
(2010) 10 KL CK 0227
In the High Court Of Kerala
Case No : C.P. No. 32 of 2000

Thankam Paul (Dr.)

APPELLANT

Vs

City Hospital (Pvt.) Ltd. and Another

RESPONDENT

Date of Decision : 08-10-2010

Acts Referred:

Companies Act, 1956 — Section 111(2), 428, 433, 434, 434(1)

Citation : (2011) 2 BC 295 : (2011) 100 CLA 517 : (2011) 162 CompCas 439 : (2011) 1 KLT 141

Hon'ble Judges : P.R. Ramachandra Menon, J

Bench : Single Bench

Advocate : V.V. Sidharthan, for the Appellant; T. Sethumadhavan, K.M. Sathyanatha Menon and Roy Chacko for 1st Respondent and Premjith Nagendran, for 2nd Respondent, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Ramachandra Menon, J.—This is a petition for "winding up" the first Respondent Company, which is a Hospital, u/s 433(e) and 433(f) of the Indian Companies Act, 1956.

2. The above Respondent Company was registered under the Indian Companies Act, 1956 with an authorised share capital of Rs. 15 lakhs divided into "1000" equity shares of Rs. 1000 each and 500 "preference shares" of Rs. 1000 each. The Petitioner is the daughter of late Rubina Paul, who was a shareholder having 94 shares. On demise of the said shareholder occurred on 8-1-1994, the Petitioner obtained a Succession Certificate as per the order passed by the Sub Court, Cherthala [in O.R (Succession) 13/1994], whereby the Petitioner became eligible to have the rights and liberties in respect of the above shares held by the Original allottee.

3. Claiming that the Petitioner is a "contributory" entitled for the rights of the shareholder of the Company as provided u/s 439(4)(b) of the Companies Act, the Petitioner has approached this Court contending that the Company is liable to be

wound up, referring to the circumstances u/s 433(e) and (f) of the Companies Act. In support of the case, it is contended that the Company is unable to settle the liabilities, of which the major claims are stated as arrears of electricity charges payable to the KSEB (to an extent of about Rs. 26 lakhs); arrears of water charges payable to Kerala Water Authority (to an extent of about Rs. 4 lakhs); decree amount stated as payable to the Bank of India (to an extent of about Rs. 10 lakhs); claim by the Indian Bank, Anr. Bank at Chennai in O.A. 356 of 1997 pending before the DRT, Chennai (to an extent of Rs. 86 lakhs); claim by M/s Standard Medical Pharmaceuticals, Hyderabad (to an extent of about Rs. 14.13 lakhs) etc. In support of the contention that the substratum of the Company is lost, two documents have been produced along with C.A. No. 627 of 2006, which are Annexure A-1 letter dated 2-2-2006 sent by the Managing Director of the first Respondent Company to the learned Counsel for the Petitioner and Annexure A-2 reply notice dated 5-3-2006 sent by the learned Counsel for the Petitioner to the Managing Director of the first Respondent. Different Company Applications have been filed at different points of time, seeking for different reliefs and counter-affidavit has been filed from the part of the opposite side in the aforesaid proceedings. Pursuant to the order passed in C.A. 326 of 2010, Addl. 2nd Respondent has also been brought into the party array (who is stated as a shareholder), who has filed his version with regard to the status and affairs of the Company, which is mainly in support of the stand taken by the first Respondent Company, rebutting the averments and allegations in the C.P. and asserting that the Company is not liable to be wound up, as the circumstances contemplated u/s 433(e) and (f) have not been established.

4. During the course of hearing, referring to the pleadings and materials on record, it was contended by the learned Counsel for the Respondents that the Company Petition itself is not maintainable either on facts or in law. It was also pointed out that the Company is put to doldrums, only because of the mismanagement, lapses and omissions of the father of the Petitioner, who was the former M.D. of the Company, which led to several rounds of litigations before different forum including this Court. Pursuant to the intervention made by this Court, two Advocate Receivers were appointed to supervise the affairs of the Company, who have been submitting periodical reports to this Court and finally, pursuant to appropriate orders obtained, the management was taken over and almost all the liabilities to the different creditors including KSEB, KWA, Banks and other institutions have been cleared and the Company has started generating profits from the last year onwards. It is stated that all the arrears and liabilities because of the mismanagement by the persons who were at the helm of the affairs of the Respondent Company, mainly attributable to the father of the Petitioner (who was the former M.D.), have already been liquidated.

5. In support of the said contention, reference is made to Annexure R-1 Annual Report for the year 2005-2006 produced along with the counter-affidavit filed in C.A. No. 627/2006 in the above C.P., contending that no such liabilities are pending as on date. It is also stated in the said counter-affidavit that the alleged

mortgage to the Indian Bank leading to O.A. 347/2001 before the DRT, Chennai was the result of certain forged transactions by the father of the Petitioner Dr. T.M. Paul (former M.D.) without any authority from the Company; that the DRT has now found that there was no mortgage of the Company property to Indian Bank and accordingly has ordered return of title deeds, dismissing the OA against the first Respondent Company, as borne by Annexure R-2. It is also pointed out that, the shareholders were contacted in connection with the offer made by somebody to buy the shares of the Company, which did not mean that the Board was planning to sell the properties of the Company; that the Company cannot sell the shares of any member and further that, if any member sells the shares according to law, the Board cannot prevent the same as well.

6. The affidavit further states that the father of the Petitioner, Dr. T.M. Paul (former M.D. of the first Respondent Company) is the accused in C.C. 6 of 2002 filed by the CBI and is absconding since 2002, in view of the Non Bailable Warrant for arrest issued by the CBI Court, besides suffering orders of attachment of the shares in the Company as borne by the communication issued by the CBI Court vide Annexure R-3. It is also stated that the Company had already filed a "suit for accounts" (O.S. 199/1997) before the Sub Court, Ernakulam against the Petitioner and Ors. including the power of attorney holder M.V. Kunjachan and that the shares of the concerned persons have been attached as per Annexure R-4 order dated 11-4-1997. The Company Petition is filed allegedly to wreak vengeance and to get out of the liability which may be fixed as a result of O.S. 199/97 before the Sub Court, Ernakulam.

7. Referring to Annexures R-5, R-6 and R-7, which are the annual reports in respect of years 2006-2007, 2007-2008 and 2008-2009 produced along with C.A. 151 of 2010, it is contended that the turnover/s of the Company in respect of the year ending on 31-3-2007, 31-3-2008 and 31-3-2009 are nearly Rs. 48 lakhs, Rs. 52 lakhs and Rs. 54 lakhs respectively and that the position as on 31-3-2010 is about Rs. 60,56,000. The learned Counsel for the first Respondent Company submits that the accounts in respect of the year which ended on 31-3-2009 showed a "cash profit" for the first time and that the position continues for the subsequent year as well, the exact figure of which is still to be finalised.

8. The learned Counsel for the Petitioner submits that the contents of Annexures R-5, R-6 and R-7 are not liable to be accepted without further proof. With regard to the fate of O.S. 199 of 1997, which was pending before the Sub Court, Ernakulam, it is stated that the said Suit has been dismissed as borne by Annexure A-1 produced along with C.A. 586 of 2008.

9. The learned Counsel for the Addl. Second Respondent submits that the Petitioner's father Dr. T.M. Paul (former M.D.) is still alive, though he is absconding in view of CBI Case and as such, he is also a legal heir in respect of the properties including the shares of the deceased mother of the Petitioner. This being the position, the Petitioner cannot claim absolute right in respect of the

shares held by the deceased mother of the Petitioner. It is also stated that the Petitioner has not become the shareholder, as the shares originally held by the deceased Rubina Paul, are still to be transferred to the name of the Petitioner; that the Board has quite validly refused to effect the transfer of shares on genuine grounds and if aggrieved, the Petitioner has to approach the Company Law Board/Tribunal u/s 111(2) of the Companies Act. In so far as the transfer of shares is not automatic and further since the Petitioner is not a creditor, the petition for winding up is not maintainable either on facts or in law, submits the learned Counsel.

10. The main challenge raised from the part of the Respondents is with regard to the maintainability of the Com. Petition preferred by the Petitioner, contending that the Petitioner does not satisfy the requirements u/s 439(4)(b) of the Companies Act, which stipulates that the "contributory" shall not be entitled to present a petition for winding up, unless 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 6 months during the eighteen months immediately before the commencement of winding up or have devolved on him through the death of the former holder.

11. True, share is a movable property as envisaged u/s 82 of the Companies Act. The Petitioner, by virtue of the Succession Certificate obtained, claims her eligibility to have the shares originally held by her deceased mother (Rubina Paul) and contends that she is a "contributory", who can present a petition for winding up by virtue of her status and stipulations u/s 439(4)(b) of the Act.

12. The term contributory is defined u/s 428, which is extracted below:

428. Definition of "contributory".--The term "contributory" means every person liable to contribute to the assets of a company in the event of it being wound up, and includes the holder of any shares which are fully paid up; and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory.

Section 439 deals with the provisions as to the applications for winding up and Sub-section (4) refers to the circumstances when a contributory is entitled to present a petition for winding up, which stipulates as follows:

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

(a) either the number of members is reduced, in the case of a public company, below seven, and, in the case of a private company, below two; or

(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.

The above provision shows that, in the case of a "contributory", the petition to wind up the Company is maintainable, only if shares are allotted to the Petitioner or have been held by the Petitioner and registered in the name of the Petitioner for at least six months during the eighteen months immediately before commencement of the winding up.

13. In the instant case, there is no claim for the Petitioner that the shares have been allotted or registered in her name and that she has been holding the same for at least 6 months during 18 months immediately before commencement of winding up. The necessity to have the shares registered in the name of the Petitioner for at least 6 months is not a requirement in the case of the Petitioner, the shares having been devolved on her, on the death of her mother, who was the former holder, submits the learned Counsel for the Petitioner. Reliance is also sought to be placed on the decision rendered by the learned Single Judge of Delhi High Court in *Shakuntala Rajpal and Ors. v. Mckenzie Philip (India) P. Ltd. and Ors.* reported in (1988) 64 Com Cases 585 (Delhi). Reference was also made to the decisions rendered by the learned Single Judge of the Calcutta High Court in *Kumarapuram Gopalakrishnan Ananthakrishnan v. Burdwan Cutwa Railway Co. Ltd.* (1978) 48 Com Cases 211 and the Patna High Court in *Registrar of Companies, Bihar v. Chauhan Brothers Industries Private Ltd.* (1973) 43 Com Cases 525, with regard to the plea raised as to the "loss of substratum", stating that the Petitioner is entitled to have the Company wound up for the grounds u/s 433(e) and (f).

14. The learned Counsel appearing for the Respondents submits that the stipulation u/s 439(4)(b) is very much categorical and in view of the admitted fact that the Petitioner is still to step into the shoes of the shareholder (since the shares have not been allotted or registered in her name) and since she has not held the shares for a minimum period of 6 months during the course of 18 months immediately prior to the date of commencement of winding up, she cannot successfully maintain the present petition and hence the Company Petition is liable to be dismissed on this score alone, besides the fact that none of the grounds as envisaged u/s 433(e) and (f) does exist. Referring to the judgment rendered by the learned Single Judge of the Madras High Court in *Nagalakshmi v. Mannargudi Transports (Pvt.) Ltd. and Ors.* AIR 1968 Mad 317, the learned Counsel for the first Respondent submits that in the case of a "contributory" on whom, the shares have been devolved through the death of the former shareholder, the restrictions u/s 439(4)(b) as applicable to a contributory who has the shares allotted to him, are very much applicable and that he cannot apply for winding up, unless the shares in respect of which he is a "contributory" were held by him or registered in his name for at least 6 months during the 18 months immediately before the commencement of winding up. As obvious from the wording in the provision, a "contributory" who seeks to sustain a petition for winding up has necessarily to be a "member" on the date of the

application and that the person on whom the shares devolve through death of the holder is not registered as a member and hence is not entitled to maintain a petition for winding up, on mere expectation of devolution, submits the learned Counsel.

15. Similarly, with regard to the plea of alleged "loss of substratum", it is stated that the decisions cited from the part of the Petitioner, are not applicable to the case in hand, for factual and legal reasons, in view of black and white difference between the different situations prevailing and also in the light of the law declared by a Division Bench of this Court in *Malabar Industrial Co. Ltd. v. A. John Anthrapper* (1985) 57 Com Cases 717. Reference was made to the decision rendered by the Apex Court in *Amalgamated Commercial Traders (P) Ltd. v. A.C.K. Krishnaswami and Anr.* (1965) XXXV Company Cases 456, explaining the scope of Section 434(1)(a) which has a direct bearing, when the Company is sought to be wound up referring to the grounds u/s 433(e). Reference was also made to the decision rendered by a Division Bench of the Bombay High Court (Panaji Bench) in *Vasant Holiday Homes Pvt. Ltd. and Ors. v. Madan V. Prabhu* (2003) 116 Com Cases 172, wherein it has been held that the conditions imposed restricting the rights of a "contributory" to file a petition for winding up, with reference to the necessity to have held the shares for at least six months during the 18 months immediately prior to the commencement of winding up petition, is stated as mandatory and that the earlier decision rendered by the Delhi High Court in (1988) 64 Com. Cases 585 (cited supra) (from the part of the Petitioner) has been distinguished.

16. In this context, it is very much relevant to refer to the Regulations "25 to 28" with regard to the transmission of the shares as given under Schedule I of the Companies Act 1956 which are extracted as given below:

25(1) On the death of a member, the survivor or survivors where the member was a joint holder, and his legal representatives where he was a sole holder, shall be the only persons recognised by the company as having any title to his interest in the shares.

(2) Nothing in Clause (1) shall release the estate of a deceased joint holder from any liability in respect of any share which had been jointly held by him with other persons.

26.(1) Any person becoming entitled to a share in consequence of the death or insolvency of a member may, upon such evidence being produced as may from time to time properly be required by the Board and subject as hereinafter provided, elect either--

(a) to be registered himself as holder of the share; or

(b) to make such transfer of the share as the deceased or insolvent member could have made.

(2) The Board shall, in either case, have the same right to decline or suspend

registration as it would have had, if the deceased or insolvent member had transferred the share before his death or insolvency.

27.(1) If the person so becoming entitled shall elect to be registered as holder of the share himself, he shall deliver or sent to the company a notice in writing signed by him stating that he so elects.

(2) if the person aforesaid shall elect to transfer the share, he shall testify his election by executing a transfer of the share.

(3) All the limitations, restrictions and provisions of these regulations relating to the right to transfer and the registration of transfers of shares shall be applicable to any such notice of transfer as aforesaid as if the death or insolvency of the member had not occurred and the notice or transfer were a transfer signed by that member.

28. A person becoming entitled to a share by reason of the death or insolvency of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company:

Provided that the Board may, at any time, give notice requiring any such person to elect either to be registered himself or to transfer the share, and if the notice is not complied with within ninety days, the Board may thereafter withhold payment of all dividends, bonuses or other moneys payable in respect of the share, until the requirements of the notice have been complied with.

From the above, it is very much obvious that on the death of a Member, the legal representative, though is the only person recognised by the Company as having any title to the interest of the shares on production of the requisite proof and such materials as required by the Board, is provided with an option under Regulation 26(1), either to be registered himself as a holder of the shares or to make such transfer of the shares as the deceased or insolvent member could have made. Clause (2) of Regulation 26 clearly states that the Board is having the same liberty to decline or suspend registration as it would have had, if the deceased or insolvent member had transferred the shares before his death or insolvency. Regulation 28 further makes it clear that, even though a person becoming entitled to a share by virtue of the death of the original holder shall be entitled to have the same dividends and other advantages, to which he would be entitled, if he were the registered holder of the share, except that he shall not before being registered as a member in respect of the shares, be entitled in respect of it to exercise any right conferred by the membership in relation to the meeting of the Company. This shows that the transfer of the shares on the death of the original holder is not at all automatic.

17. Coming to the case in hand, there is no case for the Petitioner that the

concerned shares originally held by the deceased mother of the Petitioner have been got registered in her name. Her only case is that by virtue of the Succession Certificate obtained by her in O.P. (Succession) 13/94 of the Sub Court, Cherthala, she is the only person to succeed to the said asset. But declaration in the above O.R and the rights and liberties in respect of the shares is with regard to the eligibility of the Petitioner as a legal heir of the deceased, to the exclusion of all Ors. . Issuance of such Succession Certificate cannot ipso facto put the Petitioner directly in the place of the original holder and she cannot be a "Member", unless the shares are got registered in her name, on submitting necessary application to the Board with requisite proof. By virtue of the mandate under Clause (2) of Regulation 26 of the I Schedule to the Companies Act, the Board is having the same power, either to decline registration or to have it allowed, as if it were an application for transfer of the shares sought to be made by an original share holder before his/her death. This being the position, the alleged rights and liberties of the Petitioner, to have sustained the Company Petition do not stand vindicated with reference to the legal provisions and as such, this Court cannot but hold that the Company Petition is not maintainable for non-satisfaction of the statutory requirements under different heads as above.

18. With regard to the merits of the case, particularly the grounds raised u/s 433(e) and (f), the same actually do not require to be examined, in view of the finding rendered on the question of maintainability. However, considering the specific pleadings and materials on record, it appears that the Petitioner cannot successfully contend that she has substantiated the existence of the enabling grounds on these heads as well. The circumstance contemplated u/s 433(e), as to when the Company can be deemed as "unable to pay its debts" is discernible from Section 434. It is with reference to the said provision that the Apex Court held in (1965) XXXV Com. Cases 456 that, even in a situation where the alleged liability is bona fide disputed by the Company, it cannot be said that there is any "neglect" to pay the amount within the meaning of Section 434(1)(a) and the Company cannot be deemed to be "unable to pay its debts". Similarly, it has been made clear by a Division Bench of the Bombay High Court-Panaji Bench in (2003) 116 Com. Cases 172 that the substratum of the Company cannot be said as lost, merely for the reason that the Company was running at loss and for this reason itself, moving an application u/s 433(f) of the Act (just and equitable ground) will not be maintainable, unless and until it was the case that the Company in no case, would be in a position to overcome the situation.

19. The averments in the Company Petition and in the subsequent proceedings filed, fail short of the requirements to invoke the provision of "just and equitable clause" [Section 433(f)] as well. On the other hand, the specific averments made by the first Respondent Company with reference to the extent of the business and the returns and the specific averment that the Company has started generating profits from the year 2009 are not specifically and successfully controverted. More so, when the burden is very high on the shoulders of the Petitioner to prove the vital facts, so as to constitute the grounds u/s 433(e) and

Section 433(f), who has sought for winding up the Company. In the said circumstances, this Court does not have any hesitation to hold that the grounds contemplated u/s 433(e) and (f) have not been established by the Petitioner and as such, the case fails on merits as well.

In the above facts and circumstances, no interference is warranted. The Company Petition fails and it is dismissed accordingly.