

(1978) 05 DEL CK 0021

In the Delhi High Court

Case No : Company Application No. 677 of 1975

Dina Nath

APPELLANT

Vs

B.L. Sharma and Others

RESPONDENT

Date of Decision : 04-05-1978

Acts Referred:

Citation : (1979) 49 CompCas 364

Hon'ble Judges : D.K. Kapur, J

Bench : Single Bench

Advocate : J.N. Verma, for the Appellant; B.N. Nayyar and O.P. Malhotra, for the Respondent

Judgement

D.K. Kapur, J.—M/s. Youngmen Benefit Chit Fund Company (P.) Ltd., which was incorporated in 1960 as a private limited company, went into voluntary winding up by resolution dated 27th April, 1973. Shri B. L. Sharma, respondent No. 1, and Shri O. P. Malhotra, respondent No. 4 were appointed as joint liquidators. On an application moved under s. 522 of the Companies Act, 1956, this company was ordered to be wound up under the supervision of this court. The present proceeding before this court is a petition under s. 543 of the Companies Act, 1956, claiming that the respondents have misapplied the property of the company or committed misfeasance, breach of trust, etc., in the course of the voluntary winding up of the company. I may mention that, during the pendency of this petition, both the joint liquidators have been removed because of the fact that they were at loggerheads and unable to function jointly and have been substituted by the official liquidator. The present petitioner claims to be a creditor of the company to the extent of Rs. 4750 together with interest. If he is a creditor, he can move the petition. After the petition was filed, summons were served and points of claim and points of defense were filed. On the various questions raised, the following issues were framed :

"1. Is the petition liable to be dismissed on the ground that even assuming the allegations no case is made out u/s 543 of the Companies Act, 1956 ?

2. Did the encashment of 5 cheques as alleged in para. 9(a) of the petition amount either to breach of trust or misfeasance by respondent No. 1 ?
3. Was the realisation of Rs. 88,637.41 by respondent No. 1 and the distribution of Rs. 88,623.03 as stated in para. 9(c) of the petition misfeasance as alleged by the petitioner ?
4. Were the acts mentioned in the last point done without the consent and connivance of respondent No. 1 and, if so, what is the effect ?
5. Was the giving up of office of the company by respondent No. 1 an act amounting to breach of trust or misfeasance ?
6. What relief has to be granted to the petitioner and against which of the respondents ?"

2. The issues cover the several points which have been raised by the petitioner in respect of the alleged defaults of the respondents. As I have pointed out, the official liquidator has been appointed as the liquidator of the company and it is possible that some more facts may come to light during the winding-up process. However, as this petition was filed earlier and raised some questions which are purely legal in nature, this case was set down for arguments without any evidence. The question to be seen is whether, on the undisputed facts in this case, a case is made out for taking action under s. 543 of the Companies Act, 1956. It is not necessary to go in the other questions which relate to the conflict between respondent No. 1 and respondent No. 4 as joint liquidators which is also mentioned in the petition.

3. The first set of facts which is relied upon by the petitioner is the withdrawal of certain cheques from the bank account of the company on 8th August, 1973, 21st May, 1973, 11th June, 1973, 26th June, 1973, and 19th July, 1973. There were five cheques in all for a total sum of Rs. 2,748. The question for determination is whether these cheques could have been encashed. The contention of the learned counsel for the petitioner is that the operation of the bank account per se amounted to misfeasance. However, the defense of the respondent (and in this case the answering respondents are respondent No. 1, Shri B. L. Sharma, a joint liquidator and Mukhi Radha Kishan, the ex-managing director of the company) is that the five cheques were paid on behalf of the company - (a) Rs. 350 to Shri Munshi Ram, a creditor of the company, (b) Rs. 500 to the chartered accountant for contusion an Income Tax appeal which was pending before the Tribunal and which appeal was eventually accepted resulting in the Income Tax liability being reduced by a sum of Rs. 6 lakhs, (c) Rs. 800 to pay the clerk and peon of the company and Rs. 350 to a chit holder, who was on his death-bed, (d) Rs. 550 to the landlord of two months' rent and Rs. 548 to the telephone bills of the company. The claim of the respondents is that the money had been paid on account of the company. The contention of the petitioner is that, once the company went into voluntary liquidation, the ex-managing director could no operate the bank account. It is, Therefore, said that

this amounts to misfeasance. On the other hand, I come to the conclusion that section 543 of the Act is meant to deal with cases where there has been a breach of trust or misfeasance as normally understood. Assuming that the ex-managing director could not operate the account after the resolution sending the company into voluntary winding up, I fail to see that harm has been caused by the acts complained of. If money belonging to the company is used for legitimate purpose of the company, I fail to see why it is misfeasance, etc. However, the ex-managing director clearly ceased to be a director on the date of the resolution sending the company into voluntary winding up. Thereafter, he had to give back the charge of the property to the liquidators. Apparently, the cheques in this case were signed by Shri B. L. Sharma as joint liquidator and Mukhi Radha Kishan as the ex-managing director. As the money can in no sense be said to be misappropriated or misused, I am unable to hold that there is any act justifying resort to s. 543 on this complaint. Of course, if there is anything wrong in the payments made or they are unauthorised, negligent or the complaint of the petitioner. I am saying this because it is possible that the official liquidator may at a later stage find something wrong with these payments in which case the court may have to take a different view. Subject to this reservation, I would say that these are not acts constituting the mischief for which s. 543 provides the remedy.

4. The next question is whether failure to inform the bankers about the change of the status of respondents Nos. 1 and 2 in relation to the company is an act of misfeasance. According to the petitioner, it was essential for the respondents to inform the bankers about their change in their status and, therefore, the encashment of the cheques is a breach of trust. As I have said, a breach of trust can only occur if the money is used in unauthorised manner, i.e., for a purpose other than the purpose of the company. If the money is used for a legitimate purpose, as in this case, to file an appeal of the company before the Income Tax department, or to pay rent to the landlord, or to pay the telephone bills of the company, etc., this cannot be classified as breach of trust.

5. The next complaint is that the first respondent as joint liquidator realised a sum of Rs. 88,637.41 and distorted Rs. 88,623.03 without the consent and connivance (sic) of respondent No. 4. It is said that respondent No. 1 and respondent No. 4 had to act jointly and, by acting alone, R-1 was guilty of act of misfeasance. There is no doubt that the joint liquidators had to act jointly, but the mere fact that one of them has acted can only constitute an act of misfeasance or breach of trust, etc., if it is shown that the company has suffered any loss. Even the case of the petitioner is that the money has been distributed to the creditors of the company and so, I cannot uphold this contention. In regard to the same question, it is the allegation of the petitioner that the money has not been distributed ratably among the entire body of creditors and there has been a fraudulent preference resulting in the misapplication of the property of the company. I have no doubt from an analysis of the respondent that there has been some irregularity in the functioning of the first respondent. This is partly

explained by the fact that the creditors passed a resolution respondent No. 1 should act alone and respondent No. 4 should be removed from the office of joint liquidators. This resolution is not a valid one, because under the Act only the court can remove a liquidator and not the creditors. The legal position is that the creditors can point a liquidator, they cannot remove him. However, due to the fact that the two joint liquidators could not act conjointly, the creditors apparently thought that one of them could act. As far as the misapplication of the money by making fraudulent preference is concerned, it is the case of the first respondent that three payments complained of are really book adjustments. In fact, in my view, this contention is premature, because till the final accounts are settled, it cannot really be determined whether there had been any over-payment to any creditor and what is the relief to be granted. The provisions of s. 543 of the Act are so framed that in case it is found that any director, manager, liquidator or officer, etc., has been guilty of misfeasance or breach of trust or misapplication of the money or property of the company, etc., then the court may compel him to repay or restore the money or property of the company or contribute such sum to the assets by way of compensation as the court thinks just. In order to pass an order under this section, it has first to be determined whether any loss has resulted to the company. As far as I can see, the liquidators in this case merely disturbed the assets of the company which consisted of debts owed to the company by making book adjustment with other persons, who were creditors of the company. Thus, some of the creditors were allowed to deal with some of the debtors. In the sense that the money should have been ratably distributed, this seems to be not a valid set of transaction, unless the transactions are respondent or reassessed in some way, then the court cannot possibly find out what is the extent of the damage, if any, caused to the company. I feel that this question will have to be gone into by the official liquidator as liquidator of the company, and one of the main reasons which has prompted me to appoint the official liquidator of this company was to ensure that the liquidation work is carried on in a sound and legal manner enabling the assets to be distributed properly between the various creditors. In those proceedings, it may eventually be found out whether this adjustment was valid or not. It is not possible to say whether it is really invalid at this stage, and if it is invalid, as to how much is the valid portion and what is the invalid portion, and also there is the difficulty that it is not possible to determine what loss the company has suffered by this book adjustment. It will be for the official liquidator to eventually take action on these matters if it is the invalid portion, and also there is the difficulty that it is not possible to determine what loss the company has suffered by this book adjustment, It will be for the official liquidator to eventually take action on these matters if it is necessary when the liquidation has proceeded further. It may even be necessary for the official liquidator to take action to recover any amount that has been over-paid to the creditors by reason of this book adjustment. In fact, the action taken by the first respondent exposes the kind of defects and dangers that are involved in voluntary liquidation generally. It also reveals that the creditors and shareholders have to be very

careful in the matter of appointing a proper person to be a voluntary liquidator. At least the mechanism of dividing the assets in a fair and equitable manner among the creditors must be properly understood. However, it cannot be denied that some-times it much easier to make book adjustments between the debtors and creditors as otherwise realisations are difficult and the creditors may not get much. Rather than taking proceedings in court for the recovery of normal amounts from debtors, which may eventually prove to be fruitless, it is sometimes better to let the creditors and debtors to deal with each other. Though, on paper, some of the creditors seem, to have e been overpaid in this way, in reality it often results in the creditors only getting paid a debt which is not normally realisable in the recovering process of a company in liquidation. In my view, this whole question is premature and incapable of decision in these proceedings, because there is no reasonable method of quantification available even if the company is said to have suffered a loss in this way. It will be for the official liquidator to take action on this question, if so advised. Subject to this reservation I reject the contention of the petitioner.

6. The next charge is that respondent No. 1 has illegally distributed money to about 300 different persons which is wholly illegal. This charge is opposed on the ground that it is wholly vague. I agree that it is vague and without knowing who are those persons and what is the amount involved, it is not possible to give any decision in this case. Again, this matter is left to the official liquidator, and the claim is rejected on the ground that it is wholly premature, if not entirely vague.

7. The final charge is that the first respondent has given away the registered office of the company situated at 4/7, Deshbandhu Gupta Road, Pahar Ganj, New Delhi, which measured 30"x 20", i.e., 600 sq. ft. with ulterior and "obsolete" (sic) motive, and the office of the company was left without adopting any proper procedure. It is said that the same office would not cause the company Rs. 1,200 to Rs. 1,800 per month whereas the previous rent was Rs. 225 per month. This has caused great loss to the company. The answer to this point is that in fact a large amount has been saved for the company by surrendering the office. It is said that a sum of Rs. 7,975 was due to the landlord which has been for - gone. Furthermore, the first respondent did not take any other office so that in fact the rent has been saved. So, we have on the one hand a claim that a valuable property of the company has been given, being the tenancy rights, and on the other hand we have a claim that a large amount of rent has been saved by this process. Inherently, this question cannot really be solved in these proceedings. Behind the allegation of the petitioner is a kind of hidden charge that some premium or pugree might have been taken by the first respondent in giving up the office and this is objectionable As the taking of any premium or pugree is forbidden by law, this court cannot take judicial notice of any such illegal act which might have been committed. As the company had gone into liquidation, no doubt the office of the company could not be given up unless both the joint liquidators had worked together. As I have already explained, the conflict between the two liquidators was that one claims that he was to act alone

and the other had been removed per resolution of the creditors, each of the liquidators started acting on his own. As this office is not a transferable property because of the Delhi Rent Control Act, no apparent loss has been caused to the company rather a saving has resulted because arrears of rent have been given up by the landlord and further expense had been saved. But the petitioner is right in saying that a suspicion attaches to the transaction. I may here say that generally when a company is in compulsory liquidation, it is generally the practice to give up the premises of the company because if the company had gone into winding up, the office is no longer required by the company. The only loss that might be said to have resulted to the company by the course followed by the first respondent is that in case an application for re-structuring of the company has come forward, it would have very much helped if an office was available. As no monetary loss as such can be established on this charge, I am unable to act under s. 543 of the Act.

8. These are all the points raised and having noted the points and the fact that the official liquidator may take action, if so advised, on better material being available, I have to reject the petition. I, however, make no order as to costs.