

(1993) 07 CAL CK 0045

In the Calcutta High Court

Case No : Company Application No. Nill of 1991 connected with Company
Petition No. 19 of 1986

A. Stock and Co. (In Liquidation) and Official Liquidator APPELLANT
Vs

Dilip Kumar Chakraborty and others RESPONDENT

Date of Decision : 09-07-1993

Acts Referred:

Companies Act, 1956 — Section 543, 543(1)
General Clauses Act, 1897 — Section 3(22)
Industrial Reconstruction Bank of India Act, 1984 — Section 36, 36(3), 64

Citation : AIR 1994 Cal 1 : (1996) 87 CompCas 139

Hon'ble Judges : Hazari, J

Bench : Single Bench

Advocate : Mr. Dhandhanian, for the Appellant;

Judgement

1. An application u/s 543(1) of the Companies Act, 1956 was filed on 16-9-91 for and on behalf of the Official Liquidator by way of a Judge's Summons which are, inter alia, as follows:

"1. Declaration that the Respondents and each of them, who were the Directors of the Company abovenamed at the time of winding up thereof and at all material times have misapplied, misappropriated and/ or retained and/ or become liable and/ or accountable for Rs. 72,87,903.86 p. and/or guilty of misfeasance and breach of trust in relation to the said Company on the following grounds:--

(a) The respondents have misappropriated a sum of Rs. 1,11,00,260.18 p. being the money lent and advanced by secured creditors and the said Respondents are bound to restore the sum of Rs. 1,11,00,260.18 p. together with interest thereon at the rate of 18% per annum being the prevailing rate charged by the Nationalised Banks from the date of liquidation until realisation.

(b) The Respondents and/ or each of them have misappropriated a sum of Rupees 39,14,443.75 p. being the unsecured loans collected mostly from various

customers as and by way of advance and misappropriated the said sum. The said respondents are bound to restore the said sum of Rupees 39,14,443.75 p. together with interest thereon at the rate of 18% per annum being the prevailing rate charged by the Nationalised Banks from the date of liquidation until realisation.

(c) The Respondents and each of them have failed and neglected to discharge the various liabilities including statutory liabilities to the extent of Rs. 14,36,282.62 p. which they have misappropriated by withdrawing on various heads of expenditure. The Respondents and each of them are bound to restore the said sum of Rs. 14,36,282.62 p. together with interest thereon at the rate of 18% per annum being the prevailing rate charged by the Nationalised Banks from the date of liquidation until realisation.

(d) The Respondents and each of them have failed and neglected to collect various sums from the sundry debtors of the company as of November 30, 1983 to the extent of Rs. 4,64,565.31 p. The Respondents and each of them are bound to restore the said sum of Rs. 4,64,565.31 p. together with interest thereon at the rate of 18% per annum being the prevailing rate charged by the Nationalised Banks from the date of liquidation until realisation.

(e) The Respondents and each of them have failed and neglected to deposit the Employees' State Insurance Corporation, Provident Fund, Sales Tax, Professional Tax, and other statutory liabilities to the extent of Rs. 3,30,391.00 p. The Respondents and each of them are bound to restore the said sum of Rs. 3,30,391.00 p. together with interest thereon at the rate of 18% per annum being the prevailing rate charged by the Nationalised Banks from the date of liquidation until realisation.

(f) The Respondents and each of them have failed and neglected to deposit arrear Sales Tax arrear ESI Contribution and arrear salary Income Tax for which Certificate Cases have been instituted by the competent authorities for realisation of the said dues amounting to Rs. 41,961.00 p. which the Respondents have failed and neglected to pay and thereby misappropriated the sum. The Respondents and each of them are bound to restore the said sum of Rs.41,961.00 p. together with interest thereon at the rate of 18% per annum being the prevailing rate charged by the Nationalised Banks from the date of liquidation until realisation.

2. An order that all necessary enquiries be made and accounts be taken to ascertain as to what sum or sums the Respondents and each of them are liable to contribute in respect of the amount for which they have become liable and/or accountable.

3. Examination of the conduct of the Respondents severally.

4. Leave be given to the Official Liquidator to alter, amend and/or modify the application upon discovery and inspection of the Books of Accounts and/or

documents of the company made by the Respondents."

and for other reliefs.

2. It was contended by the learned Advocate appearing for the Official Liquidator that the respondents in an application u/s 543(1) of the Companies Act, 1956 have no right to file affidavit-in-op-position but may contest the proceedings by filing their points of defence only after the points of claim had been filed. But by a Judgment dated 10-1-92 delivered by Mrs. Ruma Pal, J. the hearing of Respondent No. 3 on the basis of affidavit-in-opposition regarding the maintainability of the application was allowed.

The operative part of the judgment is as follows:

"Accordingly, I allow the respondents No. 3 to be heard on the basis of his affidavit regarding the maintainability of the application. It is, however, made clear that if any disputed question of fact is involved the Court will relegate the respondent No. 3 to the normal procedure of trial of a misfeasance proceedings,

Let this matter appear as "For Orders" on 20-1-92 for the purpose of determining the preliminary issues as far as respondents Nos. 2 and 3 are concerned.

Let Xerox copy of this judgment be given to the parties upon the undertaking to apply for the certified copy of the judgment and payment of usual charges."

It is submitted by the learned Advocate appearing for the Official Liquidator that the Official Liquidator is empowered u/s 543 of the Companies Act, 1956 to take appropriate steps against the delinquent director for the acts of misfeasance and/or breach of trust and for beneficial winding up of the company as also for causing investigation into the affairs of the company to find out the reasons of such winding up as also its state of affairs prior to the date of liquidation and upon such enquiry if it is found that anybody has misappropriated the funds of the company, to realise the said sum and to have the said sum restored back to the teal of the company. In the instant case the official liquidator investigated into the affairs of the company by appointing a Chartered Accountant from the approved panel of this Court and after going through the Investigation Report the Official Liquidator formed the opinion and initiated the present misfeasance proceedings.

3. Respondent No. 3 raised a preliminary issue by filing affidavit-in-opposition affirmed by Bidhan Kumar Dutt (the respondent No. 3 herein) as to the maintainability of the misfeasance proceedings. The case of the respondent No. 3 is that the company was wound up on 16-9-86 and by letter dated 25th/27th June, 1984 addressed to A. Stock and Co. Ltd., I.R.C.I, withdrew the nomination of the respondent No. 3 as a director from Board of Directors of the company.

4. It is submitted by Mr. Dhandhanian, learned Advocate appearing for the respondent No. 3 that the Official Liquidator proceeded on an entirely wrong and erroneous assumption that the respondent No. 3 was a director the company

now in Liquidation on the date of its winding up, that is 16-9-86 but the nomination of the respondent No. 3 as director was withdrawn in the month of June, 1984. It is submitted by Mr. Dhandhanian that the statutory protection enjoyed by the respondent No. 3 is against initiation of legal proceedings. Some meaning or significance has to be given to such statutory protection. Before allowing any person to initiate legal proceeding against a person enjoying such a statute protection, the Court must be satisfied that there is a very strong prima facie case and not mere allegations against such a person.

5. Mr. Dhandhanian refers to S. 36(3)(b) of the Industrial Reconstruction Bank of India Act, 1984 and submits that a nominee director shall not incur any obligation or liability by reason only of his being a director or for anything done or omitted to be done in good faith in discharge of his duties as a director. The term good faith has been defined in S. 3(22) of the General Clauses Act which is as follows:

"A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not."

Mr. Dhandhanian submits that S. 64 of IRBI Act, 1984 provides that no suit or other legal proceedings shall lie against any officer of IRBI authorised to discharge any functions under this Act for any loss or damage caused or is likely to be caused by anything which is in good faith done or intended to be done. It is submitted by Mr. Dhandhanian that in the instant case the allegations are vague and general allegation against all the directors and no specific allegation is made against the respondent No. 3 and only were general allegations regarding misappropriation are not sufficient because the case of the respondent No. 3 stands on a special footing as the respondent No. 3 was a nominee director on the Board of the Company.

6. Mr. Dhandhanian refers to a decision in the case of Official Liquidator Milan Chit Fund & Finance P. Ltd. v. Joginder Singh Kholi reported in (1978) 48 Com. Cas 357 : (1978 Tax LR NOC 11 Del) wherein it was held:

"It has been held that misfeasance was a serious charge and detailed narration of specific acts of omission and commission must be set out in the application and the liability to restore must be quantified. The Official Liquidator Vs. Raghawa Desikachar and Others,

x x x x x x x x x x x It, however, appears on a perusal of the application that apart from the vague allegations made against all the directors in relation to the conduct of the business of the Company, there is no specific allegation made against this respondent. In the absence of any specific allegation, the application must, therefore, be dismissed in so far as this respondent is concerned."

Mr. Dhandhanian further refers to a decision reported in (1955) 3 WLR 269 In Re: B. Johnson & Co. (Builders) Ltd. and submits that no proceeding can be initiated against the respondent No. 3 as the respondent No. 3 did not respondent No. 3

did not owe any duty to the company and he was an agent of the IRBI and not of the company. Mr. Dhandhanian also refers an order dated 13-1-89 by Mrs. Manjula Bose, J. (as she then was) in the case of Re: Container & Closures Ltd. (In Liqn.) wherein it was ordered that no misfeasance proceeding need be started against the ex directors.

7. Mr. Dhandhanian further refers Notification No. 42/7/73-CL II issued by the Company Law Board and submits that no prosecution can be started against nominee director enjoying statutory protection under the IRBI Act.

8. An affidavit has also been filed on behalf of the respondent No. 2 stating the similar facts as of the respondent No. 3. The learned Advocate appearing for the respondent No. 2 adopted the arguments made by Mr. Dhandhanian.

9. It is submitted by the learned Advocate for the Official Liquidator that Official Liquidator has filed the misfeasance Summons only in the statutory form indicating the nature of charges details of which will appear from the points of claim points of defence, discovery and inspection of documents and also for fixing a date for hearing of the Misfeasance Proceedings.

10. I have carefully considered the facts and circumstances of the case and the arguments advanced by the learned Advocates and also the decisions placed before me.

11. It has been urged on behalf of the Respondent No. 3 that the respondent No. 3 being a nominee Director enjoys the statutory immunity in accordance with the provisions of the Industrial Reconstruction Bank of India Act, 1984. There cannot be any dispute with regard to the provisions laid down under the said Act. S. 64 of the said Act, inter alia, provides that no suit or other legal proceedings shall lie on official of the IRBI authorised to discharge the function under this Act for any loss or damage caused or like to be caused which is "in good faith" done or intended to be done-. The nominee Director, the respondent No. 3 became director of the said company by virtue of his employment in the office of the secured creditor, IRBI. Being a Director of a company the respondent has its statutory obligation cast upon him under the Companies Act, 1956. Whether such duties and obligations have been complied with and have been performed "in good faith" is a question of fact to be decided on trial. From the documents and papers placed before me, it is very difficult to decide whether these respondents have acted in "good faith" or act done on behalf of IRBI. Those questions should be gone into and the Official Liquidator should be given a chance to file points of claim and the respondents may be at liberty to deal with the said allegations in the points of defence. The Official Liquidator is ready and willing to expedite the matter so that once and for all the matter is decided on trial. The preliminary issue may be decided at the time of final hearing of the Misfeasance Proceedings.

12. The respondents No. 3 and also No. 2 have failed to show any valid or cogent reason why the usual procedure should not be followed in the instant case. The

question of balance of convenience is also relevant factor to be considered here. If on the mere statement from the Bar and the affidavits to that effect that the respondents are released the same will not be justified at this stage. Therefore, the balance of convenience is lying in favour of adopting the usual procedure of Misfeasance Proceedings by giving direction of filing points of claim and defence etc.

13. In my opinion, it was the incumbent duty of the respondent No. 3 to look into all the affairs of the company including the day-to-day affairs as he was a director nominated by IRCI the then financial institution and as such he had double responsibility. First responsibility as a director of the company and 2nd and the paramount responsibility was to watch and control the affairs of the company and to see that nothing goes and or happens which is to discharge the duty as a faithful watch dog.

14. In view as above it is ordered that the official Liquidator will file the points of claim within six weeks from date, the respondents No. 2 & 3 will file the points of defence within six weeks thereafter, documents shall be discovered within four weeks thereafter, inspection forthwith thereafter and the date of hearing of the Misfeasance Proceedings will be fixed by the appropriate court taking Company Matters.

15. All parties are to act on a signed copy of the minutes of the operative part of the judgment on the usual undertaking.

16. Order accordingly.