(2008) 08 MAD CK 0051

In the Madras High Court

Case No : O.S.A. No''s. 479 and 480 of 2002 and 56 of 2004, C.M.P. No''s. 19149 and 19151 of 2002, 3776 of 2004 and 11149 of 2005 and C.A. No''s. 888 of 1995, 2218, 2221 and 2225 of 2000 and 1321 of 2001 in C.P. No. 88 of 1989

B. Rajagopal and Another and P.C. Varghese — APPELLANT

Vs

Official Liquidator, High Court and Others (Dhanalakshmi Funds (India) Ltd. (in liquidation)) — RESPONDENT

Date of Decision : 06-08-2008

Acts Referred:

Companies (Court) Rules, 1959 — Rule 130
Companies Act, 1956 — Section 542, 543, 543(2), 545
Reserve Bank of India Act, 1934 — Section 45B

Citation : (2008) 145 CompCas 305 : (2009) 1 CompLJ 95 : (2008) 4 LW 259 : (2008) 7 MLJ 515

Hon'ble Judges : M. Venugopal, J;M. Chockalingam, J

Bench : Division Bench

Advocate : Nalini Chidambaram, for Gladys Daniel, in O.S.A. Nos. 479 and 480 of 2002 and P.N. George Graham, for Devadason and Sagar in O.S.A. No. 56 of 2004, for the Appellant; P.N. George Graham, for Devadason and Sagar for Respondent No. 8 in O.S.A. No. 479 of 2002 and Arvind P. Datar, for the Respondent

Judgement

M. Chockalingam, J.—These appeals have arisen from the common order of the learned single judge of this court made in C.A. No. 888 of

1995 and C.A. No. 1321 of 2001 in C.P. No. 88 of 1989 Official Liquidator Vs. T. Sudarsan and Others, . While the former filed by the official

liquidator was allowed granting all the reliefs, the latter at the instance of respondents Nos. 8 and 10 in C.A. No. 888 of 1995 was dismissed.

2. The parties hereinafter will be referred to as official liquidator and the respondents as shown in C.A. No. 888 of 1995.

3. The brief facts of the case in Company Application No. 888 of 1995 are thus:

(a) M/s. Dhanalakshmi Funds (India) Ltd. was ordered to be wound up by an order of this court, dated November 16, 1990, in C.P. No. 88 of

1989 and the official liquidator became the liquidator of the said company. The company in liquidation was incorporated on August 9, 1985, and it

was declared as ""Nidhi"" on August 22, 1986, under the Companies Act, 1956. The main object of the company is to encourage and afford all

facilities on mutual basis for cultivating thrifts, saving and to render all types of financial assistance to its members only by receiving long and short-

term deposits from the members and in particular recurring time deposits, term deposits, fixed deposits and other deposits and to grant loans only

to members on securities. As per the memorandum of association of the company in liquidation, the authorised share capital of the company is Rs.

2,00,000 divided into 2,00,000 equity shares of Re. 1 each. As per the provisional balance-sheet of the company in liquidation as on March 31,

1989, the share capital of the company was Rs. 1,96,090. There were 48 branches of the company. The official liquidator has taken into his

custody the books and records of the company of 41 branches and the Registered Office of the company. The official liquidator has taken into his

custody and control the available assets and affairs of the company in respect of the registered office and 26 branches of the company. The fund

position of the company as on November 9, 1995, was Rs. 75,41,123.85. The former directors of the company have not filed the statement of

affairs as required under the Act and the official liquidator has filed C.A. No. 428 of 1991 reporting the default of non submission of the statement

of affairs and the said application is pending.

(b) It is stated by the official liquidator that the business of the company in liquidation has been carried on with intent to defraud the creditors of the

company. By an order, dated November 26, 1993, in C.A. No. 2224 of 1993, this court has appointed M/s. M.T. Arasu and Company,

chartered accountants, to carry out the investigation of the affairs and accounts of the company in liquidation. The auditors have submitted their

reports to the official liquidator and based upon those reports as well as the available books and records of the company, the official liquidator

submitted the report for appropriate orders under Sections 542 and 543 of the

Companies Act, 1956. There were two partnership firms, (1)

Asian Integrated Finance and Industrial Corporation and (2) Dhanalakshmi Consolidates Finance and Industrial Investments. According to the

statement of the former Director Sri P.C. Varghese recorded by the official liquidator on January 4, 1994 and January 6, 1994, under Rule 130 of

the Companies (Court) Rules, 1959, Sri B. Rajagopal is the Group President of the Dhanalakshmi Group of Companies and Sri K.V. Sasidhar is

the Group Chairman of the Dhanalakshmi group of companies, and they were the promoters of the company in liquidation. The partners of the two

firms did not repay the depositors of the two firms. From a perusal of the books and records of the company in liquidation as well as the statement

of Sri P.C. Varghese recorded by the official liquidator on January 4, 1994 and January 6, 1994, under Rule 130 of the Companies (Court) Rules,

1959, it is seen that no formal agreement appears to have been executed between respondents Nos. 8 to 10 as partners of the two firms herein

and the company in liquidation for taking over either the assets and effects or the liability or the business of those two firms by the company in

liquidation.

(c) The original balance-sheets for the years ended December 31, 1986 and December 31, 1987, are not available among the records taken

possession by the official liquidator. Even though claims have not been called for, the official liquidator has received 4421 claims filed voluntarily

claiming various amounts aggregating to Rs. 7,04,03,266.22. As per the statement of the administrators in their report in October, 1990 filed

before the court in C.P. No. 88 of 1989, a total sum of Rs. 33,57,350.16 was due and payable to the company in liquidation by the sister

concerns of the Dhanalakshmi group. The partners of the two firms, namely, respondents Nos. 8 to 10 are the pivotal persons, who have

conducted the business in the name of the company in liquidation and they are equally liable to the deposits/creditors of the company in liquidation

even though not inducted as directors of the company in liquidation. They have siphoned off funds of the company in liquidation to their sister

concerns. In paragraph 41 of the report of the official liquidator, various charges levelled against respondents Nos. 1 to 10 have been enumerated.

All of them are guilty of misfeasance and breach of trust in relation to the affairs of the company in liquidation.

4. Respondents Nos. 8 and 10 have filed counter affidavit stating that the official liquidator has filed the application after the expiry of the period of

limitation prescribed u/s 543(2) of the Companies Act, 1956; that neither B. Rajagopal nor B. Muralidhar had taken part in the promotion or

formation of the company; that the charges of misfeasance and breach of trust has been levelled against these respondents based on some

materials, but those materials have not been forwarded to them in spite of specific request made by them to the official liquidator; that the liability of

the company could be ascertained only after calling for claims and only after ascertaining the truthfulness of these claims; that the lapse on the part

of the official liquidator to recover the amounts due to the company has resulted in loss to the company and the said amount has to be computed

and to that extent these respondents'' liability has to be reduced and that the report of the official liquidator is bereft of any material particulars and

is based on surmises and conjectures and the charges levelled against Mr. B. Rajagopal and Mr. B. Muralidhar are vague and baseless and

therefore, the application was to be dismissed.

5. The eighth and tenth respondents in C.A. No. 888 of 1995 have filed C.A. No. 1321 of 2001, seeking an order to discharge them from the

proceedings under Sections 542 and 543 of the Companies Act initiated by the official liquidator in C.A. No. 888 of 1995 in C.P. No. 88 of 1989

with the following allegations:

(a) Both of them were carrying on business of accepting deposits from members of the public at interest and advancing the money on interest. The

firm was regularly paying interest to the depositors and the principal amount on maturity. Section 45B of the RBI Act imposed restrictions on

entities other than incorporated companies from accepting deposits from public. In the circumstances, the first applicant, namely, B. Rajagopal and

the second applicant K.V. Sasidhar, decided to close down the finance business run by the firm. The company promoted by respondents Nos. 1

to 7 in C.P. No. 88 of 1989 offered to take over the assets and liabilities of the firm and accordingly, the assets and liabilities of the firm were

taken over by the company as reported by the official liquidator. The company, namely Dhanalakshmi Funds (India) Ltd., was incorporated with the object of accepting deposits and lending money on interest to its members as ""Nidhi"" company. The applicants in this application were not

inducted as directors of the company and they were not involved in the day-to-day management of the company. For a while, the first applicant

was helping Mr. K.V. Sasidhar to evolve broad policy matters as requested by him. In Priya Rubber Estates and Plantations P. Ltd., the first

applicant was a nonexecutive director and Mr. K.V. Sasidhar was the chairman and managing director, who was controlling the affairs of the

company. All investment decisions were made by K.V. Sasidhar only. But misunderstandings arose between the applicants herein and K.V.

Sasidhar and the applicants herein resigned from the directorship in consequence of the misunderstanding during the end of 1986.

(b) In these circumstances, one of the depositors filed C.P. No. 88 of 1989 for winding up the company under the provisions of the Companies

Act and by order dated, November 16,1990, the company was ordered to be wound up and the official liquidator was appointed as liquidator of

the company. Though the official liquidator has filed the above application in 1995, the same was not pursued for many years after it was filed. If

the official liquidator''s office had pursued the applications diligently in the context of the affidavit filed by K.V. Sasidhar owning responsibility for

the conduct of the business of the company and offering to settle the dues by sale of assets worth Rs. 14 crores, the official liquidator would have

been able to realise substantial amounts and paid off the depositors. The signatories to the memorandum and articles of association of the company

at the time of formation did not include the signature of the applicants. To fall within the mischief of Section 542, the company ought to have carried

on business and incurred debt at a time when there is, to the knowledge of the directors, no reasonable prospects of creditors ever receiving

payments. Taking over the business of the firms by incorporated companies is an admitted method of carrying on business. No irregularity or

illegalities can be attributed to it. The taking over of the business of the two firms were in pursuance of the board resolution, dated August 31,

1985, confirmed by a general body resolution in extraordinary general meeting held on September 1, 1985. Mr. P.C. Varghese was in charge of

the affairs of the company. The applicants had no financial interest in the company, neither they were holding any shares in the company. For some time, the first applicant acted in the capacity of a non-executive director in some of the companies and due to difference of opinion, he had

resigned and relinquished the said position. It was Mr. K.V. Sasidhar, who had control over the assets of various companies and he was the

pivotal person behind the group of companies, where neither of the applicants had beneficial interests. The said K.V. Sasidhar passed away on

February 13, 1999 and it is totally unfair to take action against the applicants after having failed to take action in terms of the offer made by K.V.

Sasidhar during his life time. The present proceedings under Sections 542 and 543 of the Act is vexatious and is the result of a conspiracy to cover

up the misdeeds of the official liquidator and is an abuse of process of the court. The applicants cannot be held liable either jointly or severally for

the said loss and the present proceedings u/s 542 of the Act is misconceived and is a result of an afterthought.

6. Counter affidavit has been filed by the official liquidator in C.A. No. 1321 of 2001 stating that the records of the company clearly indicate that

the applicant in C.A. No. 1321 of 2001 was involved in the day-to-day affairs of the company and he had signed the share certificates. The first

applicant states that for a while, the first applicant was helping Mr. K.V. Sasidhar to evolve broad policy matters in the affairs of the company

though there were directors in the company. The broad policy matters can be taken only at the top management level and therefore, it is very clear

that they have occupied top management positions in the company. The applicants cannot say that only K.V. Sasidhar has taken all business

decisions. The applicants herein have purposely avoided signing documents and as per their instructions only, the employees-signatories had signed

the memorandum and articles of association of the company in liquidation. Though the first applicant was not a director, he had given instructions to

the board of directors from time to time and the board of directors have also acted as per his instructions. The applicants also admit the fact that

they had little financial interest in the Dhanalakshmi group of companies. From the above facts admitted by the applicants, it is evident that their

involvement in the company in liquidation is proved beyond doubt and therefore, the present application is not maintainable.

7. The points for determination in these appeals are:

(i) Whether the official liquidator is entitled for the reliefs asked for?

(ii) Whether the appellants are entitled for discharge?

8. Learned senior Counsel for the appellants in O.S.A. Nos. 479 and 480 of 2002 would submit that the application filed by the official liquidator

is based on the auditor''s report; that the appellants have filed an application denying the allegations; that they were not given reasonable

opportunity in connection with the allegation of misfeasance and malfeasance; that the principles of natural justice has not been followed; that only

xerox copies of the documents have been produced by the official liquidator; that the appellants are not able to question the finding of financial

irregularities committed by the company in the course of the business; that the official liquidator has failed in his obligation to examine K.V.

Sasidhar under Rule 130; that instead, the official liquidator examined only P.C. Varghese; that it is pertinent to point out that the report of the

official liquidator should have been filed only after the receipt of the statement of affairs; that filing of the report without receiving the statement of

affairs was a grave procedural irregularity; that no credibility could be attached to the auditor''s report relied on by the liquidator; that the liquidator

failed to prove the allegation as per the procedure established by law; that the statement of Varghese cannot be taken as evidence; that any

evidence sought to be relied upon by the official liquidator should be proved in a duly constituted trial before the company court with an

opportunity to the appellants to cross-examine the witnesses and controvert the opinion of the auditor regarding the involvement of the appellants in

the fraudulent conduct of the business of the company and also to contradict the same by adducing evidence on their part to disprove the

allegations and accusations made; that in the instant case, the liquidator failed to discharge his burden; that Sections 542, 543 and 545 of the

Companies Act have a distinct legal connotation and the court can exercise power to order prosecution and make a declaration and indict a

person under the said provisions only after it follows the procedure established by law and not deal with the issues in a summary manner; that it is

pertinent to point out that the copies of the subsequent documentary evidence were not given to the appellants; that the documents produced at the

instance of Varghese in no way prove that the appellants were involved in the fraudulent conduct of the business of the company in liquidation; that

Sasidhar offered to bring in Rs. 1 crore immediately; that despite that, the liquidator failed in his obligation to take timely step to preserve the assets

and protect the interest of the depositors; that the learned single judge failed to appreciate that Sasidhar filed an affidavit owning responsibility for

the conduct of the business of the company; that under the circumstances, non-production of the records of the company cannot be attributed to

the appellants, and for these reasons, the order of the learned single judge has got to be set aside by allowing the appeals, and the appellants be

discharged from the claim.

9. Learned Counsel for the appellant in O.S.A. No. 56 of 2004 would contend that the learned single judge should have discharged the appellant

as the learned single judge has come to the conclusion that respondents Nos. 8 to 10 alone misappropriated the funds of the company under

liquidation; that the company under liquidation was incorporated on the direction of respondents Nos. 8 to 10; that they are the founders of the

company; that under the circumstances, the appellant should have been discharged from the claim of the liquidator; that it is pertinent to point out

that respondents Nos. 8 to 10 have given unconditional undertaking about their involvement in the company under liquidation and the

responsibilities undertaken by them through the letter issued to the appellant dated October 11, 1988; that the appellant is not liable to contribute

towards damages for the company; that he is not guilty of misfeasance and breach of trust when he acted as per the directions of respondents Nos.

8 to 10, and hence, the order of the learned single judge has got to be set aside, and the appellant be discharged from the claim.

10. The court heard learned senior Counsel for the official liquidator on the above contentions. He would submit that the learned single judge was

perfectly correct in granting the relief in the application made by the liquidator; that the materials produced by the liquidator have been considered

by the learned single judge; that as per the provisions of law, the application has been filed by the liquidator; that there is nothing to disturb the

finding recorded by the learned single judge and hence, all the appeals have got to be dismissed.

11. As could be seen above, the official liquidator sought the reliefs specifically

alleging that the company had lost Rs. 18,32,39,002 which

respondents Nos. 1 to 10 were jointly and severally liable; that they were liable to make good the loss; that they are guilty of fraud played,

misfeasance and breach of trust in relation to the affairs of the company in liquidation; and that their acts made them liable under the heads (1)

disbursement of housing loans; (2) creating false pronotes; (3) jewel loans; (4) teachers'' loan; (5) utility loan; (6) diversion of funds against the

vehicle maintenance; and (7) transfer of funds to sister concerns. In order to substantiate the claim, the official liquidator relied on not only the

report of the auditor appointed by this court, but also the statement given by the seventh respondent Mr. P.C. Varghese and also number of letters

written by the contesting respondents and also all circumstances attendant.

12. The respondents contested the application in C.A. No. 888 of 1995, inter alia, stating that they were carrying on business in which they were

partners, by accepting deposits from the members of the public and also advancing moneys on interest; that on maturity, the depositors were paid

interest regularly; that in view of the restrictions on payment of interest, respondents Nos. 8 to 10 decided to close down their financial business

run by the firms; that at that time, a company was promoted by respondents Nos. 1 to 7 who offered to take the assets and liabilities of the firms;

that accordingly, the assets and liabilities of the two firms were taken over by the company in liquidation as reported by the official liquidator; that

the said Dhanalakshmi Funds (India) Ltd., was incorporated with the object of accepting the deposits and lending money on interest; that they

were neither inducted as directors of the company nor involved in the day-today management of the company; that the eighth respondent was

some time helping Mr. Sasidhar to evolve broad policy matters; that all the investment decisions were taken by the ninth respondent; that the board

of management in two companies were vested with the relations and the confidants of the ninth respondent Sasidhar; that in view of the

misunderstanding between respondents Nos. 8 and 10 and 9 in 1986, they resigned from their respective posts, and thus, the company has come

exclusively under the management of the ninth respondent Sasidhar; that while the matter stood thus, the company petition was filed in C.P. No. 88

of 1989; that winding up was ordered; that the administration was taken up by the official liquidator; that the interim administrators were appointed;

that subsequently, they were discharged; and that the official liquidator has taken over the entire company''s assets. It is further contended that at

the time of the formation of the company in liquidation, these respondents never signed the memorandum of articles of association, nor they were

on the board of directors of the company; that under such circumstances, at no stretch of imagination, no liability could be attributed to them; that it

was a company constituted for a lawful purpose and cannot be stated to be fraudulent; that the application filed under Sections 542 and 543 of the

Companies Act has got to be dismissed as non-maintainable since the facts and circumstances do not warrant an application under Sections 542

and 543 of the Companies Act; that as far as Section 542 was concerned, it was a quasi criminal in nature; that in order to decide the same,

evidence was to be adduced; that only on appreciation of evidence, it could be decided; that as far as Section 543 was concerned, they were

neither directors nor promoters of the company; that under the circumstances, they could not be found liable, and hence, the application filed by

the official liquidator must be dismissed and the application filed by respondents Nos. 8 and 10 be ordered.

13. Originally, there were two partnership firms namely Asian Integrated Finance and Industrial Corporation and Dhanalakshmi Consolidates

Finance and Industrial Investments in which respondents Nos. 9 and 10 were partners in the former and respondents Nos. 8 and 9 were partners

in the latter. The business of the firms was to receive deposits from the public and also paying interest to the depositors. At that time, since they

could not make payment of interest on the higher rate, they decided to close down the business in view of the prohibition u/s 45B of the Reserve

Bank of India Act. At that time, the company in liquidation was registered with the Registrar of Companies on August 9, 1985. It was also

declared as ""Nidhi"" on August 22, 1986. It was adumbrated that the main object of the company was to encourage and afford all facilities on

mutual basis for cultivating thrifts, saving and to render all types of financial assistance to its members only by receiving loan and term deposits from

the members. At this juncture, from the materials available, it would be quite clear that these two firms were dissolved. According to the respondents, a resolution was passed in that regard, and pursuant to the resolution passed, the assets and liabilities were taken over by the

company in liquidation and the deposits receipts were renewed by the company in which respondents Nos. 8 to 10 were neither promoters nor

directors nor involved in the management, and hence, they were not liable.

14. The following materials and circumstances are noticed by the court to find that the respondents have misapplied the funds and property of the

company and thus, they are guilty of fraud, misfeasance and breach of trust which, in the opinion of the court, are sufficient to reject the contentions

of the respondents.

15. According to the contesting respondents, the board of directors of the company in liquidation passed a resolution on August 31,1985, for

taking over the assets and liabilities of the two firms. The firms were dissolved on December 7, 1985; but, either in the directors'' report or in the

annual accounts audited for the years 1986 and 1987, there was no reference at all. Nearly 4421 claims aggregating to Rs. 7.04 crores and odd

on the fixed deposit receipts issued by the company, were made to the official liquidator. A perusal of the fixed deposit receipts for example as

could be found in pages 1 to 3 of the typed set of documents filed by the official liquidator, would indicate that the eighth respondent has signed as

director. Repeated contentions of the eighth respondent was that he was neither a director nor a promoter of the company. A letter was addressed

to all the depositors as could be found in page 12 of that typed set which was issued by the eighth respondent stating ""B. Rajagopal, Group

President, Dhanalakshmi Group Family Letter"". A reading of the letter would clearly reveal that Dhanalakshmi group of companies have taken over

Gangothri Chemicals and M. G. Brothers Lorry Service; that they have also been awarded dealership by Ashok Leyland; and that they have

entered into the field of plantation, transportation, finance, marketing, electronics, metal engineering and consultancy. Thus, they called for the

continued support of the members. The letter was signed by the eighth respondent as a Group President which would clearly indicate that the

eighth respondent though not named as director or the promoter of the company, has taken active participation in the management and also in the

activities of the company calling himself as Group President.

16. It is not in controversy that the seventh respondent Mr. P.C. Varghese was appointed as Junior Accounts Officer in the year 1983 in Dhana-

lakshmi Consolidates Finance and Industrial Investments. Subsequently, he was appointed as the executive of the company in liquidation. Even

before the company petition was filed, the seventh respondent who was not satisfied with the conduct of respondents Nos. 8 to 10 and also the

diversion of funds from the company, has sent a letter dated October 10, 1988, to respondents Nos. 8 to 10 and also to one Mr. Vijyakumar, the

Chief Administrative Manager. The letter itself is in the nature of a warning. It is stated therein that they have been acting with dishonest intention

from collecting deposits from various persons through various branches and the funds collected were taken by respondents Nos. 8 to 10. He has

also cautioned that they were responsible for the acts done by them. Though he happened to be the signatory under the document, he has stated

that they were to settle the accounts of various depositors and all the signatures were put by him only on their obligation. This letter brought forth a

reply from the ninth respondent Mr. Sasidhar on October 11, 1988. Paragraph 2 of the letter reads as follows:

In view of your apprehension of certain untoward things taking place in the event of failure of the company, we hereby with our full knowledge and

clear mind own our responsibilities, liabilities, claims, etc., in respect of any consequences, actions, either civil, criminal or statutory that may arise

on account of your act of commissions, omissions, non-fulfilment of certain legal formalities, etc., which have been done solely on account of our

advice and on our behalf. We further own all moral and financial responsibilities and liabilities on account of your above referred actions done by

you on our behalf.

17. The very reading of the above letter would clearly indicate that it is a strong piece of evidence in the opinion of the court that what were all

found in the letter of the seventh respondent dated October 10, 1988, were true and correct. A comment that it was only a xerox copy of the

letter; but, the original was not filed was made. At that juncture, learned Counsel appearing for the seventh respondent who is the appellant in

O.S.A. No. 56 of 2004, placed the original before the court, which was perused and handed over to him. It is pertinent to point out that Sasidhar was calling himself as the chairman of the company and respondents Nos. 8 and 10 though they were not shown either as directors or promoters

of the company, were actually carrying on the management. From the above letter, it would be quite clear that respondents Nos. 8 to 10 have

owned the responsibility, and they had admitted that the acts were done with the clear knowledge, and they also knew the consequences of the

same including the actions both civil and criminal.

18. In the course of the statement, P.C. Varghese has pointed out certain pencil notings in the minutes book which were made by the eighth

respondent. Nowhere in the minutes of the meeting signed by the directors, either the list of the members attended the meeting or the signatures are

found. According to the seventh respondent, eighth respondent gave instructions to write up the minutes books of the meeting at the residence of

another director. It is clear from the statement of the seventh respondent that the board meeting was neither conducted, nor the directors attended.

It is true that the company in liquidation had seven directors who are shown as respondents Nos. 1 to 7. Though respondents Nos. 8 to 10 have

not shown themselves as directors of the company in liquidation, the eighth respondent has termed himself as Group President, and the ninth

respondent was termed as the chairman of the company in liquidation. When the Department of Company Affairs took up inspection of books and

accounts of the three sister companies to examine the flow of funds from the company in liquidation, the books and records were not produced.

The non-production of accounts would be indicative of the fact that the funds of the company in liquidation were diverted to its associate concerns

which were completely under the control of respondents Nos. 8 to 10. The fact that the diversion of funds from the company in liquidation to the

different concerns which were under the control of respondents Nos. 8 to 10, was made clear by Mr. Varghese in his letter referred to above. This

fact which was mentioned with the caution by Mr. Varghese, was not at all denied in the reply sent by the ninth respondent to the seventh

respondent Varghese.

19. Apart from the above, materials are available to indicate that after the firms were taken over, the deposit receipts were sent by the eighth

respondent in respect of the first firm and by the ninth respondent in respect of the second firm. But, it is pertinent to note that the certificates of the

company in liquidation were issued by renewing the deposits of the firm. At this juncture, it remains to be stated that there is no evidence available

at all indicating when and what assets were transferred from the firms to the company in liquidation, though it was contended all along that the

assets and liabilities of the firms were taken over by the company in liquidation. From the statements given by Varghese, it would be quite clear that

respondents Nos. 8 and 9 were the actual promoters of the company; that the directors were actually the staff originally employed in the firms; and

that the directors were acting on the instructions of respondents Nos. 8 and 9 to manage the day-to-day affairs of the company and carrying on the

business of the company on their instructions. Thus, it would be quite clear that respondents Nos. 8 and 9 were actually having the control of the

day-to-day participation of the company. It is not in controversy that the firms were actually issuing jewel loans; but, the official liquidator was not

given custody of the jewels.

20. Despite service of notice and reminders, except the seventh respondent all other respondents including respondents Nos. 8 and 9 neither

appeared nor had given the statement of affairs. They have not appeared before the court for a period of nearly 6 years which situation compelled

for issuance of bailable warrant, and only thereafter, they appeared. It would be quite clear from the available materials that it was a fraudulent

scheme designed by respondents Nos. 8 to 10 who were originally partners of the firm to make it appear as if a new company namely the

company in liquidation, was promoted by the seven directors shown as respondents Nos. 1 to 7, and as if a resolution was passed by the

company to take over the assets and liabilities of the two firms. Though respondents Nos. 8 to 10 have not shown themselves as the promoters or

directors of the company, from the materials available, it would be quite clear that they have actually promoted the company in question making 7

of the staff including the seventh respondent who joined in one of the firms as Junior Accounts Officer, as directors of the company. That apart, the

issuance of receipts by the eighth respondent and also the communication addressed by the seventh respondent Varghese to the ninth respondent,

were all earlier in point of time which would clearly indicate the acts of fraud, misfeasance, breach of trust and the misapplication of funds of the

company and also the diversion of the funds to the different sister concerns.

21. The contention put forth by the appellants'' side that the statement of the seventh respondent was self serving and it was given by him with an

intention to escape from the liabilities; that apart from that, an opportunity should have been given to cross-examine him, but not permitted to do

so, and hence, no credence could be attached to the statement or the examination of the seventh respondent cannot be countenanced for the

simple reason that the official liquidator has filed a detailed report speaking of the fraud, misfeasance, etc., and also placed the materials relied on

by him. Thus, it would be quite clear that it was a clear discharge of the burden by adducing sufficient proof; but, on the contrary, respondents

Nos. 8 to 10 have not chosen to challenge the report of the official liquidator by filing a counter. Under the circumstances, the contention put forth

on the side of the official liquidator that the question of cross-examination would not arise has got to be accepted.

22. As far as the contention that the application of the official liquidator invoking Sections 542 and 543 of the Companies Act is not maintainable

cannot stand the scrutiny of law. Section 542 reads:

542. Liability for fraudulent conduct of business.- (1) If in the course of the winding up of a company, it appears that any business of the company

has been carried on, with intent to defraud creditors of the company or any other persons, or for any fraudulent purpose, the Tribunal, on the

application of the official liquidator, or the liquidator or any creditor or contributory of the company, may, if it thinks it proper so to do, declare that

any persons who wee knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible, without any

limitation of liability, for all or any of the debts or other liabilities of the company as the Tribunal may direct.

23. Section 543 reads:

543. Power of Tribunal to assess damages against delinquent directors, etc.- (1) If in the course of winding up a company, it appears that any

person who has taken part in the promotion or formation of the company, or any past or present director, manager, liquidator or officer of the

company-

(a) has misapplied, or retained, or become liable or accountable for, any money or property of the company; or

(b) has been guilty of any misfeasance or breach of trust in relation to the company;

the Tribunal may, on the application of the official liquidator, or the liquidator, or of any creditor or contributory, made within the time specified in

that behalf in Sub-section (2), examine into the conduct of the person, director, manager, liquidator or officer aforesaid, and compel him to repay

or restore the money or property or any part thereof respectively, with interest at such rate as the court thinks just or to contribute such sum to the

assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Tribunal thinks''

just.

24. A reading of the above provisions would make it clear that Section 542 would cover ""any other person"". In the instant case, the eighth

respondent has acted as the Group President and the ninth respondent has acted as the chairman. Section 543 could be applied to promoters of

the company. It is evident from the report of the auditor appointed by the court and the statement of the seventh respondent that respondents Nos.

8 and 10 were actually the promoters of the company in liquidation. The official liquidator has filed the application under Sections 542 and 543 of

the Companies Act on the strength of the report of the auditor, the statement given by the seventh respondent, and also the other circumstances

attendant. Respondents Nos. 8 to 10 have made a flat denial which was thoroughly falsified in view of the available materials. Admittedly, the

deposits made with the two firms were not repaid. In order to get over their obligation, respondents Nos. 8 to 10 have actually promoted the

company showing respondents Nos. 1 to 7 as directors; but, they have been actually carrying on the business of the company. There is no

evidence at all that the assets and liabilities of the firms were taken over by the newly formed company under liquidation. Respondents Nos. 8 to 9

have neither made available the balance-sheets for the year 1986-87, nor no answer in that regard.

25. It is pertinent to point out that when the criminal cases were filed for non-payment, these respondents have cleverly settled the complainants by

making payment and made the situation quiet. While the assets of the two firms were actually taken over by the company in liquidation, the

renewed deposit receipts were issued by the company in liquidation. Thus, the company under liquidation was made liable when transfer of assets

of the firms was made. The respondents despite the severe charges, have not furnished any information as to the status of the new companies, the

transfer of assets from the firms to the company in liquidation, the sources of funds and the assets and liabilities of the new companies.

26. The contention that was raised by learned senior Counsel for the appellants that at one stage, respondents Nos. 8 and 10 in view of the

misunderstanding, have resigned their respective posts and they have come out, and from the time onwards, Sasidhar was carrying on the affairs of

the company along with the confidants; that from the report of the official liquidator, it would be quite clear that Sasidhar made an affidavit

undertaking all the liabilities; that had in time the official liquidator proceeded against the assets and properties which were with him, the entire

matter would have been solved; but, neither the affidavit was placed before the court, nor there was any action taken against the individual or the

assets; and that the instant application has been brought forth vexatiously against the appellants herein, cannot be countenanced for more reasons

than one. As narrated above, the eighth respondent has been acting as the Group President of the company under liquidation and has issued

deposit vouchers, and the number of letter correspondences would also make it clear that though he has not shown himself as a promoter or a

director, he was actually carrying on the affairs along with others. Thus, they were all jointly and severally responsible, and pointing to the ninth

respondent, he could not come out of the clutches of law or liability.

27. It is true that an affidavit of Mr. Sasidhar is referred to, and it is also pointed out in the report that the affidavit could not be traced and

produced before the court; but, a communication was addressed to Mr. Varghese, the original of which was placed for perusal of the court. On

perusal, the same would make it abundantly clear that respondents Nos. 8 to 10 were liable for the acts committed. Under the circumstances,

merely because of the non-production of the affidavit of Mr. Sasidhar, the ninth respondent, it cannot be stated that respondents Nos. 8 and 10 were out of the liability or they could plead discharge of the liability, and under the circumstances, that contention has got to be rejected.

Accordingly, it is rejected. Learned single judge marshalling the entire materials available has come to the conclusion that the company has lost Rs.

18,32,39,002 on various accounts, and respondents Nos. 1 to 10 were liable to make good the loss and granted the reliefs in the application by

the official liquidator and rejected the application of discharge.

28. As far as the appeal by the seventh respondent in O.S.A. No. 56 of 2004 is concerned, this court is unable to see any merit whatsoever.

Admittedly, he was one of the directors of the company under liquidation. It is true that he made a statement, and he has also filed a

communication between him and the contesting respondents. It is an admitted fact that he was the signatory under the document. Having acted as a

director and also being a party to all the acts of misfeasance, fraud and breach of trust, he cannot now come forward to state that he has got to be

discharged. This court is unable to see any reason or ground to discharge him.

29. In the result, all these Original Side appeals are dismissed confirming the order of the learned single judge and leaving the parties to bear their

costs. Consequently, connected CMPs are also dismissed.

30. As regards C.A. Nos. 2218, 2221 and 2225 of 2000, a direction is issued to the official liquidator to sell the property namely Priya Rubber

Estates and Plantations Ltd., at the earliest, and the sale proceeds that would come to the hands of the official liquidator, has got to be dealt with in

accordance with the provisions of law. Respondents Nos. 8 and 10 in C.A. No. 888 of 1995 Official Liquidator Vs. T. Sudarsan and Others, and

also the legal representatives of the ninth respondent are directed to place the documents pertaining to the property or give the necessary

information to the official liquidator enabling him to make sale of the property.

31. Accordingly, these company applications are disposed of.

