KERALA HIGH COURT

George

Vs

Athimattam Rubber Co. Ltd

Company Petn. No. 5 of 1964 and Appln. No. 87 of 1964

(P.T. Raman Nayar, J.)

05.03.1964

JUDGMENT

P.T. Raman Nayar, J.

1. When this winding up petition, brought by a contributory under the just and equitable clause, came on for admission5 Mr. Meenattoor entered appearance for the company and asked for an opportunity to be heard on the question whether the petition disclosed a case for ordering a winding up. Subsequently the company made an application praying for the dismissal of the winding up petition in limine on the score that it disclosed no adequate grounds, that it was prompted by mala fides, and that the petitioner, if he was really aggrieved, had other remedies and was acting unreasonably in seeking to have the company wound up instead of pursuing those other remedies.

2. The very institution of a winding up petition against a company, more so its advertisement, adversely affects the reputation of the company, and, if done without reasonable and probable cause, is a wrong which can be restrained by suit. It is also the duty of the Court before admitting a winding up petition, especially one brought by a contributory, to satisfy itself that there are prima facie grounds; and it is well-settled that, even after the Court has admitted a petition, it can, on being moved for the purpose by the company or some other interested person, stay proceedings and revoke the admission. Rule 96 of the Companies (Court) Rules, which deals with the admission of winding up petitions and directions as to advertisement, recognises this, for, it says that the judge may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition the hearing to be given to the company is not for the purpose of deciding the manner of the advertisement, but for deciding whether the advertisement should be made at all and the petition proceeded with. (See in this connection Cercle *Restaurant Castiglione Co. v. Lavery*[1]*, In the matter of Pioneer Bank, Ltd*[2]*., W.I. Theatres v. Associated Bombay Cinemas Ltd*[3]*., Lord Krishna Sugar Mills Ltd. v. Smt. Abnash Kaur*[4]*,* and *Charles Forte Investments Ltd. v. Amanda*[5]*).*

[1](1881) 18 Ch D 555, In re A Co., (1894) 2 Ch 349
[2] ILR 39 Bom 16 : AIR 1914 Bom 190
[3] AIR 1959 Bom 170
[4](1961) 31 Com. Cas. 587 : AIR 1961 Pun 505
[5](1963) 3 WLR 662

In fact the maintainability of the application made by the Company is not questioned; nor is it suggested that I would be wrong in hearing the company before deciding whether the winding up petition should be admitted or not.

3. As I have said, the winding up petition is brought under the just and equitable clause and the grounds alleged are :

> (1) that the directors of the company, who are closely related to one another, are mismanaging its affairs for their own benefit and have been guilty of misappropriation and other misconduct;
> (2) that the company has been working at a loss; and
> (3) that the company has sold a number of its undertakings and is about to sell its two remaining undertakings with the result that its sub-stratum has disappeared or is disappearing.

4. I am satisfied that there is not much substance in any of these grounds so that they add tip to little and can, even cumulatively, scarcely Justify a winding up order. Taking the first ground first, it is true that four of the five directors of the company are closely related to one another, two being brothers, a third being their first cousin, and the fourth, a son-in-law of one of the brothers. The fifth is, however, not related to the remaining four and is, in fact, the paternal uncle of the petitioner. Close relationship between the several directors of a company is however no ground for winding up although it is a factor to be considered in cases where that close relationship has fostered misconduct and mismanagement and has enabled the directors to dominate the other share-holders and monopolise the company for their own individual benefit as in *R. Sabapathy Rao v. Sabapathy Press Co. Ltd*[6]. and *Gopal Chetti v. Ripon Press and Sugar Mill Co. Ltd*[7]., I might also mention that there was a reconstitution of the board in August 1963 by which four of its old members were replaced. The previous Board also consisted of close relations. The common member of the two Boards is the petitioner's paternal uncle. Of the remaining four members of the old Board, two others were also paternal uncles of the petitioner while a third was a son-in-law of one of these paternal uncles. The remaining member also, it is said, was a relative of the petitioner, being his stepmother's brother. So we find that what happened in August 1963 was that a Board composed almost entirely of the petitioner's close relatives was replaced by a Board composed predominantly of persons who; though closely related to one another, are not related to the petitioner.

5. Misconduct and mismanagement are not by themselves sufficient for a winding up order,, and the significant feature in the present case is that almost all the acts of misconduct and mismanagement alleged by the petitioner relate to periods before the new Board took charge. It is not the petitioner's case that any member of the new Board, in particular, the director-in-charge who is actually conducting the management was in any manner privy to the mismanagement which took place while the old Board was functioning or that the new Board has failed to pursue remedies available to the company against the old Board. All that is alleged against the new Board is that on the 5th October 1963 it resolved to sell what remained of the Little

[6] AIR 1925 Mad 489
[7] AIR 1925 Mad 633

Flower Estate, one of the two undertakings owned by the company, the rest of the Little Flower

Estate having already been sold while the old Board was functioning.
It is also alleged that, for the purpose of this sale, the Board had decided to terminate an agreement for slaughter tapping, paying to the other contracting party compensation of as much as Rs. 40,000/- which is exactly half the consideration for the agreement. But, in fact, the resolution is that,

> "subject to the consent of the company in general meeting, the remaining portions of the company's Little Flower Estate be sold and the sale proceeds utilized for the discharge of the debentures issued by the company and the balance amount for the day to day working and development of the Munderi Group of Estates",

the other remaining undertaking of the company. I fail to see how this can conceivably amount to misconduct.

6. It is also alleged but not against the present Board, that moneys received by previous sales of the company's undertakings have not been fully accounted for, that, in particular, although portions of the Little Flower Estate were sold for Rs. 1,60,000/-, ostensibly for the purpose of redeeming debentures raised for the purpose of purchasing the Munderi Group, only Rs. 91,000/- has been deposited in the debenture redemption account. But the company's case is that debentures to the value of Rs. 26,000/- and odd have been purchased and cancelled, that a sum of Rs. 89,000/- and odd still remains in the debenture redemption account with the State Bank of Travencore - the debentures are actually redeemable only in 1968 - and that the rest of the money has been utilized for the working of the company including the development of the Munderi Group. That the debentures have been purchased and cancelled and that a sum of Rs. 89,000/- and odd lies in deposit in the Bank is not disputed, and, with regard to the balance, there are certainly no grounds disclosed for thinking that the money has not been duly brought to account and has been misappropriated.

7. It is not denied that the company has been regularly holding its annual general meetings and laying its duly audited accounts before the meeting and that neither the petitioner nor any other member has so far raised any objection. It is not alleged that the directors dominated over the other share-holders or that the share-holders outside the director's group were apathetic or powerless to interfere.

8. As I have already pointed out, the new Board took charge only in August 1963; no allegation of any substance is made against it; and, even if the allegations against the old Board are well-founded - I express no opinion whatsoever as to this - that, in the absence of anything to show that the members of the new Board were privy to the mismanagement and misconduct, is a matter, of no consequence. Even if there was mismanagement in the past, the new Board should be given sufficient time to manage the affairs of the company properly and free it from the results of the past mismanagement.

9. The allegation that the company has been working at a loss does not appear to have much substance. What is said is that the company has paid no dividend from the year 1958-59 onwards except for the year 1960-61 for which year and dividend of live per cent was "paid by some manipulation of account." It would thus appear that till 1958-59 the company was working at a

profit, and the balance sheet for the year 1962-63 shows that, for that year, there was a profit of Rs. 2000/- and odd and that the total loss carried forward was only Rs. 23,000/- and odd which is not very much having regard to the company's paid up capital of Rs. 3,25,000/-. There is no allegation that there is no reasonable prospect of the company being able to earn a profit, and the fact that between 1958-59 and today it has suffered a loss of Rs. 23,000/- and odd is certainly no ground for saying that the company should be wound up.

10. It is not suggested that the company is commercially insolvent, not even that it is not a sound concern. In this connection I might remark that it is not disputed that the company's two rupee fully paid up shares which were selling at between 80 and 85 nP. per share before the new Board took charge are now selling at Rs. 1.23 nP. This is not an indication that the company's affairs are deteriorating,

11. Coming now to the alleged disappearance of the substratum, it is true that the company has, in the past, sold some of its undertakings and acquired new undertakings in their place. The company was formed for the purpose, among other purposes, of acquiring two estates, the Little Flower Estate and the Kainakary Estate, but its memorandum is very widely worded, and, by clauses expressly declared to be independent main objects clauses, empowers it to buy other estates and carry on the business of planting among other activities. That it sold one of the estates it was formed to acquire and a substantial portion of the remaining estate, does not mean that its sub-stratum has gone so long as it has acquired other estates and is in a position to carry on the business it is authorized by its memorandum to do.

12. The company has now two undertakings, namely, the unsold portion of the Little Flower Estate, and the Munderi group of estates. The previous Board had passed a resolution on the 6th May 1963 constituting a committee to negotiate for the sale of the Munderi Group, but no action has so far been taken to sell these estates. But the present Board seems to have thought it better to retain the Munderi Group and sell instead the remaining portion of the Little Flower Estate utilising the sale proceeds for the discharge of the debentures and for the development of the Munderi Group - reference has already been made to its resolution of the 5th October 1963. So the present position is that no action has been taken for the sale of the Munderi Group, that the present Board seems to be in favour of retaining this group of estates and that a resolution has been passed for the sale of the remaining portion of the Little Flower Estate subject to the sanction of the company in general meeting. Even where the sole undertaking of a company has been actually sold it cannot be said that its substratum has disappeared so long as there is some other business it can carry on coming within the objects stated in its memorandum See *In Re Kitson and Co. Ltd*[8]*.,* and *In Re Taldua Rubber Co. Ltd*[9]*.,* In the present case, however, the company still owns undertakings for carrying on its business, and the fact that it at one time thought that it

[8](1946) 1 All ER 435

[9] (1946) 2 All ER 763

might be desirable to dispose of one of its undertakings andnow thinks that it might be desirable to dispose of the other undertaking, is very far from saying that its substratum is disappearing.

13. I might mention that the petitioner holds only 200 shares, i.e., less than 1/800th of the paid up capital of the company. It is not his case that, in a winding up, he will be able to get even the face value of the shares, and, in bringing this petition, it can scarcely be said that he is acting for

anyone but himself. In the circumstances the only injury he can legitimately apprehend if the company continues to work instead of being wound up is that in a future winding up he would not get what he would get to-day. But an offer was made to him by the director-in-charge of the company to buy his 200 shares not merely at its face value but at a premium of 50 per cent. This offer the petitioner summarily rejected and this indicates that he has not brought the petition in order to safeguard his legitimate interests in this connection it might be as well to remember that the petitioner was an employee of the company till September 1963 when he chose, or, according to the company, was compelled to resign.

14. I might also mention that I told counsel for the petitioner that, if the petitioner so desired, I would convene a meeting of the members of the company to ascertain their wishes. But the petitioner was not prepared for such a course.

15. Even if the allegations made by the petitioner would justify a winding up order under the just and equitable clause, I think that, on the allegations made, the petitioner's proper remedy would be an application under Section 398 of the Companies Act and that he is acting unreasonably in seeking to have the company wound up instead of pursuing that remedy. To say that that remedy is not available to the petitioner since he cannot muster the support required by Section 399 of the Companies Act seems to the no answer and only serves to show that other members are not prepared to subscribe to the allegations made by the petitioner.

16. In the result I allow the application brought by the company and dismiss the winding up petition.
Order accordingly.