In Re: Ambica Textiles Ltd.

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Court : Kolkata

Decided On : Feb-09-1949

Reported in : AIR1950Cal491,54CWN157

Judge : Sinha, J.

Acts : Companies Act, 1913 - Section 103(3); ;Contract Act, 1872 - Section 70

Appeal No. : O.O.C.J. Suit

Appellant : In Re: Ambica Textiles Ltd.

Advocate for Def. : Samar Sen, Adv.

Advocate for Pet/Ap. : R. Chaudhury, Adv.

Judgement :

Sinha, J.

1. This matter has come before me for settlement of the list of debts and claims.

2. The Company was incorporated on 5th April 1945. The Company never carried on any business nor was any commencement certificate taken. Certain applications were made for shares in the Company and a total sum of Rs. 78,750 was paid to the Company by intending shareholders. The money received from the shareholders was deposited with the Central Bank of India Ltd., Clive Street

Branch, a sum of Rs. 445-14-0 has since accrued as interest on the said deposit.

3. As the promoters of the Company found it difficult to commence business of the Company, at a meeting held on 10th March 1947 it was resolved that the share money received from the applicants should be refunded in full to the respective applicants. It was also resolved that the Central Bank of India be requested to honour the cheques in respect of such refund by debiting the current account of the Company. The Central Bank of India, however, did not agree to pay.

4. On 28th April 1947, the Registrar, Joint Stock Company, issued notice under Section 247, Companies Act, for striking out the name of the Company from the register and on 18th September 1947, the Company's name was struck off.

5. On 31st December 1947, a resolution was passed for voluntary winding up of the Company. The Central Bank of India, however, did not agree to pay out the money deposited in the current account of the Company in the Bank in spite of the said resolution.

6. On 12th March 1948, an application was made 'in the matter of Trustees Act' for distribution of the money lying with the Central Bank of India amongst the share-holders. On 12th April 1918, Das J. treated the application as an application for restoration of the Company under Section 247, Companies Act, and made an order for restoration.

7. On 15th April 1948, an application was presented for winding up of the Company. On 10th May 1948, the winding up order was made and Mr. G. S. Mukherjee was appointed the Official Liquidator. The Liquidator advertised in the papers inviting claims against the Company. No claim was filed.

8. On 1st December 1948, I gave directions for filing the list of creditors and contributories.

9. The Liquidator has filed an affidavit and in part 1 of Annexure 'A' to the said affidavit the names of the intending share-holders who deposited money with the Company for taking shares have been set out. In part 2 of Annexure 'A' the claim of Sharda Agencies for Rs. 7913-5-3 has been set out but the claim is not

accepted by the Liquidator.

10. An affidavit was filed, affirmed on 24th January 1949, by Sharda Agencies, a partnership firm carrying on business at 22, Canning Street claiming a sum of Rs. 7913-5-3. As the affidavit did not disclose sufficient materials, I gave directions for the filing of a further affidavit in compliance with which a fresh affidavit has been filed by Rati Lal.

11. It appears from the affidavit that Sharda Agencies is a partnership firm and they were appointed the Managing Agents by the Articles of the Association of the Company for a period of twenty years from the date of incorporation at a monthly allowance of Rs. 2000 in addition to a commission on the annual net profits of the Company. It is claimed that the said firm paid Rs. 4008-11-3 under the directions of the Company's Directors on account of the expenses incidental to the formation of the Company. They also claim to have paid Rs. 3904-10-0 on account of expenses after its incorporation and for its management. The relevant vouchers have been annexed to the affidavit.

12. As regards pre-incorporation expenses, there can be no doubt that they are not payable by the company. It was conceded and, I think rightly, by learned counsel for the claimants that they could not claim pre incorporation expenses in the liquidation proceedings. I, therefore, hold that the Company is not liable for costs and expenses incurred in respect of its formation and promotion.

13. Learned counsel however contended that expenses incurred by the claimants after incorporation should be allowed. They consist of a stamp and registration fees for registering the company and postal and other charges and publicity and travelling expenses. I am not quite sure whether all these expenses were made after the incorporation. Stamp and registration charges seem to me to be really pre incorporation expenses. Be that as it may, I do not think the claimants are entitled to be paid for these expenses and for the following reasons;

14. Section 103(3), Companies Act, provides as follows:

'Any contract made by Company before the date on which it is entitled to commence business shall be provisional only and shall not be binding on the Company until that date and on that date it shall become binding.'

15. It was held in In re: 'Otto' Electrical . (1906) 2 Ch. 390 : (75 L. J. Ch. 682) under the corresponding section of the English Act that the section applied to all contracts of a company, whether preliminary or final or in the course of carrying on its business.

16. In that a cast, one Mr. Jenkins bought some furniture for 240 and put it into an office which he took for the company. He claimed the money. The claim was disallowed as the Company had never become entitled to commence business. Buckley J., said as follows:

'How does be claim? Obviously in contract; he claims upon this ground that, expressly or by implication, the Company promised to pay him for the furniture if he would pay the furniture dealer for it. Of course, that is contract. The Act of parliament says that that contract is not binding on the Company, and he cannot sue here. The other claims are for moneys which he advanced to a man to come up to town when he was going to serve the Company, and other payments of a like kind. They are all claims in contract. In my judgment he cannot be heard to any that there was such a contract; the Act of Parliament forbids it.'

He also observed that the word ''provisional' in section means that the contract is to be read as if contained a provision that it shall not be binding on the company unless and until the Company became entitled to commence business.

17. Mr. Sen contends that under Section 70 of the Indian Contract Act, his clients are entitled to claim expenses incurred after the incorporation of the company. I do not agree. I think that inasmuch as the company never became entitled to commence business, the expenses were not incurred for its benefit. Further, the section does not apply to persons who are incompetent to contract. It can only apply where the law can imply, from the circumstances, a promise to pay. Where the statute prohibits the Company from making a binding contract before commencement of business no implication of a promise to pay can or should be

made.

18. Mr. Sen next contended that his clients were entitled to recover registration fees and expenses inasmuch as the Company was under a statutory liability to pay them. In support of his contention, he referred me to the judgment of Buckley J- In re: English and Colonial Produce Co. Ltd. (1906) 2 Ch. 435 : (75 L. J. Ch. 831) This judgment however was overruled in In re: National Motor Mail coach Co. Ltd. (1908) 2 Ch. 615 : (77 L. J. Ch . 790) where Cozens-Hardy M. R. observed as follows:

'I need hardly say that any opinion expressed by Buckley J. especially upon this branch of the law, deserves the greatest respect, but I cannot concur in the view which he took, and Mr. Eustace Smith confessed that he had not been able to find any other authority differentiating between a statutory liability and any other liability in relation to this question. There is no other ground upon which the judgment can be supported, and I know of no principle or authority on which that distinction can be maintained.'

The result is that the claim of Sharda Agencies must be dismissed. I settle list by deleting the claim of Sharda Agencies.