
(1961) 08 P&H CK 0017
In the Punjab And Haryana At Chandigarh
Case No : Civil Original No. 5 of 1959

Thakur Prem Singh and Another	Vs	APPELLANT
Thakur Hotel (Smile) Company Private Ltd. and Others		RESPONDENT

Date of Decision : 03-08-1961

Acts Referred:

Companies Act, 1956 — Section 397

Citation : AIR 1962 P&H 23

Hon'ble Judges : Tek Chand, J

Bench : Single Bench

Advocate : D.N. Awasthy, for the Appellant; B.R. Tuli and R.K. Aggarwal, for the Respondent

Judgement

(1) This is a petition under sections 397, 398 and 403 of the Companies Act (1 of 1956) in respect of Thakar Hotel (Simla) Company Private Limited. It is alleged that on account of the oppression of minority represented by the petitioners, respondent No. 4 be removed from managership and all members of the company should constitute the Board of Directors. In the alternative, two sets of brothers should be equally represented on the board of directors and the non-director members should be joint managers on equal terms as to powers of management, remuneration and other facilities.

(2) The petitioners, Thakur Prem Singh and Thakur Pritam Singh, sons of Thakur Dass, are from his junior wife and respondents Nos. 3 and 4, Manohar Singh and Ram Sarup, and sons from the senior wife. Respondent No. 2, Shiv Saran Singh is related to the petitioner's father being his sister's husband. Thakur Dass and respondents No. 2, Shiv Saran Singh, are owners in equal shares of the property known as Bellevue South at Simla. In April, 1950 Thakur Dass executed a deed of gift transferring his half share in the house to the two petitioners and respondents Nos. 3 and 4 in equal shares. Thakur Dass ran a hotel business in this building under the name and style of "Royal Hotel and Restaurant, Simla" as its some proprietor. He executed a deed of gift transferring the ownership of the

hotel business to his four sons, the two petitioners and respondents Nos. 3 and 4, giving them each 12 per cent. The remaining 52 per cent, share was gifted by him in favour of respondent No. 2, Shiv Saran Singh. The result was that the two petitioners had become owners to the extent of 24/100ths share in the hotel business and respondents Nos. 3 and 4 had similar interest. The share of respondent No. 2 in the business in 52/100ths. The donees decided to run the hotel business as a private limited company styled as "Thakar Hotel (Simla) Company Private Ltd."

The company was incorporated in September 1950 but the business had been running since 19th April, 1950, the date of the execution of the deed of gift. This company had an authorised capital of Rs. 2,00,000/- divided into 200 shares of Rs. 1,000/- each. The paid up capital was Rs. 50,000/- which was allotted to petitioners Nos. 1 and 2 and respondents Nos. 2, 3 and 4. Six fully paid up shares of the total value of Rs. 6,000/- were allotted to each of the two petitioners and to each of respondents Nos. 3 and 4. Respondent No. 2 was a holder of 26 fully paid up shares of the total value of Rs. 26,000/-. An agreement, Exhibit P. 75 was executed between the parties on 15th April, 1950, in relation to the constitution of the company which they were contemplating to form. Condition No. 4 of the agreement runs as under-

"There will be two directors, one of whom will be the first party (Shiv Saran Singh Thakur respondent No. 2) and the other director will be one out of the other four of the second party. The first party will be the managing director and so long as he holds the qualifications to be a director and in him will be vested and to him will be delegated all the powers of the board of directors."

Article 90 of the Articles of Association of this company provides that unless otherwise determined by the company in general meeting the number of directors shall not be less than two or more than five. Article 91 provides that the first director shall be S. S. S. Thakur (respondent No. 2) and second, Manohar Singh, respondent No. 3. Article 92 confers power on the directors to appoint any other person to be a director subject to the qualification that the total number of directors shall not at any time exceed the maximum number. It may be added that this power has never been exercised and the board has constituted throughout of two directors whose names are mentioned above.

(3) The allegations made in the petition are that there is an undertaking that all the five promoters would be the first directors of the company, but beyond a mere allegation there is nothing substantial on the record in support of this contention. It was then alleged that respondent No. 2 who had become the managing director stayed most of the time in Delhi in the service of Government and did not attend to the working of the company from its inception till 1955. It was stated that the petitioners were merely assigned minor posts of assistant manager and store-keeper. The entire income and funds of the company used to be pocketed by respondents No. 3 and 4 and they ran the affairs of the company to their personal advantage and committed a number of irregularities including

misappropriation of the funds. The affairs of the company were being mismanaged. It was also stated that no meeting of the members of the company took place until 7th June, 1952. Ram Sarup, respondent No. 4, had been convicted by the Magistrate in 1951 for forging Matriculation certificate of the Punjab University and he, therefore, had to leave service of the Government. The company appointed him manager in November, 1951. It was alleged that in May, 1951, the books of the company were not written up and large amounts were appropriated and respondent No. 3. Manohar Singh, admitted that a sum of Rs. 3,000/- was due from him though he had retained much larger amount. Respondent No. 3 was consequently removed and in his stead respondent No. 4 was appointed as the manager and the affairs of the company thus remained entirely in the hands of respondent No. 4.

Despite the petitioners having pressed for their inclusion on the board or in the management, their request was turned down. It is then stated that no balance-sheets were furnished to them for the years 1950-51, 1951-52 and 1952-53. It was also alleged that the hotel was run on the premises of Bellevue South which had been taken on rent from the owners but no rent was being paid to them. The company, on the advice of their counsel and auditor, K. N. Chandla, decided to re-write and re-audit the accounts of the three years from 1st April, 1950 to 31st March, 1953, and the petitioners were kept in the dark. The re-written accounts and the audit reports were not made available to them. The complaint of the petitioners is that the respondents being in majority are riding rough shod over the rights of the petitioners who are in minority of 24 per cent. No dividends had been paid to them and their interests are being deliberately disregarded. It was alleged that there was an utter lack of probity on the part of the respondents in dealing with the affairs of the company.

(4) These allegations had been denied by the respondents in their written statement. It was stated that it was wrong that the five promoters, that is, the petitioners and three respondents, were to constitute the board of directors. The memorandum of Articles of Association were signed by the petitioners as promoters of the company and at no stage they ever raised objections that the board of directors should consist of all five of them. With regard to the other allegations it was stated that respondent No. 3 was the manager from 19th April 1950 till 31st May, 1950. From that date to 27th July, 1950, Pritam Singh petitioner worked as the manager. From 28th July, 1950 to 12th November, 1950 Prem Singh petitioner worked as manager. From 13th November, 1950 to 30th April, 1951, Manohar Singh respondents No. 3 discharged the duties of the manager. Finally, from 21st November, 1951 up to date Ram Sarup respondent discharged the duties of the manager.

It was admitted that the bank account of the company was not opened till May, 1951, but the petitioners were held to be blamable for this fault as they were the managers from 1st June, 1950 to 12th November, 1950. It was alleged against the petitioners that they never gave any account of the period during which they

acted as managers. The imputation that respondents Nos. 3 and 4 had been pocketing the entire income and funds of the company and had been running its affair to their maximum personal advantage had been repudiated. In May 1951, Manohar Singh respondent No. 3 was removed and Pritam Singh petitioner was appointed in his place. At that time a sum of Rs. 5337-12-9 was debited to his accounts. The reason why the accounts could not be written up for this period was that the petitioners had never submitted their accounts. After respondent No. 4 had become the manager on 21st November, 1951, he got the accounts properly written up for the period up to 30th April, 1951 from whatever records were available in the office and that the accounts for the period commencing 1st May, 1951, up to date have been regularly maintained. It was denied that the share of the given to them. They have been paid this rent after amounts due to the company from them on account of their board and lodging on the premises of the company had been deducted.

Regarding the petitioners' complaint as to inspection of the books of the company it was stated that the petitioner Prem Singh, by his letter dated 28th/30th March, 1955, had asked for inspection of the minutes book relating to the general meetings of the company and he was allowed to inspect the minutes book which he did on 31st March, 1955. A copy of the minutes of the ordinary/general meeting held on 27th December, 1954 was supplied to him at his request. The allegation that respondents Nos. 2 and 3 were having free board and loading was denied and it was stated that manager alone, during the term of his service as manager, was allowed free board and lodging and no one else. Respondent No. 4 further stated that he never occupied good rooms in the hotel for himself but he was staying in a gallery which had never been used for purposes of lodging of the hotel guests.

The petitioner's allegation that respondent No. 2 was drawing Rs. 100/- per month for himself was denied and it was stated that in all he had received travelling allowance for attending three meetings in the beginning but he had not even charged travelling allowance from the company after that. The respondents contended that they had 76 per cent shares in the total share capital of the company as against 24 per cent held by the petitioners. The respondents expressed their willingness to purchase the petitioners' shares if they desired to sever their connections with the company. In the replication, the petitioners reiterated what was stated in their petition and styled the respondents' offer to purchase the petitioners' shares as not bona fide and in the nature of an attempt to oust the petitioners from the company with a view to deprive them of their valuable rights.

(5) The parties' pleadings gave rise to the following issues:

- (1) Are the company's affairs being conducted in a manner oppressive to any member or members, or in a manner prejudicial to the interests of the company?
- (2) Do the facts justify the making of a winding up order on the ground that it is

just and equitable to wind up the company?

(3) To what relief, if any, are the petitioners entitled?

(6) The two main issues can conveniently be disposed of together.

(7) On behalf of the petitioners, only Prem Singh offered himself as a witness. In his examination-in-chief he stated what has been summarised above from the petition. In his cross-examination he admitted that Pritam Singh, his brother, became an assistant manager from 20th June to 12th November, 1950, and that he too acted as assistant manager. He also admitted that Pritam Singh had become manager from 1st May, 1951 to 20th November, 1951. He also admitted that he was allowed inspection of the books and similar facility was also given to his brother when it was asked. He admitted his signatures and those of his brother of the memorandum of Articles of Association of the company. He also admitted that according to the terms of agreement Exhibit P. 75 there were to be two directors of the company, one being Shiv Saran Singh respondent No. 2 and the other one out of the four brothers, and that Manohar Singh respondent No. 3 was the second director representing these four brothers.

(8) On behalf of the company, two witnesses were produced. R. W. 1 is K. N. Chandra, chartered accountant. He was appointed by the company as auditor in 1954 to audit the accounts for the year 1953-54. He was also asked to audit the accounts for the previous years 1950-51, 1951-52 and 1952-53 which was done in 1955. Since 1953-54, he has been auditing the accounts of the company was maintaining accounts and account books in a regular manner. In his cross-examination, he mentioned that the reason for re-auditing of the accounts was that the balance-sheets for the previous years were not produced and it was, therefore, necessary to regularise the subsequent audits. He asked respondent No. 4 to produce the balance sheets, but he could not do so and the reasons given to him was that the previous auditor has not audited the accounts and that they had not given any report. The re-audited reports were made by this witness. He also stated that during the course of re-auditing he found a lot of misappropriation of the funds of the company to which he had made reference in his report. According to the balance-sheet for the year 1953-54, he found that Rs. 3398-9-6 were due from respondent No. 2, and he also found that a sum of Rs. 564-3-0 was due from Prem Singh petitioner and Rs. 614/- were due to the company from Pritam Singh petitioner. Respondent No. 4, Ram Sarup, was shown as creditor to the extent of Rs. 2618/-.

(9) The other witness produced on behalf of the company is R. W. 2 Ram Sarup, respondent No. 4. He has in the main supported the company's case as stated in the written statement. He stated that Manohar Singh respondent No. 3 had rendered accounts during the period of his managership and that it was found that he owed to the company a sum of Rs. 5337-12-9 which amount has now been repaid by him by adjustment. It was also stated that Pritam Singh had received a sum of Rs. 507-8-0 towards the rent due to him and similarly Prem

Singh had been paid a sum of Rs. 300/-. These payments, of course, were not final. This witness stated that the accounts were being allowed inspection of the books whenever such a demand had been made by them. He also stated that the petitioners had not rendered accounts to the company during the period of their managership despite several demands. He denied the allegation that Shiv Saran Singh respondent No. 2 lodged in the hotel. He further said that he was serving as a managing director honorarily and did not charge any salary or allowance whatever. For the earlier period, he said, that the balance-sheets could not be passed because the accounts were not forthcoming for the period during which petitioners were in charge of the affairs of the company as managers.

(10) The questions that call for examination in this case are really two. The petitioners had to make out that the affairs of the company were being conducted in a manner oppressive to them and, further, that the facts justify the making of a winding up order on the ground that it was just and equitable that it should be wound up though in the circumstances it would unfairly prejudice them if the company were ordered to be wound up. I am not satisfied as to the petitioners having satisfied these two conditions which are precedent before the relief as prayed or any other relief, could be given to them. They are admittedly in minority having a holding of 24 per cent only in the share capital of the company. One of the acts of oppression, according to them, is that they have not been taken on the board of the company as directors. According to the agreement, Exhibit P. 75, and also according to the Articles of Association of the company to which they are also signatories as promoters, they had agreed that the company should have two directors. They cannot, therefore, have a legitimate grievance that there are not five directors. The Articles of Association mention that the two directors are going to be respondents Nos. 2 and 3. The petitioners made certain vague allegations that large sums have been wrongfully pocketed by the respondents and that their due share out of the dividends has not been given to them. This allegation had not been substantiated in any way.

The next grievance is that the accounts for the first three years following the incorporation of the company have not been regularly kept and the balance-sheet for these years have not been prepared. This is so. But according to the respondents, the balance-sheets could not be prepared because the petitioners, who had been carrying on the affairs of the company as managers, had not agreed to render accounts. It is not for me at this stage to go into the correctness or falsity of the respective explanations given by the parties. It appears that no steps were taken by the petitioners at that time in order to see that the accounts were being properly maintained. There is not sufficient material placed on the record of this case from which I can lay the blame at the door of the respondents or of the petitioners.

The fact, however, is that during the last eight years the affairs of the company are being regularly maintained and it is not suggested, must less proved, if any defalcations have taken place during the last eight years or so. My attention has

not been drawn to any impropriety by the respondents during this period. The company declared dividend for the first time in 1955, again in 1959 and also in subsequent years. It has not been proved in this case that the petitioners had not been given their share of the dividend. After giving careful consideration to the arguments of the learned counsel on behalf of the petitioners and after having been taken through the record of this case. I am not aware of any oppressive conduct on the part of the respondent against the petitioners at least during the last eight years.

For the earlier three years, allegations, against them were certainly made, but those allegations do not appear to me to have been substantiated. It will be appropriate at this stage to note what was observed by Roxburgh J., from whose decision appeal was preferred to the Court of Appeal in *Re H. R. Harmer, Ltd.* (1958) 3 All ER 689. The learned Judge said-

"The purpose of this section (section 210) is not so much to rake up the past as to redeem the future."

In this case the entire effort of the petitioner has been concentrated on raking up the past without any reference to the conduct of the affairs of the company in the subsequent years from 1954 up to date. My attention was also drawn to *Loch v. John Blackwood, Ltd.* 1924 AC 783. Lord Shaw said at P. 788-

"It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life of affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up."

A conduct is oppressive if it is "burdensome, harsh and wrongful", *Scottish Co-operative Wholesale Society Ltd. v. Meyer* (1958) 3 All ER 66 (71). The word "oppressive" was given dictionary meaning by Viscount Simonds J. This definition was approved in (1958) 3 All ER 689 (701). From the perusal of the record of the respondents as in any way unjust, harsh or tyrannical against the minority (the petitioners). The learned counsel for the respondents drew my attention to a decision of the Supreme Court in *Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others*, . It was stated there that, if there was merely a misconduct of the directors in misappropriating the funds of the company, an order for winding up would not be just and equitable, but if, in addition to such misconduct, circumstances exist which render it desirable in the interest of the shareholders that the company should be wound up, section 162(vi). Indian Companies Act, 1913, would be no bar to the jurisdiction of the Court to make

such an order. The Supreme Court, in laying down the above principle, relied upon the decisions in *Re Anglo-Greek Steam Co.* (1866) 2 Eq 1 and in *Re Diamond Fuel Co.* (1879) 13 Ch D 400 (408). Therefore, even on the assumption that the petitioners had successfully proved the misconduct of the directors during the earlier three years of the company's incorporation in 1950, that would not furnish a justification for the winding up of the company for "just and equitable" reasons.

(11) As the petitioners have failed to satisfy the two conditions mentioned above required for taking action u/s 397 of the Companies Act, the petition must fail and is consequently dismissed. It may also be mentioned that there was reference in the petition to section 398 as well, but its requirements have not been satisfied and this provision was not seriously pressed in arguments. I do not otherwise think that ground is made out for the removal of Ram Sarup, respondent No. 4, as the manager of the company. As the dispute is between the brothers, I will not award costs against the petitioners.

(12) Petition dismissed.