

(1957) 08 KL CK 0012

In the High Court Of Kerala

Case No : A.S. No. 422 of 1954 and 363 of 1955 (E)

Sebastian Joseph

APPELLANT

Vs

Thomman Paily

RESPONDENT

Date of Decision : 05-08-1957

Acts Referred:

Companies (Amendment) Act, 1956 — Section 391, 451
Companies Act, 1913 — Section 153

Citation : AIR 1958 Ker 314 : (1957) 1 KLJ 970

Hon'ble Judges : P.T. Raman Nair, J;C.A. Vaidialingam, J

Bench : Division Bench

Advocate : N. Kumaran Achen, for the Appellant; Madhava Prabhu, for the Respondent

Judgement

Raman Nayar, J.—These appeals are by a member of a company in liquidation, one against the dismissal of his application for the removal of the liquidator, and the other against an order sanctioning the reconstitution of the company.

2. By an order dated 15-8-1120 made in Company Petition No. 1 of 1117, the District Judge, Anjikaimal, ordered the winding up of a company called the Gothuruthi Educational and Industrial Company Ltd., registered on 23-9-1098 under the provisions of the Cochin Companies Act 4 of 1080, and at all material times, governed by the provisions of the Indian Companies Act, 1913.

In M. P. No. 237 of 1123, the liquidator, who happened also to be the managing director of the company at the time of the winding up order, applied to the Court under S. 153 of the Companies Act for permission to convene a meeting of the members to approve a scheme for reconstituting the company and for consequential orders. This was opposed by 74 out of the 141 members of the company and, in view of this opposition, the application was summarily dismissed by the Court.

On appeal to this Court in A. S. 79 of 1123, this Court took the view that the

mere fact of 74 members opposed the scheme did not necessarily mean that some of them may not change their views when all aspects of the question were discussed at a meeting. Permission was accordingly granted for convening a meeting, and the official liquidator was directed to convene a meeting of the members of the company after taking necessary directions from the lower Court.

On the matter going back to the lower Court, that Court appointed a Commissioner for the purpose of convening a meeting and ascertaining the views of the members on the question whether the company should be reconstituted. A meeting was accordingly held on 26-9-1954. Three resolutions were passed at this meeting. The first resolution to the effect that the company should be reconstituted was passed by a majority of 98 to 1.

The second resolution stating that the Court should be moved to give effect to the first resolution was passed by the same majority. The dissentient member, who is the appellant before us, moved a third resolution which was carried unanimously and that was to the effect, that the re-constitution should be without the liability imposed on the members by Cl. (4) of the memorandum of association of the company.

(By this clause the liability of each member was limited by guarantee to the sum of Rs. 500 and was to enure for a period of 24 years, in case the company was wound up within that period. That the legal effect of this clause was, as has been pointed out by counsel on both sides, that there would be unlimited liability after this period of 24 years was probably not appreciated by the persons who founded the company and subscribed to the memorandum of association).

3. It seems to us quite clear that the purport of the resolutions was that the reconstitution to be effected should be without any liability whatsoever to the members. It is now the common case that this is a resolution which, under the law, cannot be given effect to; and it would therefore follow that it is impossible to reconstruct the company in the manner in which the resolutions of the members demand. The Court below, however, sanctioned the reconstitution leaving the question as to the precise legal effect of the third resolution to be decided when it arose.

4. We cannot agree to this disposal of the matter. The question whether the company could be lawfully reconstituted in the manner in which its members wanted it to be reconstituted was a matter which should have been decided by the Court before it gave its sanction. That sanction, as we have already remarked, cannot be granted in the terms of the resolutions as they stand, and it is well settled that, as the language of Section 153 itself indicates, the Court, in sanctioning a compromise or arrangement, cannot introduce any substantial alteration and cannot substitute its own decision for that of the members.

When the members want a reconstitution without any liability to themselves all that the Court can do is to withhold its approval if such a re-constitution is not possible under the law. It cannot say that there shall be a reconstitution with

such liability on the members as the law might impose. We might also remark that in this case there was no scheme or arrangement placed before the Court for its approval. There was only a bare resolution that the company be reconstituted without liability to the members, and this is certainly not what S. 153 contemplates.

5. A. S. No. 363 of 1955 is the appeal against the order of the lower Court sanctioning the re-constitution and it follows from what we have said that this appeal has to be allowed. It is accordingly allowed with costs both here and in the Court below. The costs will come out of the assets of the company.

6. In M. P. No. 1836 of 1122 brought under Sec. 176 of the Companies Act, the dissentient member who happened to be also a creditor, levelled ill charges against the official liquidator and demanded his removal. The Court below found in favour of the liquidator on all the charges and dismissed the petition. The appeal against that dismissal is A. S. No. 422 of 1954.

We think it unnecessary to consider this appeal on the merits since both sides assure us that practically all the assets of the company have been brought into Court and almost all the liabilities met leaving a balance of about Rs. 65,000 in Court deposit. Hardly anything remains to be done, and it would appear that the liquidator has little chance of acting to the detriment of the company in the future, whether or not he has done so in the past.

7. This does not mean that the charges against the liquidator should go uninvestigated, or, if well founded, unpunished. But we think it unnecessary to adjudicate on them now since the appellant or any other person interested will have an opportunity of presenting them and making the liquidator liable in respect of any loss caused to the company when the question of his discharge comes up. The reservation of such a right will amply safeguard the interests of the company.

We might state that the appellant now presses only the six charges enumerated as C, D, E, G, H and J., in his petition and does not press the remaining charges. With regard to these six charges (and such other charges, if any, as are not mentioned in his petition) we wish to make it clear that the appellant will be entitled to agitate them at the time of the liquidator's discharge notwithstanding the findings of the lower Court which are hereby set aside so far as these six charges are concerned. We ourselves express no opinion whatsoever on these charges and leave the matter entirely open.

8. With these remarks we dismiss the appeal, A. S. 422 of 1954, since, as we have shown, the removal of the liquidator is no longer necessary in the interests of the company. There will be no order as to costs.