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(1992) 03 P&H CK 0027

In the Punjab And Haryana At Chandigarh

Case No : C.P. No. 39 of 1990

Trilok Chand Jain and Others APPELLANT

Vs

Swastika Strips Pvt. Ltd. and Another RESPONDENT

Date of Decision : 12-03-1992

Acts Referred:
Companies Act, 1956 — Section 433

Citation : (1992) 75 CompCas 275 : (1992) 102 PLR 47

Hon'ble Judges : M.S. Liberhan, J

Bench : Single Bench

Advocate : J.K. Sibal, for the Appellant; L.M. Suri, Senior Advocate and Arun Kumar, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Liberhan, J.—The exordium facts for winding up the respondent-company are that Swastika Metal Works was a registered partnership firm having 11 partners in it. Swastika Strips Private Limited was incorporated on November 8, 1988. Swastika Strips Private Limited, respondent No. 1, entered into a partnership with Swastika Metal Works, respondent No. 2, on March 16, 1989, which was later on dissolved on March 31, 1989. On the dissolution of the partnership firm, its assets and liabilities were taken over by the company, i.e., Swastika Strips Private Limited, respondent No. 1, according to the balance-sheet drawn up on March 31, 1989. The authorised capital of the company was Rs. 10 lakhs divided into 1,00,000 equity shares of Rs. 10 each. In the balance-sheet drawn up, shares were allotted to the partners of the partnership firm at the time of its dissolution. However, no shares were allotted to the partners, namely, Trilok Chand Jain and Dinesh Kumar Jain. At the time of dissolution of the firm, the value of goodwill of the firm was kept at Rs; 1 crore. Resultantly, Rs. 10,24,500.27 due to the shares of Trilok Chand Jain and Dinesh Kumar because of the inflated goodwill kept at the time of dissolution of the partnership firm were shown to their credit. It is on the basis of this amount which the

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petitioners assert as an admitted amount due by the company but it has failed to pay the same in spite of statutory notices served on it, that the winding up of the company has been sought. It may further be noticed that various small amounts other than the amount stated above are stated to be due to the other petitioners. It is pertinent to mention at this stage that, on the dissolution of partnership on March 31, 1989, the liabilities and assets of the partnership were taken over by the company, respondent No, 1, as per account standing as on March 31, 1989, which was drawn up by N. K. Jain and Associates ; N. K. Jain is none else but the son-in-law of Darshan Lal. One of the sons of Darshan Lal Jain, Neeraj Jain, filed a suit before the Additional Senior Sub-Judge, Jagadhri, for a declaration that the dissolution is bad. Further, a declaration for rendition of accounts and a permanent injunction restraining the partners from receiving and recovering any amount from the company till the time the true and faithful accounts are rendered was also sought. An ex parte injunction was granted by the Senior Sub-Judge, Jagadhri, on September 28, 1989, and the company was restrained from paying any amount to defendants Nos. 1 to 10 or their relations but the said injunction did not survive after October 28, 1989.

2. The company resisted the winding up, firstly, by taking a defence that since there is an arbitration clause in the dissolution deed of the partnership firm, the winding up proceedings are liable to be stayed u/s 34 of the Indian Arbitration Act, which prayer was declined. It was further submitted that in fact no amount is due. The amount of the goodwill as shown in the balance-sheet amounting to Rs. 1 crore is bogus and, therefore, cannot be taken into account as the correct figure. The capital of the partners in the partnership account will be payable at the time of final dissolution of the firm. In fact Swastik Metal Works (Regd.) was a losing concern and remained closed since the beginning of 1988. It has further suffered a loss to the tune of Rs. 1,17,74,099.16 up to the year 1988-89 and the said loss was to be shared by ten partners. It is with the intention to offset the said loss that the goodwill of the firm was kept at more than Rs. 1 crore. It is only with the intention of offsetting the said loss that the company was floated and, in this mechanism, firstly, entered into partnership (registered) in the ratio of 50:50 and thereafter dissolved the same after handing over the rights and liabilities to the company. It is with this objective that the value of the goodwill was increased. Similarly, the value of the land and building was also increased. The same was added to the partnership account so that there may not be any loss to the firm payable by the partners. The respondents specifically undertook at the Bar that they are ready and willing to pay and clear all the liabilities as per the balance-sheet so far as the minor petitioners are concerned.

3. Learned counsel for the petitioners has vehemently argued that shareholders and partners are seeking liquidation because various amounts are due to them from the company and the company is unable to pay the same as envisaged by Section 435 (e) and (f) of the Companies Act. The petitioners are only claiming that money which the respondents agreed to pay in view of the balance sheet drawn up irrespective of the fact whether it comes to their share on account of

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value of the goodwill kept or not. In the alternative, winding up of the respondent-company under Sections 433, 434, 439, 582 and 583 of the Companies Act, 1956, has been sought.

4. At this stage, another fact which is not disputed and may be taken note of is that the property in dispute of the company is mortgaged with the Syndicate Bank and the said bank has filed two civil suits for recovery of Rs. 69,45,498.99 and Rs. 31,30,556.30 against the partnership firm and the partners as well jointly and severally, inter alia, contending that the partners were guarantors. The firm and its partners compromised with the bank to pay the amount due in a particular time frame. The petitioners undertook to be personally responsible to the bank in case of any shortfall for which they agreed. However, the petitioners agreed not to create any hindrance in the sale of the property.

5. I may mention at this stage that the company is doing the business of commission agency which is not a dead business. Nothing has been shown that the company is not a viable concern.

6. The only argument emphasized by learned counsel for the petitioner is that, in terms of dissolution deed, annexure P-3, signed by the company and ten other partners, all the assets and liabilities were taken over by the company. The company has agreed to pay according to the balance-sheet as per mutual agreement. According to the statement of accounts, annexure P-5, credit to the account of Trilok Chand Jain as head of the Hindu undivided family is Rs. 1,68,313.56 to the balance which was carried forward. Similarly, in the personal account as partner the credit to his account is Rs. 3,62,743.96 to the balance which was carried forward including the share of the goodwill amount which fell to the share of Trilok Chand Jain was Rs. 6,25,000. Similar is the position with respect to Dinesh Kumar.

7. It is axiomatic that the winding up petition is only a pressure to realise the assets of the company in order to pay its debt but still anything is left to distribute the same amongst the partners of the company. The 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 (sic).

8. Another test which is to be kept in mind when winding up is sought on the grounds of its inability to pay the debt, whether the company''s existing liabilities are such which make the court fully satisfied that the existing assets of the company would be insufficient to meet the existing liabilities. Ordinarily, courts would not first to grant a decree for an alleged debt and, thereafter, as a consequence to execute the decree for alleged debt pass an order of winding up.

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9. After going through the evidence on record and the pleadings of the parties, I am of the considered view that prima facie it cannot be said that an admitted debt is due from 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 but is unable to pay.

10. Another consideration which arises in this petition is that the petitioners themselves, under Sections 582 and 583 of the Companies Act, sought the winding up of a registered partnership firm. No doubt, u/s 582 of the Companies Act, a petition for dissolution of the partnership firm and winding up can be filed but I have failed to accept the rights and liabilities of the parties after dissolution after going through the accounts. How has it become an admitted debt ? The very stand of claiming dissolution and winding up of a registered firm leads to an inference that there is no admitted debt as yet. It cannot be assumed that any relationship of debtor and creditor has come into existence without the dissolution of the partnership firm and going through the accounts fixing liabilities and rights of each partner.

11. The conduct of the petitioners in the interlocutory speaks volumes against the desirability of the winding up. There is no gainsaying the fact that the firm and resultantly the company which has taken over the assets and liabilities owes a large sum to the secured creditors for which even the petitioners are jointly and severally liable. Though the respondents have categorically stated that they would relieve the petitioners of their personal liability, they would meet their liability from the assets of the company. The value of the goodwill is only in the way for meeting substantive liabilities. The petitioners, at all points of time, have been raising one objection or the other to the sale of the property of the company to meet the liabilities of the petitioner within the time schedule, even agreed upon by the petitioners in the civil suit. On June 20, 1989, on the asking of the parties, this court permitted the respondent to sell the property at not less than Rs. 600 per square yard. This was done on the suggestion of the petitioners to the effect that the maximum price of the land is Rs. 600 per square yard. The respondent failed to get any customer for the said rate and an offer was made to the petitioners to secure any customer. The petitioners showed their inability to do so. The petitioners have further showed their inability as well as unwillingness to sell the assets of the company to meet the liability of the secured creditors. I fail to comprehend how the petitioners'' debt unless the liabilities of the partnership firm which the company has taken over are met. The petitioner as one of the partners of the firm is entitled only to the assets left over which is a disputed question of fact and should not be taken into account for winding up. It would not be just to wind up a company solely on the ground that some amount has been shown to be due to the petitioner on the basis of some self assessed goodwill that some money falls to the share of the petitioner even without

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meeting the liabilities of the firm towards its secured creditors.

12. There is not an iota of evidence on the record produced by the creditor to show the incapability of the company to pay its debt. Again, it may be noticed that the winding up cannot be ordered solely on the creditors'' claim but it is only the liability of the company to pay which is the primary consideration.

13. In view of the facts and circumstances stated above, the dispute raised by the company appears to be bona fide and this is not a fit case for the company to be ordered to be wound up. The parties are left to seek an alternative remedy through a civil suit for recovery of the amount, if any, to the petitioners.

14. Resultantly, the petition is dismissed with no order as to costs.

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