

(1968) 03 KL CK 0017
In the High Court Of Kerala
Case No : A.S. No. 344 of 1967

Sebastian Joseph

APPELLANT

Vs

New Gothuruth Educational and Industrial Company Ltd. and
Others

RESPONDENT

Date of Decision : 05-03-1968

Acts Referred:

Companies Act, 1956 — Section 647

Citation : (1968) 03 KL CK 0017

Hon'ble Judges : M.S. Menon, C.J;P. Govindan Nair, J

Bench : Division Bench

Advocate : M. Ramanatha Pillai, for the Appellant; T.P. Poullose, T.T. Uthup and V.L. Cherlatee for respondent Nos. 1 and 2 and V.U. Joseph, for the Respondent

Final Decision : Dismissed

Judgement

1. This is an appeal by a member of the Gothuruth Educational and Industrial Company Ltd. (in liquidation), against an order passed by the District Judge, Ernakulam, on a petition purporting to be u/s 396 of the Indian Companies Act, 1956, moved by the New Gothuruth Educational and Industrial Company Ltd. and also by its chairman, managing director and trustees. This application has been allowed and it is contended before us by the appellant that the District Judge had no jurisdiction to deal with the matter as under the Companies Act, 1956, jurisdiction is vested in the High Court in regard to this matter. It is also urged that the petition is defective in that it does not conform to the relevant rules and forms applicable. Thirdly it was urged that in any view of the matter the transfer of the assets of the Gothuruth Educational and Industrial Company Ltd. (in liquidation), sought by the application cannot be allowed without settling the claims of the appellant.

2. The Gothuruth Educational and Industrial Company Ltd., has been in the process of being liquidated and certain proposals were made before the court and orders have been passed as early as February 15, 1963, sanctioning what is

called reconstruction of the company. The relevant parts of this order are extracted in the order under appeal which we may also extract:

On I.A. No. 949 of 1962 an order was passed on February 15, 1963, to the following effect.

(1) That the members' representative be authorised to take all necessary steps to form the new company with the members of this company willing to become members of the new company for the purpose of acquiring the undertaking, property and liabilities of this company and with the same objects as are set forth in clause (3) of the memorandum of association of this company.

(2) That the new company be a company limited by guarantee and that the liability of each member be limited to a sum of Rs. 500 (five hundred rupees only).

(3) That this company should transfer to the new company the whole of its undertaking, property and liabilities.

(4) That the liquidator and the members' representative above-mentioned be authorised to take all necessary steps to fully and effectively carry out the scheme.

(5) That the liquidator be authorised to meet, out of the assets of this company all the expenses for convening and conducting the meeting of the members and all the costs and expenses required for fully and effectively carrying out the scheme and that the members' representative above-mentioned be paid out of the assets of the company, the expenses required for the purpose of forming a new company, as stated above and all other expenses and costs he has to meet for fully and effectively carrying out this scheme.

3. It is clear from the terms of the resolution passed at the meeting which has been accepted by the court by order dated February 15, 1963, that the Gothuruth Educational and Industrial Company Ltd. (in liquidation), is to cease to exist. This being so, it is equally clear that the present application that has been moved is a step in respect of a winding-up of the Gothuruth Educational and Industrial Company Ltd. (in liquidation). In regard to such winding-up, the provisions of the Companies Act, 1956, will have no application. This is clear from the provision in Section 647 thereof. Section 647 states:

647. Where the winding up of a company has commenced before the commencement of this Act--(i)

(ii) the other provisions with respect to winding up contained in this Act shall not apply, but the company shall be wound up in the same manner and with the same incidents as if this Act had not been passed:

That the winding up of the Gothuruth Educational and Industrial Company Ltd. commenced before the commencement of the Companies Act, 1956, is not disputed. Such winding up will therefore have to be concluded without reference

to the provisions of the Companies Act, 1956. This being so, there is no substance in the contention raised by counsel for the appellant that the District Court had no jurisdiction to deal with the matter. We are supported in this view by a decision of the Travancore-Cochin High Court in *A. Ananthasubramonia Ayyar v. Official Receiver, Sitaram Spg. & Wvg. Mills Ltd.* [1957] Comp. Cas. 417 AIR 1957 T.C. 51. Similar views have been taken by the Bombay, Punjab and Rajasthan High Courts. The provision in Section 391 of the Companies Act, 1956, or for that matter Section 153 of the Companies Act, 1913, can be utilised either for compromise or for an arrangement or for the purpose of winding up of the company. When the scheme visualised by the resolution adopted in the meeting spells out winding up of the company, any transfer involved to implement that resolution will be with respect to the winding-up of the company and therefore an application u/s 153A of the Companies Act, 1913, for implementing such resolution as well as one u/s 394 of the Companies Act, 1956, for the same purpose will be steps-in-aid of the liquidation of the company. It is therefore appealable as an order passed in liquidation. This is what has been held by the Bombay High Court and therefore it is impossible to accept the contention of counsel for the appellant that whenever an application is moved either u/s 153A of the Companies Act, 1913, or u/s 394 of the Companies Act, 1956, it must be understood and treated as an original petition.

4. The second contention raised by the appellant is also without any force. The application has been styled as one u/s 394 of the Companies Act, 1956, but the quoting of a wrong section or the failure to adopt a particular form prescribed either by the Companies Act, 1956, or by the rules framed under the earlier Act cannot affect the substance of the application and does not touch the question of jurisdiction. We are not at all satisfied that the appellant has in any manner been prejudiced by the non-adoption of any particular form or any particular procedure.

5. The only other point remaining is about the transfers being allowed to be effected without the alleged claims of the appellant being settled. The order dated February 15, 1963, clearly provided that the claims of the appellant should be settled and it is so stated therein. But this order has been modified on an application moved before the court by an order dated June 12, 1963. This order provided that the settlement of the claims of the appellant need not precede the transfer of the assets. For a long time before us it was urged vehemently by the appellant's counsel that this order dated June 12, 1963, was passed behind the back of the appellant, that he was not aware of it and that, therefore, that order cannot bind him. We had, therefore, to call for the entire records of the case and on a perusal of the records it is seen that notice on the application was issued to the petitioner and it is seen from the cover of the registered letter addressed to the petitioner that it was taken to him on more than one occasion. The address given in the cover is the correct address and there is reason to believe that the appellant has been deliberately avoiding service. In the affidavit filed by the appellant in answer to an application, I. A. No. 824 of 1963, he has specifically

referred to the order dated June 12, 1963. This is seen from the counter affidavit dated January 24, 1964, in I. A. No. 824 of 1963 Company M. P. No. 1 of 1117 of the District Court. So he was aware of the order dated June 12, 1963, before January 24, 1964. He took no steps to vacate it. Nevertheless, it was urged before us that he was not aware of the order. This conduct of the appellant is reprehensible. The order is binding on him and he cannot be heard to contend against its terms.

6. Sufficient safeguards have been made by the court below in the order challenged before us for safeguarding the interest of the appellant. It has been directed that a sum of Rs. 6,500 must be retained by the official liquidator and the claim that has been put forward on behalf of the appellant is only for Rs. 4,219-71. On the other hand, the respondents' counsel has said that orders had been passed by which the appellant has been directed to pay over Rs. 6,000 to the company in liquidation. Whatever this be--we should not be understood as expressing any opinion in regard to the claims and counter claims--these are matters which are to be considered in due course. We are not at all satisfied that any interference with the order under appeal is necessary.

7. We dismiss this appeal with costs.