

Raghubar Dayal And Ors. vs The Sarrafa Chamber And Ors. on 18 February, 1954

Equivalent citations: AIR1954ALL555, [1954]24COMPCAS388(ALL), AIR 1954 ALLAHABAD 555

ORDER

Brij Mohan Lall, J.

1. This is a petition by three shareholders of the Sarrafa Chamber, Jhansi (hereinafter described as the Company) for its winding up on the ground that it is just and equitable to do so.

2. This Company was formed in 1946 with a nominal capital of rupees one lakh divided in 200 shares of rupees five hundred each. The object of the Company was to carry on trade in gold and silver. The Company was never registered.

3. This petition is resisted mainly by opposite parties Nos. 2 and 3. It is not necessary to mention the defence raised by them on merits because a preliminary question has arisen for deci-

sion whether the Company consists of more than twenty members and whether an application for winding up of such a Company can be entertained. It may, however, be remarked that although in the counter-affidavit filed by the opposite parties it was expressly stated that the . Company consisted of forty-eight partners no plea was taken to the effect that the application was on that ground not maintainable. The learned counsel for the petitioners contended that the question of maintainability of the petition could not be entertained by Court. This contention is, however, without force. A question of law can be raised at any stage. In order to enable the learned counsel for the petitioners to prepare himself to meet this new point an adjournment was given to him as desired by him.

4. Before taking up the question of law there arises a question of fact as to whether the Company consists of more than twenty members. In this connection it may be pointed out that the opposite parties' allegation, viz., that there are forty-eight members, has not been controverted in the rejoinder affidavit. On the contrary, one finds that besides the petitioners opposite parties Nos. 2 to 17 are described by the petitioners themselves as members of the Company. This brings the total number of the share-holders to nineteen.

It may also be pointed out that opposite parties Nos. 12 and 15 to 17 are firms. Naturally they consist of more partners than one. Thus on the petitioners' own showing the number exceeds twenty. The learned counsel for the petitioners also admitted that although the number to start with did not

exceed seven, fresh members were admitted and the total number in course of time exceeded twenty. Thus, it is now common ground between the parties that the members of this Company exceed twenty in number.

5. Section 4(1) of the Indian Companies Act 7 of 1913 lays down that "No company, association or partnership consisting of more than ten persons shall be formed for the purposes of carrying on the business of banking unless it is registered."

Sub-section (2) runs as follows : "No Company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business" i.e. a business other than banking business "that has for its object the acquisition of gain by the Company, association or partnership, or by individual members thereof, unless it is registered as a Company under this Act or is formed in pursuance of an Act of Parliament of the United Kingdom or some other Indian Law or of Royal Charter or Letters Patent."

6. It is conceded on either hand that the object of the present Company was "acquisition of gain". Since its membership exceeded twenty it was obligatory on the members to get the Company registered. This, as already stated, was not done. The result, therefore, was that not only this partnership did not acquire the status of a Company as contemplated by law but, on the contrary, it was an association of which the formation was forbidden by law. The question for consideration is whether members of such an association can come to Court and seek redress through it.

By acceding to the petitioners' request to wind up the Company the Court will be indirectly according recognition to the Company. Since the law has forbidden the formation of such com-

panies it could never have been its intention to lend its helping hand to members who had formed this forbidden association. If such members are given the same rights and privileges as are provided, by law for persons who form associations permitted by law they suffer no penalty for having disregarded the express provisions of law regarding the formation of companies. I am, therefore, of the opinion that the Court should not entertain this petition for winding up of a company which was formed in contravention of Section 4(2) of the Indian Companies Act.

7. I am fortified in this view by the case of

-- 'In re Padstow Total Loss and Collision Assurance Association', (1881-82) 20 Ch D 137 (A). This is a case exactly parallel to the present one. There also members exceeding twenty in number had formed an association for the object of acquisition of gain. An application was made for the winding up of such a company. It was held, that this application could not be entertained.

8. This case came up for consideration before a Bench of this Court in -- 'Mewa Bam v. Ram Gopal', AIR 1926 All 591 (B). In that case the prayer was not for winding up of the Company but for dissolution of that partnership. The majority view (expressed by Walsh and Mukerji JJ., Sulaiman J. dissenting) was that a suit for dissolution of such a partnership could not lie because the Court would not recognise such a partnership. The learned Judges relied on the aforesaid English case.

Even Sulaiman J., who gave a dissenting judgment, was of the opinion that had the petition been for winding up it could not be entertained. He remarked at p. 593: "There is ample justification for holding that a winding up order of an illegal association cannot be made."

Thus it will appear that although there was a difference of opinion among the Judges constituting that Bench about the maintainability of a suit for dissolution of a forbidden partnership there was complete unanimity between them on the question of non-maintainability of a petition for winding up in respect of a Company formed in contravention of the provisions of Section 4 of the Act.

9. The learned counsel for the petitioners took his stand on Part IX of the Indian Companies Act which relates to winding up of un-registered Companies. He relied on the definition of the term "un-registered Company" in Section 270 which runs as follows :

"The expression 'unregistered company' shall not include a railway company incorporated by Act of Parliament of the United Kingdom or by an Indian law nor a company registered under the Indian Companies Act, 1866 (10 of 1866) or under any Act repealed thereby, or under the Indian Companies Act, 1882 (6 of 1882), or under this Act, but save as aforesaid, shall include any partnership, association or company consisting of more than seven members."

His contention was that the Company in question came within the definition of the terms "unregistered Company" and, therefore, it could be wound up under the provisions of Chapter IX, subject to the limitations mentioned therein, and since there was no express provision in Part IX laying down that Companies formed in contravention of the provisions of Section 4 could not be wound up, his petition was maintainable. This argument has no force. Part IX is intended to cover the cases of those Companies which can legitimately remain un-registered. In other words, it provides that Companies consisting of not more than ten members in cases of banking companies and not more than twenty members in case of other companies can be wound up.

It was not the intention of law to lend recognition to companies formed in violation of the provisions of the Indian Companies Act. But for Part IX an un-registered company, though permissible in law, could not be wound up. Part V of the Act which relates to winding up provides for winding up of a "Company". The term "Company" is defined in Section 2(2) as meaning "a company formed and registered under this Act or an existing company." An "existing Company" has been defined by Section 2(7) to mean "a company formed and registered under the Indian Companies Act, 1866 (10 of 1866) or under any Act or Acts repealed thereby, or under the Indian Companies Act, 1882 (6 of 1882)." -

It will, therefore, follow that according to the definition contained in the Act "Company" means a registered Company only and, therefore, Part V could not apply to the winding up of un-registered companies though lawfully formed. The legislature, therefore, felt the need to enact special provisions in Part IX to provide for the winding up of un-registered companies legitimately formed. In the circumstances, I find no force in the contention put forward by the learned counsel for petitioners viz. that Part IX contemplates that a Company formed contrary to the provisions of

Section 4 can also be wound up through Court.

10. I am, therefore, of the opinion that this petition must fail on the preliminary ground that the Court cannot entertain a petition for the winding up of a Company formed in contravention of the provisions of Section 4 of the Act. I make no orders as to costs because the opposite parties are also privy to the formation of an association forbidden by law. Moreover, they had not taken in their reply the point on which they have succeeded.

11. The petition is dismissed. Parties shall bear their own costs. Stay orders dated 15-12-52 and 7-8-53 are vacated.