(2007) 08 CAL CK 0070

Calcutta High Court

Case No: CP No. 132 of 2006 and CA No. 259 of 2006

Vishnu Kumar Agarwalla		APPELLANT
	Vs	
Sreelall Foreign Money Changers (P.) Ltd.		RESPONDENT

Date of Decision: Aug. 28, 2007

Acts Referred:

- Companies Act, 1956 - Section 397, 398, 433, 443(2)

Citation: (2008) 88 SCL 246

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: Abhrajit Mitra and Ratnanko Banerjee, for the Appellant;Utpal Bose and Sushanta Dutta, for the Respondent

Final Decision: Dismissed

Judgement

Sanjib Banerjee, J.

The petitioners seek winding up of the company on just and equitable grounds, citing complete deadlock in both the pre-dispute shareholding and directorial position in the company. According to the petitioners, the first petitioner and the second respondent are entitled to equal shareholding and say in the management of the company and upon such persons, brothers, having irreconcilably fallen out, the partnership firm run in the guise of the limited liability company needs to be dissolved.

2. The company was incorporated by the two brothers in 1999 for taking over the business of a partnership firm functioning as foreign money changers. The petitioners say that such business, the only that the firm and the company were ever involved in, is no longer possible as the company''s licence to carry on such business has been revoked and, given that the company was an association of two individuals having equal measure of rights therein, there would be no useful

purpose in letting the company live.

3. The key facts are not in dispute, though the respondents assert that the petitioners no longer have a representative on the board of the company and that it is the husband and wife team of the second and third respondents which has control of the management.

4. The husband and wife team of the petitioners refers to the lack of probity on the part of the second and third respondents in the conduct of the company''s affairs, of the assets of the company having been usurped and of the petitioners being denied any say in the company''s affairs and participation in its remaining business. There are charges made in the petition that should ordinarily adorn a petition under Sections 397 and 398 of the Companies Act in an action for redressal against oppression and mismanagement. The petitioners cite these as further grounds, in addition to the deadlock, to suggest that in the event mere deadlock is not enough in justice and equity for an order of winding up to be sought, such additional charges should be taken into account for the petitioners to pass the test u/s 433(f) of the Companies Act, 1956.

5. The petitioners allege that the sharp decline in the turnover of the company from Rs. 4.3 crores in 2003-04 to Rs. 35 lakhs in the following financial year is directly attributable to the mismanagement of the company by the second respondent and his denying the petitioners'' access to the company''s office and its books and records. The petitioners insinuate that the entire transactions of the company were not reflected in its books and that the second respondent made clandestine profits and siphoned off company funds. Loyal employees of the company were shown the door, according to the petitioners, for not showing exclusive loyalty to the second respondent. A rival business of dealing in foreign money changing and share trading was commenced by the second respondent from the company''s office and the goodwill and infrastructure of the company were misused for the personal gains of the second respondent, according to the petitioners. The petitioners claim that despite the first petitioner''s signature in the financial statements of the company for the year ended 31-3-2004, the entries therein were dubious and the first petitioner was constrained to sign the papers upon the same being presented to him with little or no time left for the statutory deadline for filing such accounts.

6. The petitioners justify the first petitioner''s action in requiring the banks to stop operation of the company''s accounts on the allegation of mismanagement by the second respondent. The petitioners submit that the first petitioner was left with no option but to call upon the Reserve Bank of India, by a letter of 29-11-2005, to not renew the foreign money changers licence in favour of the company that was to run out by the end of 2005. The petitioners also called upon the second respondent to have the business of the company wound up, but this encouraged the second respondent to induct his wife into the company as a director without the first petitioner consenting to the same.

7. The respondents'' version of things is, expectedly, quite at variance with what the petitioners suggest. The respondents have set out the share structure shortly upon incorporation of the company: the two brothers held 9100 shares each., their wives held 3500 shares each and the two brothers as karta of their individual Hindu undivided families held 100 shares each. The respondents refer to an oral partition following which the family office at room No. 7,23A, Netaji Subhas Road, Calcutta-700 001, a rented accommodation, was halved, one brother retaining the No. 7 and the other getting the new room shown as room No. 7A.

8. According to the respondents, following the oral partition, the company came to the second respondent and several other businesses and assets of the family were taken over by the first petitioner. The respondents claim that it was only after such partition and while the formalities to effectuate it had not been completed, that the first petitioner attempted to sabotage the business of the company. The respondents suggest that notwithstanding the petitioners continuing to be shareholders in the company, the second and the third respondents are beneficially entitled to the entire paid up capital in the company as the petitioners were required to transfer their shares in the company to the second and the third respondents in terms of the oral partition. Contrary to what the petitioners claim, the respondents suggest that the company is no longer a partnership between the two brothers and the present petition has been prompted by ulterior motive upon the petitioners having consolidated their control over other family assets by taking advantage of the petitioners own wrong in not transferring the shares ostensibly held by them in the company.

9. The respondents'' principal contention is that the just and equitable Clause cannot be unreasonably invoked and Section 443(2) of the Act is placed in aid of the submission that this petition made with oblique motive should be dismissed:

443. Powers of court on hearing petition.- (1) * * *

(2) Where the petition is presented on the ground that it is just and equitable that the company should be wound up, the court may refuse to make an order of winding up, if it is of opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

10. The respondents state that even if the company''s foreign money changer licence is no longer valid, and it cannot carry on its only effective business, there is no reason to doubt that the company''s memorandum cannot be amended for it to pursue other businesses and retain the goodwill that it had developed over the years. The respondents urge that the grounds cited by the petitioners need investigation and the demand for just and equitable winding up cannot be supplemented by such other grounds without those being established in a properly constituted action.

11. The petitioners rely on the judgments reported at Modern Furnishers (Interior Designers) (P.) Ltd. In re In Re: Modern Furnishers (Interior Designers) (P.) Ltd. and Others, and Brown Forman Mauritius Limited Vs. Jagatjit Brown-Forman India Ltd. and Another, . In Modern Furnishers (Interior Designers) (P.) Ltd.''s case (supra), in proceedings instituted under Sections 397 and 398 of the Companies Act, a Single Judge of this Court declined to pass any orders on the following reasoning:

If there is a genuine and irreconcilable difference of opinion between petitioner No. 1 and petitioner No. 2 on the one hand and the respondent Nos. 2 and 4 on the other, over the management of the company, then the classic position of a deadlock in management has arisen as the shareholding of the two groups are equal. Proceedings under Sections 397 and 398 of the Companies Act cannot be resorted to for solving a genuine deadlock in the absence of any established misfeasance or malfeasance by one group to the prejudice of the other. If the parties have lost all confidence amongst them and it is not possible for them to carry on business jointly or provide for an acceptable management, the only way out seems to be to wind up the company and if necessary in the instant case to dissolve the existing partnership. The assets, if any left, will be available to the parties for distribution.

On the facts of this case, the dispute in the management of the company cannot be solved in the domestic forum inasmuch as the two opposing groups hold equal shares. The court also cannot through its officers continue to manage the company for all times to come. The petitioners have also not been able to make out a case of substantial injustice which can be set right by the court invoking the principles laid down in Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others, .

For the reasons stated above, I am not inclined to and do not pass any order on this application except that I record that learned Counsel for the respondents stated on instructions that the respondents and the company will not stand in the way of petitioner No. 2 to exercise his rights as a shareholder in the company in accordance with law. (p. 869)

12. In the Brown-Forman Mauritius Ltd.''s case (supra), a Single Judge of the Delhi High Court accepted the petitioner''s contention therein that upon the joint venture between the two groups having failed, the company was liable to be wound up on just and equitable grounds. In arriving at such conclusion, inter alia, the following reasons were given :

Since the shareholding is equally distributed between the Petitioner and the Respondent and neither of them have shown any proclivity of selling or acquiring the holding of the other a deadlock in the management has manifested itself. This deadlock is also evident in that there is no consensus on the vital questions of injecting further funds into the Company''s coffers; on the sales or depletion goals which the company should achieve; and these warring parties are already embroiled

in litigation. I am deliberately steering clear of discussing issues in minute details since a mere overview of the disputes and rival contentions leaves me in no doubt that it is just and equitable to wind up the Company. It is more than likely that the Petitioner and the respondent may initiate further litigation including arbitration against each other and, therefore, it would be expedient for the Company Judge to abjure from expressing views on the respective claims. The focal concern must be the Company''s health alone. (p. 240)

13. At the beginning of the final hearing, the respondents have made an offer to buy out the petitioners at Rs. 72.50 per share, without prejudice to their contention that they were entitled to the company in view of the family partition. The petitioners have spurned such offer on the ground that they were unable to assess the bona fides of such offer and were equally unable to make a counter offer as the petitioners had no access to the company books and could not say for certain, in such circumstances, as to what would be the worth of the company.

14. The respondents have relied on the judgments reported at Jose J. Kadavil and K.T. Mathew Vs. Malabar Industrial Co. Ltd., ; Suresh Kumar Bansal Vs. U. P. Mineral Products Ltd., V.V. Projects and Investments P. Ltd. Vs. 21st Century Constructions P. Ltd., and Palaniappan S. v. Tirupur Cotton Spg. & Wvg. Mills Ltd. [2003] 50 SCL 293 (Mad.), in support of the contention that relief u/s 433(f) based on the just and equitable Clause is in the nature of a last resort when other remedies are not efficacious to protect the general interest of the company, that such Clause can be invoked only in compelling circumstances and the court has to weigh the interests of the shareholders and the creditors of the company before making an order thereunder.

15. Both sides have referred to the Supreme Court''s recognition of partnership principles in company law in the judgment reported at Hind Overseas Private Limited Vs. Raghunath Prasad Jhunjhunwalla and Another, . The petitioners refer to such judgment for the recognition therein that the sixth Clause in Section 433 of the Act is not to be read as being ejusdem generis with the preceding five clauses. The respondents cite it in support of their contention that such Clause can be used to wind up a company upon the court''s satisfaction that such order would not only enure to the benefit of the petitioners but also to the benefit of the other shareholders. The Supreme Court in that case reversed the Calcutta judgment on the finding of fact that the company was not in substance a partnership merely because the shareholding was between two family groups.

16. In both the Calcutta and Delhi cases noted above, there was no doubt that the Company Judge harboured as between the two sets of protagonists in the company being entitled to equal shareholding and, consequently, to equal say in the management thereof. There is a doubt in this case that needs to be resolved. If the company, indeed, fell in the second respondent''s share upon the oral partition that has been pleaded, it would not be just or equitable to the respondents'' group to

wind up the company, almost merely by virtue of such group resisting winding up. Indeed, it would be unjust and inequitable to the respondents to wind up the company if the family partition resulted in their getting the company. Just as in the classical orders staying creditors'' winding up petitions pending adjudication of the disputes raised by the company, the present petition may also have been stayed upon the parties being required to obtain a decision on the case of family partition made out by the respondents and denied by the petitioners.

17. But there is the equitable consideration. Even if all the facts alleged by the petitioners against the respondents are accepted, there is the single act that would disentitle the petitioners from invoking the just and equitable Clause : the petitioners'' conduct in having the company''s foreign money changing business stopped on the first petitioner''s representation to the Reserve Bank. That the company no longer carries on its only business, is the major plank on which this petition has been founded. Such ground is of the first petitioner''s creation. Just as a creditor''s winding up petition would not be received if the company''s inability to pay is attributable to the creditor''s conduct, a petitioner invoking the just and equitable clause for winding up a company should have done nothing to prejudice the company to be entitled to urge such ground. Even if there was no partition and the first petitioner was entitled to equal shareholding and say in management of the company along with his brother, the second respondent, the first petitioner having called upon the Reserve Bank not to renew or cancel the company''s licence, is enough for'' the first petitioner to be disqualified from seeking justice and equity in having the company wound up.

18. The petitioners have alleged ouster from the management. A charge of such ouster can be maintained, in appropriate action, both on grounds of illegality and on grounds of inequity. A perfectly legal act may be inequitable and an illegal act may, in the larger interest of the company, be justified. The petitioners here cite the exclusion of their nominee on the board and the induction of the third respondent as an illegal act and hasten to insinuate that such illegal act was per se inequitable. It is not necessary that the one must follow the other and in considering whether it is just and equitable to wind up a company, an act of illegality is tempered by a justification thereof on the ground of necessity.

19. The first petitioner''s exclusion and the third respondent''s induction on the company''s board need to be weighed against the first petitioner''s conduct. He may have been justified in alleging that company funds had been defalcated by his brother but in issuing dictates to the company''s bankers and in exhorting the Reserve Bank to revoke the licence issued to the company, the first petitioner took steps that impeded the functioning of the company. If then, the other remaining director excluded the first petitioner from the management of the company and inducted another to replace him, however illegal, such action can be justified to be in the interest of the company since the petitioners'' charge of defalcation against

the second respondent was yet unproven.

20. The petition fails and is permanently stayed. All observations made here must be seen strictly in the context of the just and equitable Clause that the petitioners invoked. The petitioners will not be precluded from urging the grounds on which this petition was founded in appropriate proceedings that the petitioners may next bring. The parties shall pay and bear their own costs.

21. The application for appointment of provisional liquidator stands dismissed; interim orders, if any, are vacated.