
(2005) 07 MAD CK 0104

In the Madras High Court

Case No : C.A. No. 1198 of 2003 in C.P. No. 496 of 2000

Administrator, MCC Finance Ltd.

APPELLANT

Vs

Ramesh Gandhi

RESPONDENT

Date of Decision : 26-07-2005

Acts Referred:

Companies Act, 1956 — Section 125, 441, 531, 531(1), 531A

Citation : (2005) 127 CompCas 85 : (2005) 6 CompLJ 432 : (2005) 63 SCL 326

Hon'ble Judges : D. Murugesan, J

Bench : Single Bench

Advocate : Arvind P. Dattar, for the Appellant; N.S. Varadachari, for the Respondent

Final Decision : Allowed

Judgement

D. Murugesan, J.—The application has been filed for an order declaring the transaction between the applicant-company and the respondent by name Sri Ramesh Gandhi is null and void in terms of Sections 125, 531 and 531A of the Companies Act and for a direction to the respondent to return the entire 61,740 equity shares of M/s. Divi's Laboratories Ltd. along with the related documents, dividends received and any other benefits received in respect of the said shares and to restrain the respondent from selling the said shares, if they have not been already sold.

2. The following are the averments in the application :

The applicant-company viz., MCC Finance Ltd. was a non-banking financial company. The company was part of the M.A. Chidambaram group of companies-SPIC group which claimed a turnover of Rs. 3,500 crores. As the applicant-company offered higher interest than the banks, it was able to collect a number of deposits. It had to repay more than Rs. 160 crores collected by way of deposits from more than one lakh depositors. As the company went into trouble, it appears that it closed its operations completely after January 31, 1999. During

the period January to March 1998, about 3,740 investors have invested their monies with the company under secured bonds. However, no security was created by the company in favour of any other person. During the said period, the respondent had also invested Rs. 90 lakhs in the company under "secured bonds", out of which Rs. 5 lakhs was repaid before the company was ordered to be wound up. It is the contention of the applicant that the respondent was very close to the former chairman of the applicant-company, and he executed a pledge agreement dated January 4, 1999, in favour of the respondent covering 61,740 equity shares of Divi's Laboratories Ltd. and also signed a blank transfer deed and gave it to the respondent along with the share certificates. As per the said agreement, the respondent was given the right to sell the shares, if the amount due to him were not settled by December 31, 1999. It is the further contention that the above shares were held in the name of Mercantile Securities Ltd. (in short "MSL") which is a 100 per cent. subsidiary of the applicant-company at the time the pledge agreement was entered into. By a board's resolution dated January 14, 1999, the above shares were transferred to the applicant-company in discharge of the loan of Rs. 85 lakhs. In spite of the transfer of shares, a tripartite agreement dated December 24, 1999, was entered into by the respondent with MSL and Divi's Laboratories Ltd. On the date when the said tripartite agreement was entered into, neither MSL nor Divi's Laboratories Ltd. owned the said shares, as they were transferred to the applicant-company on January 14, 1999. The pledge of shares in favour of the respondent is without title and is fraudulent. Hence this application.

3. Mr. Arvind P. Datar, learned senior counsel appearing for the administrator would submit that though there were a number of investors, the then chairman of the company had preferred only the respondent and therefore the transfer of shares shall be deemed to be a fraudulent preference of its creditors and be invalid accordingly in terms of Section 531 of the Companies Act, 1956 (hereinafter referred to as "the Act"). He would further submit that for the same reason, the transfer shall be void against the liquidator in terms of Section 531A of the Act. He would also submit that as the tripartite agreement entered into by the respondent with MSL and Divi's Laboratories Ltd., was on December 24, 1999, in respect of the shares which were already transferred to the applicant-company on January 14, 1999, the agreement is void. He would finally submit that in any case one Mr. Avichi, who was one of the hundi holders, filed C. P. No. 319 of 1999 before this court for winding up on November 4, 1999, and the tripartite agreement was entered into after the winding up proceedings were deemed to have commenced in terms of Section 441 of the Act and the transaction is void in terms of Section 536(2) of the Act.

4. Mr. N.S. Varadachari, learned counsel for the respondent in reply would submit that as the shares belonged to MSL, which was holding them in Divi's Laboratories Ltd., the shares cannot be said to be the assets of the applicant-company. In the absence of the same, the relief sought in this application is liable to be rejected. He would further submit that in any case C. P. No. 319 of

1999 was only closed and the winding up order was passed only in C. P. No. 496 of 2000. The said petition was filed on August 10, 2000, which is after the tripartite agreement. Hence, the provisions of Section 536(2) cannot be invoked. He would also submit that insofar as invoking the provisions of Sections 531 and 531A of the Act, there is no fraudulent preference, as the shares cannot be the assets of the applicant-company and in that case the transaction cannot be questioned, more particularly, on the ground of fraudulent preference u/s 531 and avoidance of voluntary transfer u/s 531A of the Act.

5. I gave my anxious consideration to the above submissions. From the pleading as well as submissions of the respective counsel, the following points arise for consideration :

(1) Whether the shares in question belonged to the applicant-company or not ?

(2) If it is held that the shares belonged to the applicant-company, whether the transfer of those shares in favour of the respondent by the then chairman of the applicant-company is invalid u/s 531 and void under Sections 531A and 536(2) of the Act ?

6. Point No. 1 : It is not in dispute that MSL was a 100 per cent. subsidiary of the applicant-company and one Sri. AL. Vadivelu was the then chairman of the applicant-company. Equally, there is no dispute that the then chairman executed a pledge agreement dated January 4, 1999, covering 61,740 shares of Divi's Laboratories Ltd. The pledge agreement was entered into by the said AL. Vadivelu in his capacity as the chairman of the applicant-company, as could be seen from the pledge agreement dated January 4, 1999. By the said pledge agreement, the company had pledged 61,740 equity shares of the face value of Rs. 10 each of Divi's Laboratories Ltd., bearing Certificate No. 21310 as additional security for repayment of the loan of Rs. 90 lakhs by the applicant-company to the respondent. These shares were held in the name of MSL, which is a 100 per cent. subsidiary of MCC Finance Ltd. at the time of the pledge agreement. The following is the communication of MSL dated January 25, 1999, to the Senior Vice President (Corporate Accounts) of the applicant-company and it reads as follows :

Mercantile Securities Limited Temple Tower, III Floor, 476, Anna Salai, Nandanam, Chennai - 600 035 Phone : 4330178, 4349622, 4349495 Fax : 044-4349596 e mail : mslbrok@smd. smd.sprintrpg.ems. vsnl.net.in January 25, 1999

Mr. G.V. Anandhkumar Sr. Vice President (Corporate Accounts) MCC Finance Ltd. Royapettah Chennai - 600 014. Dear Sir, Sub : Transfer of our investments to MCC Finance Ltd. at book value

In the board meeting held on January 14, 1999, board has passed a resolution transferring our inventories, viz., stock of shares and debentures at book value to MCC Finance Ltd. held by us as on June 30, 1998, of about Rs. 85 lakhs in lieu of

which we shall adjust the loan obtained from MCC Finance Ltd. (List of shares and debentures is enclosed).

We shall by passing the necessary entries in our books giving effect to the resolution.

Kindly let us know to whom we should deliver the said shares. Thanking You, for
Mercantile Securities Ltd. K. Sarath C. Reddy Managing Director.

7. In the list of shares and debentures enclosed to the said letter, 61,740 shares of Divi's Laboratories Ltd., was shown as stock as on June 30, 1998, presumably thereby meaning that on the date of the resolution, the said shares held by MSL were transferred at book value to the applicant-company in lieu of the loan obtained from the applicant-company. In view of the said communication the shares of Divi's Laboratories Ltd., were transferred to the applicant-company and on and from the date of resolution of the board of MSL, the shares must be held to be assets of the applicant-company. In this regard, it is also relevant to point out that the balance sheet of MSL as on June 30, 1999, subsequent to the board's resolution, did not include the said shares in the list of assets. In *Vasudev Ramchandra Shelat Vs. Pranal Jayanand Thakar and Others*, , the Supreme Court has held that the gift cannot be held to be incomplete for failure to comply with the formalities prescribed by the Companies Act for transfer of shares. In *Commissioner of Income Tax Vs. M. Ramaswamy*, , this court has held that the transfer of shares is complete though it is not registered, as the registration is only a procedural formality and has no bearing on the transfer as between the transferor and the transferee. On the transfer of shares by a board's resolution and that too in lieu of the repayment of the loan must be construed only as a concluded contract between the MSL and the applicant-company. Therefore, the submission of Mr. N.S. Varadachari, learned counsel for the respondent that the shares belonged to MSL which held them in Divi's Laboratories Ltd., and consequently it cannot be said to be the assets of the applicant-company cannot be accepted. Accordingly, point No. 1 is answered.

8. Point No. 2 : It was argued by Mr. Arvind P. Datar, that inasmuch as the company petition for winding up of the applicant-company filed by Mr. Avichi on November 4, 1999, the said petition was closed down when the company was ordered to be wound up in the company petition filed by the Reserve Bank of India in C. P. No. 496 of 2000 on August 3, 2001. Merely because the petition filed by Mr. Avichi was closed, that does not mean that the winding up proceedings shall commence only from August 10, 2000, as the petition for winding up was filed by the Reserve Bank of India only on the said date. Law is well-settled, in terms of Section 441, that the winding up proceedings are deemed to have commenced from the date of filing of the petition. There is no dispute that a petition for winding up was filed by Mr. Avichi on November 4, 1999. While that petition was pending, the Reserve Bank of India also filed a similar petition on August 10, 2000. Both the petitions were heard together and the court passed the following order :

"In the above company petition, this court, by order dated July 18, 2001, directed advertisement, and accordingly, advertisement was effected.

This court has already held that number of depositors have not been repaid and the liability of the respondent-company is to an extent of rupees 160 crores and with the assets available it is not possible for the respondent-company to discharge the liability. This court also appointed a provisional liquidator and questioning the appointment of the provisional liquidator, the respondent took the matter on appeal and in the appeal, the order of appointment of the provisional liquidator was confirmed on the ground that the respondent-company was not in a position to discharge its liability.

Since the respondent-company is not in a position to discharge its liability, I am of the view that the respondent-company is liable to be wound up. Learned counsel appearing for the respondent-company is not seriously opposing. Accordingly, the respondent-company, M/s. MCC Finance Ltd., is ordered to be wound up. The provisional liquidator already appointed shall be the official liquidator. The petition is ordered accordingly. The administrator already appointed is ordered to continue as administrator. The directors of the respondent-company are directed to file statement of affairs within a period of 21 days.

In view of the order passed in this company petition, the alter company petitions in C. P. Nos. 319 of 1999, and 504 to 506 of 2000 are closed with the liberty granted to the petitioners to revive the company petitions if any necessity arises for modification of the order."

9. A reading of the above order, shows that the applicant-company was ordered to be wound up, as it was unable to discharge its liability to the Reserve Bank of India. Since the winding up was ordered in the said petition, the learned judge ordered the company petition filed by Mr. Avichi in C. P. No. 319 of 1999 as closed. The said petition came to be closed only due to the fact that the company has already been ordered to be wound up. It must be borne in mind that the company petition filed by Mr. Avichi was not dismissed on the merits. In the circumstances, the proper rule of construction would be that the date of commencement of winding up proceedings shall be reckoned from the date of filing of C. P. No. 319 of 1999, though the said petition was closed in view of the fact that the company was ordered to be wound up in another petition.

10. The company application has been filed under Sections 531 and 531A of the Act. Section 531 relates to the fraudulent preference and the said section reads as under :

"(1) Any transfer of property, movable or immovable, delivery of goods, payment, execution or other act relating to property made, taken or done by or against a company within six months before the commencement of its winding up which, had it been made, taken or done by or against an individual within three months before the presentation of an insolvency petition on which he is

adjudged insolvent, would be deemed in his insolvency a fraudulent preference, shall in the event of the company being wound up, be deemed a fraudulent preference of its creditors and be invalid accordingly :

Provided that, in relation to things made, taken or done before the commencement of this Act, this sub-section shall have effect with the substitution, for the reference to six months, of a reference to three months.

(2) For the purposes of Sub-section (1) the presentation of a petition for winding up in the case of a winding up by the Tribunal and the passing of a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond to the act of insolvency in the case of an individual."

11. Section 531A relates to the avoidance of voluntary transfer and the said section reads as under :

"Any transfer of property, movable or immovable, or any delivery of goods, made by a company, not being a transfer or delivery made in the ordinary course of its business or in favour of a purchaser or encumbrancer in good faith and for valuable consideration, if made within a period of one year before the presentation of a petition for winding up by the Tribunal or the passing of a resolution for voluntary winding up of the company, shall be void against the liquidator."

12. In terms of the provisions of Section 531, any transfer of property, movable or immovable, taken or done against a company within six months before the commencement of its winding up be deemed a fraudulent preference of its creditors and consequently is invalid. In this case, C. P. No. 319 of 1999 is said to have been filed by one Mr. Avichi for winding up of the applicant-company on November 4, 1999. The transfer of shares was effected in favour of the respondent on January 31, 2000, i.e., after the said petition was filed. As per Section 441 of the Act, winding up proceedings are deemed to have commenced on the date of filing of the winding up petition. Section 531 relates to a fraudulent preference, if occasioned within six months before the commencement of the winding up proceedings. As the transfer of shares was effected after the commencement of the winding up proceedings in the company petition filed by the said Avichi, Section 531 cannot be made applicable to the facts of this case. It is also relevant to note that the Reserve Bank of India filed C. P. No. 496 of 2000 for winding up of the applicant-company on August 10, 2000. As the transfer of shares was effected in favour of the respondent on January 31, 2000, and the said company petition was filed after a period of six months, Section 531 is not applicable to the facts of this case.

13. On the other hand, in terms of Section 531A, any transfer of property, movable or immovable, not being a transfer or delivery made in the ordinary course of its business or in favour of a purchaser or encumbrancer in good faith and for valuable consideration, shall be void against the liquidator, if such transfer of property, both movable and immovable, is made within a period of

one year before the presentation of the petition for winding up. The petition for winding up was filed by Mr. Avichi on November 4, 1999, and the winding up proceedings are deemed to have commenced in respect of the applicant-company on and from the said date. The transfer of shares in favour of the respondent was effected on January 31, 2000, i.e., during the pendency of the petition for winding up. In that case, Section 531A is not attracted and the transfer cannot be declared to be void against the liquidator.

14. Though the application is filed under Sections 125, 531 and 531A of the Act, it was also argued as to the applicability of Section 536(2) of the Act. In the event this court comes to the conclusion that the transfer of shares is void under the provisions of the Act, the respondent cannot be allowed to take advantage of the fact that the applicant has not quoted the said provision in the application. While adjudging the issue, to render substantial justice, this court would be competent to issue directions strictly in conformity with the provisions of the Act, though the applicant failed to mention the provisions under which the relief is sought. As the winding up proceedings are held to have commenced on November 4, 1999, the transfer of shares made on January 31, 2000, was after the commencement of the winding up proceedings. The provisions of Section 536(2) read as under :

"(2) In the case of a winding up by the Tribunal, any disposition of the property including actionable claims of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall, unless the Tribunal otherwise orders, be void."

15. Sub-section (2) of Section 536 contemplates that any transfer of shares in the company shall be void unless the Tribunal otherwise orders. In this case, the winding up proceedings commenced on November 4, 1999. While the said petition was pending, pursuant to the tripartite agreement dated December 24, 1999, the shares were transferred on January 31, 2000, during the pendency of the winding up proceedings. In my opinion, the transfer of shares in favour of the respondent pursuant to the tripartite agreement dated December 24, 1999, is void in terms of the above section. The provisions of Sections 531 and 531A relate to the invalidation and avoidance of the transactions that took place prior to the winding up proceedings. Section 536 relates to the avoidance of transfer, etc., after the commencement of the winding up proceedings. The object of Section 536 seems to be to prevent improper disposition or dissipation of the property or transfer of shares of the company otherwise available for distribution among the creditors of the company in liquidation. The fundamental principle is that the assets of the company shall be made available for distribution *pari passu* amongst the creditors of the company and that no creditor should obtain advantage over his fellow creditors. The words employed in Sub-section (2) of Section 536, viz., "unless the court otherwise orders" relate to bona fide transaction occasioned in the ordinary course of business. If the transfer is not

bona fide, in terms of Sub-section (2) of Section 536, the transaction would be void. On the facts of this case, it appears to me that the transaction is not bona fide. The then chairman had preferred the respondent by entering into a pledge agreement in respect of the shares in question. Thereafter, the shares were transferred in the name of the applicant-company by MSL vide the resolution of the board meeting held on January 14, 1999. After such transfer was effected, obviously, for the reasons not known, a tripartite agreement was entered into on December 24, 1999, by the respondent with the MSL and Divi's Laboratories Ltd., and that too pending the winding up proceedings. That apart, the shares were transferred in favour of the respondent pursuant to the said tripartite agreement when the winding up proceedings were pending. As the winding up had been ordered, the provisions of Section 536(2) are attracted. The tripartite agreement entered into by the respondent with the MSL and Divi's Laboratories Ltd., was without any right over the shares, as the shares had already been transferred in the name of the company in liquidation. Further, on the date when the shares were transferred in favour of the respondent also, neither MSL nor Divi's Laboratories Ltd., had any right over those shares. The transfer of shares in favour of the respondent is, therefore, not binding on the applicant-company, as the applicant-company was the owner of the shares at the relevant point of time. From the above facts, it is clear that the transaction was not bona fide and, therefore, the same should be declared to be void.

16. For all the above reasons, I am of the considered view that the application must be allowed. Accordingly, the transfer of 61,740 shares in favour of the respondent, viz., Sri Ramesh Gandhi is declared null and void. As it is submitted that the respondent has sold the said shares while the application was pending before this court, no direction can be issued to the respondent for return of the shares along with the related documents, dividends and other benefits and also there is no question of issuing direction restraining the respondent from selling the said shares. However, there shall be a direction to the respondent to return the amount of the equity shares, dividends and other monetary benefits received in respect of the said shares to the company in liquidation within a period of two months from the date of receipt of copy of this order. The application is ordered on the above terms.