T. C. I. HOTELS (LANKA) LTD

v.

MARINA OVERSEAS CORPORATION

COURT OF APPEAL
JAYASINGHE, J.
JAYAWICKREMA, J.
CA. (Rev.) 144/99
D. C. COLOMBO 3902/Spl
18TH NOVEMBER, 1999
01ST DECEMBER, 1999
21ST JANUARY, 2000

Companies Act No. 17 of 1982 - Winding up proceedings - S.255(c), (f) - Failure to commence business within one year of incorporation - Is relief of winding up discretionary? - Just and equitable to wind up.

Marina Overseas Corporation (Respondent) instituted action for the winding up of TCI Hotels Ltd., (Petitioner), on the ground that TCI Hotels Ltd., has not commenced business within 1 year from its incorporation and that it was just and equitable to wind up the said Company under S.255(c) and (f) of the Companies Act. After inquiry, Court made order to wind up the said Company - TCI Hotels Ltd., (Petitioner).

The contention of the Petitioner was that business of the company had in fact commenced, but due to the intervention of exernal factors that were beyond the control of the Company made the continuance of the business impossible, and further, the jurisdiction of the Court to wind up a company where it has failed to commence business is discretionary and that it is not a matter of right.

It was also contended that Marina Overseas Corporation had not ventilated its grievances if any, before the Board of Directors or the domestic forum of the company and it took no steps to agitate for even a voluntary winding up.

Held :

(1) Evidence placed before Court does not support the contention that the company has commenced business.

(2) It is a mixed question of fact and law whether the company should be allowed to carry on having considered the reasons adduced by

Marina Overseas Corporation for the winding up and the objections taken thereto. If the Petitioner is to succeed there is a burden cast on him to satisfy court that the discretion vested in Court has been exercised unreasonably.

(3) There was no purpose in agitating for a winding up order when the majority shareholders who hold 73% of issued capital was opposed to winding up.

APPLICATION in Revision from an Order of the District Court of Colombo.

Cases referred to :

1. In *Re Baku Consolidated Oilfields Ltd., 1944 - 1 Aller 24.*
2. In *Re Eastern Telegraph Company Ltd.. 1947 - 2 Aller 104.*
3. *B. Vishwanathan vs. Seshasajee Paper Boards Ltd.,* - 1992.73 Company cases 136 Madras.
4. *New Kerala Chits & Trades (Pvt.) Ltd., vs. Official Liquidator* - 1981-51 Company cases 601 (Kerala).
5. *Tinuskia Vastra Bhandar vs. Assam Tea Corporation Ltd.,* - 1992-72 Company cases 178 (Ganhati).
6. *Registrar of Companies vs. Bihar Wire & Wire Productions (Pvt.) Ltd.,* - 1979.45 Company cases 194 (Patna).
7. *Metropolitan Railway Ware housing Company* - 1867-36 LJ Ch. 827.
8. *Langham Skating Rink Company* - 1877, 5 Ch. D 669 at 685.
9. In *Re. Haven Gold Mining Company* - 1881, 20 Ch. D 151.
10. In *Re. Redrock Gold Mining Company Ltd.,* - 61 Law Times 785.
11. Suburban Hotel Company - 1867 L. R. 2 Ch. 737.
12. *Sakunthala Rajpal vs. Mckenzie Philip (India) (Pvt.) Ltd.,* - 1988-64 Company Cases 585 (Delhi).
13. *Kerala State Industrial Development Corporation Ltd., vs. Poonamundi Tea Pack Ltd.,* - 1988-63 Company cases 575 (Kerala).
14. *Charles Forte Investment Ltd., vs. Amanda* - 1963-2 All E. R. 940.

Nigel Hatch for Petitioner.

K. N. Choksy P. C. with *Nihal Fernando and Ms. Nilani Somadasa* for Respondent.

Cur. adv. vult.

July 05, 2000.
JAYASINGHE, J.

The Petitioner Marina Overseas Corporation instituted action in the District Court of Colombo for the winding up of TCI Hotels Limited on 21.12.1993 on the ground that TCI Hotels Limited has not commenced business within one year from its incorporation and secondly that it was just and equitable to wind up the said company under and in terms of Section 255(c) and (f) of the Companies Act No. 17 of 1982.

At the inquiry into the winding up held on or about 25.07.1997 the Petitioner Company led the evidence of a representative from the Registrar of Companies and marked documents 'P1' to 'P18'. The company sought to be wound up - TCI Hotels Limited produced marked 'R1' the Annual Report of 1990/1991 and led in evidence an affidavit filed in opposition to the said winding up by P. K. Davey. At the said inquiry it was admitted and/or established that TCI Hotels was incorporated as a private limited liability company on or about 24.09.1980 for the establishment of Sheraton Hotel on a land leased from the Urban Development Authority; that due to political disturbances in Sri Lanka in 1983 TCI Hotels had been compelled to modify the proposed project from a 350 roomed to a 300 roomed 5 Star Hotel; that due to the Urban Development Authority repossessing the land leased to the said company, it was seeking to identify a suitable alternative project; commenced arbitration proceedings with the Urban Development Authority with a view to settling the company's claim for compensation in view of the Urban Development Authority resuming possession of the lease hold.

By the order delivered on 08.01.1999 the learned Additional District Judge made order winding up the company.

TCI Hotels Limited is now seeking to revise the said order of the learned Additional District Judge of Colombo.

Mr. Nigel Hatch Counsel for the company sought to be wound up submitted that the contention of the Petitioner Marina Overseas Corporation that TCI Hotels Limited had failed to commence business within an year of its incorporation on 24.09.1980 is untenable as the documentary evidence produced by the Petitioner Company itself would establish *inter alia* that the project was in fact started but due to an unsettled economic environment it was scaled down and after the Urban Development Authority repossessed the land TCI Hotels Limited continued its efforts to identify an alternative to the original concept resulting in a reduction in the share capital. The learned Counsel sought to rely on certain preliminary steps taken to satisfy Court that it had commenced business within a year of incorporation; that it secured a lease hold from the Urban Development Authority; that after March 1983 shares were issued and fully paid up by the promoters; that a sum in excess of Rs. 25 million was paid to architects; interior designers; for soil and water tests etc.; that in 1984/ 1985 the paid up capital being Rs. 138 million; that it was compelled to modify the project from the original concept and that the foreign and local promoters were anxious to proceed to a scaled down project of a 200 roomed luxury hotel; that due to riots in July 1983 and consequential investor pessimism the directors continued with their efforts to identify a suitable alternative project; that the Urban Development Authority repossessed the land and thus an alternative to the original project too was not possible; that arbitration proceedings commenced regarding compensation to be paid after Urban Development Authority repossessed the land.

The learned Counsel also complained that the learned Additional District Judge failed to take cognizance of an affidavit in opposition filed by the P. K. Davey.

It was the contention of the Petitioner that TCI Hotels Limited never commenced business which it was constituted to undertake. The business was that of a 350 Room Five Star Hotel operated by Sheraton at a site at Galle Face.

The Petitioners also contended that when the Urban Development Authority repossessed the land on which the said hotel was to be sited, the entire project was at an end. As a matter of fact Prakash Kanyalal Davey in his affidavit 'P2' had averred that;

> While the said company endeavoured to construct a Sheraton Hotel in Colombo and obtained the requisite approvals including the lease of the land from the Urban Development Authority, due to *inter alia* civil strife and/or the unsettled political situation in Sri Lanka the said project became frustrated and had to be abandoned with the knowledge and/or approval of the Government in Sri Lanka which the Petitioners acquiesced in and is estopped from denying.

Two vital considerations emerge from the above averment. Firstly there is an admission by Davey that the project has not proceeded beyond obtaining the requisite approvals and leasing of the land from the Urban Development Authority and secondly that the project had become frustrated and had to be abandoned. This affidavit is dated January 1994. When the land reverted back to its source with it went any hope there was that the project might get off the ground.

Davey has in his affidavit also averred that in view of the improvement of the political situation in Sri Lanka the principal shareholder is considering establishing a hotel and that a proposal to that effect has been received; that they would be presented to the Board no sooner they are finalised. Davey goes on further and avers that in the event of such a project bearing fruition . . . exchange earnings generated for Sri Lanka and the said company.

According to the Annual Report 'X4'/'P4' for the year 1984/1985 it appears that as at 31.03.1985 the company had not yet commenced its business and that there appears to be

no prospect of commencing its business for the declared reasons viz. the unfortunate circumstances prevalent in the country; the decline in tourism, the excess capacity of hotel rooms in Colombo; the lack of support from financial institutions and Banks towards any hotel related projects and withdrawal of support by most of the shareholders themselves despite considerable efforts made to identify and evaluate an alternate project; no encouragement was received from important institutions that investors would normally expect.

The Petitioners contend that since a substantial investment had been made by the Petitioner towards the project as far back as in the year 1983/1984 and the project, on the admission of the TCI Hotels Limited itself had become frustrated and had to be abandoned, the Petitioners have become entitled to pray for a winding up order of the said company in terms of section 255(c) and (f) of the Companies Act No. 17 of 1982.

In *Re. Baku Consolidated Oilfields Limited*[1] Bennett, J. took the view that the majority of the shareholders have no right to compel a minority to embark upon any other undertaking. A similar view was taken by Jenkins, J. in *Re. Eastern Telegraph Company Limited.*[2]

Mr. Hatch also submitted that the jurisdiction of Court to wind up a company is entirely discretionary and that it is not a matter of right. He relied on the word *may* in Section 255 to support his argument that winding up is discretionary. In *B. Vishwanathan vs. Seshasayee Paper Board Ltd.*,[3] it was held that it is a settled principle of law that the relief of winding up is a discretionary relief and the Court has to find out whether winding up would be in the interest of justice and also in the public interest. In *New Kerala Chits & Trades (Pvt.) Ltd., vs. Official Liquidator*[4] Court held that a company may be wound up by Court, among others, if the company, has, by special resolution, resolved that the company be wound up by

Court, or if the company is unable to pay its debts or if the Court is of opinion, that it is just and equitable that the company is wound up. The word *may* in the Section denotes that the Court is vested with the discretion in taking a decision. The discretion no doubt is to be exercised in a judicial manner. The Court has discretion in taking a decision under all clauses of Section 433. (Section 433 corresponds to Section 255 of the Companies Act). In *Tinuskia Vastra Bhandar vs. Assam Tea Corporation Ltd.,*[5] Court held that it is not bound to make an order of winding up under Section 433 although grounds for winding up under Section 433(a) to (p) is made out. In *Registrar of Companies vs. Bihar Wire & Wire Productions (Pvt.) Ltd.,*[6] Court held that the mere fact that business had not commenced within a year by itself is not a ground for a Court to order winding up and the Court must ascertain whether there was some good reason for the failure. That another consideration in the matter of an order for winding up are the wishes of the majority of shareholders. In *Metropolitan Railway Warehousing Company*[7] it was held that the jurisdiction given to Court by Section 222(c) of the Companies Act of 1948 vests a discretionary jurisdiction in Court as to whether a winding up order should be issued. It was held that the circumstance that a business has not been commenced within a year does not give a member an absolute right to a winding up order. Hence where the delay is sufficiently accounted for and there appears to be a reasonable prospect that the company if allowed to go on may succeed or if the great majority of members desire to go on an order may be refused. In *Langham Skating Rink Company*[8] *at 685* it was held that a shareholder presenting a petition is largely at the mercy of the majority and that it is a settled principle that as between share holders the wishes of the majority shall prevail. It was held that it is very important that the Court should not unless a very strong case is made take upon itself to interfere with the domestic forum which has been established for the

management of the affairs of the company. To justify interference there must be something unreasonable something like tyranny something amounting to an injury, of which the minority have a right to complain.

The resistance of Mr. Hatch for the winding up was primarily on two grounds. He argued that business of the company in fact had commenced. But due to the intervention of external factors that were beyond the control of the company made the continuance of the business that has commenced impossible. He then submitted that in any event the jurisdiction of the Court to wind up a company where it has failed to commence business is discretionary and that it is not a matter of right.

Both Counsel sought to rely on the just and equitable principle.

I have carefully considered the submission of Mr. Hatch. Evidence placed before Court does not support the contention that the company has commenced business. Davey's affidavit does not bear that out. In fact there is no Sheraton and the Petitioner claims that the company has not commenced business for 13 years after incorporation. With the site meant for the construction repossessed by the Urban Development Authority there was no prospect of the hotel coming up. In effect substratum of the company has disappeared.

I do not think the Petitioner would seriously dispute the contention of TCI Hotels Limited that the jurisdiction of the Court to wind up a company is discretionary. Section 255 provides that a company may be wound up by Court if any of the grounds set out from (a) to (f) are present. However it is always open to the Respondents who are objecting to the winding up to adduce sufficient evidence to controvert the

positions taken up by the Petitioner for a winding up order and to invite Court to disallow an application for winding up. It is a mixed question of fact and law whether the company should be allowed to carry on having considered the reasons adduced by the Petitioner for the winding up and the objections taken thereto. If the Petitioner is to succeed there is a burden cast on him to satisfy Court that the discretion vested in Court has been exercised unreasonably. Mr. Choksy, P. C. contended that the company was unable to raise the balance share capital either from the investors or financial institutions due to unsettled conditions in the country including the riots of July 1983. The learned President's Counsel relied on 'X4'/'P4' - the Project Report for the year 1984/85. That the Board of Directors decided to scale down the project to a two hundred roomed hotel which he says failed to get off the ground. Thereafter the Urban Development Authority repossessed the land for non use for the purpose for which it was leased. Consequently the hotel was without a site for its construction. In this background, the Annual Report for 1984/95 marked 'X4'/'P4' also states that in view of the unfortunate circumstances prevalent in the country, the decline in tourism; the excess capacity of hotel rooms in Colombo, the lack of support from financial institutions towards any hotel related project and withdrawal of support by most of the shareholders themselves; despite the considerable efforts made to identify and evaluate an alternate project no encouragement was received from important institutions that investors would normally expect. While the directors would continue in their effort to try and identify a suitable alternate project, the Urban Development Authority resumed the land and thus an alternative to the original project was not possible. P. K. Davey in his affidavit had averred that the project has become frustrated and had to be abandoned with the knowledge and/or approval of the Government of Sri Lanka. In *Re. Haven*

Gold Mining Company[9] it was held that if the Court is satisfied that the subject matter of the business for which a company was formed substantially ceased to exist it will make an order for winding up the company although the large majority of shareholders desire to continue to carry on the company. Here the company was established for working a gold mine in New Zealand and it turned out that the company had no title to the mine and had no prospect of obtaining possession of it except as to a small portion for a few months. A winding order was made although there were general words in the Memorandum of Association enabling the company to purchase and work other mines in New Zealand. The large majority of the shareholders wished to continue the company. In *Re. Redrock Gold Mining Company Ltd.*,[10] where a company was incorporated in January 1888 with the object of purchasing and working the Redrock mines. There were further objects mentioned in the memorandum namely to purchase and otherwise acquire mines and other properties in the Colony of New South Wales and elsewhere and generally carry on the business of milling and mining in all its business. In October 1889, the Directors reported to the shareholders that the Redrock mines was a failure and that the company must either go into liquidation or employ the unexpended capital in other ways. Court held that the main object for which the company was formed has failed and therefore though there were large subsidiary powers in the Memorandum of Association, there must be a winding up order. Even though the power of Court for winding up is discretionary I am unable to accept the contention of Counsel that the discretion has been improperly exercised.

Mr. Hatch also submitted that it is not just and equitable for the company to be wound up. Mr. Choksy, P. C. submitted that the Petitioner had waited for 13 years before filing proceedings for winding up on 20.12.1993. He submitted that without question the company had not commenced business

for not only 1 year but for 14 years after its incorporation and accordingly the Petitioner is entitled for an order of winding up. He submitted that it will be just and equitable to make an order for winding up for the reason that the project has been frustrated and abandoned but nevertheless the TCI held on to the Petitioners investments for 14 years. That with no prospect of a Sheraton Hotel being constructed at Galle Face and without the Petitioner receiving any return whatsoever on its investments, it is just and equitable that the company should be wound up. He submitted that when the project has been frustrated and abandoned due to the emergence of certain circumstances, the substratum of the company has disappeared and that was why it is just and equitable to wind up the company under Section 255(f). In *Suburban Hotel Company*[11] Lord Cairns suggested that if the substratum of a company were gone, that might render it just and equitable to make a compulsory winding up order. Courts have over the years extended this principal and it is now possible to say that the substratum of a company is deemed to be gone when the subject matter of a company is gone, the object for which it was incorporated has substantially failed or it is impossible to carry on business of the company except at a loss. In *Redrock Gold Mining Company (supra)* Kay, J. stated "The principle of this Court is that when an association is formed for a particular purpose it does not matter that it has large powers in addition to that particular purpose. If that particular purpose fails any shareholders have a right to say "put an end to it, pay me my money." In *Re. Haven Gold Mining Company (supra)* it was stated that where the Court is satisfied that the subject matter of the business has substantially ceased to exist it will make an order for winding up of the company although a large majority of shareholders desire to continue to carry on the company. In *Re. Eastern Telegraph Company (supra) Ltd.*,[12] Jenkins, J. stated "that, I take it, means that a shareholder has invested his money in the shares of the

company on the footing that it is going to carry on some particular object, he cannot be forced against his will by the votes of his fellow shareholders to continue to adventure his money on some quite different project or speculation."

In *Re. Baku Consolidated Oilfields Ltd., (supra)* the company was formed to acquire the undertakings of four other companies carrying on oil business in Russia. Before the undertakings could be acquired they were confiscated by the Russian Government. For several years nothing happened and then a shareholder petitioned for winding up. The petition was opposed by the majority of shareholders. Court made order for winding up and stated "In my judgment it is clear on the facts that the purpose for which this company was originally formed has gone. It can never carry on the business it was formed to carry on. That seems to me to be clear. It also seems to me to be clear that majority of shareholders have no right to compel a minority to embark upon any other undertaking."

Mr. Hatch also complained that the Petitioner Marina Overseas Corporation had not ventilated its grievances if any before the Board of Directors or the domestic forum of the company before it sought relief from Court. It took no steps to agitate for even a voluntary winding up within the domestic forum of the company and that it acquiesced in all that took place being a promoter and minority shareholders. In *Sakunthala Rajpal vs. McKenzie Philip (India) (Pvt.) Ltd.,*[12] it was held that winding up is granted only as an ultimate necessity where it is in the best interest of all concerned. If the fight is only between two groups of shareholders one concievable method of resolution could be by giving all the assets of the company to one group of shareholders, the other being compensated in terms of money or put in another way the purchase of one groups interests in the company by the other.

In *Kerala State Industrial Development Corporation Ltd., vs. Poonamudi Tea Pack Ltd.,*[13] It was held that a hasty petition without attempting to sort out the dispute and the controvercy in the domestic forum provided by the Articles would have to be discouraged. Just and equitable ground has to be not only for the Petitioner but also to the company and all shareholders. The principles of winding up cannot be deliberately invoked. In *Charles Forte Investments Ltd., vs. Amanda*[14] it was held that in order to obtain a winding up order the party seeking the exercise of discretionary power of the Court has not only to establish the circumstances obtaining in the company are such that the winding up is the only alternative remedy but also to show that it had no other remedies available.

In the light of the state of affairs prevalent within TCI Hotels Limited I cannot see an alternative to winding up. As submitted by the learned President's Counsel there was no purpose in agitating for a winding up order when the majority shareholders who hold 73% of issued capital was opposed to winding up. I see no reason to interfere with the findings of the learned District Judge. Application for revision is refused with costs fixed at Rs. 25,000/-.

JAYAWICKRAMA, J. - I agree.

Application dismissed.