
(1997) 05 P&H CK 0108

In the Punjab And Haryana At Chandigarh

Case No : Company Petition No. 72 of 1988 in Company Petition No. 32 of 1983

Expo Expert Private Ltd.

APPELLANT

Vs

Jai Gopal Angrish and Others

RESPONDENT

Date of Decision : 29-05-1997

Acts Referred:

Companies Act, 1956 — Section 541, 542, 543

Citation : (1999) 97 CompCas 913

Hon'ble Judges : N.K. Kapoor, J

Bench : Single Bench

Advocate : Amit Sethi, for the Appellant; Ajay Mittal and S.S. Mahajan for respondent Nos. 1 to 3 and 5, for the Respondent

Judgement

N.K. Kapoor, J.—This is a petition under Sections 541, 542, 543 of the Companies Act, 1956, read with Section 151 of the CPC and Rule 9 of the Companies (Court) Rules, 1959, for a declaration that respondents Nos. 1 to 5 be held guilty of misfeasance and breach of trust in relation to the affairs of the company and its creditors and thus be held responsible jointly and severally without any limitation of liability for all debts/unauthenticated expenditure as given in paragraphs 10, 11, 12 and 13 in all amounting to Rs. 3,20,842, a decree be passed in favour of the petitioner-company and against respondents" Nos. 1 to 5 jointly and severally and they be directed to contribute jointly and severally to the assets of the company and to pay the amount to the official liquidator or such sum which the court may determine along with interest at the rate of 12 per cent. per annum from the date of winding up of the company, i.e., September 22, 1983, till its realisation along with costs. The case set up by the petitioner is that Xpo Xpert Private Limited was incorporated on November 29, 1977, having its registered office at S-146, Industrial Area, Social Chowk, Jalandhar. The paid-up capital of the company was Rs. 2,30,500 which was divided into 4,910 equity shares of Rs. 100 each, i.e., Rs. 50 called and paid up and Rs. 15,000 remaining unpaid capital. The authorised capital of the company was Rs. 10,00,000 divided into 10,000 equity shares of Rs. 100 each. The main

object of the company before it went into liquidation was export and import of all kinds of merchandise, machinery, equipment, articles, manufactured or otherwise processed. A winding up order of the company has already been passed on September 22, 1983, and the official liquidator attached to this court has been appointed as liquidator of the company. The official liquidator has been authorised to file or defend any suit, claim petition, prosecution or other legal proceedings, civil or criminal, in the name and on behalf of the company as per order dated January 9, 1986, passed in Company Petition No. 87 of 1985. As per averment in the petition, respondent No. 1 is the ex-managing director and respondents Nos. 2 to 5 are ex-directors of the company. All these persons were taking active part in day-to-day affairs of the company during the course of its functioning. According to the petitioner, acts of the respondents in connection with functioning of the company and its management have been found to be fraudulent and against the interest of the company and its creditors. They are, therefore, guilty of misfeasance and breach of trust in relation to the company and thus liable for such acts of commission and omission severally and jointly. Though the ex-directors of the company were required to submit the statement of affairs on or before October 7, 1983, yet they submitted the statement of affairs on June 8, 1985. The official liquidator on taking the control of the company found that the following amounts due from the parties has become time barred. The detail is as under :

A

Name of party Date of last transaction Amount including interest up to August, 1983 (Rs.)

(1) Sun "N" Star High Street Market, Birmingham U. K. 21-5-81 1,19,100

(2) Diwan Industrial Corporation Kalasia Gali, Ludhiana. 14-8-81 1,550

(3) Gothwal Machinery Stores, Agra Road, Dausa (Raj) 14-9-79 8,500

(4) Novelty Hardwar Store, Tripolia Bazar, Jaipur. 09-7-80 1,075

(5) Kumar Sons, Sadar Bazar, New Delhi. 19-2-80 395

Total 1,30,620

2. Similarly, a sum of Rs. 5,069 became time barred as despite numerous intimations given to the ex directors to furnish the correct addresses of the parties, no reply was received and so this amount too has become time barred. The detail is given as under :

B

Name of party Amount (Rs.)

(1) Sadafal Hardware 397

(2) Pradeep Hardware Store 136

(3) Rajesh Kumar Gopal Chander 1,459

(4) Ram Bartan Bhandar 1,475

(5) Bhagwan Dass Phool Chand 694

(6) Anand Prakash Goyal 800

(7) U. P. Crockery House 109

Total 5,069

3. Similarly, the official liquidator as per report submitted by the chartered accountant found that a sum of Rs. 1,80,052 stated to have been spent under different heads of expenses as per entry in the cash book is, however, not supported by any voucher nor the same has been authenticated by ex-directors of the company. With these broad averments, a prayer has been made that the ex-directors of the company--respondents Nos. 1 to 5--be held jointly and severally liable and directed to pay this amount to the official liquidator along with interest at the rate of 12 per cent. per annum till actual payment is made. This petition is duly accompanied by an affidavit. Necessary annexures in support of the claim laid too had been annexed with the petition.

4. A joint reply has been filed by respondents Nos. 1 to 3 and 5. The respondents in their reply have stated that respondent No. 4 was not a director of the company whereas the remaining being members of the board of directors were conducting the business of the company. The respondents have denied/controverted the various material averments made in the petition. The respondents have specifically denied the charge that they are guilty of misfeasance and breach of trust in relation to the affairs of the company or that there have been acts of omission and commission on their behalf. As regards the various amounts which have become time barred, it has been stated that all efforts were made to recover the amount but they failed and the amount could not be recovered and on the advice received no suit was filed. Similarly, the answering respondents denied that the liquidator ever demanded the addresses. It was thus prayed that the petition be dismissed.

5. On the pleadings of the parties, the following issues were framed :

(1) Whether the petition discloses any cause of action under Sections 541, 542 and 543 of the Companies Act, 1956 ? OPP

(2) Whether the petition as filed discloses commission or omission or any act of misfeasance or misappropriation or breach of trust or fraud in respect of the duties of the respondents as directors of the company ? OPP

(3) Whether due to the mismanagement, negligence and misconduct of the respondents the debts of the company have become time-barred, if so, to what effect ? OPP

(4) Whether the respondents are personally liable to pay the amount as claimed

in the petition to the official liquidator ? OPP

(5) Whether respondent No. 4 was not the director of the company with effect from December 7, 1982 ? If so, to what effect ? OPR

(6) Relief.

6. The official liquidator examined Harbagh Singh, UDC, in the office of the Registrar of Companies, Jalandhar, as PW-1 ; Mr. Rajnish Mittal, chartered accountant of Datta Singla and Company as PW-2 and appeared as his own witness as PW-3 in support of the petition. PW-1 Harbagh Singh on the basis of record deposed that at the time of winding up of the company, i.e., on September 22, 1983, Jai Gopal Angris, Om Parkash Aggarwal, Sat Pal Aggarwal, and Rajinder Nath Sharma were the directors of the company. He also placed on record the certificate of registration exhibit PW-1/1 ; annual return of the company filed for the year ending September 30, 1982, exhibit PW-1/2 and original Form 32-exhibit PW-1/3. Mr. Rajnish Mittal, chartered accountant, PW-2, deposed that he audited the accounts of the company and submitted the report exhibit PW-2/1. He further deposed that he had not prepared the balance-sheet as the accounts were not complete. Another report exhibit PW-2/2 was submitted by him. R.S. Negi, Additional District and Sessions Judge, Mandi, as the official liquidator, deposed to the effect that on going through the statement of accounts and records of the company he found that some cases of recovery had already become time-barred, i.e., prior to the liquidation order. Similarly, he found that some correct addresses of the persons were not supplied by the ex-directors to the official liquidator and so all these amounts had become time barred. All these witnesses were cross-examined by the contesting respondents. Nothing has come on record creating any doubt to the veracity of any of the witnesses" statement. The respondents have not chosen to lead any evidence. In fact, they have also not appeared as their own witnesses.

7. Learned counsel for the petitioner has argued that as per the facts proved on record, the respondents" carelessness and negligence is writ large. In fact, they are clearly guilty of misfeasance and breach of trust in running the affairs of the company till the same was taken over by the official liquidator and so they are jointly and severally liable to pay this amount along with interest to the official liquidator in terms of Sections 541, 542 and 543 of the Companies Act. Reliance has been placed upon the following decisions ; P.A. Tendolkar v. Official Liquidator [1967] 37 Comp Cas 392 (Karn); Smart Advertising Co. (P.) Ltd. (In Liquidation) Vs. Ramesh K. Nanchahal and Another, ; P.K. Nedungadi Vs. The Malayalee Bank Ltd. (In Liquidation) and Others, ; Official Liquidator, Supreme Bank Ltd. Vs. P.A. Tendolkar (Dead) by Lrs. and Others, and The Official Liquidator Vs. Raghawa Desikachar and Others, .

8. Learned counsel for the respondents, on the other hand, argued that mere inaction on the part of the directors/managing director cannot be construed as a case of misfeasance and breach of trust. To hold a director or a managing

director to be liable, it has to be held that such person is clearly guilty of violating the duty cast upon him. Thus, merely for the reason that certain debts could not be recovered though attempt was made to recover the amount due cannot be held to be a case of misfeasance and breach of trust. Similarly, the allegations levelled in the petition that the answering respondents did not furnish the correct addresses of the party though asked for is merely an assertion without any proof. As a matter of fact, during the time when the answering respondents were in control of the affairs of the company every possible attempt was made to recover various amounts from the party, but despite sincere efforts made, the amount could not be recovered. Thus, there has been no negligence on the part of the respondents in carrying out the affairs of the company. The decision given by this court in the case reported as Faridabad Rubber Soles (P.) Ltd. v. S.L. Chopra [1994] 3 PLR 78 is applicable as per the facts of the present case. Consequently, the petition deserves to be dismissed.

9. Section 541 of the Companies Act fixes the liability where proper accounts are not kept. As per Section 541(1) of the Companies Act, in case it comes to the notice that proper books of account were not kept by the company throughout the period of two years immediately preceding the commencement of the winding up, every officer of the company who is in default is liable to punishment with imprisonment for a term which may extend to one year unless he can show that he acted honestly and that in the circumstances in which the business of the company was carried on, the default was excusable. u/s 542 of the Companies Act, liability is fixed for fraudulent conduct of business. In case it comes to notice that business of the company has been carried on, with intent to defraud the creditors of the company, or any other persons, such person can be held personally liable for all or any of the debts or liabilities of the company as the court may direct. Similarly, u/s 543 of the Companies Act, the court can assess damages against delinquent directors and direct them to repay the same with interest at such rate as the court may think just. Under this section, such an application has to be filed within five years from the date of the order for winding up. The aforesaid sections and other relevant provisions of the Companies Act envisage fixing of liability of the defaulting party as well as make them liable for a criminal prosecution. Presently, the petition has been filed to fix the liability of the delinquent director--managing director/director-with a further prayer that they be directed to reimburse the company for the losses which have occurred on account of their acts of misfeasance and breach of trust.

10. The official liquidator in support of his petition has examined a functionary of the Registrar of Companies as well as the chartered accountant who audited the accounts of the company. The chartered accountant has submitted his report on the basis of record which was made available to him. The official liquidator has also deposed to the effect that before he took over the affairs of the company, substantial amount, i.e., Rs. 1,30,620 had already become time barred. Similarly, he deposed that a sum of Rs. 5,069 could not be recovered as the ex-directors did not care to reply to the communication addressed by him

requesting them to supply the correct addresses of the party. A perusal of the list of companies who owed money to the petitioner-company as per details given in the earlier part of the judgment reveals that these amounts as detailed could be recovered within a period of three years from the date of last transaction. For reasons best known to the ex-directors, no step/steps appears to have been initiated to recover these amounts consequently resulting in making these claims to be time-barred. As noticed earlier no evidence has been adduced by the contesting respondents. Thus, keeping in view the admitted position, I hold that the aforesaid amounts as at "A" became time-barred. As regards the amounts as per list "B", the same also became time-barred on account of non-supply of correct addresses of the parties by the answering respondents. Since there is no rebuttal of the statement of the official liquidator, the same cannot be taken to have been proved.

11. Mr. Rajnish Mittal, chartered accountant of Datta Singla and Company, PW-2, had examined the accounts of the petitioner-company and has come to the conclusion that a sum of Rs. 1,80,052 alleged to have been spent by the company under different heads of expenses is, however, not supported with vouchers. In the absence of vouchers, this amount cannot be said to have been spent for the affairs of the company. In any case, it was for the ex-directors to explain as to how this amount has been spent to run the company and for its welfare.

12. The apex court in *Official Liquidator, Supreme Bank Ltd. Vs. P.A. Tendolkar (Dead) by Lrs. and Others*, was examining as to whether a director of a company is liable for misfeasance if he is found to be negligent and held as under (at page 400) :

"It is certainly a question of fact, to be determined upon the evidence in each case, whether a director, alleged to be liable for misfeasance, had acted reasonably as well as honestly and with due diligence, so that he could not be held liable for conniving at fraud and misappropriation which takes place. A director may be shown to be so placed and to have been so closely and so long associated personally with the management of the company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of the business of a company even though no specific act of dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the company even superficially. If he does so he could be held liable for dereliction of duties undertaken by him and compelled to make good the losses incurred by the company due to his neglect even if he is not shown to be guilty of participating in the commission of fraud. It is enough if his negligence is of such a character as to enable frauds to be committed and losses thereby incurred by the company."

13. Similarly, the apex court in *P.K. Nedungadi Vs. The Malayalee Bank Ltd. (In Liquidation) and Others*, held that it is not essential to prove fraud on the part of the director. It is sufficient to hold directors liable in case it is proved that they

are guilty of misfeasance and breach of trust which includes breach of duty of the company in misapplying the company's assets. A mere act of omission cannot be construed to be a case of misfeasance or breach of trust unless the same has resulted in actual loss to the company. It is for the petitioner to establish (i) that there has been a breach of trust or duty or misfeasance ; and (ii) loss which has arisen therefrom. Allegations or proof of fraud are not essential and it is wholly immaterial that acts of omission constitute offences for which director or officer may be criminally liable.

14. The Mysore High Court in P.A. Tendolkar's case [1967] 37 Comp Cas 392 held that this section applies where a director, officer, etc., has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of misfeasance or breach of trust in relation to the company. The court may compel a delinquent director, officer, etc., to repay or restore any money or property which he has misapplied or retained or became liable or accountable to the company or to contribute to the company's assets an appropriate sum by way of compensation. To similar effect is the view taken by this court in Smart Advertising Co. (P.) Ltd. (In Liquidation) Vs. Ramesh K. Nanchahal and Another, . Relying upon the decision of the apex court in P.K. Nedungadi Vs. The Malayalee Bank Ltd. (In Liquidation) and Others, , the court held that where a company suffers loss on account of breach of duty on the part of a director, he is liable to compensate the company to the extent of such loss. The court further held that where the director and managing director of a company in liquidation had failed to take action for realisation of certain debts owing to the company and the debts became time-barred before the winding up order was passed by the court, is a fit case for passing a decree against the director and a managing director for the amount of the debts. The court further held the director and the managing director liable and ordered them to reimburse the company the amount of the debts.

15. To be fair to counsel for the respondents, reference to Faridabad Rubber Soles (P.) Ltd. 's case [1994] 3 PLR 78 would be appropriate. The court in the instant case came to the conclusion that the official liquidator had not alleged fraud or dishonesty on the part of the director for not recovering the amount for the company and thus held that merely for the reason that the debts have become time-barred, the same does not amount to misfeasance. This decision of this court has no bearing on the point under scrutiny. The court in the aforesaid case noticed that the company premises were locked by the State Bank of Patiala on July 17, 1982, and the books and the records of the company were inside and so the answering respondent had no access to the same since the lock was opened in November, 1987, as per direction of the court. The ex-directors of the company obviously had no access to the books of account and so could not initiate action for recovery of the amount due to the company. Under these circumstances, the court held that the respondents are not liable. In the instant case, it has been proved on record that the ex-directors/managing director did not initiate any steps to recover the amount due from the defaulting party and

the same became time-barred. Similarly, a sum of Rs. 5,069 was lost as the ex-directors did not co-operate with the official liquidator and furnish the correct addresses of the defaulting party. Similarly, no explanation has been given regarding the sum of Rs. 1,80,052 for which there is no voucher on the record of the company. In any case, these could be explained by the answering respondents by adducing evidence or even stating on oath. But for reasons best known to them, they have chosen not to lead evidence or to depose on oath.

16. Accordingly, I accept this petition and pass a decree for a sum of Rs. 3,20,842 along with interest at the rate of 12 percent, per annum from September 22, 1983, till its realisation against respondents Nos. 1 to 3 and 5. The petitioner's claim against respondent No. 4 stands dismissed as he has not been found to be a director of the petitioner-company. No costs.