

(2002) 07 DEL CK 0044

In the Delhi High Court

Case No : CA 1225 of 2000 in CP No. 156 of 2000

Shakun Duggal and Others

APPELLANT

Vs

Shakun and Company

RESPONDENT

Date of Decision : 08-07-2002

Acts Referred:

Companies Act, 1956 — Section 397, 398, 4, 433, 439

Citation : (2003) 115 CompCas 781 : (2002) 100 DLT 665 : (2004) 50 SCL 398

Hon'ble Judges : Mukul Mudgal, J

Bench : Single Bench

Advocate : P.C. Khanna and Ruchi Sindhwani, for the Appellant; Sumant Batra and P. Bhatt, for the Respondent

Judgement

Mukul Mudgal, J.—This application challenges the maintainability of the company petition on the ground that the provision of Section 439(c) & 4(b) are not satisfied. The relevant clause of Section 439 read as follows:-

"439. Provisions as to applications for winding up - (1) An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section--

(a) by the company; or

(b) by any creditor or creditors, including any contingent or prospective creditor or creditors; or

(c) by any contributory or contributories; or

(4) A contributory shall not be entitled to present a petition for winding up a company unless-

(a)

(b) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his

name, for at least six months during the eighteen months immediately before the commencement of the winding up, or have devolved on him through the death of a former holder."

2. The petitioner Nos. 1 & 2, Ms. Shakun Duggal and Ms. Sukhbir Duggal are the daughters of Shri Ashok Duggal and late Smt. Alka Duggal. The petitioner No. 3 is Shri Ashok Duggal, husband of late Smt. Alka Duggal.

3. The applicant/respondent has submitted that the averment in para 3(b) of this application that the shareholding of the late Ms. Alka Duggal is only 25% has not been denied in para 3 of the reply to this application. Para 3 of the application sets out the following shareholding pattern:

"NAME OF THE SHAREHOLDER NO. OF SHARES PERCENTAGE

Mrs. Chander Mukul Mehra 10 shares 25%

Mr. Pradeep Mehra 10 shares 25%

Mrs. Alka Duggal 10 shares 25%

Mrs. Nishi Handa 05 shares 12.5%

Mrs. Sangeeta Khetrapal 05 shares 12.5%"

4. In the reply to this application the shareholding pattern averred in para 3 of the application has not been specifically denied by the company petitioner but only the contents of the winding up petition have been reiterated. In fact it is stated in the winding up petition in para 19 as under:-

"Shri Ashok Duggal was working in a well known commercial concern and he did not want to lose his job at the hands of any mischief maker in the company in which he works. Shri Ashok Duggal was Therefore keen that as far as possible he should be found on any enquiry to be distant with the Respondent Company, Therefore, he was holding no shares. His 50% holding was being partly held by his wife who held 10 shares and partly by his two sisters-in-law in whom he had implicit confidence."

5. The 3 petitioners in the winding up petition are Shakun Duggal daughter of late Alka and Ashok Duggal, the 3rd petitioner, and Surbhi Duggal who is the 2nd petitioner and Nishi Handa and Sangeeta Khetrapal who are proforma respondents who have not pleaded support to the petition.

6. The respondents/applicants have submitted that the petitioners by using the knowledge and confidential information by them, derived from their association with the company, have floated a competing company with a misleading nomenclature called "M/s Shakun Exim Corporation" and have purloined and enticed the customers of the respondent company. This dubious conduct of the petitioners has led to filing of Suit No. 749/2000 by the respondents for permanent injunction, restraining passing off, rendition of accounts by petitioner No. 1 and 3 and has also led to counter blast Suit No. 885/2000 filed by the

petitioner No. 1 against the respondent company and respondent No. 2 for declaration and injunction.

7. The respondents contended as under:-

Late Mrs. Alka Duggal held 10 shares i.e. 25% shares of the company, transfer of which was sought in January, 2000 by petitioner No. 3 Ashok Duggal from the name of his deceased wife Alka Duggal to his name. However, in the interest of the company and due to the misconduct of the petitioners, the Board in its meeting dated 9th February, 2000 suspended all the Directorial rights of Mr. Ashok Duggal and Ms. Shakun Duggal. Thereafter an EGM was convened on 10th April, 2000 regarding the issue of removal or continuance of Mr. Ashok Duggal and Ms. Shakun Duggal. A show cause notice was issued on 16th March, 2000 to the petitioner Nos. 1 and 3 and no reply was filed. However, a purported meeting was said to be convened on 5th April, 2000 by the petitioners. Eventually on 8th April, 2000 the petitioner Nos. 1 and 3 replied to show cause notice which was considered on 10th April, 2000 and having been found unsatisfactory, the resolution for the removal of respondents 1 and 3 was carried unanimously in the said meeting and Form 32 was accordingly filed with the Registrar of Companies on 11th April, 2000. This information was sent to the petitioners 1 and 3. Subsequently on 12th April, 2000 developments pursuant to the said removal of the petitioners were also taken note of and it was resolved that the transfer of shares and requested by petitioner No. 3 be refused and the said shares be offered to the existing shareholders. Information on 14th April, 2000 regarding refusal of transfer of shares was sent to the petitioners. There has been no challenge to the refusal on 14th April, 2000 by the petitioners. This company petition was filed and thereafter taken up for hearing on 25th May, 2000.

8. The present application questions the locus standi of the petitioners. The main plea of the respondents/ applicants is that the petitioners' claim that they are contributories u/s 439(1)(b) is misconceived as the Board of Directors have refused to transfer the shares, pertaining to late Smt. Alka Duggal in favor of the petitioners as per the communication dated 14th April, 2000. The significant factor which in my view supports the claim, made in this application is the fact that the refusal to transfer 25% per cent shares of Late Smt. Alka Duggal in favor of petitioner Nos. 1 & 2 as far back as on 14th April, 2000 has not been challenged in any Court of Law. The petitioners in view of the non-denial of the shareholding pattern which averred Smt. Alka Duggal's shares to be 25% only at best could have founded their claim on the basis of 25% shareholding. Significantly the two sisters-in-law of petitioner No. 3, Nishi Handa and Sangeeta Khetrpal have not supported the case of the petitioners, even though they were averred to be holding the other 25% shares of Ashok Duggal. The refusal to transfer the shares and the legality and the validity of such refusal to transfer are contentious matters, particularly in view of the facts narrated above. The misconduct on the part of the petitioners alleged by the respondent Company and the petitioners' Explanation, if any, in response to such reasons are matters

which cannot be investigated in the winding up jurisdiction of a company Court. Besides the above plea; the respondents/applicants have also averred that the petitioners' plea that the winding up of the respondent Company is warranted due to a deadlock in the management by relying on *Hindi Overseas Pvt. Ltd. v. Raghunath Prasad Jhunjhunwalla and Anr.* 1976 (3) SCC 565 is totally misplaced as the deadlock situation can only arise when shareholding is almost equal. In the present case, the petitioners' locus can at best be traced to 25% shares which were held by late Alka Duggal particularly when the two proforma respondents, Nishi Handa and Sangeeta Khetrapal have not supported the case of the petitioner about the balance 25% holding. I am, Therefore, satisfied that the winding up Court is not the appropriate Court to investigate the refusal to transfer the 25% shares in the name of the petitioner Nos. 1 & 2. Significantly the respondent Company had also offered to buy out the shares of the petitioners but the aforesaid offer was not accepted. Consequently, I am satisfied that the application deserves to succeed on the ground of non-compliance of Section 439(4)(b) of the Companies Act.

9. The other questions raised in detail in the written submissions are accordingly not required to be gone into as I am of the view that *M/s Hind Overseas judgment (supra)*, sought to be relied upon by the petitioners for pleading a deadlock in the partnership firm is not applicable to the facts of the present case.

10. The following observations of the aforesaid judgment In *M/s Hind Overseas Pvt. Ltd. (supra)* are significant:

"When more than one family or several friends and relations together form a company and there is no right as such agreed upon for active participation of members who are sought to be excluded from management, the principles of dissolution of partnership cannot be liberally invoked. Besides, it is only when share-holding is more or less equal and there is a case of complete deadlock in the company on account of lack of probity in the management of the company and there is no hope or possibility of smooth and efficient continuance of the company as a commercial concern, there may arise a case for winding up on the just and equitable ground. In a given case the principles of dissolution of partnership may apply squarely if the apparent structure of the company is not the real structure and on piercing the veil it is found that in reality it is a partnership. On the allegations and submissions in the present case, we are not prepared to extend these principles to the present company.

The principle of "just and equitable" clause baffles a precise definition. It must rest with the judicial discretion of the court depending upon the facts and circumstances of each case. These are necessarily equitable considerations and may, in a given case be superimposed on law. Whether it would be so done in a particular case cannot be put in the strait-jacket of an inflexible formula.

xxxxx xxxxx Section 433(f) under which this application has been made has to be read with Section 443(2) of the Act. Under the letter 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.

Again under Sections 397 and 398 of the Act there are preventive provisions in the Act as a safeguard against oppression in management. These provisions also indicate that relief u/s 433(f) based on the just and equitable clause is in the nature of a last resort when other remedies are not efficacious enough to protect the general interests of the company.

xxxxx xxxxx It is not a proper principle to encourage hasty petitions of this nature without first attempting to sort out the dispute and controversy between the members in the domestic forum in conformity with the articles of association. There must be materials to show when "just and equitable" clause is invoked, that it is just and equitable not only to the persons applying for winding up but also to the company and to all its shareholders. The company court will have to keep in mind the position of the company as a whole and the interests of the shareholders and see that they do not suffer in a fight for power that ensues between two groups."

The aforesaid judgment was strongly relied upon by the petitioners to contend that since there is deadlock in the management of the respondent Company, it will be just and equitable that the respondent company be wound up. The above position of law clearly indicates that in the present case, the petitioners have the appropriate remedy to challenge the refusal to transfer the shares and winding up is not the appropriate remedy. The petitioners have also chosen not to invoke the remedy u/s 397 and 398 of the Act alleging oppression and mismanagement. Consequently the question of deadlock, proceeding on the basis that the petitioners 1 & 2 were entitled to be treated as shareholders of 25% shares cannot be invoked as the petitioners hold only 25% shares and in the absence of the support from any other shareholder, the question of deadlock cannot be said to arise even according to the Hind Overseas judgment (supra). Consequently the applicants have been able to substantiate the averments made in the application to the effect that the petitioners do not have the locus to maintain the present winding up petition. This application is accordingly allowed and the winding up petition is accordingly dismissed. However, it is made clear that the allowing of this application and the consequential dismissal of the winding up petition will not come in the way of the petitioners in assailing in an appropriate forum in law the decision of the company to refuse to transfer the shares in favor of the petitioners 2 & 3.