1908

JANGLUBAI v. JETHA APPAJI.

has extended that right to her relations. On the other hand, the fact that he mentions the *pitru-bandhus* (father's cognate kindred) as coming in as heirs before the *matri-bandhus* (mother's cognate kindred) in cases of obstructed succession shows that wherever the right of precedence is given to the mother it is purely personal. The observations and authorities cited in the judgment in *Saguna* v. *Sadashiv*(1) support our view.

The conclusion we have arrived at has this further merit that it brings the Mitákshara in conformity with the Mayukha. For these reasons we confirm the decree with costs.

Decree confirmed.

R. R.

(1) (1902) 26 Bom. 710 at p. 715.

LIVIC LANIGIRO

Before Mr. Justice Davar.

1908 January 13.

SHAH *In re* INDIAN COMPANIES ACT (VI OF 1882), AND *In re* STEAM NAVIGATION COMPANY OF INDIA, LIMITED, HAJI AHMED HASSAM, PETITIONER.

Indian Companies Act (VI of 1882), section 128, clause (e)—Petition to wind up—"Other reason of a like nature".

When the law requires the fulfilment of one or more of several conditions before an order could be made, the part fulfilment of two or more of such conditions should not be taken as having cumulative effect justifying the order.

If the Court comes to the conclusion that the main original object for which the Company was formed has substantially failed or that the substratum of the Company is gone it will consider that it would be just and equitable to wind up the Company and will make an order for its compulsory winding up. The Court would not be justified in making a winding up order merely on the ground that the Company has made losses and is likely to make further losses.

THIS was a petition by Haji Ahmed Hassam, a shareholder in the Shah Steam Navigation Company of India, Limited, for the compulsory winding up of that Company by the Court under section 128 of the Indian Companies Act.

1908

SHAH STEAM NAVIGATION COMPANY *IN RE.*

Lowndes, for the petitioner:—The Company has been carried on at a loss. We estimate the losses at 4 lacs. We admit we do not come within the first four clauses of section 128, Indian Companies Act, but submit that under clause (*e*) the Court can act. The circumstances of the case make it just and equitable to wind up the Company. The whole substratum of the Company is gone; it is on the verge of insolvency. See *In re Haven Gold Mining Company* (1); Palmer's Company Precedents, part 2, p. 43 (8th edition); *In re German Date Coffee Company* (2); *Re Red Rock Gold Mining, Company, Limited* (3); *In re Amalgamated Syndicate* (4); *In re Suburban Hotel Company* (5). We admit one of our objects is to get rid of the agents.

Strangman, for certain shareholders supported the petition.

Jardine, for the Company opposed the petition:—It is not enough to allege vaguely that it is just and equitable that the Company should be wound up. See *In re Rica Gold Washing Company* (6). The remedy for mismanagement is to get the directors to call a meeting. *In re Professional, Commercial, and Industrial Benefit Building Society* (7).

Even assuming that the Company is a losing concern as alleged by the petitioner that does not make it just and equitable that the Company should be wound up. *In re Suburban Hotel Company* (8); and *In re The Factage Parisien* (9).

A shareholder has no right to stop the Company's business when a large majority of the Company's shareholders wish to go on. *In re Middlesborough Assembly Rooms Company* (10); *Re The Patent Artificial Stores Company* (11). See also *In re Langham Skating Rink Company* (12).

Padshah, for certain shareholders also opposed the petition. He referred to *In re Joint-Stock Coal Company* (13) and *In re Spence's Patent Non-conducting Composition and Cement Company* (14).

(1) (1882) 20 Ch. D. 151.
(2) (1882) 20 Ch. D. 169.
(3) (1889) 61 L. T. 785.
(4) (1897) 2 Ch. 600.
(5) (1867) L. R. 2 Ch. 737 at p. 746.
(6) (1879) 11 Ch D. 36.
(7) (1871) L. R 6 Ch. 856.
(8) (1867) L. R. 2 Ch. 737.
(9) (1864) 13 W. R. 214.
(10) (1880) 14 Ch. D. 104.
(11) (1864) 34 Beav. 185.
(12) (1877) 5 Ch. D. 669.
(13) (1869) L. R. 8 Eq. 146.
(14) (1869) L. R. 9 Eq. 9.

1908

SHAH STEAM NAVIGATION COMPANY, *IN RE.*

DAVAR, J. :—On the 19th of November 1907 the petitioner Haji Ahmed Hassam who holds shares of the nominal value of Rs. 75,000 in the Shah Steam Navigation Company presented a petition in Chambers praying that the Company "may be wound up under the provisions of the Companies' Act VI of 1882, and that for such purpose all necessary and proper directions may be given." At the hearing of the petition before me on Saturday the 21st of December 1907, Mr. Strangman representing shareholders who held 385 shares appeared in support of the petitioner. Essaji Tajbhoy who holds 851 shares and his son Gulam Hussein who holds 51 shares, were represented before me by their solicitor, Mr. Dinsha, who also supported the prayer of the petition.

Mr. Jardine appeared for the Company and opposed the petition. He was supported by Mr. Padshah who represented shareholders who held 1,915 shares. Messrs. Adamji peerbhoy and Sons, the Agents of the Company, also opposed the petition and were represented by their solicitor, Mr. Merwanji. This Company was registered as a Joint Stock Company on the 18th of August 1906. The capital of the Company is 30 lacs of rupees divided into 12,000 shares of Rs. 250 each. The capital of the Company paid up till now is Rs. 11,25,000. The remaining shares have not been issued. The objects of the Company as set out in the Memorandum of Association are many and multifarious. The principal object, however, was to acquire, as a going concern, from the firm of Messrs. Essaji Tajbhoy their business of plying steamers which the said Essaji and his son Gulam Husein were carrying on before the incorporation of the Company. This business *was* acquired, but very soon afterwards grave differences arose between the Company and Essaji and his son, and the Company,—in terms of the agreement between the promoters of the Company and the firm of Essaji Tajbhoy subsequently adopted and ratified by the Company—returned to the vendors seven out of nine steamers purchased from the said Messrs. Essaji Tajbhoy. Heavy litigation is now pending between the Company and the firm of Essaji and the petitioner is a party defendant to one of the suits filed by the Company and now pending.

1908

SHAH STEAM NAVIGATION COMPANY, *IN RE.*

The application to wind up the Company is made under section 128 of the Companies' Act. This section is a verbatim reproduction of section 79 of the English Companies' Act of 1862 except that in clause (*e*) of the section in our Act the words "for any other reason of a like nature" are added. It was admitted by Mr. Lowndes, who appeared for the petitioner, that his application did not fall within any of the first four clauses of the section but he relied on clause (*e*) of the section and argued that there were "other reason of a like nature" as were mentiond in the first four clauses, which rendered it "just and equitable" that the Company should be would up by the Court. Those other reasons of a like nature, on which Mr. Lowndes relied, are set out in the petition. The petitioner and the shareholders who support him have not the statutory majority of "not less than three-fourths of the members of the Company entitled to vote" so as to enable them to pass "a Special Resolution requiring the Company to be wound up by the Court". The Company *did* commence its business within a year from its incorporation and has not "suspended its business for the space of a whole year." The members are not reduced to less than seven and the Company is able to pay its debts. The application of the petitioner must, therefore, fall within the provision of clause (*e*) of the section and before I can grant the prayer of the petition, I must be of opinion for other reasons of a nature similar to those set out in the first four clauses of the section that it is just and equitable that the Company should be wound up.

In the case of the *Suburban Hotel Company*(1) decided under the corresponding section of the English Companies' Act, Lord Cairns, L. J, held that the fifth head of section 79 of the Companies' Act, 1862, is restricted to matters '*ejusdem generis*' with the four previous heads and does not authorise the Court to wind up a solvent Company against the wish of the majority of shareholders because the business has been carried on at a loss and appears likely to continue a losing concern. This is a case of 1867. It appears, however, that this old rule that the words just and equitable in clause 5 of section 79 of the English Companies'

(1) (1867) L. R. 2 Ch. 737.

1908

SHAH STEAM NAVIGATION COMPANY, *IN RE*.

Act of 1862 are to be construed as relating only to matters *ejusdem generis* with the grounds for winding up mentioned in the earlier parts of the section—has of late been considerably relaxed. In *In re Amalgamated Syndicate*[1], decided in 1897, Vaughan Williams, J., in the course of discussion with Counsel and at the end of his judgment, remarks that the stringency of the *ejusdem generis* rule had been more or less relaxed of late. In Palmer's Company Law, 5th edition (1905), at page 334, with reference to the "just and equitable" clause it is stated:—"It was at one time thought that these words must be confined to cases *ejusdem generis* with the previous cases but this rule is now *discredited*." The Courts in England seem to have therefore under the "just and equitable" clause of the section of their Act unfettered discretion to consider any and all reasons which may be urged as making it just and equitable that the company should be would up. It would be a very interesting question to consider whether the introduction or retention of the words "for any other reason of a like nature" in clause (*e*) of section 128 of the Indian Companies' Act is not intended to restrict the discretion of the Indian Courts to reasons *ejusdem generis* with the four previous clauses of the section.

If I were inclined to hold that the words "for any reason of a like nature" in the Indian Act gives to Courts in India a more restricted discretion than the English Act confers on the English Courts and that in considering whether it is just and equitable to wind up a Company I must be guided by reasons of a nature similar to those mentioned in the first four clauses of the section, then the petitioner, in my opinion, must fail for there are no *other* reasons of a like nature to be found anywhere in the petition or in the affidavits filed in support of the petition. What was urged before me was that three at least of the requirements of the section have been partly established. It was urged that although the petitioner has not the statutory majority of three-fourths to enable him to get a Special Resolution passed he still had a majority on his side—that although the Company had not suspended its business for

[1](1897) 2 Ch. 600.

1908

SHAH STEAM NAVIGATION COMPANY, *IN RE*.

the space of a whole year it had ceased to do any business since August 1907—and that although it was not unable to pay its debts, it was only able to pay its debts from the capital. It could hardly, I think, be contended that when the law requires the fulfilment of one or more of several conditions before an order could be made that the part fulfilment of two or more of such conditions should be taken as having cumulative effect justifying the order. Mr. Lowndes, for the petitioner, in his reply summed up all his grounds for asking for an order compulsorily winding up the Company. They are:—

(1) A majority of the shareholders of the Company do not wish to go on.

(2) The Company has done no business since August last.

(3) The Company is making losses and paying out of its capital, and

(4) The real object of the Company was to go on with Essaji's business but that is gone.

The first three grounds thus urged are only part compliance with some of the requirements of section 128 of the Indian Companies Act and taken either each by themselves or together would not justify an order for compulsory winding up.

In considering the fourth ground that the real object of the Company is gone and taking that ground with the other grounds urged I am willing in this matter to construe clause (*e*) of the section as widely as the corresponding clause in the English Act and I propose to consider the application on the merits on the assumption that I have free and unfettered discretion to consider all and every ground urged in support of the contention of the petitioner that it is just and equitable that the Company should be wound up by the Court.

I have carefully looked into the numerous cases cited by counsel in the course of their arguments before me. I do not think it is necessary to refer to them all or discuss them in detail. In *In re Heaven Gold Mining Company*[1], it was held that where the Court was satisfied that the subject-matter of the

(1) (1882) 20 Ch. D. 151.

business for which the Company was formed had substantially ceased to exist, it will make an order for winding up the company. In *In re German Date Coffee Company*(1) the Court held that where the substratum of the Company had failed and it was impossible to carry out the objects for which it was formed it would be just and equitable that the Company should be wound up.

The effect of the authorities I take it to be this. If the Court comes to the conclusion that the main original object for which the Company was formed has substantially failed or that the substratum of the Company is gone it will consider that it would be just and equitable to wind up the Company and will make an order for its compulsory winding up.

The case *In re Joint Stock Coal Company*(2) is a very strong authority showing that the Court will not make an order to wind up a Company because it has made or is making losses. It was there held that a Company which had sustained and was continuing to sustain heavy losses but was still able to meet its liabilities was not to be considered insolvent and the Court in such a case could not make an order to wind it up. Vice-Chancellor Malins, in he course of his judgment, says at p. 153:—

"In the case af the *Suburban Hotel Company*, my view was, that wherever it was made clear to the Court that the Company in carrying on its business had made a loss, was losing, and was likely to continue losing, that brought it under the class of cases in which it was just and equitable that the Company should be wound up. My decision, however, was overruled by the Court of Appeal, and I am not, therefore, at liberty to direct a winding-up, although I may be of opinion that the Company has lost, is losing, and will continue to lose."

It seems, therefore, quite clear that the Court would not be justified in making a winding up order merely on the ground that the Company has made losses and is likely to make further losses.

(1) (1882) 20 Ch. D. 169. (2) (1869) L. R. 8 Eq. 146.

1908

SHAH STEAM NAVIGATION COMPANY, *IN RE.*

A case in which the facts are very similar to the facts disclosed in the present case is *In re Langham Skating Rink Company* [1]. In that case three of the share-holders of the Company presented a petition for the winding up of the Company. The petition did not allege that the Company was insolvent but stated circumstances showing that its condition was not hopeful and that it had abandoned all but a very small part of its objects and submitted that it was just and equitable that the Company should be wound up. Vice-Chancellor Bacon, who heard the petition in the first instance, was satisfied on the evidence that the Company was *substantially insolvent* and ordered a meeting of the shareholders to ascertain whether they did not wish to have the Company wound up. The Court of Appeal however held that on that petition no other order ought to have been made except to dismiss the petition. The Court held that the allegations in the petition did not make out a sufficient case for the Court's interference under clause 5 of the section and as the petition did not allege any of the cases mentioned in the first four clauses of section 79 of the Companies' Act the Vice-Chancellor ought to have dismissed the petition. Sir George Jessel, Master of the Rolls, in the course of his judgment referring to the just and equitable clause, says:—

"Now there is no doubt that this last clause gives the power to the Court to wind up a Company in cases not coming within any of the first four heads, but, as was laid down in the case of *In re Suburban Hotel Company*[2], it is a power which must not be acted upon unless there is very strong ground for acting upon it, and for this reason, that these Companies are governed by a majority of their own members, and where there is a domestic tribunal which has power to decide upon a question, it should, if possible, be left to that domestic tribunal."

Lord Justice James while concurring in the opinion of the Master of the Rolls observes:—

"It really is very important to these Companies that the Court should not, unless a very strong case is made, take upon itself

(1) (1877) 5 Ch. D. 669. (2) (1867) L. R. 2 Ch. 737.

1908

SHAH STEAM NAVIGATION COMPANY, *IN RE.*

to interfere with the domestic forum which has been established for the management of the affairs of a Company."

Keeping in view what these authorities lay down let me now turn to the facts of this case and examine the allegations made by the petitioner to see whether he establishes a strong case as is required, or any case at all for the interference of the Court.

When arguing the petition Mr. Lowndes candidly stated to me that one of the objects of the petition was to rescue the Company from the thraldom of its Agents and he complainted that the Agency agreement obtained by Messrs. Adamji Peerbhoy and Sons from the Company was a most one-sided and unfair one. The obvious answer to that is that the Company entered into the agreement and the share-holders subscribed shares in the Company—with their eyes open and it is not even suggested that any unfair means were employed or underhand acts were resorted to by Messrs. Adamji Peerbhoy and Sons, in obtaining this agreement. Besides it does not seem to me that the agreement is an unfair one. It was argued that under clause 6 of the Memorandum of Association the firm of Messrs. Adamji Peerbhoy and Sons were to be Agents as long as the Company lasts and that such an appointment for an indefinite period was very detrimental to the interests of the Company. It must, however, be remembered that the Agents as promoters put in a considerable sum of moneys of their own and have a large stake in the Company and they had right to secure to themselves such benefits as the Company chose to agree to. It must also be remembered that the Agents are liable to be removed if they are "found guilty of misconduct or fraud in the management and discharge of their duties as such Agents of the Company." It does not seem to me that there is anything particularly unfair in this appointment simply on the ground that it is for an indefinite period more especially when the terms of their remuneration are taken into consideration. Besides office rent and the expenses of the office establishment the Agents get only ten per cent. on the annual net profits of the Company after making various deductions and the agreement further stipulates that "the Agents shall not be entitled to any commission during the time the

1908

SHAH STEAM NAVIGATION COMPANY, *IN RE.*

dividends, after making the aforesaid allowances, fall short of 5 per cent. on the paid up capital for the time being of the said Company." In my opinion the terms of the Agents' remuneration are extremely reasonable and I do not find anything in the agreement obtained by the Agent from the Company that is particularly unreasonable or unfair. I have discussed this point in my judgment because it was forcibly urged on behalf of the petitioners that it was the Agents' firm that was really resisting the winding up of the Company to the datriment of the share-holders because they were anxious to retain to themselves the benefit secured to them as Agents of the Company. It is quite clear that the Agents derive no benefit while the Company is working at a loss or making no profits and it is manifestly to the advantage of the Agents that the Company should make profits. I do not think—having regard to the large stake they themselves have in the Company—that the Agents would resist the winding up of the Company if they were honestly convinced that there were no prospects of working the Company at a profit in the near future.

The only grounds urged for winding up the Company were that the Company had made a loss of Rs. 4,50,000, that there were no prospects of the Company ever working at a profit, that the original object of the Company and its substratum were lost and that the Agents' firm were incompetent to carry on the business of the Company. The principal deponents before me are the petitioner Haji Ahmed Hassum and Alibhoy Adamji Peerbhoy. The estatements of the petitioner are in many instances reckless and extravagant. The facts deposed to by Alibhoy are a complete answer to the petitioner's allegations. The loss of Rs. 4,50,000, mentioned in the petition, reiterated by the petitioner, and re-echoed in the affidavit of Golam Hussain Essaji, seems to me to be a gross exaggeration. It is possible that Alibhoy is minimising the loss when he puts it at Rs. 1,67,763 but he certainly furnishes some data to go by, whereas the petitioner has nothing in support of his bare assertion.

If the services of Essaji and his son are lost to the Company the fault is not the fault of the Agents and if there is any truth in the allegations made against them—the Company has no reason to regret the loss of their connection with the Company.

1908

SHAH STEAM NAVIGATION COMPANY, *IN RE*.

If the Company returned seven of Essaji's steamers I must take it that the Company had grave cause for doing so. The substratum of the Company is by no means gone and the original objects of the Company have not become impossible of accomplishment and are not lost. The Company has already bought other steamers the Ipswich and the Xema and two launches, and there is nothing to prevent the purchase of other steamers. If the Company had to suspend their business for a time and to make losses the blame does not lie with the Agent, but, I think, on the materials before me, lies on other shoulders, There is heavy litigation pending between the Company and Essaji's firm, and in one of the suits the petitioner is a party and I am most anxious to say as little as possible in the present proceedings lest it may be felt that what I may say now, might prejudice either one side or the other in the litigation that is pending. A conviction however has forced itself on my mind that this application by the petitioner is not made *bonâ fide* either in the interest of the Company or of its share-holders. It seems to me that this is an attempt to wipe out the Company and make short work of the litigation against Essaji and his son and the petitioner. The Company have obtained an injunction against Essaji and his son and it was stated to me and not contradicted that an appeal is now pending against an order refusing injunction and Rule Nisi for an injunction against the petitioner. Allibhoy says the petitioner is a mere nominee and Agent of the vencors Essaji Tajhhai & Co. That may or may not be so but the fact remains that the petitioner has purchated or is supposed to have purchased some of the steamers returned to Messrs. Essaji by the Company. He was on the Board of the Company's Directors. He knew that Essaji and his son had covenanted not to ply steamers that may be returned to them but that the same should be broken up. The petitioner does not pretend that he has purchased the steamers returned to Essaji for the purpose of breaking them up. He has plied one of such steamers for pilgrim traffic. The petitioner has resigned his seat on the Ditectorate of this Company and is now a director of the Bombay Steam Navigation Compeny, Limited. Allibhoy Adamji in his affidavit charges that "the primary object of having this

1908

SHAH STEAM NAVIGATION COMPANY. *IN RE.*

Company wound up is that the vendors (Messrs. Essaji Tajbhoy) may be released from the covenant against plying steamers" and that "the other objects are to make himself and the vendors escape from liability in respect of their wrongful actions and breaches of covenants." Allibhoy further charges the petitioner as plying the steamers "on behalf of Essaji and his son, on their account in collusion with them, in his name, to ruin the Company." These are grave charges. They may be proved in the end to be unfounded. In view of pending litigation I do not desire to discuss them but I am constrained to say that the admitted facts of the case and the conduct of the petitioner lends strong colour to these allegations.

Then it is said the Agents are incompetent to manage the affairs of the Company. This is no ground for winding up the Company. The Agent's firm promoted the Company and brought it into existence. The competence or otherwise of the Agents must have been konwn to the share-holders, before they took up shares in the Company. The loss of Essaji's services is made a great deal of in the course of the argument. I am quite satisfied that those services were not lost to the Company by anything done by the Agents It is not always absolutely necessary that the Agents should personally have konwledge of the business from the very beginning of that business coming into existence. In a city like Bombay Essaji or his son cannot be the only persons who have knowledge of the business of a Company such at this one. There must be dozens of men available to assist the Agents if the Agents require such assistance. In fact they have such a man in Mahomed Yusuf. A most unwarrantable attack is made on this man's character on the strength of an unsuccessful criminal prosecution 10 or 11 years ago at Burmah. This charge was persisted in till the last in spite of the man's oath that he was acquitted by the final Appellate Court at Burmah. The petitioner relied on a copy of the Judicial Commissioner's judgment whereas this man says that the final Appellate Court is that of the Recorder of Rangoon. I accept the statement made by this man to me that he was finally acquitted. That the allegations against his competence are as baseless as those against his character appears fairly clear from the affidavits before me.

1908

SHAH STEAM NAVIGATION COMPANY, *IN RE*

I am of opinion that the Company has not had a fair trial. It has been handicapped by its disputes and differences with the vendors Essaji Tajbhoy and his son. The petitioner has befriended the vendors and is actively assisting them and this is an attempt to throttle the Company and end the litigation against Essaji and his son and himself.

I am not in the least influenced by any consideration as to which of the parties has a majority of share-holders on its side. The Company's share-holders have taken sides just as they happen to be friendly or otherwise to the contending parties, *viz.*, the Agents and Essaji. Most of them must be acting as is usual in uch cases without any clear idea as to real facts or the correct issue between the parties. It seems to me, however, that the share-holders are fairly evenly divided in their opinion. I am not concerned with the question which party has a majority on its side. It is sufficient for present purposes that the petitioner has not the required majority to get a special resolution for winding up the Company passed.

Far from having a strong case such as the authorities require to induce the Court to interfere, the petitioner has made out no case whatever for winding up the Company. I am strongly of opinion after hearing this matter discussed by counsel for a whole day and reading every one of the affidevits filed on this petition that it would be both unjust and inequitable to grant the prayer of the petition.

I dismiss the petition and direct the petitioner to pay the costs of the Company, of its Agents Messrs. Adamji Peerbhoy and Sons and of the share-holders represented by Mr. Padshah.

Essaji Tajbhai and his son and the share-holders represented by Mr. Strangman who appeared to support the petition must bear their own costs.

I certify that this was a fit case for employment of counsel.

Attorneys for petitioners : *Messrs. Payne & Co.*

Attorneys for the Company : *Messrs. Bicknell, Merwanji & Romer.*

B. N. L.