

(2012) 08 DEL CK 0263

In the Delhi High Court

Case No : Writ Petition (C) No. 3175 of 2012

Court on its Own Motion

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 01-08-2012

Acts Referred:

Companies Act, 1956 — Section 433, 434, 435, 436, 437

Citation : (2012) 08 DEL CK 0263

Hon'ble Judges : Rajiv Sahai Endlaw, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Rajeeve Mehra, ASG, Mr. Aditya Malhotra, for UOI, for the Appellant;
Rajiv Bahl, for Official Liquidator, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—This writ petition was registered as a Public Interest Litigation (PIL) and notice thereof issued to the Official

Liquidator and Union of India through the Ministry of Corporate Affairs, on receipt of the following note from Hon"ble Company Judge of this

Court:-

1. By virtue of the liquidation process, an unviable corporate entity is dissolved after performing multifarious functions which can be broadly

classified as take over and disposal of assets of the Company, determination of various liabilities like workers" dues, secured, preferential and

unsecured claims and lastly, distribution of funds amongst creditors and workmen in accordance with Companies Act, 1956 (for short "the Act").

2. The Official Liquidator is appointed by the Central Government u/s 448 of the Act and is attached to the High Court of the State for the

purpose of conducting liquidation proceedings of companies which are ordered to be wound up by the High Court. Functionally the Official

Liquidator is under the supervision and control of the High Court, but administratively is under the control of the Central Government through the Regional Director.

3. Today, there are more than 300 odd companies in compulsory winding up before this Court and approximately 50 companies are under

voluntary liquidation with the Official Liquidator attached to this Court. These include several giant-sized companies including Non- Banking

Finance Companies (NBFCs) like JVG Finance, Hoffland, CRB Capital Market, Crystal Credit etc. with their branches and assets spread all over

India.

4. Even though the Companies Act envisages a definite time limit for various steps to be taken in the winding up proceedings, there is no standard

operating procedure in place for completion of the above mentioned steps.

5. In the recent past, winding up proceedings have tended to linger on for several years. This Court would not be surprised if the average time span

of liquidation proceedings exceeds five years.

6. Delay in take over and scrutinizing the records of the company in liquidation has several times resulted in claims against the debtors of the

company getting dismissed on the ground of limitation. In fact, by the time, the stage of distribution of proceeds arrives, creditors and workmen

have not only financially suffered immense losses, but they also loose interest in the proceedings.

7. The delay, in the opinion of this Court, is primarily attributable to lack of properly trained and skilled professional personnel working in the office

of the Official Liquidator.

8. This Court in the recent past had permitted the Official Liquidator to hire the services of Company Secretaries and Cost Accountants but the

experiment was not successful as due to lack of future career prospect, the attrition rate was high.

9. Today, even elementary investigation is not being carried out in the Official Liquidator's office. For instance, in the JVG Group of Companies,

had it not been for the Serious Fraud Investigation Office (for short "SFIO") investigation conducted ten years after the appointment of Provisional

Liquidator, this Court would never have known that its Directors had purchased their personal farmhouse and jewellery from the company's funds.

The SFIO investigation in the aforesaid case is primarily based on the bank statements of the current account of the company in liquidation. It

seems to this Court that officials in the office of the Official Liquidator did not take care to correlate the withdrawal entries in the bank statements

of the company in liquidation with the assets purchased. In the meantime, the promoters of the said company progressed from one scam to

another.

10. In fact, in a number of matters, even the workmen and creditors' claim are being adjudicated by Committees appointed by this Court as the

Official Liquidator's office neither has the resources nor the expertise to do so. This is creating a hiatus between power and responsibility inasmuch

as under the Act, the responsibility is of the Official Liquidator, but the actual determination is being done by an outside agency.

11. This Court also finds that there is no coordination between the Official Liquidator's office on the one hand and Police, Central Bureau of

Investigation, Provident Fund Commissioner, Income Tax Department and Debt Recovery Tribunal on the other. In many cases, even ex parte

orders passed by the Income Tax Department and Debt Recovery Tribunal attain finality and as a consequence of the huge ex parte

demands/decrees, no dividend is available for distribution amongst unsecured creditors.

12. This Court in the last few months has been winding up companies only as a measure of last resort as it has not been confident that the office of

the Official Liquidator is equipped enough to give immediate "succor" to the workmen and creditors of the company.

13. But the prevailing state of affairs is remediable. In the recent past, the Government has been successful in reviving and rehabilitating companies,

where scams have been perpetrated by the promoters of the companies themselves. This Court can take judicial note of the fact that Satyam

Computers was successfully revived and rehabilitated without putting the company in liquidation even though its promoters are stated to have

siphoned off huge funds from the company.

14. This Court is also of the prima facie view that keeping in view the scale of the scams that are now taking place, the office of the Official

Liquidator needs to be managed by professionals like Chartered Accountants,

Cost Accountants, Company Secretaries and Lawyers. Even senior officers working in Income Tax Department, Reserve Bank of India and Comptroller and Auditor General of India's office need to be posted in the office of the Official Liquidator.

15. Moreover, as the Officers posted in the office of Official Liquidator are required to have in depth knowledge of the Act, Companies (Court)

Rules, 1959 as well as Court Procedure, this Court is of the opinion that continuous training programmes should be conducted by the Ministry of

Corporate Affairs. Training programmes should particularly cover the following aspects:-

a) General Introduction/discussion about winding up, knowledge of Sections 433 to 452 of the Act.

b) How to inspect records of the company ordered to be wound up which are maintained by ROC, with particular reference to the object of the liquidation proceedings.

c) The manner and procedure involved in taking over possession of assets and books of accounts.

d) Time bound action to be taken by Official Liquidator on receipt of winding up orders or on appointment of Provisional Liquidator.

e) Procedure for exercise of powers u/s 457 of the Act.

f) Procedure for conducting sale of assets.

g) Examination of Statement of Affairs.

h) The manner and purpose for recording of Statement of Ex-Director under Rule 130.

i) Process as provided in Companies (Court) Rules, 1959 for initiating legal action for non-filing of Statement of Affairs and u/s 477/478 and under

Sections 531 to 545 of the Act.

j) Preparing and filing of Half yearly/Annual Statement of Account with the Court/ ROC.

k) Operation of bank account and reconciliation of PD account.

l) Adjudication of claim and settlement of list of Creditors/Contributories.

m) Stay of winding up order/recalling of winding up orders, action to be taken if winding up order is recalled.

n) Declaration of dividend and the treatment of unpaid dividend on final

dissolution.

16. The finances required for professionalizing the Official Liquidator's office are not much of a concern inasmuch as the Common Pool Fund of

the Delhi Official Liquidator has today a bank balance in excess of Rs. 50 crores.

17. Undoubtedly, the present Official Liquidator is a fair person, but due to weak infrastructural facilities and untrained manpower, he is not able to

do much.

18. Since the intent of this order is not to point out any shortcoming of any particular individual, but to remove the structural weaknesses which

cause delay in winding up proceedings, the Registry of this Court is directed to open a Public Interest Litigation file and place a copy of this order

in the said file.

The counsel for the Official Liquidator as well as the learned ASG, we must appreciate, took up the matter in the right spirit and not as an

adversarial litigation and showed their willingness to do all within their powers and means to improve the functioning of the office of the Official

Liquidator. The learned ASG of course, contended that this PIL as well as the orders to be made herein be confined to the Official Liquidator,

Delhi and be not treated as a precedent for the other Courts. We are wholly in agreement. The problems highlighted by the Hon"ble Company

Judge are peculiar to and in the context of Delhi only and neither do we have an inkling of the circumstances prevailing in the other States nor do

we desire to issue any direction qua Official Liquidator attached to Courts in any other part of the country.

2. The learned ASG has very kindly offered that the personnel from the office of the Official Liquidator can be sent for training to the Indian

Institute of Corporate Affairs at IMT, Manesar, Gurgaon. It is also offered that the said Institute would be requested to evolve a module for the

specialized training for such personnel. He has further suggested that the Company Court appoints professionals like Chartered Accountants,

Company Secretaries, Cost Accountants, Advocates etc. for assisting in liquidation process; these professionals can be appointed initially for a

period of two years extendable for further period of two years with their salaries being paid out of the Common Pool Fund. It is also urged that the

Companies Bill, 2011 has already been tabled in the Lok Sabha and is lying with

the Standing Committee - the same provides for appointment of Private Liquidator in addition to Official Liquidator. Reference in this regard is made to Clause 275 of the said Bill. Yet another suggestion mooted is for appointment on contractual basis of retired officers from the Reserve Bank of India, Income Tax Department and other departments having specialized knowledge.

3. In the present regime, the Official Liquidator, u/s 449 of the Companies Act, 1956, becomes a Liquidator of the Company on a winding up order being made and is also the Provisional Liquidator (under Section 450 of the Act) wherever the Company Court so desires. Though the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 has introduced the concept of Asset Reconstruction Companies but the same in the present state of law cannot be applied to the Official Liquidator. The need however for the Official Liquidator to have a businessman like skills with understanding of all laws affecting the businesses of the companies in liquidation, to utilize the assets of the company in liquidation in the best interest of the creditors of the Company, cannot be over emphasized.

4. The Hon'ble Company Judge in the note itself has admitted the availability of the funds. Thus though funds are not the crunch for the Official Liquidator to seek professional acumen for winding up but we are of the view that the suggestion mooted by the learned ASG of a contractual appointment of such professionals may not serve the purpose. We say so, since such contractual appointment may not attract the best talent available and may also pose issues of trust and integrity. We are of the opinion that when such professionals are employed in the various departments of the Government itself, the provision for a cadre therefor in the office of the Official Liquidator would go a long way in resolving the issues raised. Moreover, the posting of such professionals to the office of the Official Liquidator can also be made.

5. In recent times it is also seen that reference by the Company Court to the Serious Fraud Investigation Office (SFIO) has yielded useful results. The Company Court is reluctant for, fear of burdening the said office, referring more cases for such investigation, even though the need therefor is felt. If such internal machinery is available in the office of the Official Liquidator

itself, the same will also be obviated. We therefore dispose of this petition with the following directions:-

- (a). The Union of India through the Ministry of Corporate Affairs to within six months hereof take necessary steps for posting of professionals as aforesaid to the office of the Official Liquidator with the need being assessed in consultation with the Official Liquidator. The requisite Service Rules, creation of cadre, appointment procedure etc. be formulated in the meanwhile.
- (b). The Indian Institute of Corporate Affairs, Manesar, Gurgaon, is also directed to in consultation with the Official Liquidator devise course modules for training of the personnel in the office of Official Liquidator.
- (c). The Official Liquidator is directed to liaison and coordinate in this regard.
- (d). Union Public Service Commission be also consulted for making the recruitments for the job profile required.
- (e). The Official Liquidator is also directed to finalize a standard operating procedure along with time line for taking over the Company in liquidation, determination of various liabilities, disposal of assets and distribution of funds. The said procedure must stipulate that the bank accounts of the Company in liquidation shall be immediately scrutinized for at least three years prior to the filing of the winding up petition.
- (f). The SFIO to co-operate with the Official Liquidator in finalizing of the said procedure.
- (g). Report be placed by the Official Liquidator and by the Ministry of Corporate Affairs before this Court at the end of six months. A copy of the said report be also placed before the Hon"ble Company Judge.