(2000) 11 P&H CK 0213

In the Punjab And Haryana At Chandigarh

Case No : C.A. No''s. 668 of 1998 and 585 of 2000 in Company Petition No. 29 of 1997

Ajanta Lucky Scheme and Investment Pvt. Ltd. APPELLANT

Vs

Dharam Bir Bhalla RESPONDENT

Date of Decision : 16-11-2000

Acts Referred:

Companies Act, 1956 — Section 440, 454, 454(5), 477, 511
Criminal Procedure Code, 1973 (CrPC) — Section 403(2)

Citation : (2001) 4 RCR(Civil) 801

Hon'ble Judges : J.S. Khehar, J

Bench : Single Bench

Advocate : Amit Sethi, for the Appellant; S.K. Hiraji, for the Respondent

Judgement

J.S. Khehar, J.—M/s Ajanta Lucky Scheme and Investment Private Limited was brought under creditors voluntary winding up by a special resolution passed on 27.9.1980. Sushil Kumar resident of N.J. 228, Islam Ganj, Jalandhar was appointed its voluntary liquidator, Consequently upon a report received from the Registrar of Companies, the official liquidator filed Company Petition No. 25 of 1982 under Sections 440 and 515 of the Companies Act, 1956. The prayer in the aforesaid petition was for official winding up of M/s Ajanta Lucky Scheme and Investment Private Limited and for the removal of the voluntary liquidator.

2. While disposing of Company Petition No. 25 of 1982, this Court vide its order dated 16.8.1984 passed formal orders of winding up of M/s Ajanta Lucky Scheme and Investment Private Limited and also ordered the removal of the voluntary liquidator. Accordingly, the voluntary liquidator was directed to hand over the assets and records of the company with the statement of affairs under Sections 454 and 511-A of the Companies Act, 1956 Act, to the official liquidator.

3. Company Petition No. 94 of 1991 was disposed of by this Court vide its order 30.7.1993. A perusal of the order passed in Company Petition No. 94 of 1991 reveals that the two Directors Dharam Bir Bhalla and Arvind Bhalla after putting

in appearance in Company Petition No. 94 of 1991 stated that they were not in possession of the assets books of accounts and records of the company as the same had been handed over by them to the voluntary liquidator Sushil Kumar. In this behalf it would be pertinent to mention here that this Court, during the course of proceedings in Company Petition No. 94 of 1991 recorded the statement of Dharam Bir Bhalla and Arvind Bhalla on 30.7.1993. The fact that they were not in possession of the aforesaid record and the that the aforesaid record had been handed over by them to the voluntary liquidator Sushil Kumar was also affirmed by them in their statements recorded on oath. In the statement of Dharam Bir Bhalla it was also expressly mentioned that he had taken a receipt from the voluntary liquidator Sushil Kumar, evidencing the handing over of the books of accounts and the assets to him. This Court made the following observations in the order dated 30.7.1993 :-

"This Court is (not) finally opining as to who is in possession of the books of accounts and the assets of the Company. The assets and the books of accounts would either be in possession of respondents 1 and 2 being the ex- Managing Director and Director, respectively or in possession of Shri Sushil Kumar, respondent No. 3 the voluntary liquidator. It would suffice if a direction is issued to respondent Nos. 1 to 3 jointly and severally to hand over the possession of the assets, books of accounts and record of the Company to the Official Liquidator. This petition stands allowed."

The word ''not'' indicated in the brackets above has been introduced by me as the tenor of the aforesaid order indicates that the aforesaid word should have been recorded at the position indicated above. Non-recording of the aforesaid word is merely a typographical omission.

4. Consequent upon the directions passed by this Court in Company Petition No. 94 of 1991 extracted above, the official liquidator addressed a letter dated 23.10.1993 to Dharam Bir Bhalla, Arvind Bhalla and Sushil Kumar to hand over possession of books of account and other relevant documents of the company to him within a period of 15 days. Dharam Bir Bhalla responded to the aforesaid communication vide his letter dated 21.11.1994. Alongwith his aforesaid letter, he enclosed receipt dated 27.9.1980. On the basis of the aforesaid receipt it was alleged that the materials being sought for had been handed over to Sushil Kumar.

5. Since the action initiated by the official liquidator to retrieve books of accounts and other relevant records from the respondents had reached a dead end, the official liquidator addressed a letter dated 26.11.1996 to the Superintendent of Police, Jalandhar City, wherein he sought his assistance to ascertain the whereabouts of Sushil Kumar. Despite the aforesaid action initiated by the official liquidator, it is conceded on his behalf that the whereabouts of Sushil Kumar could not be ascertained. The official liquidator finding himself in the aforesaid quandary filed Company Petition No. 29 of 1997 alleging therein that Dharam Bir Bhalla and Arvind Bhalla were deliberately and willfully shifting their

responsibility to hand over the possession of assets, books of accounts and other records of the company to the official liquidator in compliance with the order passed by this Court in Company Petition No. 94 of 1991 on 30.7.1993. In Company Petition No. 29 of 1997, the prayer made by the official liquidator is that Dharam Bir Bhalla and Arvind Bhalla Director of M/s Ajanta Lucky Scheme and Investment Private Limited be summoned, tried and convicted u/s 538 of the Companies Act, 1956.

6. Pointed attention of this Court has been invited to Section 538 of the Companies Act, 1956. Relevant extract thereof is being reproduced hereunder :-

"538 (1) If any person, being a past or present officer of a company, which at the time of the commission of the alleged offence is being wound up whether by or subject to the supervision of the Court or voluntarily, or which is subsequently ordered to be wound up by the Court or which subsequently possess a resolution for voluntary winding up, -

(a) does not, to the best of his knowledge and belief, fully and truly discover to the liquidator all the property, movable and immovable, of the company and how and to whom and for what consideration and when company disposed of any part thereof, except such part as has been disposed of in the ordinary course of the business of the company :

(b) does not deliver up to the liquidator, or as he directs, all such part of the movable and immovable property of the company as is in his custody or under his control, and which he is required by law to deliver up;

(c) does not deliver up to the liquidator, or as he directs, all such books and papers of the company as are in his custody or under his control and which he is required by law to deliver up;

(d) to (p) XXX XXX XXX XXX XXX

he shall be punishable, in the case of any of the offences mentioned in Clauses (m), (n) and (o) with imprisonment for a term which may extend to five years, or with fine, or with both, and in the case of any other offence, with imprisonment for a term which may extend to two years, or with fine, or with both;

xx xx xx"

Mr. Amit Sethi, Advocate appearing for the official liquidator has drawn pointed attention of this Court to an extract from Datta on Company Law Fifth Edition, 1991 by C.R. Datta page 1306 to bring to the notice of this Court the effect of voluntary winding up, which reads as under :-

''''Effect of voluntary winding up. - The passing of resolution for a voluntary winding up is the starting point of collection of the company''s assets with a view to its distribution among the creditors and contributories. The legal entity of the company continues till the final meeting is held and the company is dissolved.

The directors cease to function unless specially empowered to do certain things by the Liquidator. No suit or legal proceeding by or against the company is stayed but the fact that the company has gone into voluntary liquidation and that a Liquidator has been appointed should be brought on record of the suit or legal proceeding. The position of the Liquidator is that of an agent and he really represents the Board of Directors. The Liquidator has certain statutory duties to perform and he is liable for non- compliance with the provisions of the Act and neglect of duty. A liquidator in voluntary winding up is now however an officer of the Court.

A resolution for voluntary winding up operates as notice of discharge of the employees of the company and cessation of powers of the directors."

7. On the basis of the aforesaid extract learned counsel has vehemently argued that a voluntary liquidator is merely an agent representing the Board of Directors and that the appointment of liquidator does not have the effect of negating the responsibilities of the directors.

8. In view of the factual position adopted by Dharam Bir Bhalla and Arvind Bhalla who were duly served in Company Petition No. 29 of 1997. Company Application No. 668 of 1998 was filed on behalf of the official liquidator u/s 477 of the Companies Act, 1956, with a prayer that respondents No. 1 and 2 may be summoned, examined and directed to give full particulars of Sushil Kumar the voluntary liquidator of the Company. Despite notice in the aforesaid Company Application to Dharam Bir Bhalla and Arvind Bhalla and despite this Court requiring them to furnish to this Court all particulars known to them about the voluntary liquidator Sushil Kumar, they continued to assert through their counsel that they had no information about the whereabouts of Sushil Kumar who had been appointed as voluntary liquidator for M/s Ajanta Lucky Scheme and Investment Private Limited.

9. During the pendency of Company Application No. 668 of 1998 Dharam Bir Bhalla and Arivnd Bhalla filed Company Application 585 of 2000. In the aforesaid application, it was prayed that Company Petition No. 29 of 1997 be dismissed and the accused therein i.e. Dharambir Bhalla and Arvind Bhalla be discharged. It was reasserted that all assets, books of accounts and records of M/s Ajanta Lucky Scheme and Investment Private Limited had been handed over by Dharam Bir Bhalla accused No. 1 and Arvind Bhalla accused No. 2 to Sushil Kumar accused No. 3. It was further asserted that said Sushil Kumar who had been appointed as voluntary liquidator of M/s Ajanta Lucky Scheme and Investment Private Limited had executed a receipt after taking possession of the aforesaid assets and records from accused No. 1 on 27.9.1980. It was further asserted that the original of the said receipt dated 27.9.1980 was exhibited as DW. 1/3 in Company Petition No. 93 of 1991 (which had been filed by the official liquidation u/s 454(5) of the Companies Act, 1956). It was further asserted that Company Petition 93 of 1991 filed by the official liquidator was dismissed by the Court vide order dated 12.5.1995. A perusal of the order shows that M/s Ajanta Lucky

Scheme and Investment Private Limited was brought under creditors voluntary winding up and Sushil Kumar (accused No. 3) was appointed its voluntary liquidator. It was further noticed that the said Sushil Kumar was directed to hand over all records and assets of the company to the official liquidator alongwith statement of affairs as required to be filed u/s 454 read with Section 511-A of the Companies Act, 1956. A perusal of the order dated 12.5.1995 passed in Company Petition No. 93 of 1991 expressly notices that whereabouts of Sushil Kumar accused No. 3 were not known to the official liquidator and that he could not be served. Accordingly the proceedings initiated in Company Petition No. 93 of 1991 were dropped, "to be taken up later as and when his where abouts are known."

10. Dharam Bir Bhalla and Arvind Bhalla appeared before this Court in response to the notice issued in Company Petition No. 93 of 1991. Dharam Bir Bhalla categorically stated during the course of the proceedings of the said case (as noticed in the order dated 12.5.1995) that he had not filed the statement of affairs before the official liquidator because the statement of affairs had been filed by him before the voluntary liquidator. Arvind Bhalla, who is the son of Dharam Bir Bhalla, stated that his father had filed the statement of affairs before the voluntary liquidator. In view of the aforesaid factual position, they asserted that they had handed over the entire assets and records to the voluntary liquidator and could not, therefore, be expected to be in possession of the records. Besides assailing the factum of appointment of the voluntary liquidator and the tiling of statement of affairs before him, it was pointed out that Gopal Krishan attorney of the voluntary liquidator Sushil Kumar had addressed a communication on 3.12.1980 to the Registrar of Companies informing him about the appointment of Sushil Kumar as official liquidator of M/s Ajanta Lucky Scheme and Investment Private Limited. To show that the voluntary liquidator had taken charge from the Board of Directors of the aforesaid company, a public notice issued by the voluntary liquidator inviting claims for settling the list of the creditors was also brought on records of C.P. No. 93 of 1991 by the aforesaid Dharam Bir Bhalla and Arvind Bhalla. While disposing of Company Petition No. 93 of 1991, this Court made the following observations :-

"In the present case accused No. 1 and 2 were Directors when the company went into voluntary liquidation and their case is that they had handed over the books of accounts and records of the company to the Voluntary Liquidator. Accused No. 1 has stated that he had filed the statement of affairs with the voluntary liquidator. There is nothing on the record to rebut this statement. The accused was not required to file another statement of affairs after the Voluntary Liquidator had been removed and the Official Liquidator took over the Company. They cannot, therefore, be held guilty of any offence u/s 454 of the Act. In any case, the prosecution has led no evidence to discharge the initial burden of proving that the accused were possessed of the books and records of the company or that those were accessible to them and that they failed to file the statement of affairs.

For the aforesaid reasons, the complaint is dismissed and the accused are acquitted."

In view of the provisions extracted above, it is asserted by the learned counsel for the respondents that on the appointment of the voluntary liquidator, the Board of Directors ceased to exercise all powers in their capacity as Directors of M/s Ajanta Lucky Scheme and Investment Private Limited. Dharam Bir Bhalla and Arvind Bhalla, under the aforesaid statutory provisions had handed over all assets and records to the voluntary liquidator and taken receipt from him in token thereof on 27.9.1980.

11. Learned counsel for the respondents further states that Sushil Kumar accused No. 3 who was appointed as voluntary liquidator in creditors winding up was not a nominee of the Board of Directors. The nomination of Sushil Kumar having been made by the creditors, accused No. 1 and 2 could not be required to furnish his particulars specially the details of his present whereabouts. To buttress their claim on behalf of accused No. 1 and 2 learned counsel has placed reliance on the decisions rendered by the Apex Court in Lalta and Others Vs. State of Uttar Pradesh, and Bhagat Ram Vs. State of Rajasthan, . In the former case the legal position was summarised as under :-

"The question is whether where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution, not as a bar to the trial and conviction for the accused for a different offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by the terms of Section 403(2) Criminal Procedure Code."

12. The aforesaid legal position has also been reiterated in the latter case.

13. In view of the finding of fact recorded in Company Petition No. 93 of 1991 in the order passed by this Court on 12.5.1995 (relevant extract already reproduced, above) that accused No. 1 and accused No. 2 Dharam Bir Bhalla and Arvind Bhalla had filed the statement of affairs with the voluntary liquidator and that there was nothing on the record to rebut the said statement, the aforesaid finding of fact must be deemed to have acquired finality between the parties for all intents and purposes and that the aforesaid issue could not be reopened any more. Besides the aforesaid submission, learned counsel for Accused Nos. 1 and 2 argues that even in the proceedings now initiated at the behest of the official liquidator, the aforesaid factual position has to been rebutted. Thus viewed it is stated, the prosecution now initiated against accused Nos. 1 and 2 u/s 538 of the Company Act, 1956 is wholly misconceived.

14. There can be no doubt about the bona fide to initiate this action against the respondents. There is also no doubt that those who have faultered must be punished. But the million dollar question is, whether in the facts and

circumstances of the instant case, there is material sufficient to establish the guilt of the accused in order to punish them for having faultered. Undoubtedly in view of the legal position in Bhagat Ram''s case (supra) findings of fact recorded in the order dated 12.5.1995 passed in Company Petition No. 93 of 1991 must be deemed to have assumed finality. In view of the extract from the order dated 12.5,1995 reproduced above there can be no doubt that this Court arrived at the conclusion that Dharam Bir Bhalla and Arvind Bhalla were not in possession of the records required by the official liquidator. Sushil Kumar the voluntary liquidator who should have the custody of the records as the factual and statutory position examined above, could neither be located nor be brought before this Court despite the best efforts on the part of the official liquidator for the last more than 16 years. There is really no good ground to continue with the proceedings specially when the custodian of the materials to be relied upon by the official liquidator has not been available for such a longtime.

15. In view of the factual and legal position enumerated above, Company Application No. 585 of 2000 is allowed and Company Application No. 668 of 1998 is dismissed.

16. Order accordingly.

