

(1955) 08 MAD CK 0028
In the Madras High Court
Case No : O.S.A. No. 36 of 1954

State of Madras

APPELLANT

Vs

Madras Electric Tramways Ltd.

RESPONDENT

Date of Decision : 19-08-1955

Acts Referred:

Companies Act, 1913 — Section 162, 165

Citation : (1955) 08 MAD CK 0028

Hon'ble Judges : Rajamannar, C.J;Panchapakesa Aiyar, J

Bench : Division Bench

Advocate : O.T.G. Nambiar instructed by King and Partridge, for the Respondent

Final Decision : Dismissed

Judgement

Rajamannar, C. J.

1. This is an appeal against the order of Balakrishna Ayyar J. winding up the Madras Electric Tramways (1904) Ltd., on an application made on behalf of the company by one J. B. Beardsell purporting to be its duly constituted attorney. The petition was filed under S. 271 of the Companies Act. The petitioner is a limited liability company incorporated under the English Companies Act with its registered office in England. The principal place of business of the company, however, is situated in Madras.

The company purchased in 1904 from the Electric Construction Co., Ltd., which was then carrying on the business of running tramways in the City of Madras, its undertaking at Madras including the tramways and equipment thereof, & was carrying on the business of running tramways in the City of Madras under the powers granted to it by the Government of Madras by various orders under the provisions of the Indian Tramways Act, 1886. On 11-4-1953 the receiver appointed by the trustees for the mortgagee-debenture holders of the company took possession of its undertaking and all its assets and thereafter the company ceased to carry on its business. The Government thereupon by notification dated

29-9-1953 declared the powers of the company conferred on it by the Indian Tramways Act and by orders and rules made under the Act as to the construction, maintenance and use of the tramways to be at an end.

2. The two grounds alleged to justify a winding up were (1) the company had ceased to carry on business and (2) the company was unable to pay its debts. The petitioner prayed that the company may be wound up by the court as an unregistered company under the provisions of the Indian Companies Act. The attorney who filed the petition on behalf of the company filed an affidavit stating that he was the duly constituted attorney of the company authorised to file the petition for winding up.

Two of the creditors of the company supported the application by affidavits. Notice of the petition was given to persons desirous of supporting or opposing the application. The State of Madras appeared and opposed the petition. In the counter statement filed on their behalf, none of the facts alleged in the petition was denied. The only plea that was taken was that the petition purporting to be by the company was not maintainable. The objection to the maintainability of the petition was thus set out:

"The provisions relating to the winding up of a foreign company pertain to its Indian branch which is statutorily allowed to be wound up for the protection of Indian nationals. The Indian Courts cannot deal with, and an Indian order will not operate on the company in England. The company itself cannot treat itself as two companies.

Accordingly a foreign company cannot itself petition for winding up as an unregistered company. While Ss. 162 and 166 of the Indian Companies Act, 1913, in so far as they relate to winding up by the Court are inapplicable, even under those sections a company can petition under sub-s. (1) of S. 162 on the basis of a special resolution. This or the company provisions in the English Act would apply only to a company in England and not in India".

3. Besides this legal plea it was also stated that as the petitioner company supported the debenture-holders in their claim to keep the entire assets in India outside the winding up, the petition was meaningless from its point of view, and was an abuse of the process of the court and was intended only to prejudice the claim of the State of Madras and Indian creditors. Balakrishna Aiyar J. overruled the objections of the State and directed by his order dated 20-1-1954 that the company be wound up and appointed the Official Receiver of Madras as the Official Liquidator of the company for the purpose of winding up of the company. The State of Madras has filed this appeal against the order.

4. The learned Advocate General for the State of Madras developed his argument with far more precision than was attempted in the counter statement. His first contention was that a foreign company doing business in India cannot under any circumstance itself file an application for being wound up. He admitted, and it is common ground, that a foreign company doing business in India can be wound

up as an unregistered company His point was that it could be done only at the instance of a creditor or contributory but not at the instance of the company itself. Part IX of the Indian Companies Act deals with the winding up of unregistered companies.

It is not disputed that the petitioner will fall within the meaning of an "unregistered company". Section 271(1) in so far as it is material for this appeal runs as follows:

271(1): Subject to the provisions of this Part, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company, with the following exceptions and additions.

(i) an unregistered company shall, for the purpose of determining the court having jurisdiction in the matter of the winding up, be deemed to be registered in the province where its principal place of business is situate or, if it has a principal place of business situate in more than one province, then in each province, where it has a principal place of business; and the principal place of business situate in that province in which proceedings are being instituted shall, for all the purposes of the winding up, be deemed to be the registered office of the company;

(ii) no unregistered company shall be wound up under this Act voluntarily or subject to super, vision;

(iii) the circumstances in which an unregistered company may be wound up are as follows (that is to say):

(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;

Section 271(3) provides for special cases. This sub-section was added in 1936 by an Amending Act. It provides that where a company incorporated outside India which has been carrying on business in India ceases to carry on business in India, it may be wound up as an unregistered company under Part IX, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the company under which it was incorporated.

Section 276 enacts that the provisions of that Part (IX) with respect to unregistered companies shall be in addition to, and not in restriction of, any provisions in the Act contained with respect to winding up of a company by the Court, But an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under the Act, and then only to the

extent provided by that Part.

5. The learned Advocate General confessed that there was nothing in Part IX of the Act which expressly prohibited a foreign company from presenting a petition for winding it up. According to him, this prohibition must be implied because of the disabilities under which a winding up court would suffer in the case of foreign companies because of the possibility of large assets being situate outside the jurisdiction of Indian Courts and because the order of winding up passed. by an Indian Court would not per se bind the company in the country of incorporation.

The idea behind this contention was that a foreign company with large assets outside India and very little assets in India may incur large debts in India and then apply to be wound up as an unregistered company under the Indian Companies Act, with the result that Indian creditors would be deprived of the foreign assets of the company.

The provisions of the Indian Companies Act which enable a foreign company to be wound up as an unregistered company in this country, according to the learned Advocate-General, were intended for the benefit of the creditors in India, principally Indian nationals, and not to enable a foreign company to escape from liability in case the assets within India were unable to meet its liabilities. Whether the assumption of the learned Advocate-General is correct or not I do not wish to say in this appeal. I will only say that such a situation might well arise even when a company incorporated under the Indian Companies Act has large assets outside India.

6. It was not denied by the learned Advocate General that S. 166 will apply to the winding up of unregistered companies as well. Under that section an application to the Court for the winding up of a company can be presented either by the company or by any creditor or contributory. There is nothing in S. 271 or any other provision of Part IX which excepts this provision of S. 166 in the case of an unregistered company.

The learned Advocate General cited to us the decisions in "*Russian and English Bank v. Baring Brothers and Co.*, (No. 3)", 1936 AC 405 (A). "*In re, Banque des Merchants de Moscou*", 1954-2 All ER 746 (B) and "*Rudow v. Great Britain Mutual Life Assurance Society*", (1881) 17 CH. D. 600 at p. 611 (C), and cited a passage in Dicey's Conflict of Laws, 6th Edn. page 294; but I have been unable to derive any assistance from any of them on this point. I am unable, therefore, to accept this contention of the learned Advocate General.

7. The next contention was that even assuming that a foreign company as an unregistered company can file a petition for winding it up, it can do so only when the company at a meeting of its shareholders has resolved to file such a petition. In the present case there has been no such decision or resolution. Though the Directors may have large powers in the conduct of the affairs of the company, they cannot themselves decide to put an end to the corporate existence of the company. He sought support for this contention in the provisions of S. 162 of the

Indian Companies Act as interpreted by him. That section runs as follows:

162. A company may be wound up by the Court - (i) if the company has by special resolution resolved that the company be wound up by the court;

(ii) if default is made in filing the statutory report or in holding the statutory meeting;

(iii) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(iv) if the number of members is reduced, in the case of a private company, below two or in the case of any other company, below seven;

(v) if the company is unable to pay its debts;

(vi) if the Court is of opinion that it is just and equitable that the company should be wound up.

According to the learned Advocate General, it follows from the provisions of this section that a company can be wound up by the court on an application by the company only if the requirement of clause (i) is complied with, that is to say, only if the company has by special resolution resolved that the company be wound up by the Court. In the absence of such a resolution, even if one or other of the other conditions in clauses (ii) to (vi) is satisfied, the Directors, on behalf of the company cannot file a petition for winding up the company.

There is nothing in S. 162 or S. 166 of the Indian Companies Act which compels one to come to this conclusion. The only direct authority which the learned Advocate General was able to cite in support of his contention is a decision in - *In re "Galway and Salthill Tramways Co., 1918-1 In Re 62 (D)*. There the directors of a company presented a winding up petition in the name of the company. An objection was taken by some of the shareholders who opposed the petition that the petition not having been authorised by a meeting of the shareholders was incompetent. O'Connor M. R. held that the directors as such had no power to present the petition. This was because the powers of the directors were only powers of managing, and the object of management is the working of the company's undertaking, while the object of a winding up is its stoppage. Therefore, the powers of the directors would not include a power to bring about the stoppage of the company's affairs without the authority of the shareholders.

The learned Master of the Rolls, however, did not think it fit to dismiss the petition on this ground. In his opinion the proper course to adopt was to adjourn the hearing so as to enable the directors duly to summon a meeting of the shareholders with the object of getting authority from them to proceed on the petition, because it was open to the company to ratify the unauthorised proceeding of the directors. Though this case was decided in 1917, the learned Advocate General could not give any instance where the decision was followed in the English courts. On the other hand in *Palmer's Company law, 19th Edn.*

(1949) this decision is dealt with thus:

Petitions by the company are not very common; for if a company desires to wind up, it has only to pass a special resolution, or an extraordinary resolution for voluntary winding up. But if the directors find the company to be insolvent owing to matters which ought to be investigated by the court, it may well be that their proper course is to apply at once to the court by petition for a compulsory order.

It has been held in Ireland that the directors cannot present a petition in the name of the company without the sanction of a general meeting; but there seems to be no justification for this ruling in the words of the Act and it has not been followed in English cases. In any case a general meeting can ratify the action of the directors.

8. In *Palmer's Company Precedents*, 16th Edn. (1952), Part II, we have a more definite statement as to the practice in England:

Where the company gets into great difficulties, the directors, acting on the company's behalf, occasionally present a petition for winding up, but such petitions are rare.

It has been held in an Irish case that the directors cannot present the petition without authority of a general meeting. This decision is, however, not followed in England, and many orders have been made on petition presented by the directors without the sanction of a general meeting.

The petition in - "*In re City Equitable Fire Insurance Co., Ltd.*," 1925-1 Ch 407 (E) appears to be one such instance.

9. I am inclined to follow the practice in England to which reference is made in *Palmer's* text books.

10. Even assuming that the Irish precedent should be followed by us, the petition cannot be dismissed, but it should be adjourned to enable the directors to summon a meeting of the share-holders and obtain their authority. I am not sure if this is what the learned Advocate General wants, because it is obvious that the shareholders are not against this petition, as by this time they should have been aware of the proceeding and no one has come up to protest against, the action of the directors. The share-holders must in the circumstances be deemed to have impliedly ratified the action of the directors.

11. Our attention was also drawn to the decision of a single learned Judge of the Pepsu High Court in - *In re "Patiala Banaspati etc., Co."*, AIR 1953 Pep 195 (F), which certainly supports his contention but with respect I am not inclined to follow it.

12. The argument of the learned Advocate General that the directors only cannot put an end to the company's existence by filing a winding up petition does not appeal to me because the court is not bound to direct a winding up merely because the directors have presented a petition. The Court will make a winding

up order only if it is satisfied that the requirements of the law are satisfied and the facts justify the course. Moreover it will be open to the shareholders to oppose the petition and to apprise the court of the fact that the majority of the shareholders are opposed to the petition. It will be then open to the court before passing final orders to have a meeting of the shareholders convened to ascertain the wish of the majority.

13. Art. 99 of the Articles of Association of the petitioner company provides inter alia that the directors "may exercise all such powers and do all such acts and things as may be exercised or done by the company, and are not hereby or by Statute expressly directed or required to be exercised or done by the company in or with the consent of a general meeting".

It is not suggested that there is any statutory provision expressly requiring the consent of a general meeting for the presentation of a winding up petition. It follows, therefore, that the directors have the power to do what the company could have done, namely, to present the petition. I agree with Balakrishna Aiyar J., that the petition was validly presented.

14. The appeal fails and is dismissed with costs.