
(1994) 09 P&H CK 0076
In the Punjab And Haryana At Chandigarh
Case No : C.A. No. 4 of 1992

Trilok Chand Jain and Others

APPELLANT

Vs

Swastika Strips Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 13-09-1994

Acts Referred:

Companies Act, 1956 — Section 433
Partnership Act, 1932 — Section 4

Citation : (1995) 82 CompCas 423 : (1995) 109 PLR 70

Hon'ble Judges : R.P. Sethi, Acting C.J.; H.S. Brar, J

Bench : Division Bench

Advocate : J.K. Sibal and Sanjeev Sharma, for the Appellant; L.M. Suri, Hemant Kumar and H.C. Sukheja, for the Respondent

Final Decision : Dismissed

Judgement

R.P. Sethi, Actg. C.J.—The appellants' prayer for winding up the respondent-company was rejected by the learned single judge, vide judgment impugned in this appeal. It is contended that the judgment of the learned single judge was against law and facts and the learned judge has wrongly held that the goodwill amount of Rs. 1 crore of the erstwhile partnership was bogus amount. The findings of the learned single judge are stated to be against the basic concept of goodwill in law which has been claimed to be a valuable asset on the basis of some Supreme Court judgments. It is further contended that the learned single judge did not take note of the fact that the respondents owed an undisputed amount to the appellants in their capacity as creditors over and above the amount credited as goodwill. The amount owed to minors itself was well over Rs. 40,000 plus interest at the rate of 18 per cent. per annum. Respondent No. 1 had undertaken to pay the amount standing credited to the accounts of the appellants as shown in the balance-sheet, annexure P-4, but the learned single judge did not take note of this important fact. The resistance to the winding up is based on a legally tenable defence and bona fide grounds. In fact, the company is alleged to be totally insolvent and was selling the bricks which made up the

buildings in order to pay its dues to the Syndicate Bank. It is submitted that the respondents were hand in glove with each other in disposing of the property and pocketing the proceeds to the detriment of the appellants. The finding of the learned single judge that respondent-company was a running concern is stated to be contrary to the pleadings. It is stated that the learned single judge was not justified in commenting upon the conduct of the appellants during the interim period from the date of the filing of the company petition till the passing of the final order and did not take note of the fact that the appellants consist of persons of small means to whom the company owed about rupees ten lakhs along with interest. The respondent filed a suit in the subordinate trial court and got a private receiver appointed for making the sale of the property in order to pay back to the Syndicate Bank who was a secured creditor. While appointing the receiver the lower court did not place an embargo upon the respondents which was to the prejudice of the same. The receiver made sales between December 26, 1990, till the date of the filing of the appeal by which Rs. 30 lakhs were recovered and paid to the Syndicate Bank. It is submitted that the assets left at the date of the filing of the appeal if permitted to be sold in the manner in which the receivers have sold the earlier assets would not fetch more than Rs. 38 lakhs whereas the actual value of the property is claimed to be more than Rs. 1 crore.

2. An application under Rule 9 of the Companies (Court) Rules has been moved by the Syndicate Bank with various prayers made therein but mainly with the object of protecting the interests of the bank which is claimed to be a secured creditor of the respondent-company.

3. An application u/s 531 of the Companies Act read with Rule 9 of the Companies (Court) Rules, 1959, being C. M. No. 7 of 1992 was also filed with the prayer that the official liquidator attached to this court be appointed as a provisional receiver of respondent No. 1 to take over the affairs of the company during the pendency of the present appeal and the respondents be restrained from selling, transferring, disposing of, alienating the assets of the company both movable and immovable.

4. We have heard learned counsel for the parties and perused the record.

5. In order to appreciate the rival contentions of the parties, it would be proper to appreciate some of the facts which led to the filing of the winding up application and the present appeal. Eleven partners constituted a partnership firm under the name and style of Swastika Metal Works which entered into a partnership with Swastika Strips Private Ltd., respondent No. 1, incorporated on November 8, 1988. The partnership came into existence on March 16, 1989, and was dissolved on March 31, 1989. The assets and liabilities of the dissolved partnership firm were taken over by respondent No. 1 according to the balance-sheet drawn on March 31, 1989. The balance-sheet shares were allotted to the partners of the firm at the time of its dissolution but no share was allotted the partners, namely, Trilok Chand Jain and Dinesh Kumar Jain. At the time of dissolution of the firm the value of the goodwill was assessed at Rs. 1 crore.

6. It was contended that a total sum of Rs. 10,24,500.27 was payable by the company to the appellants as principal amount on March 31, 1989, along with interest at the rate of 18 per cent. per annum. Notice of demand u/s 434 of the Act was served on September 5, 1989, calling upon the company to make the payment within three weeks from the date of service. After the receipt of the notice by the company, the respondents are alleged to have got a suit filed by one Shri Neeraj Jain in the court of the Additional Senior Subordinate Judge, Jagadhri, for a declaration to the effect that the dissolution deed dated March 31, 1989, dissolving the firm was ineffective, non-existent, non est, inoperative, void, illegal, a nullity and not binding on the plaintiff as the same was against his interest. A further prayer for rendition of the accounts of the firm was made with a prayer for grant of permanent injunction restraining the defendants from receiving or recovering any amount from the defendant-company till true and faithful accounts were rendered or settled. The trial court passed an ex parte order under Order 39, rules 1 and 2 of the CPC and granted an ad interim injunction till October 27, 1989. The injunction is claimed to have been vacated by the lapse of time. It was contended that the suit filed by Shri Neeraj Jain was not maintainable.

7. The claim of the appellant is based upon the terms of the deed of dissolution of partnership which allegedly existed between the respondent-company and the individuals of the partnership under the name and style of Swastik Metal Works. Section 4 of the Partnership Act defines partnership to mean the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. The word "person" in Section 4 of the Partnership Act contemplates only natural or artificial, i.e., legal persons. The firm is not a person within the meaning of the said section and as such is not entitled to enter upon a partnership with another firm or Hindu undivided family or individual. The Supreme Court in *Dulichand Lakshminarayan Vs. The Commissioner of Income Tax, Nagpur*, has observed (at page 542 ITR 29):

"In *JAI DAYAL MADAN GOPAL, IN RE.*, , Sulaiman C. J. followed the Calcutta decisions and was not prepared to dissent from the view that the word "person" in Section 239 of the Indian Contract Act, 1872, should not be interpreted so as to include a firm. The learned Chief Justice, however, expressed the view that it was difficult to say that there was anything in Section 239 itself which made the application to that section of the definition of "person" as given in the General Clauses Act in any way repugnant. The learned Chief Justice, however, does not appear to have considered whether there was anything repugnant in the subject of partnership law, as it prevails in this country, which operates to exclude the application of that definition to the word "person" occurring in Section 259 of the Indian Contract Act. In our opinion, the word "person" in Section 4 of the Indian Partnership Act, which has " replaced Section 239 of the Indian Contract Act, contemplates only natural or artificial, i.e., legal persons and for the reasons stated above, a firm is not a "person" and as such is not entitled to enter into a partnership with another firm or Hindu undivided family or individual. In this

view of the matter, there can arise no question of registration of a partnership purporting to be one between three firms, a Hindu undivided family business and an individual as a firm u/s 26A of the Act."

8. As the claim has been preferred on the basis of a firm which in law did not exist, the claim of the appellants was liable to be rejected on this ground alone. However, as this point has not been raised by the respondents either in the pleadings or during the arguments, we have opted to decide this appeal even on merits.

9. A company can be dissolved under the circumstances enumerated in Section 433 of the Companies Act. One of such circumstances is that if the company is unable to pay its debts it may be dissolved by the court. The debt within the meaning of Clause (e) of Section 433 of the Companies Act must be determined or a definite sum of money payable immediately or on a future date.

10. A conditional liability cannot be termed to be a debt unless the condition has already happened. Wilful avoidance or neglect to pay the debt does not ipso facto amount to non-payment because of inability to pay. The inability must be proved with reference to the existing available assets of the company in relation to its debts.

11. The petitioner in a petition filed u/s 433 of the Act seeking winding up of the company on the grounds mentioned in Clause (e) is under a legal obligation to make out sufficient grounds in his favour before invoking the jurisdiction of the court. The coercive method of winding up the company cannot be permitted to be utilised merely as pressure tactics on the company or as a means for the recovery of the debts due from it. Only in cases where the claim of creditors is undisputed and the company had not replied to the notice served upon it, is the winding up petition maintainable and not otherwise. Resort to the remedy of winding up should not be mala fide. The winding up petition cannot be termed to a proper mode of recourse to a bona fide disputed debt.

12. The learned single judge rightly observed that, "winding up cannot be used as a lever to recover by using the method of arm-twisting. Once the court comes to the conclusion that the resistance to the winding up is based on bona fide grounds and legally tenable defence, the winding up of the respondent-company cannot be taken to be a legitimate means for enforcing the payment of a debt, though ostensibly it may be a winding up petition yet in fact it appears to be in exercise of pressure to succumb to some interim motion of the company that the winding up petition should be dismissed." On facts after appreciating the evidence on record, the learned single judge rightly held :

"I am of the considered view that prima facie it cannot be said that an admitted debt is due by the company. As controverted by learned counsel for the respondents, it is in fact an imaginary figure of the goodwill, in which the share of the petitioners is an admitted claim but prima facie, in my considered view, the said share cannot be considered to be sufficient to wind up a running

company. The cumulative effect of the facts as narrated above does not satisfy the test of an admitted debt which the company is liable to pay and is unable to pay."

13. Learned counsel for the appellant has vehemently argued that the claim of his client was undisputed and the resistance put up by the respondents was without any basis. He has submitted and argued at length that the goodwill of the partnership was a valuable asset which after the dissolution of the firm had become the liability of the respondent-company and was undisputably payable to the appellants. Whereas the claim of the appellant was bona fide reasonable and undisputed, the resistance put up by the company was hypothecated, fabricated and concocted, to resist the claim of the appellants. He has further argued that had the learned single judge taken note of all the circumstances in the pleadings the petition should have been allowed and the company directed to be wound up.

14. The deed of dissolution of the partnership consisting of the members of the family provided that after the dissolution of the firm the business shall be carried on by the respondent-company and in consideration of the assets available, the continuing partners agreed to pay to the outgoing partners the amount standing credited to their respective accounts in the balance-sheet as drawn on March 31, 1989, as per mutual agreement. The balance-sheet attached with the deed of dissolution shows a sum of Rs. 1 crore as goodwill of the company. It is worth notice that the fixed assets of the company were valued at only Rs. 41,46,769. How the goodwill of the dissolved firm was assessed at Rs. 1 crore is neither discernible from the deed of dissolution nor explained by the appellants herein. The term "goodwill" is not defined in the Act but is understood to mean the advantage which is acquired in carrying on a business, beyond the mere value of the capital, stock, fund or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers. The goodwill depends upon the character and nature of the business to which it is attached. It has been held that goodwill is composed of a variety of elements and is bound to differ in its composition in different trades and in different businesses in the same trade which is determined on the peculiar circumstances of each case. There may be cases where goodwill alone be paid and leave the business without which the business may yield little or no profit at all.

15. In the instant case, it would appear that the partnership deed (annexure R-2 with C. A. No. 7 of 1992) amongst the members of the family and the respondent-company was executed on March 16, 1989, and it was dissolved on March 31, 1989, that is, within fifteen days. Within these fifteen days the said concern is not supposed to have acquired any goodwill much less to the extent of Rs. 1 crore as mentioned in the balance-sheet. The business of the firm was manufacturing brass, copper, nickel and zinc alloys, sheets and circles and dealing and trading in non-ferrous metals and other products thereof is not shown to have acquired the patronage of the customers to the extent that it

could claim goodwill to the extent of Rs. 1 crore. This would also be evident from the fact that after the dissolution of the firm the continuing partners, that is, the company has admittedly become a sick unit and been not in a position to repay the debts payable to the Syndicate Bank. The goodwill in the instant case was, therefore, not only imaginary but bogus and without any basis which could not be permitted to be the property of the partnership. This would, therefore, not become the undisputed debt of the outgoing partners which would be sought to be recovered by having resort to the coercive method of the winding up of the respondent-company.

16. The petition for winding up of the company was apparently not bona fide and had been resorted to only as pressure tactics to extract money from the respondents by twisting their arm under the cloak of the provisions of the Companies Act. The appellants have vainly attempted to utilise the provisions of the Act for preferring claims of debts against the respondents which were disputed and required determination in proper litigation. There is no merit in this appeal which is hereby dismissed with costs.

17. However, Cheques Nos. 023660, 023657, 023658 and (sic) dated August 18, 1994, for Rs. 6,407.75, Rs. 10,883.33, Rs. 16,000.00 and Rs. 15,334.50 respectively drawn in the name of the erstwhile partners have been handed over by learned counsel for the respondent-company and the same have been acknowledged by learned counsel for the appellants on August 21, 1994.

18. Consequent upon the dismissal of this appeal all other petitions shall stand disposed of.