

(1976) 10 BOM CK 0004

In the Bombay High Court

Case No : Civil Revision Application No. 137 of 1976

Vasantrao

APPELLANT

Vs

Shyamrao

RESPONDENT

Date of Decision : 08-10-1976

Acts Referred:

Companies Act, 1956 — Section 11, 11(2), 3, 425(1), 44

Citation : (1977) 47 CompCas 669 : (1975) MhLj 337

Hon'ble Judges : Masodkar, J

Bench : Single Bench

Judgement

Masodkar, J.—Ex facie an interesting but on closer scrutiny an infirm question of law is raised by the present revision. The entire controversy submitted has something to do with the application of the provisions of Part X of the Indian Companies Act, 1956 (hereinafter called "the Companies Act"), as urged, excluding the operation per force the statute of Chapter VI of the Indian Partnership Act, 1932 (hereinafter called "the Partnership Act"). Indeed, the main plank of submission is that in a suit purporting to have been filed under Chapter VI of the Partnership Act, if the partnership in issue consists of more than seven partners, but below twenty, on the date of the suit for dissolution of such partnership, per force the provisions of Part X of the Companies Act are attracted and by virtue of the provisions of section 582 read with section 583, the ordinary civil court would have no jurisdiction to entertain the suit and the only relief can be provided by the competent company court with regard to winding up or dissolution.

2. Few facts need be stated to appreciate the submission. The present applicants instituted in fact the present Civil Suit No. 9 of 1974 in the Court of Civil Judge, Senior Division, seeking reliefs, inter alia, of dissolution of the partnership and seeking further a declaration that the firm "Shivraj Fine Art Litho Works", Nagpur, stood dissolved as and from the midnight of January 9, 1974. The plaint filed by these applicants then alleged that the said partnership firm was a registered firm

known as "Shivraj Fine Art Litho Works" and carried on business in lithographic and art printing business at Nagpur and Bombay. Thereafter, the original plaintiffs-the present applicants-moved an application purporting to be under Order 23, rule 1, of the Code of Civil Procedure, seeking to withdraw this suit. Before the order could be made, defendants to the original suit applied for transportation as plaintiffs in that suit. The court appears to have accepted the prayer of the plaintiff with regard to their withdrawal and the prayer of the defendants with regard to their transposition in the suit. The matter came to this court and eventually the orders of the trial court in that regard were affirmed. In *Vasantrao Dattaji Dhanwate v. Shyamrao Dattaji Dhanwate* (Civil Revision Application No. 501 of 1974 decided on January 22 1975 [1975] Mh LJ 337. After the transposition so ordered and without filing any written statement, the present applicants, who are now defendants in that suit, appear to have moved an application at exhibit 163, questioning that in view of the provisions of Part X of the Companies Act, the suit was entertainable by the court. It is rather strange that the court purported to decide that application without insisting upon the applicants-defendants to file their written statement. Normal course of procedure is that the defendants once properly arrayed should be directed to file written statement and even by written statement such a defendant is entitled to raise the question of jurisdiction. Whatever may be the position, it appears that by order below exhibit 163, the learned judge negated the contention. That order is questioned by this revision.

3. As stated above, the only question is whether the suit is entertainable. For the purpose of deciding this revision, it is assumed that on the date of the filing of the suit the partnership firm was registered and further it had eight members as partners.

4. The answer to the question depends on properly appreciating the two enactments and the provisions of those two chapters mentioned above.

5. Indeed, a little closer reading of the provisions and contemplation of Part X of the Companies Act would indicate that under the facts and circumstances the objection has absolutely no force. Part X of the Companies Act deals with winding up of unregistered companies. For the purpose of that part, section 582 defines what are deemed to be "unregistered companies". Clause (b) thereof gives an inclusive definition of that term and states that an unregistered company includes any partnership, association or company consisting of more than seven members at the time when the petition for winding up the partnership, association, or company is presented before the court. Provisions of section 582 deal with the winding up of such unregistered companies. It does not permit unregistered companies to be wound up under the provisions of the Act, except the winding up contemplated by the court within the contemplation of section 425(1)(a) of the Act. In other words, the winding up u/s 583 of unregistered companies which may include a partnership of more than seven members can only be subject to the provisions of sub-section (3) and sub-section (4) of section

583 of the Companies Act. Those sub-sections indicate that unregistered companies cannot be wound up under the provisions of the Act voluntarily or subject to the supervision of the court. Both these phrases have reference to section 425(1)(b) and (c) of the Act. Sub-section (4) of section 583 shows that unregistered companies can be wound up only on the stated grounds contained in clauses (a) to (c) of that sub-section. Clauses (a), (b) and (c) which are enumerative indicate the circumstances on the proof of which alone the process of winding up can at an be taken before the company court. Thus, it would appear that there is a limited remedy and relief provided by the provisions of section 583 and the provisions are not applicable to all sorts of causes. It is amply made clear that even these restrictive provisions applicable to all sorts of cases. It is amply made clear that even these restrictive conditions will not affect the operation of any other enactment that would provide for any partnership, association or company being wound up by virtue of the provisions of section 590 of the Companies Act. Indeed, the provisions of section 590 which are also the part enacted would save the enactment with regard to partnerships conferring authority or jurisdiction in the matter of winding up. The whole scheme of Part X, firstly, operates on the restricted class of cases of unregistered companies and by express provisions of section 590 saves the enactments which provide for the machinery to wind up partnership, association or company. Thus, it would be ample to observe that the provisions of Part X of the Companies Act do not ipso facto affect the operation of the provisions of the Act like the Partnership Act.

6. There are good reasons to continue the provisions of both these Acts together to find out the principle with regard to provisions of such a saving enacted by section 590 of the Companies Act.

7. As far as the law of commerce, economic gains, etc., is concerned, it is clear that joint commercial or economic activity for the purpose of gain can be carried on by more than one individual. When such joint activity ensues with a view to earn gain, law contemplates so as to a void the public mischief involving uncertainty and the obvious dangers to the innocent third parties in transacting business that such joint ventures should have a legal forms or legal personality. With that view in object and in contemplation so as to subserve the public purpose of avoiding possible economic and commercial mischief, provisions of section 11 of the Companies Act enact statutory prohibition with regard to associations and partnerships of persons exceeding certain number of persons to carry on any sub-section (1) the business of banking, and by sub-section (2) to carry on any other business for the purpose of acquisition of gain. Nay the provisions of sub-sections (4) and (5) indicate culpability and provide a penalty against the individuals who act in contravention of the provisions of sub-sections (1) and (2). Sub-section (2) of section 11 inhibits association or partnership of more than 20 persons to carry on business other than the business of banking having its object for acquisition of gain, unless such association or partnership is registered as a company under the Act or it is formed in pursuance of some other Indian law. It is not necessary for the purpose of the present revision to

consider the scope and amplitude of the words "formed in pursuance of some other Indian law"; suffice it so say that presumably and ex facie, these words indicate the formation of the companies or associations or partnerships by the law. Now, "company" which is a juridical person is required to be formed and registered to be the company as such because of section 3 of the Act. The term "company" which is now the part of the definition in that provision indicates a company formed and registered under this Act and also an existing company as defined by sub-clause (ii). That clause deals with the companies which re formed and registered under the Acts mentioned in sub-clause (ii). Thus, to be a company proper, two requirements are indicated. Firstly, it should be formed or constituted in the manner provided by the Act, and, secondly, it must be registered. Unless both these statutory conditions are fulfilled, for the purpose of the Act, there is no company. The Act thus preliminary contemplates companies which are registered companies. Provisions of section 11 are enacted to further this intention that under the provisions of the Act the juridical entity, called the "company", must necessarily exist for the purpose of legal control, as is envisaged by other parts of the Act, the basic object being to safeguard public interest to which a reference has already been made.

8. Logically, it follows that below the number of persons stated in sub-section (2) of section 11, there can be a company, association or partnership consisting of more than one person carrying on the business having its object to acquire gain. Such a joint commercial activity of persons for the purposes of gain would not be an illegal company, association or partnership. These entities, loosely so called, or joint ventures, can be eventually subjected to the process of winding up by recourse to the provisions of Part X of the Companies Act and, for the purpose of that Part, those are treated as unregistered companies. It is a case of partnership which can legally exist, it follows that, by virtue of section 590, if there be a law providing for a machinery for its legal dissolution, the operation of that law is not in any manner affected. That would also apply with regard to any other association of persons which can legally be wound up.

9. Turning to the provisions of the Partnership Act, this position is further enforced. The provision of that Act are enacted for the purpose of, as is stated, in the preamble "to define and amend the law relating to partnership". The concept of partnership in law and by the statute, is nothing but a relation of persons which arises upon an agreement to share the profits of a business carried on by all or may not them acting for all. That Act enacts Chapter VI and provides for dissolution of a firm. Under the Act there are registered firms and the provisions is made by Chapter VII with regard to such registration. The effect of non-registration of firm is indicated by section 69 and by sub-section (3) of that section it is made clear that a firm, though unregistered, can be brought to dissolution and for such dissolution non-registration is no bar. Thus, under the provisions of Chapter VI of the Partnership Act, a non-registered firm or a partnership can be dissolved.

10. As argument was advanced, it may be indicated that the process of winding up is really in law a step towards dissolution though under the company jurisprudence it is possible that the process of winding up may result in reconstruction of the companies and not reach the stage of dissolution proper. As far as the provision of Chapter VI of the Partnership Act is concerned, the effects indicated by section 46 which deals with the right of the persons to have business wound up after dissolution can only be said to be declaratory in this regard. For the purpose of partnership law, as stated above, which is nothing but a relation of parties flowing from the agreement to share profits of the commercial activity, the winding up of the business of the partnership is treated as part and parcel of the dissolution itself. (See Santdas Moolchand Jhangiani and Another Vs. Sheodayal Gurudasmal Massand, . The Partnership Act thus provides not only for the registration of the firms but also provides for dissolution of the firms whether registered or unregistered. There can be dissolution by an agreement (section 40) or any law (section 41) called "compulsory dissolution", or upon happening of certain events (sections 42 and 43); or dissolution can be effected by court (section 44) on the stated contingencies mentioned on clauses (a) to (g) of section 44. Unlike the Companies Act, there is no specified court contemplated by the Partnership Act and it is to the court u/s 9 of the Code of Civil Procedure, the party will have to approach to have relief u/s 44 or under any of the provisions of Chapter VI of the Partnership Act.

11. This brief review of the provisions of the Partnership Act along with the provisions of the Companies Act relevant for the purpose indicates that if there be a legal relationship of partners called "a firm", either registered or unregistered, such relationship can be brought to an end any the process of dissolution contemplated by Chapter VI of the Partnership Act and nothing in Part X of the Companies Act affects that position. I have already indicated how section 583 of the Companies Act by itself operates on a circumscribed spheres and contingencies. It is not a provision of universal application. Being a provision enacting specific remedy, it will have to be strictly construed and only applied to the matters expressly governed. Moreover, there is a provision in section 590 which clarifies by enacting a saving that the provisions with regard to dissolutions or winding up of the partnership made by any other Act is not affected by anything enacted by Part X of the Companies Act.

12. Now, that being the position and there being a suit seeking reliefs under Chapter VI of the Partnership Act, even assuming that there were eight partners on the date of the suit, that is not within the prohibition of section 11 of the Companies Act and it can be dissolved by recourse to Chapter VI of the Partnership Act and there is no bar whatsoever of such dissolution enacted either expressly or implied by the provisions of Part X of the Companies Act.

13. In this view of the matter there is no merit in the present revision and the same is dismissed with costs.