45 Phil. 142

[G.R. No. 19892. September 06, 1923]

TECK SEING & CO., LTD., PETITIONER AND APPELLEE. SANTIAGO JO CHUNG CANG ET AL., PARTNERS, VS. PACIFIC COMMERCIAL COMPANY ET AL., CREDITORS AND APPELLANTS.

D E C I S I O N

MALCOLM, J.:

Following the presentation of an application to be adjudged an insolvent by the "Sociedad Mercantil, Teck Seing & Co., Ltd.," the creditors, the Pacific Commercial Company, Piñol & Company, Riu Hermanos, and W. H. Anderson &. Company, filed a motion in which the Court was prayed to enter an order: "(A) Declaring the individual partners as described in paragraph 5 parties to this proceeding; (B) to require each of said partners to file an inventory of his property in the manner required by section 51 of Act No. 1956; and (C) that each of said partners be adjudicated insolvent debtors in this proceeding." The trial judge first granted the motion, but, subsequently, on opposition being renewed, denied it. It is from this last order that an appeal was taken in accordance with section 82 of the Insolvency Law.

There has been laid before us for consideration and decision a question of some importance and of some intricacy. The issue in the case relates to a determination of the nature of the mercantile establishment which operated under the name of Teck Seing & Co., Ltd., and this issue requires us to look into, and analyze, the document constituting Teck Seing & Co., Ltd. It reads:

"ESCRITURA DE SOCIEDAD MERCANTIL LIMITADA

"Sepan todos por la presente:

"Que nosotros, Santiago Jo Chung Cang, mayor de edad, comerciante, vecino y

residente del municipio de Tabogon, Provincia de Cebu, Islas Filipinas, Go Tayco, mayor de edad, comerciante, vecino y residente del municipio de Cebu, Provincia de Cebu, Islas Filipinas, Yap Gueco, mayor de edad, comerciante, vecino y residente del municipio y Provincia de Cebu, Islas Filipinas, Lim Yogsing, mayor de edad, comerciante, vecino y residente del municipio de Cebu, Provincia de Cebu, Islas Filipinas, y Jo Ybec, mayor de edad, comerciante, vecino y residente del municipio de Jagna, Provincia de Bohol, Islas Filipinas, hacemos constar por la presente, que constituimos y formamos una sociedad mercantil limitada, bajo las leyes vigentes en las Islas Filipinas, y para ser registrada de acuerdo con los reglamentos vigentes del Codigo de Comercio en Filipinas.

"Que la razon social se denominara "*Teck Seing & Co., Ltd.*" y tendra su domicilio principal en la Calle Magallanes No. 94, de la Ciudad de Cebu, Provincia de Cebu, Islas Filipinas.

"Que el capital social sera de *treinta mil pesos* (P30,000) moneda legal de las Islas Filipinas, dividido en cinco acciones de a P6,000 como sigue:

Santiago Jo Chung Cang	P6,000.00
Go Tayco	6,000.00
Yap Gueco	6,000.00
Jo Ybec	6,000.00
Lim Yogsing	6,000.00
Total	30,000.00

"Que la duracion de la sociedad sera la de *seis años*, a contar de la fecha de esta escritura, pudiendo prorrogarse este tiempo a discrecion unanime de todos los accionistas.

"El objeto de la sociedad sera la compra y venta de mercaderias en general.

"El administrador o administradores de la sociedad podran, previa conformidad de los accionistas, establecer cuantas sucursales o establecimientos considere

necesarios para facilitar sus negocios y el mayor desarrollo del comercio a que se dedica la sociedad, verificando todas las operaciones que crean convenientes para el fomento de su capital.

“Las ganancias o perdidas que resultaren durante cada año comercial, se distribuiran proporcionalmente entre los accionistas, de acuerdo con el capital aportado por cada uno de los mismos.

“Las ganancias que resultaren en cada año comercial, si resultaren algunas ganancias, no podran ser retiradas por los accionistas hasta dentro del termino de *tres años*, a contar de la fecha del primer balance anual del negocio, quedando por tanto estas ganancias en reserva, para ampliar el capital aportado por los accionistas y ampliar por tanto la esfera de accion emprendida por la misma sociedad. Al pasar o expirar el termino de *tres años*, cada accionista podra retirar o depositar en poder de la sociedad, las ganancias que le debieran corresponder durante dicho termino de *tres años*.

“Que los accionistas no podran extraer ni disponer en ningun tiempo cualesquiera cantidad o cantidades de la sociedad, que haya sido aportada por los mismos, para atender sus gastos particulares ni aun pagando redito alguno sobre la cantidad que intenten disponer o extraer de dicha sociedad.

“El accionista Sr. Lim Yogsing tendra a su cargo, en union del Sr. Vicente Jocson Jo, la administracion de la Compañia, quienes podran usar indistintamente la firma social, quedando por consiguiente autorizados ambos para hacer en nombre de ella toda clase de operaciones, negocios y especulaciones mercantiles, practicando judicial y extrajudicialmente cuantos actos se requieran para el bien de la sociedad, nombrar procuradores o abogados para reclamaciones y cobro
de creditos y proponer ante los tribunales las demandas, convenios, transacciones y excepciones procedentes. En caso de ausencia, enfermedad o cualquier otro impedimento del accionista administrador Sr. Lim Yogsing, este podra conferir poder general o especial al accionista que crea conveniente para que en union del administrador auxiliar Sr. Vicente Jocson Jo, pudieran ambos administrar convenientemente los negocios de la sociedad. Que los administradores podran tener los empleados necesarios para el mejor manejo de los negocios de la sociedad, y fijaran los sueldos que debieran percibir dichos

empleados por servicios rendidos a la sociedad.

"Que ambos administradores podran disponer de *mil doscientos pesos* (P1,200) moneda filipina, anualmente, para sus gastos particulares, siendo dicha cantidad de P1,200 la que corresponde a cada uno de dichos administradores, como
emolumentos o salarios que se les asigna a cada uno, por sus trabajos en la administracion de la sociedad. *Entendiendose*, que, los accionistas podran disponer cada fin de año la gratificacion que se concedera a cada administrador, si los negocios del año fueran boyantes y justifiquen la concesion de una gratificacion especial, aparte del salario aqui di spues to y especificado.

"Que pasado el termino de *seis años*, y es de la conveniencia de los accionistas la continuacion del negocio de esta sociedad, dicho termino sera prorrogado por igual numero de años, sin necesidad del otorgamiento de ulteriores escrituras, quedando la presente en vigor hasta el termino dispuesto por todos los accionistas.

"Que las diferencias que pudieran suscitarse entre los accionistas, bien sea por razon de lo estipulado en esta escritura, ya por actos en el curso y direccion de los negocios en ella comprendidos, se procurara arreglar entre los mismos amistosa y extrajudicialmente, y si no se consiguiere un arreglo de este modo, dichos accionistas nombraran un arbitro, cuya resolucion estan todos obligados y por la presente se comprometen y se obligan a acatarla en todas sus partes, renunciando ulteriores recursos.

"En cuyos terminos dejamos formalizada esta escritura de sociedad mercantil limitada, y prometemos cumplirla fiel y estrictamente segun los pactos que hemos
establecido.

"*En testimonio de todo lo cual*, firmamos en la Ciudad de Cebu, Provincia de Cebu, Islas Filipinas, hoy 31 de octubre de mil novecientos diez y nueve.

(Fdos.) "LIM YOGSING
"JO YBEC por HO SENG SIAN

"SANTIAGO JO CHUNG CANG

"GO TAYCO

"YAP GUECO

Firmado en presencia de:

(Fdos.) "ATILANO LEYSON
"JULIO DIAZ

"ESTADOS UNIDOS DE AMERICA
"ISLAS FILIPINAS
"PROVINCIA DE
CEBU

"En el Municipio de Cebu, de la Provincia antes mencionada, I. F., hoy 31 de octubre de 1919, A. D., ante mi, Notario Publico que subscribe, comparecieron personalmente Santiago Jo Chung Cang, ,Go Tayco, Yap Gueco, Lim Yogsing y Jo Ybec, representado este ultimo por Ho Seng Sian, segun autorizacion hecha en telegrama de fecha 27 de septiembre de 1919 que se me ha presentado en este mismo acto, de quienes doy fe de que les conozco por ser las mismas personas que
otorgaron el preinserto documento, ratificando ante mi su contenido y manifestando ser el mismo un acto de su libre y voluntario otorgamiento. El Sr. Santiago Jo Chung Cang me exhibio su cedula personal expedida en Cebu, Cebu, I.
F. el dia 19 de septiembre de 1919 bajo el No. H77742, Go Tayco tambien me exhibio la suya expedida en Cebu, Cebu, I. F., el dia 9 de octubre de 1919 bajo el No. G2042490, Yap Gueco tambien me exhibio la suya expedida en Cebu, Cebu, I.
F. el dia 20 de enero de 1919 bajo el No. F1452296, Lim Yogsing tambien me exhibio la suya expedida en Cebu, Cebu, I. F., el dia 26 de febrero de 1919 bajo el No. F1455662, y Ho Seng Sian representante de Jo Ybec, me exhibio su cedula personal expedida en Cebu, Cebu, I. F. el dia 4 de febrero de 1919 bajo el No. F1453733.

"Ante mi,

(Fdo.) "F. V. ARIAS
"*Notario Publico*
"*Hasta el 1.° de enero de 1920*

"Asiento No. 157
Pagina No. 95 de mi
Registro Notarial
Serie
1919
Libro 2.°.

"Presentado a las diez y cuarenta y tres minutos de la mañana de hoy, segun el asiento No. 125, pagina 9 del Tomo 1.° del Libro Diario. Cebu, 11 de febrero de 1920.

(Fdo.) "QUIRICO ABETO
"*Registrador Mercantil Ex-Officio*

[SELLO]

"Inscrito el documento que precede al folio 84 hoja No. 188, inscripcion 1.ª del Tomo 3.° del Libro Registro de Sociedades Mercantiles. Cebu, 11 de febrero de 1920. Honorarios treinta pesos con cincuenta centavos. Art. 197, Ley No. 2711, Codigo Administrativo.

(Fdo.) "QUIRICO ABETO
"*Registrador Mercantil Ex-Officio*"

[SELLO]

Proceeding by process of elimination, it is self-evident that Teck Seing & Co., Ltd., is not a corporation. Neither is it contended by any one that Teck Seing & Co., Ltd., is the accidental partnership denominated *cuenta en participacion* (joint account association).

Counsel for the petitioner and appellee described his client in one place in his opposition to the motion of the creditors, as "*una verdadera sociedad anonima*" (a true *sociedad anonima*). The provisions of the Code of Commerce relating to *sociedades anonimas* were, however, repealed by section 191 of the Corporation Law (Act No. 1459), with the exceptions that

sociedades anonimas lawfully organized at the time of the passage of the Corporation Law were recognized, which is not our case.

The document providing for the partnership contract purported to form "*una sociedad mercantil limitada,*" and counsel for the petitioner's first contention was that Teck Seing & Co., Ltd. was not "*una sociedad regular colectiva, ni siquiera comanditaria, sino una sociedad mercantil limitada.*" Let us see if the partnership contract created a "*sociedad en comandita,*" or, as it is known in English, and will hereafter be spoken of, "a limited partnership."

To establish a limited partnership there must be, at least, one general partner and the name of at least one of the general partners must appear in the firm name. (Code of Commerce, arts. 122 [2], 146, 148.) But neither of these requirements have been fulfilled. The general rule is, that those who seek to avail themselves of the protection of laws permitting the creation of limited partnerships must show a substantially full compliance with such laws. A limited partnership that has not complied with the law of its creation is not considered a limited partnership at all, but a general partnership in which all the members are liable. (Mechem, Elements of Partnership, p. 412; Gilmore, Partnership, pp. 499, 595; 20 R. C. L., 1064.)

The contention of the creditors and appellants is that the partnership contract established a general partnership.

Article 125 of the Code of Commerce provides that the articles of general copartnership must state the names, surnames, and domiciles of the partners; the firm name; the names, and surnames of the partners to whom the management of the firm and the use of its signature is intrusted; the capital which each partner contributes in cash, credits, or property, stating the value given the latter or the basis on which their appraisement is to be made; the duration of the copartnership; and the amounts which, in a proper case, are to be given to each managing partner annually for his private expenses, while the succeeding article of the Code provides that the general copartnership must transact business under the name of all its members, of several of them, or of one only. Turning to the document before us, it will be noted that all of the requirements of the Code have been met, with the sole exception of that relating to the composition of

the firm name. We leave consideration of this phase of the case for later discussion.

The remaining possibility is the revised contention of counsel for the petitioners to the effect that Teck Seing & Co., Ltd. is "*una sociedad mercantil 'de facto' solamente*" (only a *de facto* commercial association), and that the decision of the Supreme Court in the case of Hung-Man-Yoc *vs*. Kieng-Chiong-Seng [1906], 6 Phil., 498), is controlling. It was this argument which convinced the trial judge, who gave effect to his understanding of the case last cited and which here must be given serious attention.

The decision in Hung-Man-Yoc *vs*. Kieng-Chiong-Seng, *supra*, discloses that the firm Kieng-Chiong-Seng was not organized by means of any public document; that the partnership had not been recorded in the mercantile registry; and that Kieng-Chiong-Seng was not proven to be the firm name, but rather the designation of the partnership. The conclusion then was, that the partnership in question was merely *de facto* and that, therefore, giving effect to the provisions of article 120 of the Code of Commerce, the right of action was against the persons in charge of the management of the association.

Laying the facts of the case of Hung-Man-Yoc *vs*. Kieng-Chiong-Seng, *supra*, side by side with the facts before us, a marked difference is at once disclosed. In the cited case, the organization of the partnership was not evidenced by any public document; here, it is by a public document. In the cited case, the partnership naturally could not present a public instrument for record in the mercantile registry; here, the contract of partnership has been duly registered. But the two cases are similar in that the firm name failed to include the name of any of the partners.

We come then to the ultimate question, which is, whether we should follow the decision in Hung-Man-Yoc *vs*. Kieng-Chiong-Seng, *supra*, or whether we should differentiate the two cases, holding Teck Seing & Co., Ltd., a general copartnership, notwithstanding the failure of the firm name to include the name of one of the partners. Let us now notice this decisive point in the case.

Article 119 of the Code of Commerce requires every commercial association before beginning its business to state its articles, agreements, and conditions in a public instrument, which shall be presented for record in the mercantile registry. Article 120, next following, provides that the persons in charge of the management of the association who violate the provisions of the foregoing article shall be responsible *in solidum* to the persons not members of the association with whom they may have transacted business in the name of the association. Applied to the facts before us, it would seem that Teck Seing & Co., Ltd. has fulfilled the provisions of article 119. Moreover, to permit the creditors only to look to the person in charge of the management of the association, the partner Lim Yogsing, would not prove very helpful to them.

What is said in article 126 of the Code of Commerce relating to the general copartnership transacting business under the name of all its members' or of several of them or of one only, is wisely included in our commercial law. It would appear, however, that this provision was inserted more for the protection of the creditors than of the partners themselves. A distinction could well be drawn between the right of the alleged partnership to institute action when failing to live up to the provisions of the law, or even the rights of the partners as among themselves, and the right of a third person to hold responsible a general copartnership which merely lacks a legal firm name in order to make it a partnership *de jure*.

The civil law and the common law alike seem to point to a difference between the rights of the partners who have failed to comply with the law and the rights of third persons who have dealt with the partnership.

The supreme court of Spain has repeatedly held that notwithstanding the obligation of the members' to register the articles of association in the commercial registry, agreements containing all the essential requisites are valid as between the contracting parties, whatever the form adopted, and that, while the failure to register in the commercial registry necessarily precludes the members from enforcing rights acquired by them against third persons, such failure cannot prejudice the rights of third persons. (*See* decisions of December 6, 1887, January 25, 1888, November 10, 1890, and January 26, 1900.) The same reasoning would be applicable to the less formal requisite pertaining to the firm name.

The common law is to the same effect. The State of Michigan had a statute prohibiting the transaction of business under an assumed name or any other than the real name of the individual conducting the same, unless such person shall file with the county clerk a certificate setting forth the name under which the business is to be conducted and the real name of each of the partners, with their residences and post-office addresses, and making a violation thereof a misdemeanor. The Supreme Court of Michigan said:

> "The one object of the act is manifestly to protect the public against imposition and fraud, prohibiting persons from concealing their identity by doing business under an assumed name, making it unlawful to use other than their
> real names in transacting business without a public record of who they are, available for use in courts, and to punish those who violate the prohibition. The object of this act is not limited to facilitating the collection of debts, or the protection of those giving credit to persons doing business under an assumed name. It is not unilateral in its application. It applies to debtor and creditor, contractor and contractee, alike. Parties doing business with those acting under an assumed name, whether they buy or sell, have a right, under the law, to know who they are, and who to hold responsible, in case the question of damages for failure to perform or breach of warranty should arise.
>
> "The general rule is well settled that, where statutes enacted to protect the public against fraud or imposition, or to safeguard the public health or morals, contain a prohibition and impose a penalty, all contracts in violation thereof are void. * * *
>
> "As this act involves purely business transactions, and affects only money interests, *we think it should be construed as rendering contracts made in violation of it unlawful and unenforceable at the instance of the offending party only, but not as designed to take away the rights of innocent parties who may have dealt with the offenders in ignorance of their having violated the statute.*" (Cashin *vs*. Pliter [1912], 168 Mich., 386; Ann. Cas. [1913-C], 697.)

The early decision of our Supreme Court in the case of Prautch, Scholes &

Co. *vs*. Hernandez ([1903], 1 Phil., 705), contains the following pertinent observations:

> "Another case may be supposed. A partnership is organized for commercial purposes. It fails to comply with the requirements of article 119. A creditor sues the partnership for a debt contracted by it, claiming to hold the partners *severally*. They answer that their failure to com ply with the Code of Commerce makes them a civil partnership and that they are in accordance with article 1698 of the Civil Code only liable *jointly*. To allow such liberty of action would be to permit the parties by a violation of the Code to escape a liability which the law has seen fit to impose upon persons who organized commercial partnerships; 'Because it would be contrary to all legal principles that the nonperformance of a duty should redound to the benefit of the person in default either intentional or unintentional.' (Mercantile Law, Eixala, fourth ed., p. 145.)" (*See also* Lichauco *vs*. Lichauco [1916], 33 Phil., 350, 360.)

Dr. Jose de Echavarri y Vivanco, in his *Codigo de Comercio*, includes the following comment after articles 121 and 126 of the Code:

> "From the decisions cited in this and in the previous comments, the following is deduced: 1st. Defects in the organization cannot affect relations with third persons. 2d. Members who contract with other persons before the association is lawfully organized are liable to these persons. 3d. The intention to form an association is necessary, so that if the intention of mutual participation in the profits and losses in a particular business is proved, and *there are no articles of association*, there is no association. 4th. An association, the articles of which have not been registered, is valid in favor of third persons. 5th. The private pact or agreement to form a commercial association is governed not by the commercial law but by the civil law. 6th. Secret stipulations *expressed in a public instrument*, but not inserted in the articles of association, do not affect third persons, but are binding on the parties themselves. 7th. An agreement made in a public instrument, other than the articles of association, by means of which one of the partners guarantees to another certain profits or secures him from losses, is valid between them,

without affecting the association. 8th. *Contracts entered into by commercial associations defectively organized are valid when they are voluntarily executed by the parties, if the only controversy relates to whether or not they complied with the agreement.*

* * * * *
* *

"The name of the collective merchant is called firm name. By this name, the new being is distinguished from others, its sphere of action fixed, and the juridical personality better determined, without constituting an exclusive character of the general partnership to such an extent as to serve the purpose of giving a definition of said kind of a mercantile partnership, as is the case in our Code.

"Having in mind that these partnerships are prevailingly of a personal character, article 126 says that they must transact business under the name of all its members, of some of them, or of one only, the words 'and company' to be added in the latter two cases.

"It is rendered impossible for the general partnership to adopt a firm name appropriate to its commercial object; the law wants to link, and does link, the solidary and unlimited responsibility of the members of this partnership with the formation of its name, and imposes a limitation upon personal liberty in its selection, not only by prescribing the requisites, but also by prohibiting persons not members of the company from including their names in its firm name under penalty of civil solidary responsibility.

"Of course, the form required by the Code for the adoption of the firm name does not prevent the addition thereto of any other title connected with the commercial purpose of the association. The reader may see our commentaries on the mercantile registry about the business names and firm names of associations, but it is proper to establish here that, while the business name may be alienated by any of the means admitted by the law, it seems impossible to separate the firm names of general partnerships from the juridical entity for the creation of which it was formed." (Vol. 2, pp. 197, 213.)

On the question of whether the fact that the firm name "Teck Seing & Co., Ltd." does not contain the name of all or any of the partners as prescribed by the Code of Commerce prevents the creation of a general partnership, Professor Jose A. Espiritu, as *amicus curiae*, states:

> "My opinion is that such a fact alone cannot and will not be a sufficient cause of preventing the formation of a general partnership, especially if the other requisites are present and the requisite regarding registration of the articles of association in the Commercial Registry has been complied with, as in the present case. I do not believe that the adoption of a wrong name is a material fact to be taken into consideration in this case; first, because the mere fact that a person uses a name not his own does not prevent him from being bound in a contract or an obligation he voluntarily entered into; second, because such a requirement of the law is merely a formal and not necessarily an essential one to the existence of the partnership, and as long as the name adopted sufficiently identify the firm or partnership intended to use it, the acts and contracts done and entered into under such a name bind the firm to third persons; and third, because the failure of the partners herein to adopt the correct name prescribed by law cannot shield them from their personal liabilities, as neither law nor equity will permit them to utilize their own mistake in order to put the blame on third persons, and much less, on the firm creditors in order to avoid their personal responsibility."

The legal intention deducible from the acts of the parties controls in determining the existence of a partnership. If they intend to do a thing which in law constitutes a partnership, they are partners, although their purpose was to avoid the creation of such relation. Here, the intention of the persons making up Teck Seing & Co., Ltd. was to establish a partnership which they erroneously denominated a limited partnership. If this was their purpose, all subterfuges resorted to in order to evade liability for possible losses, while assuming their enjoyment of the advantages to be derived from the relation, must be disregarded. The partners who have disguised their identity under a designation distinct from that of any of the members of the firm should be penalized, and not the creditors who presumably have dealt with the partnership in good faith.

Articles 127 and 237 of the Code of Commerce make all the members of the general copartnership liable personally and *in solidum* with all their property for the results of the transactions made in the name and for the account of the partnership. Section 51 of the Insolvency Law, likewise, makes all the property of the partnership and also all the separate property of each of the partners liable. In other words, if a firm be insolvent, but one or more partners thereof are solvent, the creditors may proceed both against the firm and against the solvent partner or partners, first exhausting the assets of the firm before seizing the property of the partners. (Brandenburg on Bankruptcy, sec. 108; De los Reyes *vs*. Lukban and Borja [1916], 35 Phil., 757; Involuntary Insolvency of Campos Rueda & Co. *vs*. Pacific Commercial Co. [1922], 44 Phil., 916.)

We reach the conclusion that the contract of partnership found in the document hereinbefore quoted established a general partnership or, to be more exact, a partnership as this word is used in the Insolvency Law.

Wherefore, the order appealed from is reversed, and the record shall be returned to the court of origin for further proceedings pursuant to the motion presented by the creditors, in conformity with the provisions of the Insolvency Law. Without special finding as to the costs in this instance, it is so ordered.

Araullo, C.J., Johnson, Street, Avanceña, Villamor, Johns, and *Romualdez, JJ.,* concur.

Date created: June 09, 2014