

(1993) 06 MAD CK 0019
In the Madras High Court
Case No : O.S.A. No. 131 of 1985

Babubhai Chandulal Mody

APPELLANT

Vs

Official Liquidator, Atlas Import and Export Co. Pvt. Ltd.

RESPONDENT

Date of Decision : 24-06-1993

Acts Referred:

Companies Act, 1956 — Section 460(4), 468, 543, 543(1), 543(2)

Citation : (1996) 86 CompCas 580 : (1994) 1 LW 445

Hon'ble Judges : Misra, J; D.M. Ali Mohamad, J

Bench : Division Bench

Judgement

S.M. Ali Mohamed, J.—This appeal is against the order of the learned single judge dated February 5, 1985, in Company Application No.

115 of 1983 in Company Petition No. 91 of 1978 in the matter of Atlas Import and Export Co. Pvt. Ltd. (in liquidation). Application No. 1094 of

1980 was filed by the official liquidator under sections 460(4) and 468 of the Companies Act, 1956, to direct the respondent directors of the

company to hand over the books of account and other records mentioned in annexure B to the report and also to hand over other assets, if any, to

which the company is entitled and Application No. 115 of 1983 is u/s 543(1) of the Companies Act to hold that the director of the company is

liable and accountable for the money or the property of the company.

2. The official liquidator filed Application No. 115 of 1983 against Babubhai Chandulal Mody, one of the directors of Atlas Import and Export

Co. Pvt. Ltd. in liquidation, u/s 543(1) of the Companies Act claiming that in respect of five items aggregating to Rs. 30,090.89, the respondent

was liable to account to the company and for a directions from this court to make good the said sum of money.

3. Before the learned single judge, it was contended by the appellant director, that he was not liable to pay the amount and it was contended that

as long as there was no dishonesty attributed to the appellant-director, no proceedings u/s 543(1) of the Act were sustainable. It was also

contended that as the legal representatives of the deceased director, J. M. Berry, were not brought on record as they are also liable, it was not

open to the official liquidator to proceed only against the appellant, Babubhai Chandulal Mody. The learned single judge rejected the contentions

of the appellant-director, Babubhai Chandulal Mody, and granted a decree directing the appellant to pay a sum of Rs. 30,069.89 with interest at

6% per annum from the date of application till the date of payment with costs of Rs. 50.

4. No orders were passed in respect of Company Application No. 1094 of 1980. Aggrieved by the above order of the learned single judge, this

appeal is filed by Babubhai Chandulal Mody, one of the directors of Atlas Import and Export Pvt. Ltd. (in liquidation). It was contended by

learned counsel for the appellant that since J. M. Berry was dead who was also a director during the material time, no proceedings u/s 543(1) of

the Act can be sustained unless the legal representatives of the deceased director were also brought on record. It was also contended that upon

the facts and circumstances of the case, the learned single judge erred in holding that the surviving appellant-director was liable to pay a sum of Rs.

30,090.89 in respect of five items.

5. We are unable to accept the contention of learned counsel for the appellant to the effect that no proceedings u/s 543(1) of the Companies Act

can be sustained unless the legal representatives of the deceased director, J. M. Berry, are brought on record since they are also liable to pay the

alleged amount claimed by the official liquidator. Section 543(1) of the Companies Act, 1956, reads as follows :-

Power of court 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 court 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 court thinks just.

6. A reading of the above section would indicate that in case, the directors have become liable and accountable for any money or property of the company, they can be compelled to restore any money or property of the company, u/s 543(2) of the Companies Act. Further, the liability of the directors, u/s 543 of the Companies Act, is joint and several. In the instant case, there were two directors, viz., the appellant-director, Babubhai Chandulal Mody, and the deceased director, J. M. Berry, and both of them as directors of the company (in liquidation) are jointly and severally liable for the money or property of the company, misappropriated by them. Learned counsel for the appellant cited the ruling of the Supreme Court in the case of Official Liquidator Vs. Parthasarathi Sinha and Others, wherein the Supreme Court has held as follows :

The liability arising under the misfeasance proceedings is founded on the principle that a person who has caused loss to the company by an act amounting to a breach of trust should make good the loss, section 543 of the Act does not really create any new liability. It only provides for a summary remedy for determining the amount payable by such person on proof of the necessary ingredients. The section authorises the court to direct such persons chargeable under it to pay a sum of money to the company by way of compensation. This is not a provision intended to punish a man who has been found guilty of misfeasance but for compensating the company in respect of the loss occasioned by his misfeasance.

Whenever there is a relationship based on contract, quasi contract, some fiduciary relation or a failure to perform a duty, there is no abatement of

the liability on the death of the wrongdoer. When once the liability is declared, it is open to the official liquidator to realise the amount due by

resorting to section 634 of the Act and section 50 of the Code of Civil Procedure. In Official Liquidator, Supreme Bank Ltd. Vs. P.A. Tendolkar

(Dead) by Lrs. and Others, , this court did not consider the effect of section 634 of the Act which made the relevant provisions of the CPC relating

to the execution of decrees applicable to orders passed by the court under the Act.

At the conclusion of the proceedings u/s 543, a declaration of the liability is made. Such declaration partakes of the character of a decree in a suit.

When once such declaration is made, it can be enforced u/s 634 of the Act and where the order made by one court has to be executed by another

court, the procedure prescribed by section 635 of the Act has to be followed. In the course of such execution proceedings the provisions of

section 50 of the CPC have to be applied when the person who is made liable dies before the order is satisfied and the liability of the legal

representatives should be determined accordingly. Any other construction of the provisions of section 543 of the Act would make the entire

process of determination of the liability of persons under it meaningless.

7. It is clear from the above ruling of the Supreme Court that a cause of action against the deceased director for misfeasance survives even after his

death and the asset of the deceased director is liable in the hands of the legal representatives. Thus, the loss can be determined even after the death

of the delinquent director. The proceedings u/s 543 may be continued against the legal representatives for the purpose of determining and declaring

the loss or damage caused to the company. However, as per section 543(2) of the Companies Act, an application under sub-section (1) shall be

made within five years from the date of the order for winding up or of the first appointment as the liquidator in winding up or of the misapplication,

retainer, misfeasance or breach of trust, as the case may be, whichever is longer. In the instant case, the official liquidator has not taken any

proceedings against the deceased director within the period of five years as contemplated under sub-clause (2). As the liability of the directors of

company is joint and several, we are of the view that the non-impleading of the deceased director and his legal representatives will not vitiate the

proceedings instituted against the surviving director. We, therefore, reject the first contention of learned counsel for the appellant that non-joinder

of the deceased director and his legal representatives vitiated the entire proceedings instituted by the official liquidator u/s 543(1) of the Companies Act.

8. With regard to the merits of the case relating to the aggregating of a sum of Rs. 30,060.89, we are of the view that except the first item relating to Rs. 11,000, the learned single judge has erred in respect of other five items. The first item relates to a sum of Rs. 11,000 given as loan by the appellant-director on August 7, 1968, from and out of the funds of the company (in liquidation) to Devichand and Co. A sum of Rs. 8,910 was received by the company by way of interest on several dates, but the directors failed and neglected to recover the loan amount as well as future interest till the date of winding up. Thus, both the directors are jointly and severally liable to make good the loss to the company (in liquidation) relating to this transaction totalling a sum of Rs. 20,085 as on January 17, 1984. The contention of the appellant-director was that the deceased director, J. M. Berry, was in charge of the affairs of the company. However, it is to be noted that the liability of the directors is joint and several and the appellant cannot escape the liability. Further, the learned judge has found that the said loan to Devichand and Co. is beyond the object of the company. But the learned judge has held that the objects are to carry on business in buying, selling, manufacturing, importing, exporting and distributing all commodities either manufactured or as raw materials of all types and grades of all engineering chemical goods, electrical goods and the other objects set forth in the memorandum of association. Thus, it is seen that the respondents has no right to lend the money belonging to the company to a third party because that is not one of the objects of the company. As the loan extended to Devichand and Co. by the directors, is an ultra vires act, the directors are personally liable. We, therefore, find no reasons to interfere with the findings under it No. 1. The learned single judge was right in the findings that the respondent is liable to pay a sum of Rs. 20,085. The second item relates to a sum of Rs. 30 which amount, as held by the learned judge, as negligible and dismissed the same. We find no reasons to interfere with the same. The third item relates to the deposit of Rs. 3,000 with the Income Tax Department of which the directors did not take steps to claim refund. The explanation of the appellant

was that the Income Tax Department had not refunded the amount in spite of repeated demands and reminders. It was also contended by the appellant that the relevant records were handed over by the director of the company to the liquidators. In view of the above, we feel that the learned judge erred in holding that the appellant director was negligent in not taking any steps to recover the deposit of Rs. 3,000. We hold that the appellant is not liable regarding a sum of Rs. 3,000 relating to deposit with the Income Tax Department. The fourth item relates to the claim of Rs. 766 being the value of stock not accounted for. It was contended by the appellant-director that the stocks being chemicals were spoiled and, therefore, destroyed in the year 1971 and in the directors' report dated June 7, 1972, permission was sought for to write off the stocks. The learned judge erred in holding that since there is no clear data as to how the stocks came to be disposed of, the director was liable for the stock of Rs. 766. In view of the explanation given by the director he is not liable for the sum of Rs. 766 relating to the stock that was destroyed. The fifth item relates to dues from trade debtors. It is alleged that the director has not taken any steps to recover a sum of Rs. 4,870.85 from Arun Agencies though it was outstanding from 1966. The sixth item relates to a sum of Rs. 1,339 that had to be recovered from Shah Electronics, though it was outstanding from 1967. It was alleged that the directors allowed the above items to be barred by time. It was contended by the appellant-director that the company was supplying goods in credit sales and some commodities were collected and some other debts were bad debts and, therefore, the directors cannot be held liable for bad debts. It was also contended by the appellant-director that in spite of his efforts, he was not able to find out the whereabouts of the debtors and, consequently, those debts were written off as bad debts. Upon the facts and circumstances, we feel that the learned judge erred in holding that the appellant-director was negligent in not taking any steps to recover the above two amounts and held that the appellant-director is liable to pay a sum of Rs. 6,209.89. In view of the above, we hold that the appellant-director is not liable to pay the said sum of Rs. 6,209.89 with regard to the above two items.

9. In view of the above, we hold that the proceedings instituted by the official liquidator u/s 543(1) of the Companies Act, 1956, against the

appellant-director are valid and in accordance with the law and we confirm the findings of the learned judge with regard to this aspect of the

matter. However, with regard to the merits of the claim, we hold that the appellant-director is liable to pay with regard to the first item relating to

Rs. 11,000 with interest at 6% per annum the amount advanced to Devi Chand and Co. With regard to the items Nos. 2 to 6, we hold that the

appellant-director is not liable to pay the same.

10. In the result, the appeal is partly allowed and the judgment and decree of the learned single judge is modified accordingly. Upon the facts and

circumstances of the case, there shall be no order as to costs.

11. Learned counsel, appearing for the official liquidator, has brought to our notice that in the judgment there is no direction as to the payment of

his fees. On a consideration of the facts and circumstances of this case, we are inclined to order a fee to be paid to counsel appearing for the

official liquidator at the rate payable to a senior counsel for the Central Government.