

Tirloch Chand Jain and others *v.* Swastika Strips (P) Ltd. and others
(I. S. Tiwana, J.)

itself. This has essentially to be in the discretion of the society. i.e., the employer to create or abolish any particular number of posts in order to run its affairs efficiently. In the instant case, it is the conceded position that neither the Registrar has required the respondent-Society to constitute any common cadre of all or any specific class of its employees nor has he framed any rules to regulate the recruitment and other conditions of service of the employees of the society. Therefore, no situation ever arose for the Registrar to exercise his powers in terms of the proviso to sub-section (2) of Section 37 of the Act.

(9) For the reasons recorded above, these writ petitions fail and are dismissed but with no orders as to costs.

R.N.R.

Before : I. S. Tiwana, J.

TIRLOK CHAND JAIN & OTHERS,—*Petitioners.*

versus

SWASTIKA STRIPS (P) LTD. AND OTHERS,—*Respondents.*

Company Petition No. 39 of 1990.

18th August, 1990,

Companies Act, 1956—Ss. 433, 434 & 439—Arbitration Act (X of 1940)—S. 34—Winding up petition—Partnership agreement containing arbitration clause—During pendency of winding up petition, dispute cannot be referred to arbitration.

Held, that proceedings under sections 433/434 read with section 439 of the Companies Act, are in a completely different jurisdiction than the one under which remedy or relief can be sought by way of arbitration. The proceedings for winding up under the Companies Act are the proceedings for the recovery of any amount. Sections 433, 434 and 439 record or codify the circumstances/grounds on which a company can be ordered to be wound up by the Court. Therefore, none of the disputes referred to in the arbitration clause of the partnership agreement can be co-related to the relief sought in the Company Petition. Hence, it has to be held that the dispute cannot be referred to arbitration.

(Para 4)

Application Under Section 34 of the Arbitration Act, 1940 praying that the proceedings in Company Petition No. 39 of 1990 pending arbitration may be stayed.

L. M. Suri, Sr. Advocate with Hemant Kumar Gupta, Advocate, for the Appellants.

N. K. Sodhi, Sr. Advocate with S. K. Hira Ji, Advocate, for the Respondent.

JUDGMENT

I. S. Tiwana, J.

(1) The short but interesting question of law that arises in this case is; whether in a petition under sections 433, 434, 439, 582 and 583 of the Companies Act, 1956, filed for the winding up for the Company a prayer made under section 34 of the Arbitration Act for referring the matter to Arbitrator can at all be granted. The following facts furnish the back-drop of the controversy raised.

(2) The petitioners along with others were the members of a private firm and on 16th March, 1989, the respondent company was also inducted as one of the partners in the firm and a new partnership deed was executed on that very day. As per mutual agreement between the partners a profit and loss account for the period ending 15th March, 1989, was prepared and it was duly credited/debited to the individual accounts of the partners. Thereafter on 31st March, 1989, the company and ten others, who were the members of the partnership concern, decided to mutually dissolve the firm and the balance-sheet as also the profit and loss account of the firm was prepared. It was agreed between the partners that the company would take over all the assets and liabilities as a going concern as per the balance-sheet drawn on 31st March, 1989. It was further agreed that the company which was described as a continuing partner in the deed of dissolution would pay to the outgoing partners the amounts standing to their credit in their respective accounts as per the balance-sheet drawn on 31st March, 1989. One of the important conditions, i.e., No. 15 of the partnership deed dated 16th March, 1989, was as follows:

“That any dispute or differences which may arise amongst the partners or their representatives with regard to the construction, meaning and effect of this deed or any part thereof

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or regarding the accounts, profits and losses of the business, or the rights and liabilities of the partners under the deed of dissolution or winding up of the business or any other matter relating to the firm shall be referred to arbitration”.

Since the company which had taken over the business of the firm failed to honour its commitments, Tirlok Chand Jain and others filed Company Petition No. 39 of 1990 with the prayer that the company be wound up in terms of sections 433/434 of the Companies Act as the same had been rendered insolvent and was unable to pay its debts and other financial liabilities. This company application has been filed by the respondents for the enforcement of the above referred to clause No. 15 of the partnership deed dated 16th March, 1989, with the prayer that the matter be referred to Arbitration and proceedings in the Company Petition No. 39 of 1990 be stayed for the time being. This prayer of the respondents is sought to be resisted on a wide variety of grounds including the one that the application under section 24 of the Arbitration Act is not at all maintainable.

(3) Having heard the learned counsel for the parties at some length, I find lot of merit in the stand of the petitioners.

(4) A bare reading of clause No. 15 of the partnership deed dated 16th March, 1989, clearly indicates that it has no relevance to the relief prayed for in Company Petition No. 39 of 1990, i.e., for the winding up of the respondent-Company. It is beyond dispute that proceedings under sections 433/434 read with section 439 of the Companies Act, are in a completely different jurisdiction than the one under which remedy or relief can be sought by way of Arbitration. It is fallacious to conceive that the proceedings for winding up under the above noted sections of the Companies Act in any way are the proceedings for the recovery of any amount. On the contrary, the above noted provisions, record or codify the circumstances/grounds on which a company can be ordered to be wound up by the Court. So, none of the disputes referred to in the above noted clause No. 15 of the partnership agreement can be co-related to the relief i.e. in Company Petition No. 39 of 1990. For this conclusion of mine I seek support from the following earlier pronouncements of this Court as well as of the other High Courts *Salag Ram v. New Suraj Finance and Chit Fund Company Pvt. Limited* (1), *Maruti Limited v.*

(1) Company Application No. 3 of 1979 in Company Petition No. 147 of 1978 decided on 12th July, 1979.

B. G. Shirke and Company and others (2), Thakur Papers Mills Ltd. Samastipur v. Kailash Chand Jain (3) and Hind Mercantile Corporation Pvt. Limited v. J. H. Rayner and Company Limited (4). No judgment taking a contrary view has been brought to my notice by the learned counsel for the applicants.

(5) In the light of the discussions above, this Company Application No. 88 of 1990 is dismissed but with no order as to costs.

R.N.R.

Before : G. R. Majithia, J.

DWARKA DASS (DECEASED) REPRESENTED BY HIS L.RS.,
—Appellants.

versus

THE PUNJAB WAKF BOARD AND OTHERS.—Respondents.

Regular Second Appeal No. 243 of 1977

4th September, 1990.

Code of Civil Procedure, 1908—S. 9—Suit for permanent injunction and possession as co-sharer—Suit land once used as graveyard brought under cultivation after 1947 by Hindu Proprietors—Change of character of property—Property cannot be treated as Wakf property—Wakf cannot be created by user—It can be treated only by dedication—In absence of evidence establishing public graveyard property held to be private.

Held, that under Mahomedans Law. Wakf cannot be created by user. It can only be created by dedication. Even though there may be no direct evidence of dedication to the public, it may be presumed to be a public graveyard by immemorial user, i.e. where corposses of the members of the Mahomedans community have been buried in a particular graveyard for a large number of years without any objection from the owner. In order to prove that a graveyard is public by dedication, it must be shown by multiplying instances of the character, nature and extent of the burials from time to time.

(2) 1981 P.L.R. 732.

(3) A.I.R. 1968 Patna 289.

(4) 1971 (Vol. 41) Company cases 548.