(2009) 07 MAD CK 0039

In the Madras High Court

Case No : Company Applications No''s. 1625 to 1628 and 1935 of 2006 in Company Petition No. 387 of 2003

Blailklock Compass World Transport (HK) Ltd. APPELLANT

Vs

Official Liquidator, High Court as the Liquidator of Scanwell Freight Express (India) P. Ltd. (in Liquidation) and Others RESPONDENT

Date of Decision : 21-07-2009

Acts Referred:
Companies Act, 1956 — Section 433, 434(1), 441, 454(5), 460(4)

Citation : (2010) 153 CompCas 480

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : T.K. Bhaskar, for the Appellant; B. Giridhar Rao and R. Saravanakumar, for the Respondent

Judgement

P. Jyothimani, J.—The company applications, C. A. Nos. 1625 to 1628 of 2006 are filed by the petitioning creditor, who was the petitioner

in C. P. No. 387 of 2003, for a direction against respondents Nos. 3 to 8 therein to file the statement of affairs, to take cognisance of the offence

u/s 454(5) of the Companies Act, 1956, against respondents Nos. 3 to 8, to direct the official liquidator to examine the conduct of the affairs of

the first respondent-company by respondents Nos. 3 to 8 and submit a report on the misfeasance and for injunction against the respondents from

alienating, transferring or disposing of any assets or movables or immovables of the second respondent-company pending decision in the above

said applications.

2. Application No. 1935 of 2006 has been filed by the official liquidator under Sections 460(4), 542 and 543 of the Companies Act, 1956, to

examine the conduct of respondents Nos. 1 to 6 therein, who are ex-directors of the company in liquidation under Sections 542 and 543(1) of the

Companies Act, 1956 and order their liability to the extent of Rs. 4,37,57,654 and future claims of the creditors with interest at the rate of 12 per

cent. per annum and to declare that respondents Nos. 1 to 6 are personally liable for all debts and liabilities of the company in liquidation and to

direct constitution of first charge on the property and effects in possession of respondents Nos. 1 to 6 in respect of Rs. 4,37,57,654.

3. The petitioning creditor in applications Nos. 1625 to 1628 of 2006 has filed C. P. No. 387 of 2003 for winding up of the first respondent-

company, M/s. Scanwell Freight Express India P. Ltd., u/s 433(e) read with Section 434(1)(a) of the Companies Act on the ground of inability of

the first respondent to settle the outstanding amount of HK $ 1162595.74 together with interest at 18 per cent. per annum and the said company

was wound up by order of this Court dated March 22, 2006 and the official liquidator was appointed with direction to take possession of the

assets of the company.

4. It is seen that the first respondent-company under liquidation was incorporated in the year 1996 having its place of business at No. 204, Chella

Mall, Second FLoor, No. 11, Sir Thyagaraya Road, T. Nagar, Chennai-600 017 with the object of carrying out the business of general carriers,

forwarding agents, etc. Respondents Nos. 1 to 6 in the application filed by the official liquidator, who are respondents Nos. 3 to 8 in the

application filed by the petitioning creditor were the directors of the company under liquidation, as per the information obtained, from the Registrar

of Companies.

5. The company petition was filed before this Court on December 9, 2003 and on March 22, 2006, as stated above, the winding up order was

passed directing the ex-directors who are respondents Nos. 3 to 8 in the creditor''s application and respondents Nos. 1 to 6 in the official

liquidator''s application to file the statement of affairs within three weeks. The winding up order thus came into effect from the date of presentation

of the application, viz., December 9, 2003.

6. It is stated that the official liquidator on May 25, 2006, after intimation to the ex-directors and the petitioning creditor took possession of the

assets, books of account, records, etc., from the sixth respondent, one of the ex-directors in the presence of representative of the petitioning

creditor at No. 204, Chella Mall, Second Floor No. 11, Sir Thyagaraya Road, T. Nagar, Chennai. The official liquidator sold the movables by

way of auction on October 17, 2006, for a sum of Rs. 1,62,300 subject to the confirmation of the court. On information from the sixth respondent

Mr. S. Ramesh that the premises was taken on lease and it belongs to Mr. M. A. Mohammed Illiyas, M. M. Mohammed Salman Sherier, c/o.

Jamals, Mount Chambers, Second Floor No. 758, Anna Salai, Chennai and the first respondent-company under liquidation paid Rs. 3,50,000

towards rental advance and the monthly rent of Rs. 55,000 was paid up to April, 2006, it was communicated to the landlord who in turn, intimated

that the rental advance of Rs. 3,50,000 paid by the first respondent-company under liquidation, viz., M/s. Scanwell Freight Express (India) P.

Ltd., has been transferred to the new company called, M/s. Scanwell Logistics P. Ltd., which is the second respondent in the applications filed by

the petitioning creditor, as per the letter of the first respondent dated July 15, 2004 and the company is in arrears of rent to the extent of Rs.

1,65,000 for May, June, July, 2006 apart from the electricity and maintenance charges.

7. It is stated by the official liquidator in his report that the ex-directors have not produced the vital records and statutory records, however, one of

the ex-directors, viz., Mr. S. Ramesh has filed the statement of affairs on June 27, 2006 and subsequently, another director, V. Babu also

concurred with the said statement of affairs. On verification of the statement of affairs, the official liquidator has found the following discrepancies:

(1) The ex-directors have stated that a sum of Rs. 8,56,647 is available as bank balance in HSBC Bank, No. 96, Dr. Radhakrishnan Salai,

Chennai-14 in ground No. 041379878001. On verification from the bank, it is found that only a sum of Rs. 2,96,170.60 was available. Therefore,

the ex-directors are liable to account for the balance amount of Rs. 5,60,476.40.

(2) The ex-directors have mentioned that a sum of Rs. 402 is available as cash on hand, but the same has not been handed over to the official

liquidator and hence, the ex-directors are liable to account for the same.

(3) The ex-directors have stated that there are trade debtors from whom a sum

of Rs. 1,98,56,336 is receivable, however, the ex-directors have

failed to furnish the particulars regarding the address and transactions resulted in their inability to recover the amount. The ex-directors are liable for

the said amount.

(4) The ex-directors have stated that under loans and advances category a sum of Rs. 23,69,833 is realisable from rent advance, fixed deposit,

telephone deposit, Income Tax refund receivable from the Income Tax Department, but the details have not been furnished and therefore, it is not

possible for the official liquidator to recover the said amount and the ex-directors are to account for the same.

(5) The ex-directors have stated that the value of the furniture and fittings is Rs. 7,00,000, however, the official liquidator is able to sell and realise

a sum of Rs. 1,62,300 only and therefore, the ex-directors are liable to account for the difference amount of Rs. 5,37,700.

(6) The ex-directors have stated that under the preferential creditors category, a sum of Rs. 3,37,784 is due and payable to the Income Tax

Department under fringe benefit tax, TDS payable. Since the ex-directors have admitted this amount, they are to account for the same.

(7) Under the unsecured creditors category, the ex-directors have stated that a sum of Rs. 2,0095,123.09 is due to various parties. However, no

document has been furnished. Since the amount is admitted by the ex-directors, it would amount to mismanagement and maladministration and they

are liable to account for the same.

Since during the course of winding up proceedings, it is found that the directors have administered the company to defraud the creditors and acted

against the interest of the company, and hence, the ex-directors are liable for misfeasance based on the facts and figures stated in the statement of

affairs dated July 27, 2006. Enclosing the statement of affairs, the official liquidator has filed the above said application.

8. It is the case of the petitioning creditor that respondents Nos. 3 to 8 in its application, who are the ex-directors of the first respondent-company

under liquidation have fraudulently constituted a new company in the name, M/s. Scanwell Logistics P. Ltd., on May 28, 2004, during the

pendency of the company petition which was filed on December 9, 2003, in the same premises of the first respondent-company under liquidation with the directors, (i) Mr. Hassen Adam Bin, (ii) Mr. Sin Wai Shing, (iii) Mr. Tang Keen Fei, (iv) Mr. S. Ramesh and (v) Mr. V. Sivakumar. Out

of the said directors the first, fourth and fifth were the directors of the first respondent-company under liquidation, who are respondents Nos. 3, 8

and 7, respectively, and transferred the property and business of the first respondent-company under liquidation. Therefore, they are liable u/s 536

of the Companies Act. They are also liable for breach of fiduciary duty towards the first respondent-company under liquidation and the conduct of

the respondents also amounts to misfeasance and liable for action u/s 543 of the Companies Act. It is also stated that when the second

respondent-company was fraudulently floated on May 28, 2004, itself, in the counter affidavit filed by the first respondent-company sworn in

October, 2004 there is no whisper about the constitution of the new company which shows the fraudulent design of the respondent-company

under liquidation. Therefore, the corporate veil of the second respondent has to be lifted to find out the fraud, With these pleadings, the

applications have been filed by the petitioning creditor.

9. The eighth respondent in the application filed by the petitioning creditor who is the sixth respondent in the application filed by the official

liquidator, by name Mr. S. Ramesh, ex-director of the company under liquidation, in the counter affidavit has stated that he was not aware of the

winding up order passed by this Court on March 22, 2006, till the intimation was given by the official liquidator on May 2, 2006, which was

received by him on May 13, 2006. It is his case that he took steps to file the statement of affairs as required u/s 454 of the Companies Act and the

same was not possible. In the meantime, the official liquidator sealed the premises on May 25, 2006 and the particulars were not available and

finally, the statement of affairs with the available details was filed on June 28, 2006 and therefore, there is no deliberate delay in filing the statement

of affairs.

10. The allegation that the second respondent-company, viz., M/s. Scanwell Logistics P. Ltd., was constituted with a design to divert the business

of the first respondent-company under liquidation is denied as false. It is stated that M/s. Scanwell Freight Express (India) P. Ltd., the first

respondent-company in liquidation, was acting as a shipping agent in India of its principal company, viz., M/s. Scanwell Freight Express

(Hongkong) Ltd., Hongkong. According to the said respondent, the principal company in Hongkong decided to terminate the agency with the first

respondent-company under liquidation and started its own subsidiary in India. The said M/s. Scanwell Freight (Hongkong) Ltd., Hongkong started

M/s. Innoplas Ltd., incorporated in British Virgin Islands and it was that company, viz., M/s. Innoplas Ltd., which formed the second respondent-

company, M/s. Scanwell Logistics P. Ltd., which is 100 per cent. subsidiary of M/s. Innoplas Ltd., and therefore, according to the said ex-

director, the second respondent-company was formed at the instance of the principal company, M/s. Scanwell Freight (Hongkong) Ltd.,

Hongkong and not by the ex-directors of the first respondent-company under liquidation.

11. It is stated that the said three directors of the first respondent-company have only facilitated the formation of the second respondent-company

and they resigned from the first respondent-company immediately after the second respondent-company came into existence. It is stated that the

second respondent is a 100 per cent. subsidiary of M/s. Innoplas Ltd., a company incorporated in British Virgin Islands with the shareholding

pattern, Harbans Singh Dillon : 99.99 per cent. and others : 0.01 per cent. Therefore, according to the said ex-director, the first and the second

respondents are different companies and the director/respondents did not derive any benefit directly or indirectly from the business of the second

respondent and there is no breach of duty on the part of the director/respondents.

12. In the counter affidavit filed by the second respondent in the application filed by the petitioning creditor, the director of the second respondent

M/s. Scanwell Logistics India P. Ltd., Mr. Alwin Andrew Hong Yu Shu has stated that the application is not maintainable since in the main

company petition the second respondent is not a party. While stating that the allegations against the ex-directors are not known, the second

respondent would state that the ex-directors of the first respondent-company under liquidation have not fraudulently incorporated the new

company. It is stated that only M/s. Innoplas Ltd., a company incorporated in British Virgin Islands promoted the second respondent-company and for promoting the new company, the assistance of two ex-directors of the first respondent-company, viz., respondents Nos. 6 and 7 was

obtained and the second respondent was incorporated on May 28, 2004.

13. It is stated that as against the issued and subscribed share capital of Rs. 1,00,000 of 10,000 equity shares of Rs. 10 each, M/s. Innoplas Ltd.,

agreed to subscribe 99,990 shares of Rs. 10 each while the seventh respondent Mr. V. Sivakumar agreed to subscribe 10 shares of Rs. 10 each

as a nominee of M/s. Innoplas Ltd. It is also stated in the counter affidavit that the directors of the second respondent-company are, Mr. Hassan

Adam Bin, Mr. Sin Wai Shing, Mr. Tang Keen Fei, Mr. S. Ramesh and Mr. V. Sivakumar out of whom, the first, fourth and fifth directors are

respondents Nos. 3, 7 and 8 in the application who are stated to have subsequently resigned from the first respondent-company.

14. It is stated that the third respondent Mr. Hassan Adam Bin resigned on June 21, 2005, Mr. Ramesh resigned on June 22, 2005 and Mr.

Sivakumar resigned on June 21, 2005. According to the second respondent, the present directors of the second respondent-company are Mr.

Sing Wai Shingh, Mr. Tank Keen Fei, Mr. A. J. R. Anderson, Mr. T. T. A. Bongso and Mr. A. A. H. Shu and the present shareholders are M/s.

Innoplas Ltd. and Mr. Sivakumar, the seventh respondent herein. It is stated that the second respondent-company is situated at No. 205, Chella

Mall Complex, Second Floor No. 11, Sir Thyagaraya Road, T. Nagar, Chennai while the office of the first respondent is at No. 204, Chella Mall

Complex, Second Floor, No. 11, Sir Thyagaraya Road, T. Nagar, Chennai and therefore, the first and the second respondents are not functioning

in one and the same place.

15. It is stated that the second respondent was not carrying on commercial business after its incorporation and it started commercial activities only

from April 1, 2006. It is also denied that the funds and business of the first respondent-company were deviated to the second respondent-

company. It is stated that the second respondent filed its ""nil"" return as on March 31, 2004 and March 31, 2005. It is stated that the business of

the second respondent is purely service oriented and the customers cannot be forced to avail the second respondent''s services and therefore,

there is no diversion of business or funds of the first respondent-company.

16. Mr. T. K. Bhaskar, learned Counsel appearing for the petitioning creditor would submit that the conduct of the ex-director of the first

respondent-company who filed counter affidavit in October 2004, in which there is no disclosure about the constitution of the second respondent-

company on May 28, 2004, itself shows the evil design. He would rely upon various provisions of the Companies Act, 1956, especially Sections

542 and 543 and also the details of directors of the newly constituted company to show the fraudulent design on the facts of the case. According

to him, the ex-directors of the company in liquidation, especially respondents Nos. 3, 7 and 8 cannot disown their responsibility in the company

affairs and when a strong suspicion was created in the constitution of the second respondent-company, that would be a cause for complete

investigation into the affairs of the second respondent-company.

17. According to him, the investigation is required because of the commonality between the first and the second respondents and their directors

and therefore, lifting the corporate veil is a necessary consequence. He would rely upon the judgment of the Supreme Court in Singer India Ltd.

Vs. Chander Mohan Chadha and Others, and Sh. Atul Gupta (Huf) Vs. Trident Projects Limited and Others, and also other judgments.

18. On the other hand, it is the contention of Mr. B. Giridhar Rao, learned Counsel appearing for the second respondent that there is absolutely

nothing to show that there was diversion of funds or business from the first respondent and in such circumstances, the question of investigation into

the affairs of the second respondent does not arise. He has stated that as per the Income Tax return, there was no income in 2005-06 and the

winding up order in respect of the first respondent-company was passed on March 22, 2006 and therefore, absolutely there is no need for

ordering investigation. It is also stated that the business of the second respondent is personal in nature and there is no possibility of diversion of

funds or business as it is service oriented business and it is only the quality of work which is a factor to be considered and the injunction petition is

filed only to avoid competition. He would submit that no useful purpose would be served in directing investigation into the affairs of the second

respondent-company.

19. It is the submission of Mr. R. Saravanakumar, leaned counsel appearing for

respondents Nos. 6 to 8 in the petitioning creditor''s application

and respondents Nos. 4 to 6 in the official liquidator''s application that the statement of affairs was filed though belatedly due to the reason that the

company premises was sealed by the official liquidator on May 25, 2006 and the particulars were not readily available and hence, there is no fault

committed by the said respondents. It is also stated that the second respondent-company is a 100 per cent. subsidiary of M/s. Innoplas Ltd., in

which the director Mr. Harbans Singh Dillon is having 99.99 per cent. shares and he is not a party in the proceedings and in such view of the

matter, the present applications are liable to be dismissed.

20. On perusal of the records and hearing the submissions made by counsel for the respective parties, it is clear that the first respondent-company

under liquidation was constituted with the object of carrying on the business of general carriers, forwarding agents, commission agents, agents for

carriers, agents for air freighting cargo, etc., and the said company was incorporated in the year 1996 with sixth respondents stated in the

application as its promoters and directors. The second respondent-company was registered in India on May 28, 2004, with five directors which

includes three respondents herein, viz., Mr. Adam Bin Hassan, Mr. Sivakumar and Mr. Ramesh. Even though it is stated in the counter affidavit of

the second respondent that the business of the second respondent-company is purely service oriented and therefore, the customers cannot be

forced to avail the second respondent''s service, there are no records produced to show as to what is the object of the second respondent-

company which was registered in India on May 28, 2004.

21. It is relevant to note that the company application was presented by the petitioning creditor on December 9, 2003 and the order of winding up

was passed on March 22, 2006, by this Court. By virtue of Section 441 of the Companies Act which is as follows:

441. Commencement of winding up by Tribunal-(1) Where, before the presentation of a petition for the winding up of a company by the Tribunal,

a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the

time of the passing of the resolution, and unless the Tribunal, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case, the winding up of a company by the Tribunal shall be deemed to commence at the time of the presentation of the petition for

the winding up.

The winding up of the company under liquidation is deemed to have commenced from December 9, 2003.

22. It is true that when winding up order was passed on March 22, 2006 and by legal fiction as per Section 441 of the Companies Act, it is

deemed to have commenced from the date of presentation, viz., December 9, 2003, there may not be any possibility for the ex-directors to have

the knowledge about the winding up application in normal circumstances. A reference to the affidavit filed by the petitioning creditor shows that the

first respondent-company filed its counter affidavit in the main company petition and the affidavit was sworn in October, 2004. If, on behalf of the

first respondent-company in liquidation, a counter affidavit was filed in October, 2004 and admittedly, before, that date, viz., on May 28, 2004,.

the second respondent-company was incorporated along with the directors of the first respondent-company, it is certainly incumbent on the part of

the directors of the first respondent-company to have revealed the said fact in the counter affidavit and there cannot be any excuse on the part of

the directors of the first respondent-company in not revealing the same.

23. Adding to that, even assuming that the second respondent-company is a 100 per cent. subsidiary of M/s. Innoplas Ltd., when admittedly, at

the time of floating of the second respondent-company in May, 2004 three of the directors of the first respondent-company were involved,

certainly it creates a suspicion about the conduct of ex-directors as to whether there was any possibility on the part of the said ex-directors to

constitute the second respondent-company with a design of causing hardship to the creditors of the first respondent-company under liquidation or

with a collusive idea of transferring the business as well as the assets of the first respondent-company in favour of the second respondent-company.

24. It is true that in the statements of accounts of the second respondent-company for the year 2004-05 and 2005-06, the income is shown as

nil"", but the statements as well as the auditor''s reports do not contain all the names of the directors of the company and two directors, viz., Mr.

Sin Wai Shing and Mr. Tang Keen Fei have signed the statements. Further, it is also admitted by the second respondent itself in the counter

affidavit that three ex-directors of the first respondent-company, viz., Mr. Hassen Adam Bin, Mr. Ramesh and Mr. Sivakumar have resigned on

June 21, 2005, June 22, 2005 and June 21, 2005, respectively.

25. On the above said admitted facts and circumstances, a reasonable suspicion arises about the formation of the second respondent-company

and it is necessary that an investigation has to be ordered in respect of the affairs of the second respondent-company. In fact, lifting the corporate

veil is an established principle in the corporate law enabling the court to find out the real truth in cases where there are strong grounds to believe

that the incorporation of company itself is a device to do some illegal, activities or defraud certain people. In order to find out the real truth in the

conduct of the first respondent-company under liquidation by its ex-directors in the light of the formation of a new company, viz., the second

respondent with some of the ex-directors of the first respondent-company as its founders, it is necessary to have further investigation and a report

in this regard. This principle was found to be one of the exceptions to the celebrated concept that a company at large is a different person from the

subscribers as it was held in Avon Salomon v. A. Salomon and Co. Ltd. [1897] AC 22 (HL) , which was affirmed by the hon''ble Supreme Court

in Singer India Ltd. Vs. Chander Mohan Chadha and Others, , by quoting a passage of its earlier judgment in Delhi Development Authority Vs.

Skiper Construction Company (P) Ltd. and another, (page 381 of 89 Comp Cas):

28. The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud

people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would

ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice

between the parties concerned.

26. In such circumstances, I direct the official liquidator of this Court to investigate about the affairs of the second respondent-company, viz., M/s.

Scanwell Logistics P. Ltd., especially with reference to the object of the said company and the transactions which have taken place from the date of its incorporation, viz., May 28, 2004, till date and file a report to enable this Court to pass final orders in the above applications. The petitioning

creditor/applicant shall deposit an amount of Rs. 10,000 (rupees ten thousand only) with the official liquidator towards expenses relating to the said

investigation within one week from this date. The official liquidator, after giving notice to the directors of the second respondent-company including

the three ex-directors of the first respondent-company under liquidation and also after giving opportunity to the petitioning creditor, shall file his

report within a period of 8 weeks from the date of receipt of a copy of this order.

27. Post all the applications on September 14, 2009.

