well as the contents of the partnership deed dated April 14, 1984, are not disputed by the respondents. The respondents also do not dispute the fact that B. Sitarama Rao expired on October 2, 1985, and that the partnership constituted under the deed dated April 14, 1984, ceased to exist. It is the case of the respondents that after the demise of B. Sitarama Rao a fresh deed of partnership was executed on October 14, 1985, with effect from October 3, 1985, by reconstituting the firm and that the petitioner, who got married by October 2, 1985, and settled out of Hyderabad, expressed that she would not continue as partner and that, therefore, her mother, B. Saraswati Bai, was admitted as partner in her place and in the place of the late B. Sitarama Rao. Respondent No. 10 also states in his counter-affidavit that the partnership deed dated October 14, 1985, recited that the petitioner retired from the partnership with effect from October 2, 1985, and that the profits of the partners under the deed of partnership dated April 14, 1984, would be determined up to October 2, 1985, and distributed as per their shares. Respondent No. 10 also states that the subsequent partnership deed dated October 14, 1985, specifically provided that the death of any partner would not dissolve the firm.

8. It is the further case of the respondents that the account of the petitioner in the first respondent firm was already settled and that the petitioner is not entitled to any share in the partnership firm reconstituted under the partnership deed dated October 14, 1985. It is stated in the counter-affidavit of respondent No. 10 that as per the ledger extract relating to the petitioner for the financial year ending March 31, 1985, the petitioner's share of profit was Rs. 32,580 for that year, and that out of that amount Rs. 20,000 was paid at her instance to her father, B. Sitarama Rao, and Rs. 9,959 was paid towards her Income Tax and she drew a sum of Rs. 448 and that the balance of Rs. 2,173 was carried forward to the next year. The sum of Rs. 20,000 paid to her father, B. Sitarama Rao, was

entered in his account for the financial year ending March 31, 1985. It is also stated that for the financial year ending March 31, 1986, the petitioner's share of profit was Rs. 26,263.78 and that the same was shown in her Income Tax return as share income from Hotel Dwaraka and Income Tax was also paid for the same. From this the respondents contend that the petitioner received her share of profit from the first respondent firm and that her claim for accounts, etc., in the present company petition is patently false and dishonest to her knowledge. In the counter-affidavit it is also denied that the petitioner made any oral demands at any time for settlement of accounts. It is also stated that the respondents were not bound to reply to any of the notices issued on behalf of the petitioner in view of the fact that the claim made by the petitioner was false to her knowledge and was also time barred. It is contended that on the date of the presentation of the company petition on February 28, 1990, the claim of the petitioner was stale and time barred and that there was no debt due by the respondents to the petitioner and that the present company petition was filed maliciously and mischievously to extort illegitimate benefits.

9. The said counter-affidavit of respondent No. 10 was filed on September 18, 1992, belatedly after the petitioner was examined in chief on September 17, 1992, and after taking time for cross-examining her on the next day. After the counter-affidavit was filed on the next day, learned counsel for the petitioner naturally sought time for filing her reply affidavit. Thereafter the petitioner filed her reply affidavit dated September 22, 1992. Therein the petitioner has denied that after her father's death she had expressed any desire not to continue as a partner. She states that the statement of the respondents that she surrendered her interest in favour of her mother because she got married and settled outside Hyderabad is farfetched and naive and that there is no truth in it. She states that the mere fact that her mother, Smt. Saraswathi Bai, was made a partner does not establish that she had surrendered her interest in favour of her mother because her brother, B. Lakshminarasimha Rao, respondent No. 3, herein was also a partner of the first respondent firm and she adds that she had seven sisters and one brother. She also states that the alleged partnership deed of October 14, 1985, cannot be given any credence because it could easily have been fabricated with the connivance of respondents Nos. 2 to 12. She wants an adverse inference to be drawn from the fact that the respondents did not come forward with their case till September 18, 1992, and did not also reply to the notices got issued through her lawyer and also from the fact that no documents whatsoever were filed by the respondents in support of their case. It is significant that she states that the facts averred in the counter-affidavit as regards her share of profit for the financial year ending March 31, 1985, are substantially correct. But she denies the averments made in the counter-affidavit relating to her share for the financial year ending March 31, 1986. She denies that she filed a return of income for the assessment year relevant to the previous year ending March 31, 1986, and apprehends that her signature "being easy to reproduce" might have been forged and that unless the relevant documents are

produced she would not be in a position to make any statement with regard to the same. She states that she had not signed the return of income for the period which ended on March 31, 1986. She also alleges that the respondents deliberately suppressed the information as to what happened to her share of profits allegedly credited to her account for the said period and that regarding the advance tax, if any, paid on her behalf and the ultimate assessment made on the firm, etc. She contends that the respondents admitted that they continued the business of the first respondent firm in the name of Hotel Dwaraka wrongfully using the assets of respondent No. 1 which stood dissolved "on the date of the death of Sri B. Sitarama Rao or in any event on the date of death of B. Mohana Rao" and, that, therefore, the respondents are liable to account for all the profits earned from the date of death of Sri B. Sitarama Rao till present.

10. The petitioner got herself examined as PW-1. In her examination-in-chief, she stated that she did not have the original partnership deed of the first respondent and she got marked a photo copy of the same as exhibit A-2. She has stated that after the death of her father on October 2, 1985, and after the death of her uncle, M. Mohana Rao, she did not sign any retirement deed or reconstitution deed. She has stated that she had never taken active part in the business of the hotel and that after the death of her father and uncle she did not get the profit and loss account and account statements. She was orally asking the respondents to furnish accounts and she got issued three legal notices dated July 15, 1988, October 10, 1988, and November 22, 1989, office copies of which were got marked as exhibits A-3 to A-5, respectively. None of the respondents replied to the said legal notices. She has stated that after the death of her father and her uncle, her account was not settled and that she was not paid any sums of money by any of the respondents. She has admitted that she has filed the Income Tax return with respect to her share of income from the first respondent firm and that she has filed the Income Tax return for 1985-86 for the accounting period ending March 31, 1985. The petitioner was cross-examined on November 6, 1992. In her cross-examination, she has stated that she came to Hyderabad after knowing of the death of her father on October 2, 1985, and by that date she was married though when she joined the partnership she was not married. She has denied that after the death of her father in his place and in her place her mother, Saraswathi Bai, was taken as a partner and that it is not true that she expressed her unwillingness to continue as a partner after her father's death. To the suggestion that she was not a partner of the firm from the date of her father's death on October 2, 1985, she replies "it is not true. I continued as partner after my father's death". Then she was asked :

"Q. I put to you that for the financial years ending March 31, 1985, and March 31, 1986, your share of profit has been apportioned and delivered and you have also filed your Income Tax returns admitting your income towards profits of your share from the first respondent-firm and also paid the Income Tax thereon."

She has answered as follows :

"Yes. At that time my father was alive and he was taking all the responsibility on my behalf."

11. Though acknowledgments for the notice issued under exhibit A-5, dated November 22, 1989, to the respondents were filed and marked as exhibits A-6 to A-16, acknowledgments in respect of notices under exhibits A-3 and A-4 have not been filed. However, she has denied the suggestion that notices under exhibits A-3 and A-4 were not issued. She denied the suggestion that for the purpose of black-mailing the respondents she filed a false case against them.

12. Though learned counsel for the respondents was given time for examining witnesses, he reported that he had no witness to be examined. No documents were also filed on behalf of the respondents.

13. Learned counsel for the petitioner contends that all the three clauses of sub-section (4) of section 583 are attracted to the facts of the case and that grounds are made out for the winding up of the first respondent firm under the Act. Learned counsel for the petitioner submits that as the respondents do not dispute the formation of the first respondent firm under the partnership deed dated April 14, 1984, consisting of 14 partners as evidenced by exhibit A-2, respondent No. 1 falls within the definition of unregistered company u/s 582 of the Act, and, therefore, the present petition u/s 583 of the Act is maintainable. He relies on the decision of the Karnataka High Court in Ganapaiah Maiya v. M.T.R. Associates [1986] 59 Comp Cas 359. He further submits that under clause 11 of exhibit A-2 the duration of the partnership shall be at will, and, therefore, when Sitarama Rao died on October 2, 1985, the first respondent firm was dissolved on October 2, 1985, and that, therefore, clause (a) of sub-section (4) of section 583 is attracted to the first respondent firm and this court will have to allow the company petition and wind up the first respondent firm. He further submits that clauses (b) and (c) of the said sub-section (4) are also attracted to the first respondent firm on the facts of the present case. He submits that respondents Nos. 2 to 12 continued the business of the firm and in spite of repeated requests by the petitioner failed to render accounts and have been continuing the business of the firm with the assets of respondent No. 1. In the circumstances, he submits that it would be just and equitable that the continuing business is wound up. He contends that u/s 50 of the Indian Partnership Act, 1932, the provisions of clause (a) of section 16 of that Act shall apply to transactions by any surviving partner undertaken after the firm is dissolved on account of the death of a partner and before its affairs have been completely wound up and that respondents Nos. 2 to 12 are, therefore, liable to account for the profits made by them out of the property of the first respondent firm or business connection of respondent No. 1 or its name as per clause (a) of section 16 of that Act. Learned counsel also submits that this liability on the part of respondents Nos. 2 to 12 is a continuing one ever since the first respondent firm was dissolved on October 2, 1985.

14. Learned counsel for the respondents contends that the company petition is

barred by time. He submits that the provisions of the Limitation Act, 1963, apply to the petitions and applications under the Act unless the contrary is indicated expressly or by necessary implication. He submits that under clause (b) of section 2, the expression "application" includes a petition and that the present company petition falls under article 137 of the Limitation Act, 1963. The said article 137 is a residuary provision and provides for limitation of three years for "any other application for which no period of limitation is provided elsewhere in this division". The starting point for the running of time under the said article is "when the right to apply accrues". Learned counsel for the respondents submits that the right in the present case accrued to the petitioner when the first respondent firm was dissolved on October 2, 1985, and, therefore, the present company petition is barred by time. He also relies on the recent decision of a Division Bench of this court in *N. Kamalamba v. M. Ramaiah* [1992] 2 APLJ 414.

15. Learned counsel for the petitioner submits that the Limitation Act, 1963, is not attracted to petitions and applications under the Act. But I am of the view that learned counsel for the petitioner is not right in view of the clarification of the position by the Supreme Court in *The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma*, . The Supreme Court has considered the changes effected in the new Limitation Act, 1963, and has disagreed with the earlier view taken by a two-judge Bench of that court in *Town Municipal, Council, Athani Vs. The Presiding Officer, Labour Courts, Hubli and Others etc.*, , and has held that article 137 of the Limitation Act, 1963, will apply to any petition or application filed under any Act in a civil court and that the said article is not confined to applications contemplated by or under the Code of Civil Procedure. In the Limitation Act of 1963, the articles are divided into three divisions : the first division deals with the suits, the second division with appeals and the third division with applications-the third division consists of two parts, the first part (Part 1) deals with applications in specified cases and the second part (Part 2) deals with other applications. Article 137, as already pointed out, is a residuary article. The corresponding article under the old Limitation Act of 1908 is article 181. The Supreme Court observed as follows (page 286) :

"The changed definition of the words "applicant" and "application" contained in sections 2(a) and 2(b) of the 1963 Limitation Act indicates the object of the Limitation Act to include petitions, original or otherwise, under special laws. The interpretation which was given to article 181 of the 1908 Limitation Act, on the principle of *ejusdem generis* is not applicable with regard to article 137 of the 1963 Limitation Act. Article 137 stands in isolation from all other articles in Part 1 of the third division. This court in *Nityananda, M. Joshi and Others Vs. Life Insurance Corporation of India and Others*, , has rightly thrown doubt on the two-judge Bench decision of this court in *Town Municipal, Council, Athani Vs. The Presiding Officer, Labour Courts, Hubli and Others etc.*, , where this court construed article 137 to be referable to applications under the Civil Procedure Code. Article 137 includes petitions within the word "applications". These petitions and applications can be under any special Act as in the present case."

16. In that case, the Supreme Court has considered the applicability of article 137 to petitions u/s 16 of the Telegraph Act. Following that judgment of the Supreme Court a number of High Courts have taken the view that the said article 137 governs applications under the Companies Act except where the Act itself makes provision for limitation. (See *Official Liquidator of Security and Finance (Pvt.) Ltd. v. Smt. Pushpawati Puri* [1978] 48 Comp Cas 385; [1978] Tax LR 10 (Delhi) and *R.C. Abrol and Co. (Pvt.) Ltd. Vs. A.R. Chadha and Co., and K.G.K. Ananthakrishnan v. Burdwan Cutwa Rly Co. Ltd.* [1978] 48 Comp Cas 611 . In view of the clear pronouncement of the Supreme Court, I have to hold that the present company petition is barred by time because the right to make the present petition u/s 583 accrued to the petitioner on October 2, 1985, when one of the partners died and the partnership was, therefore, dissolved and the present company petition was filed more than four years thereafter, i.e., on February 28, 1990, and the petitioner has not filed any application for condoning the delay in presenting the company petition beyond time. The petitioner has also not given any explanation for the delay in filing the company petition. The three years" time expired on October 2, 1988, and even as per the petitioner the first legal notice, i.e., the original of exhibit A-3, dated July 15, 1988, did not evoke any response from any of the respondents. The second legal notice, i.e., the original under exhibit A-4, was issued on October 10, 1988. But there was no response to that also. But by then the time ran out and there was no reason whatsoever for the petitioner to get issued another legal notice on November 22, 1989 (the original of exhibit A-5).

17. Learned counsel for the petitioner contends that respondents Nos. 2 to 12 have been using the property of the first respondent and continuing the hotel business using the firm name after the dissolution of the first respondent firm on October 2, 1985, without winding up its affairs and, therefore, u/s 50 read with clause (a) of section 16 of the Indian Partnership Act, 1932, they are liable to render accounts for the profits made by them. He also submits that so long as respondents Nos. 2 to 12 continue to make such profits, the petitioner is entitled to demand accounts from them and, therefore, there is no question of any limitation for the present company petition and that the company petition is maintainable under clauses (b) and (c) of sub-section (4) of section 583 of the Act. I do not find any substance in this contention. Sub-section (4) of section 583 of the Act is as follows :

"(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 opinion that it is just and equitable that the company should be wound-up."

18. In interpreting the said sub-section (4), it has to be borne in mind that there can be a variety of unregistered companies. Clause (b) of section 582 defines an unregistered company in an inclusive way and states that the said expression shall include any partnership, association or company (other than those specified in clause (a) of section 582) 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. In the present case, I am only concerned with a partnership. Chapter VI of the Indian Partnership Act, 1932, deals with dissolution of a firm. u/s 39 of that Act "the dissolution of a partnership between all the partners of a firm is called the "dissolution of the firm"." Dissolution of the firm means breaking up or extinction of the relationship which subsisted between all the partners of the firm. That Act provides for dissolution under different circumstances. Section 40 of that Act provides for dissolution by agreement; section 41 provides for compulsory dissolution; and section 42 provides for dissolution on the happening of certain contingencies, one of them being by the death of a partner. Section 43 provides for dissolution by notice of partnership at will. Section 44 provides for dissolution by the court and specifies the various grounds on which the court may dissolve a firm at the suit of a partner-ground (g) is "on any other ground which renders it just and equitable that the firm should be dissolved". Section 46 provides that "on the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights". This adumbrates the rights of the partners to have the business of the firm wound up after dissolution. This provision makes it clear that when a partnership is dissolved its partners are entitled to have the firm wound up. This right accrues the moment a firm is dissolved in any of the manners provided under the Indian Partnership Act, 1932. (See *N. Kamalamba v. M. Ramaiah* [1992] 2 APLJ 414). Therefore, I am of the view that where a firm is dissolved, a partner can approach this court only under clause (a) of sub-section (4) of section 583 and that clauses (b) and (c) can be invoked only in cases where the firm is subsisting and not dissolved. The question of rendering of accounts by the partners u/s 50 read with clause (a) of section 16 arises in the winding up proceedings if entertained by the court and cannot give rise to a separate cause of action for the winding up of the firm under sub-section (4) of section 583 of the Act. In *Vasantrao alias Baburao and Another Vs. Shyamrao and Others*, , the Supreme Court has observed that the relief of declaration that a firm stood dissolved is not one that can be claimed in a proceeding under Part X of the Act which provides for the winding up of unregistered companies and that sub-section (4) of section 583 mentions the circumstances in which an unregistered company may be wound up and one of the circumstances is that the company has been dissolved.

19. On the facts also, I find that the petitioner has not made out a clear case

that the accounts were not settled after the demise of B. Sitarama Rao. In the company petition it is stated as follows :

"The account of the petitioner is yet to be settled and on the other hand the respondents are continuing the business in the name and style of the first respondent company. This being so the petitioner is entitled to her share in the profits earned by the company right from April 4, 1984, up to date."

20. Learned counsel for the petitioner states that the date April 4, 1984, has to be read as April 14, 1984, i.e., the date of the partnership deed under which the first respondent firm was constituted (exhibit A-2). But in her reply affidavit dated September 22, 1992, she accepts the statement of accounts for the period ended March 31, 1985, and states that they are substantially correct. She only disputes the accounts of the year ended March 31, 1986, and denies that she filed the return of income for the assessment year relevant to the previous year ended March 31, 1986, and apprehends that her signature was forged and that she had not signed the return of income for the period ended March 31, 1986. But to the specific question put as regards her share of profit for the financial years ending March 31, 1985, and March 31, 1986, that she filed her Income Tax returns admitting her income towards profits of her share from the first respondent firm and that she also paid the Income Tax thereon she answers "yes" and adds that at that time her father was alive and he was taking all the responsibility on her behalf. It cannot be that she did not understand the question because she is fairly proficient in English. But whatever her case might be as regards the accounts for the financial year ended March 31, 1986, there can be no doubt that she accepted the accounts up to the financial year ending March 31, 1985, and her case that accounts had to be rendered from April 14, 1984, does not stand scrutiny. The respondents no doubt contend that the petitioner did not want to continue as partner after the death of her father on October 2, 1985, and that in her place also her mother Smt. B. Saraswathi Bai was taken as a partner and that a fresh partnership deed was executed on October 14, 1985. But they have not produced any evidence to substantiate their case and did not examine even the tenth respondent who gave the counter affidavit on behalf of the respondents.

21. However, in view of my finding that the company petition is barred by time, it is dismissed. No costs.