## NEINA MARIKAR *v.* CEYLON STANDARD PRESS COMPANY, LIMITED.

1904.
*June 17.*

*Special, 279.*

*Company—Ordinances Nos. 4 of 1861, 6 of 1888, and 3 of 1893—Application for compulsorily winding up—Discretion of the Court to inquire into the* bonâ fides *of the application.*

Upon an application to the District Court by a registered shareholder in a Joint Stock Company for an order to wind up the Company compulsorily—

*Held*, *per* MIDDLETON, J., that, as a general rule, after a resolution had been passed for winding up a Company voluntarily a shareholder could not obtain a compulsory order for winding up, there being no allegation in the petition or affidavit that it was not the majority of the shareholders who had assented to the voluntary winding up, or that there was any fraud on the part of those who had done so, or that they could not be trusted to determine the matter themselves, and that the resolution to wind up voluntarily was a sham.

*Held*, *per Curiam*, the Court has a discretion vested in it by sections 78 and 80 of Ordinance No. 4 of 1861 to dismiss a petition for winding up a Company, if it is satisfied that the petition is one not made in good faith, or is founded upon insufficient materials.

S. L. NEINA MARIKAR being a registered shareholder in the Ceylon Standard Press, Company, Limited, petitioned the District Court of Colombo for an order to wind up the Company compulsorily under the provisions of the Joint Stock Companies' Ordinance, No. 4 of 1861, and the amending Ordinances No. 6 of 1888 and No. 3 of 1893.

In his application and affidavit submitted to the Additional District Judge, Mr. Felix Dias, it was stated that an attempt was being made to wind up the Company privately to the detriment of the general body of shareholders, and that a resolution to that effect had been passed, but had not been confirmed. The counsel for the applicant moved for an interim order on the Company not to confirm any such resolution until the hearing of the application. The Additional District Judge allowed an order on the Company returnable on the 25th February, to appear and show cause why the Court should not order it to be wound up compulsorily under its direction, and it further ordered that the Company should refrain from confirming any resolution for the voluntary winding up of its affairs until the hearing and determination of the said application.

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On the 1st February, 1904, the proctor for the said Company applied to the District Judge of Colombo, Mr. Joseph Grenier, to fix the 4th February, 1904, for the Company to show cause against Mr. Dias's order. This was allowed *ex parte*.

Pursuant to this order an inquiry was held by Mr. Grenier into the matters alleged in the petition, and on the 22nd February the learned Judge dismissed the petition with costs by the following order:—

"I find the petitioner is a Moorish trader, and holds one share in the Company worth Rs. 100. His application to wind up the Company is supported by an affidavit carefully and methodically arranged with figures, which apparently justify these statements. ..... In view of his admission in cross-examination the first question I have to determine is whether this petition is a *bonâ fide* one; and secondly, whether the petitioner can be held responsible for the statements contained in it and in his affidavit ..... It is contended for the Company that the petitioner has been made use of by others for purposes of their own.

"I think that the Court has a discretion vested in it by sections 78 and 80 of Ordinance No. 4 of 1861 and the preceding section to dismiss a petition for winding up a Company, if it is satisfied that the petition is one not made in good faith, or is founded upon insufficient material, or no materials at all.

"This petition has been presented by a contributory who had not fully paid up his share at the date of the application, and before I grant the prayer of it I must be satisfied that it is a *bonâ fide* one. The cross-examination of the petitioner shows that he was not a free agent, so to speak, in presenting this petition, and that he did not know what the object of the petition was. According to his own admissions he did not know who supplied the facts contained in the affidavit or who drafted out the affidavit. All he can say is that counsel drafted it, and that the affidavit was sent to his house on the morning of the day he presented it to the Additional District Judge; but it is certain that, although he possesses a slight knowledge of the English language, he had not the least conception of the real contents of the affidavit or the petition or of the gravity of the charges he was making against the directors of the Company. The Court cannot have any sympathy with a shareholder who thus lends himself to be made use of by others.

"It was contended for the petitioner that, as the statements contained in the affidavit had not been contradicted by any counter-affidavit, I must accept them as true. If I was satisfied of the

*bonâ fides* of the petition I should certainly have required an affidavit from the directors. But where an irresponsible person who confesses to ignorance of the entire contents of his affidavit is put forward to asperse the integrity and probity of several public men I fail to see of what use any counter-affidavit can possibly be. The petition must be dismissed with costs."

The petitioner appealed. The case was argued on the 24th and 25th May, 1904.

*Dodwell Browne* (with *Samarawikrama*), for appellant.

*Lascelles, A.-G.*, for the Company, respondent.

*Cur. adv. vult.*

17th June, 1904. WENDT, J.—

To my mind the wording of section 80 of the Joint Stock Companies' Ordinance, 1861, which empowers the Court to dismiss the petition of a contributory, with or without costs, or to make a winding-up order, or such other order or decree as it deems just, gives the Court a discretion as to whether it will or will not grant the prayer of the petition. Any doubt that might exist is removed by the decision in the case of the *Metropolitan Saloon Omnibus Company* (*5 Jur. N. S. 922, 28 L. J. Ch. 830.*

The question then is whether the learned District Judge exercised his discretion, and, if so, whether he exercised it in a way which was reasonable.

It is true that the Company presented no counter-affidavit to contradict the allegations in the petitioner's affidavit, such as they were, but they were not bound to do so, if petitioner had failed to make out a *primâ facie* case to the satisfaction of the Court. The Court has held that he did so fail. It has held that the petition was not presented *bonâ fide*, but that the petitioner merely allowed himself to be put forward by others. The impression left on my mind by the petitioner's cross-examination is that the petitioner, a wealthy man, took his single Rs. 100 share in the Company, not by way of an investment for himself, but in order to " oblige " others who asked him to do so. He took no interest whatever in the Company's affairs thereafter, and never attended any one of its meetings, or (so far as appears) was represented at it. He neglected to pay the last call of Rs. 25 on his share, and it seems difficult to believe that his petition was simply prompted by a desire to get repaid his Rs. 75.

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At the argument I was somewhat inclined to think that the District Judge ought to have required an answer from the Company, and then investigated the charges made by the petitioner, but on fuller consideration I think this would only come at a later stage after the petitioner had satisfied the Court as to his *bonâ fides*, and *primâ facie* satisfied it as to the truth of his allegations. As the case stands, I think appellant has not shown that we ought to interfere with the District Judge's order, and I would therefore dismiss the appeal with costs.

MIDDLETON, J.—

This was an appeal against an order of the District Judge dismissing an application for the winding up of the Standard Press Company, Limited, compulsorily by the Court under sections 75 to 80 of the Joint Stock Companies' Ordinance, No. 4 of 1861.

The District Judge's reason for dismissing the petition was that he considered he had a discretion under sections 78 and 80 to refuse to make the order if he thought fit, and that he exercised that discretion adversely to the petitioner on the ground that the petition was not presented in good faith. The petitioner was the owner of only one Rs. 100 share which was not fully paid up. For the appellants it was contended that the learned District Judge did not possess under the Ordinance the discretion he claimed, and that, even if he did, such discretion had not been rightly exercised. The affidavit in support of the petition alleged that the Company was unable to pay its debts, and that three-fourths of the capital had been lost or become unavailable.

It would appear that our Companies' Ordinance, No. 4 of 1861, follows the provisions of the English Companies' Act of 1856, and no amendment has been made on the lines of the Companies' Act of 1862, and no provision similar to section 138 of that Act which enables a contributory, where a Company is being voluntarily wound up, to obtain the assistance of the Court on a specific point without all the expenses of a compulsory winding up, is available here. The real complaint of the learned counsel for the petitioner is, that he has not been able to develop what he believes to be his case by the filing of affidavits by the directors or the secretary and their cross-examination, when he says he would be in a position to show he was entitled to the order he claimed.

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It is admitted that on the 16th December, 1903, at a general meeting of the Company a resolution was passed to wind up the Company voluntarily; that the 27th January, 1904, was fixed for the confirmatory meeting; and that the petition in this case was presented to the Court on the 23rd January, 1904, and that since then the confirmatory meeting has been held and the Company has resolved to wind itself up voluntarily.

The learned counsel for the appellant quoted various cases to us. In *Ex parte Hawkins in re Metropolitan Saloon Omnibus Company, Limited (28 L. J. Ch., p. 830)*, decided by the Lords Justices in 1859 on sections 67 and 72 of "the Joint Stock Companies' Act, 1856," there is no doubt that the Company were called upon to answer the affidavit in the petition, but it is possible that the petitioner's cross-examination on his affidavit might have disclosed, as the Lords Justices held, that the evidence showed, after the inquiry before the Commissioner, the petition was presented in bad faith and on false pretences; and if it had done so, the discretion which the Lords Justices held lay in the Commissioner might very well have been exercised as the learned District Judge has exercised it here. Section 72 of the English Act of 1856 is identical with section 80 of our Ordinance No. 4 of 1861. Section 67 in that Act is the same as section 75 in ours. The observations of Lord Justice Turner also apply to this case, where *primâ facie* the large majority of the contributories are in favour of a voluntary winding up. He says when a person who is a partner takes proceedings against the will and against the opinion of the large majority of his co-partners, he ought to show a clear case of *bonâ fides*.

The present case is perhaps not so strong a one as the English case, but the petitioner here is the owner of one not fully paid up share, does not understand English well, never attended a meeting of the Company, took no interest in the Company, understands the reports only a little, only lately came to know of its affairs, is ignorant of the contents of his own affidavit, and did not attend the winding up meeting of the Company. The affidavit alleges fraud in the directors in issuing misleading reports as to the prospects and position of the Company, and implies that they have failed to observe the statutory provisions in different respects, and believes that they are the largest creditors and may take advantage of it to waive the statute of limitations in their own favour. I do not consider that Jessel M. R.'s judgment in *In re Rica Gold Washing Company (11 Ch. D., 42)* assists the appellant, but is rather against him, and the Master of the Rolls' remarks as to stating the facts which constitute the fraud are very

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germane to this affidavit. Because the directors took a sanguine view of the business of the Company, they ought not to be charged with fraud in the absence of some facts to indicate it. *In re Crystal Reef Gold Mining Company* (*1 Ch. D., 410*) does not help the appellant except in indicating that a shareholder who is in arrear in payment of calls presenting a petition may be heard when the calls are paid. The same observation applies to *In re Bristol Joint Stock Bank* (*44 Ch. D., 703*). On the other hand, the Attorney-General relies on the ruling of the Lords Justices *In re Gold Company* (*11 Ch. D., 701*), where it was laid down that as a general rule after a resolution has been passed for winding up a Company voluntarily, a shareholder cannot obtain a compulsory order for winding up. There is no allegation in the petition or affidavit here that it was not the majority of the shareholders who have assented to the voluntary winding up, or that there is any fraud on the part of those who have done so, or that they cannot "be trusted to determine the matter themselves, and that the resolution to wind up voluntarily was a sham." Considering that the ruling in that case applies here, I must decline to accede to the appellant's request to re-open these proceedings, as I am fully satisfied that under the circumstances the order made by the learned District Judge was justified and equitable.

The appeal, in my opinion, should be dismissed with costs.