

(1994) 06 CAL CK 0008

Calcutta High Court

Case No: Company petition No. 373 of 1991

In Re: Pioneer Tubewell
Industries Pvt. Ltd. and Shivmoni
and Co.

APPELLANT

Vs

RESPONDENT

Date of Decision: June 10, 1994

Acts Referred:

- Arbitration Act, 1940 - Section 8
- Companies Act, 1956 - Section 433(1)
- Negotiable Instruments Act, 1881 (NI) - Section 20
- Partnership Act, 1932 - Section 69, 69(3)

Citation: (1995) 1 ILR (Cal) 411

Hon'ble Judges: Ajoy Nath Ray, J

Bench: Single Bench

Advocate: B.K. Chatterjee, P.K. Ghosh, S. Ghosh Chowdhury and Jishnu Saha, for the Appellant; S.B. Mukherjee, U.B. Mukherjee and Siraj Gupta, for the Respondent

Judgement

Ajay Nath Ray, J.

This is an application for winding up at its receiving stage. The petition has been hotly contested by the company.

2. In my opinion, the papers disclose without any manner of doubt that the company is admittedly indebted to the petitioning creditor to the extent of Rs. 10.33 lakh approx.

3. The petitioning creditor supplied pipes to the company and the company supplied strainers to the petitioning creditor. By their letter of October 15, 1990, the Petitioners inquired of the company whether Rs. 10.40 Lakh was outstanding to them. The company's Accountant by his letter dated October 24, 1990, confirmed that, according to the company's books Rs. 10.33 Lakh approx. was outstanding.

The exact figure is mentioned in the Accountant's letter which has not been challenged by the company in its affidavit.

4. There is also an undertaking dated October 15, 1990, on the part of the Managing Director of the company to pay Rs. 1 Lakh "in phase manner" between January and March 1991. Such payment was not made whether in any phased manner or otherwise.

5. To make matters even worse the instructed Attorney of the company who has continued as Solicitor for the company in this proceeding by his letter dated April 2, 1991, made the reckless denial that the company never placed any order on the petitioning creditor. There was absolutely no warrant for making such a wrong denial.

6. In the above facts and circumstances of tire case, in my opinion, it would be useless to inquire any further about the existence of an indisputable debt. The said debt indisputably exists.

7. The petitioning creditor has also relied upon a dishonoured cheque for the said sum of Rs. 10.33 Lakh approx. (but there is a difference of about Rs. 100 between the amount of this cheque and the exact figure mentioned in the company's Accountant's letter). The cheque is dated February 21, 1991, and in regard thereto parties have had proceedings before a Criminal Court. The company's case is that the signed cheque was delivered in blank to the petitioning creditor in December 1990 and that the petitioning creditor filled up the body of the cheque and put the date thereon. There might be some substance in this allegation of the company. The petitioning creditor did not make the case in the petition that the blank cheque was filled up under the holder's authority, u/s 20 of the Negotiable Instrument Act. Thus, I rest my satisfaction about the indisputability of the debt upon the Accountant's admission and not upon this dishonoured cheque.

8. It was also the submission of Mr. Bimal Kumar Chatterjee appearing for the petitioning creditor that even if I ignore the cheque and its dishonor altogether the papers would still disclose with sufficient certainty the debt owed by the company. I accept such submission.

9. One of the other defences raised on behalf of the company by Mr. S. B. Mukherjee was that the person verifying the affidavit affirming the petition did not have authority so to do. Specific leave was obtained to file the petition signed by the constituted Attorney. That leave was granted on October 11, 1991. The copy of power of attorney produced by Mr. Chatterjee also gives the said authorized person right to demand and sue for a debt. Under these circumstances, this defence raised by Mr. Mukherjee is not substantial or meritorious.

10. The other point raised by Mr. Mukherjee is that the firm cannot present the winding up petition because it is an unregistered firm.

11. In inquiring about whether the firm is registered or not, the following facts came out during hearing Originally the firm Shivmoni & Co. was registered in 1952 with two partners, viz. one Moni Bose and one Mohtta. The said Mohtta died on August 22, 1990. He died leaving his widow as the sole heiress. Moni Bose and the widow have executed a deed of partnership dated October 27, 1990. Intimation was sent to the Registrar of Firms in April 1991 that the said widow came as a partner on and from August 23, 1990.

12. I have directed the two certified copies of extracts from the Registrar of Firms, the copy power of attorney and the copy of partnership deed of October 27, 1990, all produced by Mr. Chatterjee to be kept on the records countersigned.

13. On these facts Mr. Mukherjee constructed his point about non-registration in the following manner. He relied heavily upon the case of [Commissioner of Income Tax, Madhya Pradesh, Nagpur and Bhandara Vs. Seth Govindram Sugar Mills](#), and said on its authority that, if a partner of a two-member firm dies, the partnership stands automatically dissolved. To the same effect is also the decision of the Andhra Pradesh High Court in P. Ananda Rao and Anr. v. G. Raja Rao and Ors. AIR 1976 A.P. 256.

14. Mr. Mukherjee said that if the firm -stood dissolved on the death of Mohtta on August 22, 1990, the new firm, although In the same name of Shivmoni & Co., between Moni Bose and Mohtta"s wife, would have to be freshly registered. Intimation would -have to be sent to the Registrar of Firms by them as if they were entering into a new partnership.

15. At least the above Supreme Court authority is not one which supports this extreme proposition about fresh registration canvassed by Mr. Mukherjee. On the other hand, there is a spate of authorities relied upon by Mr. Chatterjee which indicates that notwithstanding the dissolution on the death of one partner of a two-member firm, the firm can be continued to be taken as a registered one provided intimations about the new partner or partners are sent, to the Registrar and no fresh registration is necessary.

16. The authorities relied upon by Mr. Chatterjee on this regard are respectively [Durga Das Janak Raj Vs. Preete Shah Sant Ram](#), ; [Firm Paras Ram Ram Sarup and Others Vs. Firm Baldev Sahai Ram Bhagat and Others](#), ; [Pratapchand Ramchand and Co. Vs. Jehangirji Bomanji Chinoy](#), ; [Bharat Sarvodaya Mills Co. Ltd. Vs. Mohatta Brothers](#), and [Kesrimal and Another Vs. Dalichand and Others](#), . There is also a reference of a Calcutta case decided by Panckridge J. in the Punjab cases.

17. Although the" cited authorities are not strictly binding on me, I am not minded to take a different view there from. The registration of a firm means the taking by the Registrar of Firms on the Register the particulars regarding the firm mentioned in the Partnership Act. If a two-member firm is dissolved by the death of one partner and an intimation of the new partner taken in place and stead of the deceased

partner reaches the Registrar, all the necessary particulars will be there on the Register and thus no extra information would be needed, if the parties kept all other particulars unchanged, as here. There might be complications if the deceased partner left more than one heir and there is dispute amongst them about who should be partner, but in the instant case the question does not arise. The widow was the sole heiress as mentioned also in the new deed. Mr. Mukherjee argued that if this was a point of law which required scrutiny, then the winding up petition would be as liable to resistance as it would be on a disputed matter of fact. For the reasons mentioned above, in my opinion, no controversy as to law also arises, the matter being long and well-settled.

18. Mr. Chatterjee further argued that even if the firm was not registered, the present winding up petition was not barred u/s 69 of the Partnership Act because a winding up petition was not "to enforce a right arising from a contract".

19. Section 69 bars a suit, a claim of set off, or other proceeding to enforce such a right in the firm name by or on behalf of an unregistered firm.

20. Mr. Chatterji submitted that if the Companies Act were not there, then and in that event, no winding up petition could have been presented by his clients even if there were owing from the company an undisputed debt. He relied upon the case of *Katra Iron Store v. Faridabad Fabricator Pvt. Ltd.* 1991 (1) Comp. L.J. 177 where it has been held that a winding up proceeding upon an indisputable debt is not a proceeding to enforce a right arising from a contract within the meaning of Section 69 of the Partnership Act.

21. The Madras High Court has held in the case of *Kottamasu Sree Mannarayanamurthy and Anr.* AIR 1939 Mad. 145 that an insolvency petition also is not barred u/s 69 as that is not a proceeding to enforce a right arising from a contract, the insolvency laws give such a right.

22. The case of AIR 1943 175 (Nagpur) opines that an execution of a decree is also not an enforcement of a right arising from a contract. This is a right arising from a decree. The case of *Virendra Process, New Delhi v. Varinder Garments, Delhi* AIR 1982 Del. 482 which was also relied upon by Mr. Chatterjee, shows that act is off action is not the enforcement of a contractual right so that Section 69 does not bar such a proceeding.

23. In the case of [Kothapalli Kanuparthi Subbayya and Another Vs. Nichenametla Subbarayadu and Others](#), it was held that an application by an unregistered firm for discharge of an attachment order is not barred by Section 69.

24. On the other side of scales there is, the authoritative pronouncement of the Supreme Court in the case of [Jagdish Chander Gupta Vs. Kajaria Traders \(India\) Ltd.](#), that an application u/s 8 of the Arbitration Act would be barred by Section 69 if it applied to the facts of the case. The Supreme Court held that an arbitration being a

creature of contract, Section 8 of the Arbitration Act cannot be invoked in the firm name save by a registered firm. In para. 9 of the judgment Hidayatullah J. also pointed" out that "other proceedings" u/s 69(3) was a comprehensive and wide expression, not limited to proceedings like claims of set off. But there is nothing in the Supreme Court case which indicates that a winding up petition, according to Their Lordships, is also a proceeding to enforce a right arising from a contract.

25. Mr. Mukherjee cited the dictum of Sir George Jessel M.R. in the Imperial Hydropathic case from the well-known text book of M/s. Sarkar & Sen (pp. 444, 445). He said that winding up petition is for recovery of a debt. To the same effect, Mr. Mukherjee submitted, is the decision of the Supreme Court in the case of [Harinagar Sugar Mills Ltd. Vs. M.W. Pradhan](#), which is as follows:

Can it be said that the petition filed by the Receiver for winding up of the company is not a mode of realisation of the debt due to the joint family from the company? in Palmer"s Company Precedents, (Pt. II, 1960 Ed., p. 25) the following passage appears:

A winding up petition is a perfectly proper remedy for enforcing payment of a just debt. It is the mode of. execution which the Court gives to a creditor against a company unable to pay its debts." This view is supported by the decisions in Bowes v. Home Life Insurance and Guarantee Co. (1865) 11 HLC 389; In Re: General Company for Promotion of Land Credit (1870) 5 Ch. A 363 (380) and In Re: National Permanent Building Society (1869) 5 Ch A 309. It is true that "a winding up order is not normal alternative in the case of a company to the ordinary procedure for the realisation of the debts due to it ; but nonetheless it is a form of equitable execution.

26. He also showed me Section 433(1)(c) of the Companies Act wherein the Court is empowered to vend up a company if it is unable to pay its debts. Mr. Mukherjee submitted that a winding up proceeding is accordingly no less a proceeding to enforce a right arising from a contract, which has given rise to a debt, that an ordinary suit is. According to him, Section 69 is a bar to a winding up proceeding initiated by an unregistered firm in the firm name, if it seeks to present it on a debt arising from a contract, like a contract of sale, exchange or supply of goods, as here.

27. Section 69 bars certain proceedings at the instance of unregistered firms in the firm name, but the Act does not altogether prohibit the carrying on of partnership business without obtaining a registration. The reason for insertion of Section 69 is that the business community should know who is trading in what name and it is equally necessary for the public authorities to be aware about the persons who are interested in a particular business. But the said reason is not so strong as to prohibit unregistered partnership business altogether. The policy is, as expressed by the Legislature, sufficiently served by a limited prohibition against unregistered firms and partners thereof. The limited prohibition is that if the firms and partners are not registered they shall not institute proceedings for enforcement of contractual rights

and rights even by the Partnership Act.

28. Section 69 is a prohibitory section. Generally speaking, all persons who are entitled to carry on legal business have a right to institute suits for enforcement of their claims. Section 69 cuts down upon such a general right. Thus, according to well-known rules of construction, it has to be restrictively interpreted.

29. Indeed, if a winding up proceeding is instituted on a debt which has arisen from a contract, the same leans for support both upon the contract and upon the Companies Act. If Section 69 is widely interpreted, it would bar a winding up petition presented upon a contractual debt. But if it is restrictively interpreted, which has been done in so many cases mentioned above, it must be held, which I do hold, that a winding up petition is not a proceeding to enforce a right arising from a contract even though the origin of the litigation might be traced up to there. It is a proceeding to enforce a right given specially by the Companies Act, even if there is a contractual debt, for the purpose of establishing the company's inability to pay. Certain other steps often have to be taken under the Companies Act, like the service of a statutory notice. Without these, the winding up petition would be incomplete. The contract itself cannot therefore be looked upon as the thing from which the right to obtain a winding up immediately arises.

30. The above point of law also, although I have taken some space to discuss it, is not, in my opinion, such a one as justly calls for relegation of the petitioning creditor to a suit. Parties have argued at length and, therefore, I have had to decide it at some length. But a point of law does not become a disputed point of law merely because the learned Counsel canvass it or dispute it for long enough.

31. Under the above circumstances, in my opinion, the company raises no sufficient point of fact or law to stop the receiving of the winding up petition and its advertisement.

32. The petition is, therefore, received. It shall be admitted. It shall be advertised once in The Statesman and once in the Ananda Bazar. Advertisements not to be published for a period of four weeks from date hereof. Publication in the Calcutta Gazette is dispensed with. Returnable eight weeks hence.

33. Parties and all others concerned will first act upon a copy of this dictated order on the usual undertakings and thereafter upon the perfected order.