

(2007) 02 AP CK 0030
In the Andhra Pradesh High Court
Case No : O.S.A.No.1 of 1993

Progressive Constructions Ltd.

APPELLANT

Vs

Mr. P.S.V.P. Vittal Rao alias Mr. Vittal Charan Das (died), rep.
by Legal Representative Smt. P. Vijaya Lakshmi

RESPONDENT

Date of Decision : 02-02-2007

Acts Referred:

Companies Act, 1956 — Section 433, 434(1), 439, 439(1), 439(8)
Partnership Act, 1932 — Section 44

Citation : (2007) 139 CompCas 807 : (2007) 2 CompLJ 493

Hon'ble Judges : M. Venkateswara, J; Bilal Nazki, J

Bench : Division Bench

Advocate : S. Ravi, for the Appellant; L. Ravi Chandar, for the Respondent

Final Decision : Dismissed

Judgement

Bilal Nazki, J.—This appeal raises some interesting questions of law. An application came to be filed before the Company Court by a shareholder for winding up u/s 433 of the Companies Act, 1956 (for short "the Act"). The Company Judge, however, instead of ordering winding up, dissolved the Firm "Progressive Engineering Company (for short "PEC") and directed settlement of accounts amongst its partners. The contention of the learned Counsel for appellant was that in the facts and circumstances of the case, the Company Judge could have not ordered dissolution of the Firm PEC and as such, the order needs to be struck down. The Company Petition was filed by the 1st respondent namely Mr. P.S.V.P. Vittal Rao, who is since dead and his legal representatives are on record.

2. Before going to the pleadings and the questions that fall for consideration, certain other facts have to be taken note of. One is that the 1st respondent also filed an appeal against the order of the Company Judge being aggrieved of ordering dissolution and not winding up, but this appeal being O.S.A.No.3 of 1993 was subsequently dismissed as not pressed unconditionally on 2nd of April

2002. A suit had also been filed by the 1st respondent being O.S.No.616 of 1983 for dissolution of the partnership, which was dismissed in default by the I Additional Judge, City Civil Court, Hyderabad.

3. The 1st respondent herein, who filed Company Petition No.6 of 1983, and who shall be referred to as petitioner, filed the application before the Company Court claiming that he was partner of the Firm PEC. The Firm had 16 partners. Disputes started between the petitioner and other partners and other partners tried to expel him, but as there was no provision in the partnership deed for expulsion of a partner, he could not be expelled. His grievance was that 15 partners of the Firm PEC were attempting to transfer whole of shares of the Firm including of the petitioner, to the respondent-Company without justification and legal authority. He also claimed that under the balance sheet as on 31.03.1981, the Firm PEC which was transferred to respondent-Company, was indebted to him in an amount of Rs.1,74,928/-, and as such, as a creditor, he was entitled to maintain the petition.

4. Counter affidavit was also filed by the appellant herein. The following issues were framed by the Company Court-

1. Whether the petitioner is a creditor of the Company within the meaning of Section 439(b) of the Indian Companies Act ?

2. Whether the petitioner is a debtor of the Company ?

3. Whether it is just and equitable to order winding up of the Company ?

4. Whether the Company Petition is maintainable in view of the various suits pending in the Civil Courts wherein the parties were agitating their respective rights ?

5. Whether the Company Petition is maintainable in view of O.S.No.616/83 on the file of the Court of the I Addl. Judge, City Civil Court, Hyderabad, a suit for dissolution and rendition of accounts of the Firm, Progressive Engineering Company ?

6. Whether on the facts and circumstances of the case the Company Petition is liable to be dismissed without enquiry ?

7. Whether the petitioner has any locus standi to file the Company Petition and the same is bonafide ?

8. To what relief ?

5. Company Petition No.11 of 1983 was filed by Yuva Bharati Steels and Yuva Bharati Chemicals against the Progressive Constructions (P) Limited for winding up of the respondent-Company alleging that it was indebted to them in an amount of Rs.6,57,206/- and also alleging that the respondent-Company was formed to take over the assets and liabilities of the Firm PEC.

6. Counter affidavit was filed by the appellant herein and the following issues

were settled for determination by the learned Company Judge-

1. Whether the petitioners are creditors within the meaning of Section 433(e) read with Section 434(1)(a) of the Indian Companies Act and within the meaning of Section 439(1)(b) ?
 2. Whether the respondent-Company is indebted to the petitioners in a sum exceeding Rs.500/- as on the date of the petition and if so, what is the amount due ?
 3. Whether the petitioners made demand requiring the respondent to pay the sum of Rs.6,56,306-45 ps as due to the petitioners and has served the said demand of the company by causing it to be delivered at its registered office requiring the company to pay the said sum due to the petitioners ?
 4. If so, whether the respondent admits the liability ?
 5. Whether the petitioners have issued the statutory notice of 21 days ?
 6. If so, whether the respondent-company has complied with the said notice as per law ?
 7. Whether the Company Petition is not maintainable without adding the partner of the petitioner-firm as parties to the Company Petition ?
 8. Whether the petitioners have no locus standi to file the company petition ?
 9. Whether the amount alleged to be due to the petitioners is admitted by the Company and whether the Company is not able to meet the said liability ?
 10. Whether C.P.No.11 of 1983 is not maintainable in view of the suits filed by the respondent against the said firm claiming Rs.4,36,000/- from the said firms and other legal proceedings pending in the lower courts ?
 11. Whether the petitioners are in fact put up by the petitioner in C.P.No.6 of 1983 on the file of this Court for his benefit ?
 12. Whether the Company Petition is bad and not maintainable on the ground that no leave of the Court u/s 439(8) of the Companies Act was sought and obtained and no petition for leave of admission was filed ?
 13. Whether the present petition is bad in view of the pendency of the suit O.S.No.1065 of 1984 on the file of the II Additional Judge, City Civil Court Hyderabad ?
 14. Whether the respondent-Company is liable to be wound up under Sections 433(e) and 434(1)(a) and Section 439(1)(b) of the Indian Companies Act ?
 15. To what relief ?
7. A common order was passed in Company Petition Nos.6 of 1983 and 11 of 1983. C.P.No.11 of 1983 was dismissed and C.P.No.6 of 1983 was allowed to the

extent that partnership was dissolved.

8. Now, coming to Issue No.3 in C.P.No.6 of 1983 i.e. whether it was just and equitable to order winding up of the Company, though there is no specific finding of the learned Company Judge on this issue as to whether it was just and equitable to order winding up of the Company, but it is held, "Applying the above principles to the present case, it is evident that this is a case of pre-existing partnership among P.W.1, R.Ws.2 and 4 and others, I held that the conversion of the partnership into a Private Limited Company is illegal, unauthorized and mala fide" "The conversion being thus non est, it follows that the firm of PEC is still deemed to be continuing in existence in the garb of a Private Limited Company, namely, PCPL. The petitioner has established beyond doubt that there is utter lack of probity and mis-management in the conduct of the affairs of the company. There is, absolutely, no scope of the petitioner and R.Ws.2 and 4 pulling on together any longer as partners of the firm. There is loss of mutual faith and confidence in one another. Clause 5 of Ex.A-5 Partnership Deed narrates that the partnership of PEC is a partnership at will. I, therefore, hold that it is a fit case for directing dissolution of the firm PEC on just and equitable ground u/s 44(g) of the Indian Partnership Act."

9. On Issue No.5 relating to the pendency of O.S.No.616 of 1983 before the I Additional Judge, City Civil Court, Hyderabad, the suit being for dissolution of partnership and rendition of accounts, the Company Judge held that the pendency of that suit will not be a bar for ordering dissolution of the partnership. Then the Court itself considered whether in a petition filed for winding up, a direction for dissolution could be given u/s 44 of the Partnership Act.

10. Now, two questions are before this Court namely, whether in the absence of any pleadings by the parties for dissolution of partnership, the partnership could have been ordered to be dissolved by the Company Court in a petition for winding up, and if so, whether such a course could be ordered by the Company Judge when a suit had been pending and the suit had been dismissed for default. As a matter of fact, the relief sought in the suit, which was allowed to be dismissed in default, was now granted by the Court in the winding up petition. The learned Company Judge was of the view that in terms of Section 443(1)(d) of the Companies Act, the Court could make any order that it thought fit. Whether an order of dissolution of partnership in a petition of winding up would be an order within the meaning of "any other order that it thinks fit", the learned Counsel for appellant submits that it is not possible to pass an order u/s 44(g) of the Partnership Act while hearing a matter under Companies Act. Section 443 of the Companies Act lays down the powers of the Court hearing a winding up petition. The power include dismissing of Company petition for winding up, adjourning the hearing conditionally or unconditionally, making any interim order that it thinks fit and making an order for winding up of the Company with or without costs or any other order that it thinks fit.

11. The learned Company Judge, while ordering the dissolution of partnership

and refusing to wind up the Company, also gave the following findings-

There is ample documentary evidence and also the admissions of RWs.2 and 4 that the Company has secured various contract works in not only Andhra Pradesh, but also Madhya Pradesh and Uttar Pradesh. The winding up of the Company will also create a blot on the company in the business field. Under these circumstances and having regard to the interests of other shareholders who might not have shared the malafide intention of expelling PW-1 without justification from the Partnership, thereby putting him to unnecessary agony and hardship, I feel that instead of taking the extreme step of winding up the Company, a just and equitable order should be passed by directing dissolution of the erstwhile partnership which is still continuing to exist and is making enormous profits. This, no doubt, results in PW-1 being entitled to a share in the profits of PCPL though there is no contribution on his part for earning profits for the Company" "Hence, the Company is liable to share the profits with PW-1 in spite of the fact that he has not contributed for the profits of the Company. This is a penalty which the company has to pay for the malafide act committed by RW-4 in expelling PW-1 illegally and without his consent."

12. So, even on the findings of the learned Company Judge, the Company was doing well and the business was flourishing and the petitioner was one of the 15 partners. The Supreme Court in *Hind Overseas (P) Ltd. V. R.P.Jhunjunwala*¹, while considering the question of ordering dissolution in a petition for winding up, referred to *Yenidje Tobacco Co. Ltd.*² and followed the principles laid down in this case. According to Apex Court, in applying the principles of dissolution of partnership, the following factors were important-

1. Equal shareholding.
2. Complete deadlock in the administration of the Company.
3. Lack of probity and mismanagement in the conduct of affairs of the Company.

13. Then the Supreme Court also referred to another case known as *Ebrahimi's case*³ and carved out certain features. The Supreme Court also noted-

The question that is raised in this appeal is as to what is the scope of Section 433(f) of the Act. Section 433 provides for the circumstances in which a company may be wound up by the court. There are six recipes in this section and we are concerned with the sixth, namely, that a company may be wound up by the court if the court is of the opinion that it is just and equitable that the company should be wound up. Section 222(f) of the English Companies Act, 1948, is in terms identical with the Indian counterpart, Section 433(f). It is now well-established that the sixth clause, namely, "just and equitable", is not to be read as being *eiusdem generis* with the preceding five clauses. While the five earlier clauses prescribe definite conditions to be fulfilled for the one or the other to be attracted in a given case, the just and equitable clause leaves the entire matter to the wide and wise judicial discretion of the court. The only limitations

are the force and content of the words themselves, "just and equitable". Since, however, the matter cannot be left so uncertain and indefinite, the courts in England for long have developed a rule derived from the history and extent of the equity jurisdiction itself and also born out of recognition of equitable considerations generally. This is particularly so as Section 35(6) of the English Partnership Act, 1890, also contains, inter alia, an analogous provision for the dissolution of partnership by the court. Section 44(g) of the Indian Partnership Act also contains the words "just and equitable."

Section 433(f) under which this application has been made has to be read with Section 443(2) of the Act. Under the latter provision where the petition is presented on the ground that it is just and equitable that the company should be wound up, the court may refuse to make an order of winding up if it is of opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

14. Following the principle laid down in this case, we find that there was no case of dissolution. The learned Company Judge also did not take into consideration that a suit for dissolution of partnership was filed before the trial Court, which was allowed to be dismissed in default. The effect of dismissal of that suit even in default was that the matter had been concluded between the parties, as that judgment had become final. And lastly, at no point of time the appellant was aware that an order of dissolution of partnership would be passed. It is also contended by learned Counsel for appellant that even the respondents were not in favour of passing of an order of dissolution, as is evident from the fact that they also filed appeal being O.S.A.No.3 of 1993 against the order of dissolution and wanted winding up, but that appeal was dismissed as not pressed, unconditionally.

15. For these reasons, we allow the appeal.