

(2022) 08 DEL CK 0058

In the Delhi High Court

Case No : Criminal Miscellaneous Case No. 807 Of 2022, Criminal Miscellaneous Application No. 3364 Of 2022

Ashwani Chawla

APPELLANT

Vs

State & Anr.

RESPONDENT

Date of Decision : 08-08-2022

Acts Referred:

Companies (Court) Rules, 1959 — Rule 24, 130
Companies Act, 2013 — Section 270, 271, 272, 273, 273(1)(c), 279, 279(1)
Indian Penal Code, 1860 — Section 120B, 420

Citation : (2022) 08 DEL CK 0058

Hon'ble Judges : Anu Malhotra, J

Bench : Single Bench

Advocate : Chandan Bhatia, Izhar Ahmad, B.N. Jha

Judgement

Anu Malhotra, J

1. The matter has been reserved for orders vide order dated 12.07.2022.

2. The petitioner vide the present petition has sought the quashing of the summoning order dated 15.10.2014 of the Court of the learned ACMM East KKD in Complaint Case No.9171/2019 filed by the respondent No.2 against the petitioner with the avowed contention of the petitioner that the accused company M/s Catmoss Retail Private Limited arrayed as accused No.1 in the Complaint Case No.9171/2019 of which the petitioner herein was the Director arrayed as accused No.2 to the complaint had gone into liquidation, in as much as, vide order dated 28.02.2013 in Co.Pet. 36/2013 titled Small Industries Development Bank vs. Catmoss Retail Pvt. Ltd., this Court had ordered for the winding up of the company and the Official Liquidator was appointed and all assets, offices and bank accounts were taken over by the Official Liquidator, and that the dishonored cheque bearing No. 206733 dated 30.06.2013 for an amount of Rs.1,58,400 is dated subsequent to the order of appointment of the Official Liquidator which is of the date 28.02.2013.

3. Reliance was placed on behalf of the petitioner on the verdict of this Court in M.L. Gupta & Anr. vs. Ceat Financial Services Ltd. 2006 SCC OnLine Del 1448 with observations in para 21 thereof which read to the effect:-

"21. On the aforesaid averments, complaint under Section 138 of the Negotiable Instruments Act cannot be filed as on the date of presentation of the cheque the company was in liquidation and cannot be stated to have committed any offence. Even second and third accused (petitioners herein) were not the Incharge of the day-to-day affairs and conduct of the business of the company on that date. No doubt there are allegations of cheating as well and the complaint is under Section 420 read with Section 120B of the IPC as well. It would have reference to the date when the cheques were issued with intent to cheat and complaint to that extent may be maintainable if prima facie case under these provisions is made out. However, the summoning orders dated 29.7.2000 would show that the cognizance of the alleged offence is taken only after Section 138 of the Negotiable Instruments Act and not under Section 420 read with Section 120B of the IPC. Since complaint under Section 138 of the Negotiable Instruments Act is not maintainable if filed after the winding up of the company, summoning order issued is bad in law."

4. A perusal of the application filed by the petitioner before the learned Trial Court seeking discharge which application was dismissed as withdrawn vide order dated 10.09.2021 indicates that reliance was also placed on behalf of the petitioner on the verdict of the Hon'ble High Court of Karnataka in M/s Religare Finvest Limited vs. Vijay Steel Tubes and Fitting Private Limited Company Petition No.70/2011 with observations in para 7 and 21 thereof which read to the effect:-

"7. Accordingly, the petition is allowed. The respondent company is order to be wound up. The Official Liquidator attached to this Court shall take over the assets of the company and take further steps in the matter for recovery of the amounts due to the creditors and workmen. The petitioner company shall deposit a sum of Rs.35,000/- as the initial expenses before the Official Liquidator. The petitioner company shall also take out paper publication in the Hindu" English newspaper in this regard. "

"21. On the aforesaid averments, complaint under Section 138 of the Negotiable instruments Act cannot be filed as on the date of presentation of the cheque the company was in liquidation and cannot be stated to have committed any offence. Even second and third accused (petitioner herein) were not the In-charge of the day-to-day affairs and conduct of the business of the company on that date. No doubt there are allegations of cheating as well and the complaint is under section 420 read with section 120B of the IPC as well. It would have reference to the date when the cheques were issued with intent to cheat and complaint to that extent may be maintainable if prima facie case under these provisions is made out. However, the summoning orders dated 29.07.2000 would show that the cognizance of the alleged offence is taken only after section 138 of the Negotiable Instruments Act and not under section 420 read with section 120 B of

the IPC. Since complaint under section 138 of Negotiable Instruments Act is not maintainable if filed after the winding up of the company, summoning order issued is bad in law."

5. Reliance has also been placed on behalf of the petitioner on the order dated 16.03.2020 of the Court of the learned MM East KKD Delhi in CC Nos.47612/16, 46759/16, 51977/16 and 46966/16 to submit to the effect that the accused persons have all been discharged in the said complaints in view of the verdict of this Court in M.L. Gupta & Anr. vs. Ceat Financial Services Ltd. (Supra).

6. It is essential to observe that Co.Pet. 36/2013 as per the website of this Court is still pending and is listed for 22.08.2022. It is essential to observe the order dated 28.02.2013 in Co.Pet. 36/2013 which reads to the effect:-

"1. The affidavit of service indicates that the Respondent has been served.

2. None appears for the Respondent despite service. In the circumstances, the petition is admitted. The Official Liquidator ('OL') attached to this Court is appointed as the Provisional Liquidator ('PL'). The OL is directed to take over all the assets, books of accounts and records of the Respondent company forthwith. A complete set of paper book be served on the OL during the course of the day. The OL shall also prepare a complete inventory of all the assets of the Respondent company before sealing the premises in which they are kept. He may also seek the assistance of a valuer to value the assets. He is permitted to take the assistance of the local police authorities, if required.

3. Publication of the citation of the petition be effected in the Official Gazette, 'The Hindustan Times' (English) and 'Dainik Jagran' (Hindi) in terms of Rule 24 of the Companies (Court) Rules, 1959 ('Rules'). The cost of publication shall be borne by the Petitioner.

4. List on 8th July 2013.

5. A fresh status report be filed by the OL before the next date of hearing.", making it apparent that only a Provisional Liquidator had been appointed.

7. In terms of Section 270 of the Companies Act, 2013, the modes of winding up of a company are prescribed to the effect:-

"270. Winding up by Tribunal.—The provisions of Part I shall apply to the winding up of a company by the Tribunal under this Act."

Section 271 of the Companies Act, 2013 provides the circumstances in which a company may be wound up by the Tribunal, which reads to the effect:-

"271. Circumstances in which company may be wound up by Tribunal.—A company may, on a petition under Section 272, be wound up by the Tribunal,—

(a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;

(b) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;

(c) if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;

(d) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or

(e) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.”

As per Section 272 of the Companies Act, 2013, the petition for winding up can be presented by persons detailed therein:-

“272. Petition for winding up.—(1) Subject to the provisions of this section, a petition to the Tribunal for the winding up of a company shall be presented by—

(a) the company;

(b) any contributory or contributories;

(c) all or any of the persons specified in clauses (a) and (b);

(d) the Registrar;

(e) any person authorised by the Central Government in that behalf; or

(f) in a case falling under clause (b) of Section 271, by the Central Government or a State Government.

(2) A contributory shall be entitled to present a petition for the winding up of a company, notwithstanding that he may be the holder of fully paid-up shares, or that the company may have no assets at all or may have no surplus assets left for distribution among the shareholders after the satisfaction of its liabilities, and shares in respect of which he is a contributory or some of them were either originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months immediately before the commencement of the winding up or have devolved on him through the death of a former holder.

(3) The Registrar shall be entitled to present a petition for winding up under Section 271, except on the grounds specified in clause (a) 379[of that section]:

Provided that the Registrar shall obtain the previous sanction of the Central Government to the presentation of a petition:

Provided further that the Central Government shall not accord its sanction unless the company has been given a reasonable opportunity of making representations.

(4) A petition presented by the company for winding up before the Tribunal shall be admitted only if accompanied by a statement of affairs in such form and in such manner as may be prescribed.

(5) A copy of the petition made under this section shall also be filed with the Registrar and the Registrar shall, without prejudice to any other provisions, submit his views to the Tribunal within sixty days of receipt of such petition."

Section 273 of the Companies Act, 2013 provides to the effect:-

"273. Powers of Tribunal.—(1) The Tribunal may, on receipt of a petition for winding up under Section 272 pass any of the following orders, namely:—

- (a) dismiss it, with or without costs;
- (b) make any interim order as it thinks fit;
- (c) appoint a provisional liquidator of the company till the making of a winding-up order;
- (d) make an order for the winding up of the company with or without costs; or
- (e) any other order as it thinks fit:

Provided that an order under this sub-section shall be made within ninety days from the date of presentation of the petition:

Provided further that before appointing a provisional liquidator under clause (c), the Tribunal shall give notice to the company and afford a reasonable opportunity to it to make its representations, if any, unless for special reasons to be recorded in writing, the Tribunal thinks fit to dispense with such notice:

Provided also that the Tribunal shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged for an amount equal to or in excess of those assets, or that the company has no assets.

(2) Where a petition is presented on the ground that it is just and equitable that the company should be wound up, the Tribunal may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing the other remedy."

(emphasis supplied)

Thus, it is implicit through Section 273(1)(c) of the Companies Act, 2013 that the Provisional Liquidator of the company may be appointed by the Tribunal till the

making of a winding up order. The order dated 28.02.2013 relied upon on behalf of the petitioner in Co.Pet. 36/2013 is not an order for winding up of the company M/s Catmoss Retail Private Limited.

8. Section 279 of the Companies Act, 2013 provides to the effect:-

"279. Stay of suits, etc., on winding-up order.—(1) When a winding-up order has been passed or a provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding-up order, shall be proceeded with, by or against the company, except with the leave of the Tribunal and subject to such terms as the Tribunal may impose:

Provided that any application to the Tribunal seeking leave under this section shall be disposed of by the Tribunal within sixty days.

(2) Nothing in sub-section (1) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court."

and thus, in terms of Section 279(1) of the Companies Act, 2013, a suit or other legal proceedings can be commenced, or if pending on the date of the winding up order may be proceeded with by or against the company with the leave of the Tribunal and subject to such terms as the Tribunal may impose.

9. The respondent in the instant case has vehemently opposed the submissions made by the petitioner and has inter alia submitted to the effect that the petitioner has deliberately not mentioned in the petition the order dated 10.07.2017 of this Court in Co.Pet. 36/2013, whereby it has been ordered to the effect:-

"CA No.51/2017

This application is moved by the applicant for seeking permission of this Court to continue with the Complaint Case No.2905/1/15, 2906/1/15, 2908/1/15 and 2911/1/15 as mentioned in para 5 of the application under Section 138 read with Section 142 of the Negotiable Instruments Act against the Respondent and its directors pending before the learned Metropolitan Magistrate. The Official Liquidator has not filed any reply to this application. The Provisional Liquidator in the present case was appointed on 28.02.2013 and the complaint was filed after the appointment of the Provisional Liquidator. Mr. Mayank Goel, learned counsel for the OL submits that without considering any aspect of the matter either in fact or in law, he has no objection in case the proceedings are continued before the learned MM subject to the condition that the OL who has taken over the assets and control of the company pursuant to the orders passed by this Court on 28.02.2013 be exempted from appearance and further no punitive order against the company or the OL be executed without the prior permission of this Court. Subject to the above, the applicant is permitted to proceed with the complaints bearing No.2905/1/15, 2906/1/15, 2908/1/15 and 2911/1/15.

The application stands disposed of.

CA No.52/2017

This application is moved by the applicant for seeking permission of this Court to continue with the Complaint Case No.2913/1/15, 2914/1/15 and 2912/1/15 as mentioned in para 3 of the application under Section 138 read with Section 142 of the Negotiable Instruments Act against the Respondent and its directors pending before the learned Metropolitan Magistrate. The Official Liquidator has not filed any reply to this application. The Provisional Liquidator in the present case was appointed on 28.02.2013 and the complaint was filed after the appointment of the Provisional Liquidator. Mr. Mayank Goel, learned counsel for the OL submits that without considering any aspect of the matter either in fact or in law, he has no objection in case the proceedings are continued before the learned MM subject to the condition that the OL who has taken over the assets and control of the company pursuant to the orders passed by this Court on 28.02.2013 be exempted from appearance and further no punitive order against the company or the OL be executed without the prior permission of this Court. Subject to the above, the applicant is permitted to proceed with the complaints bearing No. 2913/1/15, 2914/1/15 and 2912/1/15.

The application stands disposed of.

(emphasis supplied)

CA No.53/2017

This application is moved by the applicant for seeking permission of this Court to continue with the Complaint Case No.2990/1/15 and 261/1/16 as mentioned in para 4 of the application under Section 138 read with Section 142 of the Negotiable Instruments Act against the Respondent and its directors pending before the learned Metropolitan Magistrate. The Official Liquidator has not filed any reply to this application. The Provisional Liquidator in the present case was appointed on 28.02.2013 and the complaint was filed after the appointment of the Provisional Liquidator. Mr. Mayank Goel, learned counsel for the OL submits that without considering any aspect of the matter either in fact or in law, he has no objection in case the proceedings are continued before the learned MM subject to the condition that the OL who has taken over the assets and control of the company pursuant to the orders passed by this Court on 28.02.2013 be exempted from appearance and further no punitive order against the company or the OL be executed without the prior permission of this Court. Subject to the above, the applicant is permitted to proceed with the complaints bearing No. 2990/1/15 and 261/1/16.

The application stands disposed of.”,

thus, submitting to the effect that the respondent had been permitted to proceed against the petitioner with the complaints.

10. On a perusal of the records of Co.Pet. 36/2013, it has been brought forth that the cheque bearing No.206733 dated 30.06.2013 for an amount of

Rs.1,58,400 is the cheque dishonored qua CC No.453/2014 which bears CC No.9171/2019 with previous number CC No.2914/1/15 and the respondent had been permitted to continue with the complaint CC No. 2914/1/15 vide order dated 10.07.2017 CA No.52/2017 in Co.Pet. 36/2013, subject to observations therein.

11. Apart from this, it cannot be overlooked that it has been observed vide para 7(B) of the verdict of this Court in M.L. Gupta & Anr. vs. Ceat Financial Services Ltd. relied upon on behalf of the petitioner to the effect:-

"7.....

A.....

B. If there is a winding up petition pending against a company in which no winding up order is passed, complaint under Section 138 would be maintainable against the company as well as its Directors as mere filing of the winding up petition would not be of any consequence. In such winding up petition even if winding up order is passed on a later point of time, namely, after the filing of the complaint under Section 138 of the Act, such a complaint can still continue."

12. Undoubtedly, in the instant case, the complaint has been instituted under Section 138 of the Negotiable Instruments Act, 1881 on 01.10.2013 and that thus, the said complaint under Section 138 of the Negotiable Instruments Act, 1881 has been filed after the date 28.02.2013 when the Provisional Liquidator had been appointed in Co.Pet. 36/2013 qua M/s Catmoss Retail Private Limited. As observed herein above, however, it is essential to observe also that vide order dated 12.03.2013 in Co.Pet. 36/2013 in CA No.407 of 2013 filed seeking recalling of order dated 28.02.2013, the directions issued by order dated 28.02.2013 were kept in abeyance till the next date i.e., 06.05.2013 and vide order dated 06.05.2013 in CA No.407 of 2013, the order dated 28.02.2013 was recalled. Vide order dated 08.07.2013, the Official Liquidator was directed to not proceed further in the matter till the next date of hearing i.e., 02.08.2013. Vide order dated 02.08.2013, however, it was observed that in Co.Pet. 36/2013, the Official Liquidator had been appointed and was at liberty to proceed in accordance with law and the petitioner was directed to comply with the order of the Court dated 28.02.2013 regarding the publication of the citation and the citation was directed to be published.

13. The records of Co.Pet. 36/2013 indicate that vide order dated 27.03.2014 in Co.Pet. 36/2013, it was ordered to the effect:-

"CA No.1731/2013

For the reasons stated in the application, the delay is condoned.

The application stands disposed of.

CO.PET. 36/2013

By an order dated 28.02.2013, the advertisement of this petition was directed to be published in 'The Hindustan Times' (English) and 'Dainik Jagran' (Hindi). The said citations were published as directed on 29.10.2013. There is no opposition to the winding up of the company except from Mr Ashwani Chawla, the Managing Director of the respondent company. The learned counsel appearing for Mr Chawla has referred to an application filed on behalf of the respondent company being CA No.1730/2013 and has submitted that the petitioner company ought not to be wound up. The principal ground taken in the said application is that the amounts owed by the respondent were not due and payable to the petitioner. It is further contended that the petitioner could take recourse to proceedings for recovery of the amount claimed but could not maintain proceedings for winding up of the respondent company. It is also contended that the proceedings are malicious.

The documents produced by the petitioner along with this petition stand uncontroverted. It is an admitted case that the respondent had availed the financial facilities from the petitioner. The documents on record also indicate that the cheques issued by the respondent had been dishonoured. The learned counsel for the petitioner has pointed out the statement of accounts at pages 112 to 127 of the petition. The said statements clearly indicate that the respondent had defaulted in making the payments to the petitioner. In this view, there is no merit in the contentions urged by the learned counsel for Mr Ashwini Chawla. Accordingly, the respondent company is directed to be wound up. The petitioner shall publish the notice of winding up in 'The Hindustan Times' (English) and 'Dainik Jagran' (Hindi) within a period of four weeks from today.

The Official Liquidator shall file a report at least one week prior to the next date of hearing.

Renotify on 26.05.2014.

CA No.1730/2013

None appears for the applicant, however, I have perused the contents of the application.

This is as application filed on behalf of the respondent company for dismissal of the winding up petition.

It is contended that the petition is malicious and that the petitioner has alternative remedy for recovery of its dues. The applicant has also averred, in the application, that the present petition has only been filed to pressurise the respondent for payment of the dues claimed by the petitioner.

In the present case the inability of the respondent to pay the dues is writ large. The application is wholly devoid of any merit and is accordingly dismissed.

CA No.1722/2013

None appears for the applicant.

This is an application filed on behalf of the respondent company seeking stay of the order dated 02.08.2013 till the disposal of the application filed for dismissal of the company petition. The said application being CA No.1730/2013 already stands dismissed. Accordingly, the prayer seeking stay of the order dated 02.08.2013 no longer survives.

The applicant has also prayed for recall of the order dated 02.08.2013 and has sought permission to file a reply to the petition. It is observed that the right of the respondent to file a reply had been closed after sufficient opportunity had been granted to the respondent. In any event, the respondent had filed an application seeking dismissal of the petition urging all grounds to contest the petition on merits. The same have also been considered. In this view, the prayer for recall of the order dated 02.08.2013 cannot be accepted.

Accordingly, the application is dismissed.

CA No.89/2012

This is an application for appointment of an Official Liquidator as a Provisional Liquidator. In view of the order finally directing winding up of the respondent company, the present application does not survive and stands disposed of.

Report No.176/2014

The report is taken on record. The statement recorded of Mr Ashwini Chawla under Rule 130 of the Companies Court Rules, 1959 indicates that the assets of the company had been dissipated during the period March to June, 2013. The learned counsel for the Official Liquidator has pointed out that Mr Ashwini Chawla was in charge of the affairs of the company during the said period and was responsible for the affairs of the company. The learned counsel for the Official Liquidator has also pointed out that this is the period during which Mr Ashwini Chawla had persuaded the Court to keep the order appointing a Provisional Liquidator in abeyance. The Official Liquidator is directed to examine whether Mr Chawla is guilty of malfeasance and breach of trust, if so the Official Liquidator would move an appropriate application for seeking compensation.

Dasti.”,

thus, it was vide order dated 27.03.2014 that M/s Catmoss Retail Private Limited was directed to be wound up.

14. The complaint in CC No.453/2014 relate to the cheque bearing No.206733 dated 30.06.2013 for an amount of Rs.1,58,400 was instituted on 01.10.2013 prior to the winding up order dated 27.03.2014 and vide order dated 10.07.2017 in CA No.52/2017 in Co.Pet. 36/2013, permission have been granted to the applicant thereof to continue with the complaint CC No. 2914/1/15.

15. Thus, taking into account the observations in para 7(B) of the verdict in M.L

Gupta & Anr. (Supra) reproduced hereinabove, and taking into account the order dated 10.07.2017 in CA No.52/2017 in Co.Pet. 36/2013, the petition is dismissed.

16. Nothing stated hereinabove will however amount to any expression on the merits or demerits of the adjudication that shall take place in the CC No.453/2014 which bears CC No.9171/2019 with previous number CC No.2914/1/15.