HON'BLE THE ACTING CHIEF JUSTICE RAGHVENDRA SINGH CHAUHAN
AND
HON'BLE SRI JUSTICE T.AMARNATH GOUD

ORIGINAL SIDE APPEAL Nos. 48 AND 50 OF 2015

COMMON JUDGMENT: (per Hon'ble Sri Justice T.Amarnath Goud)

Since both these appeals challenge the common order dated 17.07.2015, in Company Petition Nos.67 and 104 of 2006, passed by the learned Single Judge, High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh, they are being disposed of by this common judgment.

O.S.A.No.48 of 2015:

2. This appeal is filed by M/s. Bhagyanagar Silk Mills Private Limited, against the order dated 17.07.2015 in Company Petition No.67 of 2006, which was filed by Ajay Kumar Gupta Dochania against the appellant and second respondent herein.

O.S.A.No.50 of 2015:

3. This appeal is filed by M/s. Bhagyanagar Silk Mills Private Limited, against the order dated 17.07.2015 in Company Petition No.104 of 2006, which was filed by Amarnath Gupta Dochania and 6 Others against the appellant and the respondent No.8 herein.

4. For the sake of convenience, the averments in C.P.No.67 of 2006 are referred to.

5. The brief facts of the case are that respondent No.1 in both the petitions is a private limited company incorporated on 18.10.1978 by three groups of individuals. First group of

individuals being father of the petitioner (petitioner No.1 in C.P.No.104 of 2006), his children, family members, friends and associates; second group of individuals are the family members, friends and associates of the Managing Director of respondent No.1; the third group are friends and associates of respondent No.2.

6. The shareholding details of the company have been setout in detail, reference to which may be unnecessary except to the extent that each group of shareholders was allotted 1/3rd shares. The company was allotted Ac. 2-30 guntas equivalent to 13,310 square yards at Phase-I, Jeedimetla, Medchal Mandal, Ranga Reddy District, on which it has built some sheds from the common funds pooled from the family members of the petitioner and the respondents.

7. The business of the company commenced in 1978-79 and term loans from the Andhra Pradesh State Finance Corporation (APSFC) and State Bank of India (SBI), Bible House Branch, Rashtrapathi Road, Secunderabad, were also obtained from time to time, after filing of proper charge with the Registrar of Companies. After three years of running of the business, the company started suffering losses; it slowly started to dwindle. The commercial activity of the company, thereafter, was completely stopped. It has ceased to function.

8. Since 1983, the father of the petitioner, who is the Founder Director, and one of the First and Permanent Directors of the

company under the Articles of Association, kept himself away from the affairs of the company.

9. It is further stated that neither any meeting of the shareholders was formally held, nor any notices of the General Body Meeting of the Company were sent to the father of the petitioner or his family members, friends or associates, including the petitioner. As the office of the Registrar of Companies was undergoing major reorganization from Manually to Fully Computerized, in the transitory period, no records of the company are available including the original records of the Memorandum of Association, the Articles of Association, the List of Directors and Members, and charges thereto, or as to latest Annual Returns of the company.

10. From the fragmentary records available, it is understood that in the year 2002-03, the company had a total liabilities of Rs.1,02,11,800/- comprising of the paid up capital of Rs.9,00,000/-, reserves and surplus of Rs.3,08,000/-, secured creditors of Rs.16,78,000/-, unsecured creditors of Rs.73,32,000/- and current creditors of Rs.2,00,000/-. The assets of the company comprising of fixed assets (land) valued at Rs.23,92,000/- and miscellaneous expenditure account of about Rs.78,26,000/-

11. The respondent Nos.1 and 2, without knowledge of the Directors, have siphoned most of the cash, sold away other movable fixed assets of the company, and unlawfully appropriated the amounts thereof.

12. The only tangible asset of the company is its immovable property being industrial sheds F8A & B in the land admeasuring Ac.2-30 guntas at Phase-I, Jeedimetla, Medchal Mandal, Ranga Reddy District. The objects of the company are also changed to include unconnected matters thereto without following procedures and by fabricating documents before the Registrar of Companies. The petitioners were surprised to note that on 3.4.2006 a public notice was published in Deccan Chronicle by Mr.M.V.Durga Prasad and S.Balvanth Reddy, Advocates, to the effect that the lands including the industrial Sheds F8A & B, admeasuring 3,342 Sq.yards at Phase-I, Jedimetla, Ranga Reddy District, were being sold by respondent Nos. 1 and 2 to another company namely, M/s.Mackel Technologies Incorporation. The petitioner and other shareholders have filed objection through their counsel. As the company has ceased to be a viable commercial entity, for a long time, it is just, equitable and necessary that the same be wound up under the provisions of the Act.

13. On behalf of the respondents, respondent No.2 has filed a counter-affidavit, contending that a preliminary objection was raised as to the maintainability of Company Petition No.67 of 2006 on the ground that no shareholder by name Mr.Ajay Kumar Dochania exists in the company. Therefore, the petition for winding up is not maintainable. The company was incorporated on 12.10.1978 for the purpose of carrying on the business of manufacturing, processing, designing, printing, dyeing, weaving, spinning, bleaching, trading and ancillary etc.

14. Immediately on its incorporation, the company has approached the Andhra Pradesh Industrial Infrastructure Corporation (APIIC) for providing land/shed for establishment of the unit.

15. Having taken over the possession, a lease-cum-agreement of sale was entered on 16.01.1978 and possession was taken from APIIC. The company had set up the unit in the industrial area, Jeedimetla to pursue its activities.

16. The company had also approached the institutions, namely, APSFC, for the term loans, and SBI, Bible House Branch, Secunderabad, for working capital requirements. The Founder Promoters, namely, Mr.Santosh Rungta and Mr.Vinay Agarwal had given personal guarantees and collateral securities for obtaining the loan from the APSFC and the SBI. The father of respondent No.2, being a shareholder, had also given personal guarantee and also collateral security of his own house to the SBI. The other Promoter, Director, namely, Mr.Amarnath Gupa, had never come forward to give either personal guarantee or collateral security in obtaining the loans from the financial Institutions and SBI.

17. It is further contended that one of the Founder Directors, namely, Mr. Amarnath Gupta, was looking after the purchase and sales of the unit. Due to diversion of funds and also supplying the finished goods to his own companies at cheaper rates, the company has suffered heavy losses. Consequently, the unit was not regular in repaying the loans to the APSFC and APIIC. The company was

ultimately closed and seized in the year 1983 by APSFC under Section 26 of the State Financial Corporation Act, 1951.

18. Due to the representation made by Mr. Santosh Rungta and respondent No.2, the APSFC has lifted the seizure, and allowed the unit to be given on lease; the lease proceeds have been directed to be credited to the APSFC under consortium of APSFC, SBI and APIIC.

19. Due to the hurdles created by the other Found Director, namely, Mr. Amarnath Gupta, the lease could not be renewed and thereafter, the unit was handed over to the APSFC. As the APSFC, SBI and APIIC have initiated legal action for recovery of outstanding dues to them, Mr. Amarnath Gupta, co-founder, had resigned on 29.5.1985 leaving the company at its peril and the other Directors had no other alternative except to defend the company, and infused some funds by raising loans from some of the shareholders for setting the outstanding dues of Rs.24,84,062/- to APSFC as one-time settlement, Rs.70,10,120/- to the SBI, and Rs.30,22,475/- to APIIC during the period 20-02-2003.

20. The other shareholders have also repaid the electricity bill dues to A.P. Central Power Distribution Company Limited to the tune of Rs.3,43,270/- during the period 2004-06 and also paid the property tax.

21. As the shareholders who have given the loans to meet the liabilities of the company were pressing for the repayment of their

loans, the company has taken a decision to dispose of a part of the land, i.e., 3,243.66 sq. yards, out of 13,310 square yards on 29.4.2006 by inviting the offers in the newspapers. One Mr.Mackel Technologies Incorporation has come forwarded to purchase the said property; accordingly, sale deed dated 29.5.2006 was executed in its favour; the proceeds from the sale were utilized to meet part of the liabilities. Mr. Amarnath Gupa, co-founder, having realized that the company has paid all the dues, instigated the petitioner to file the winding up petition. Therefore, the respondents prayed to dismiss the company petition.

22. On behalf of the petitioners, petitioner in C.P.No.67 of 2006 examined himself as PW.1 and got marked Exs. P.1 to P.12. On behalf of the respondents, Mr. Santosh Rungta, Managing Director of the company, examined himself as RW.1 and got marked Exs. R.1 to R.15. Respondent No.2 has filed his chief examination affidavit as R.W.2. However, as he has failed to present himself for cross-examination on several occasions, his chief examination affidavit was eschewed by order of the learned single Judge dated 01.06.2015.

23. Having regard to the rival pleadings and the respective submissions of the learned counsel for the parties, the learned single Judge framed the following points for consideration.

> "(i) Whether respondent No.1 has lost its substratum?
> (ii) Whether respondent No.1 is liable to be wound up?"

24. After considering the evidence produced by the parties, the learned Single Judge, insofar as point No.1 is concerned, held that the company has lost its substratum. Consequently, the learned Single Judge, insofar as point No.2 is concerned, held that company should be to wind up. In the result portion, the learned single Judge, held as follows:

> "42. For all the reasons mentioned hereinbefore, the respondent-Company is ordered to be wound up. The Official Liquidator attached to this Court is appointed as the Liquidator of the respondent-Company. The petitioners shall deposit a sum of Rs.25,000/- (Rupees twenty five thousand only) as the initial expenses to the credit of the Official Liquidator. The Official Liquidator is directed to take over the affairs of the respondent-Company.
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> The petitioners shall carry out publication of advertisement in two daily newspapers, *viz.,* Times of India (English) and Eenadu (Telugu) of Hyderabad editions having circulation in the State of Telangana and file proof of the same within 30 days from the date of receipt of a copy of this order. They shall also cause to be delivered a certified copy of this order to the Registrar of Companies for the State of Telangana and the State of Andhra Pradesh, Hyderabad within thirty days from the date of its receipt."

Challenging the said order, respondent No.1-company has filed the present appeals.

25. Admittedly, the company has completely abandoned its main object of carrying on business in printing, dyeing, and process of textiles. And there is no possibility of the company pursuing its main object in future. It is not even the case of the respondents that in future it will revive its activity relating to its main object. On the contrary, after amendment of its memorandum and articles of association by including the object of dealing in steel, under 'other objects', the company has run the business in steel for about

one year. But even that business was completely stopped thereafter. The fact remains that the company has stopped all its activities both in the main business, as well as in the other business from the year 2007 onwards.

26. Hence, at this juncture, we must see whether both the cases fall under both clauses of Section 433, namely, clause (c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year, and also clause (f) if the Court is of the opinion that it is just and equitable that the company should be wound up. A perusal of the records, it is clear that by the time the petitioners filed the company petitions, one year period for which the company suspended its business has not expired, but all through the pendency of these petitions, the company did not carry on any business for nine years. Therefore, these cases fall under clauses of Section 433.

27. The legal position that could be summed up is that 'loss of substratum' is a judicially recognized ground falling under "just and equitable" head for winding up of a company. If from the memorandum of association the main object could be culled out, and if the company abandons the main object, and it becomes impossible for it to pursue the main object in future, the company is said to have "lost its substratum" regardless of the fact that it pursues its other objects. In all such cases, the Court orders winding up of a company under "just and equitable" ground.

28. Insofar as C.P.No.67 of 2006 is concerned, though the petitioner therein is the son of Mr.Amarnath Gupta, he is not an interested person in the company, under law, as he is not a shareholder. Therefore, he has no *locus standi* to file C.P.No.67 of 2006 seeking winding up of the company as being "just and equitable". Hence, the judgment of the learned Single Judge, insofar as allowing C.P.No.67 of 2006, is liable to be set aside, and it is accordingly set aside. Accordingly, O.S.A.No.48 of 2015 is allowed.

29. Insofar as C.P.No.104 of 2006 is concerned, the petitioners therein are shareholders and they have made out a case for winding up of the company as being "just and equitable". The learned Single Judge has passed a well considered order in that aspect. Thus, we see no ground to interfere with the same. Hence, O.S.A.No.50 of 2015 is dismissed, confirming the order of the learned Single Judge.

30. Accordingly, O.S.A.No.48 of 2015 is allowed and O.S.A.No.50 of 2015 is dismissed. Miscellaneous petitions pending, if any, in both the appeals, shall stand closed. There shall be no order as to costs.

RAGHVENDRA SINGH CHAUHAN, ACJ

T.AMARNATH GOUD, J

Date: 12.04.2019
TJMR