
(2015) 02 KAR CK 0433
In the Karnataka High Court
Case No : O.S.A. Nos. 33 and 44 of 2013

Kirtivan D. Kotian

APPELLANT

Vs

Mohan Singh and Others

RESPONDENT

Date of Decision : 25-02-2015

Acts Referred:

Citation : (2015) 128 CLA 116 : (2015) 191 CompCas 288

Hon'ble Judges : Vineet Saran, J;S. Sujatha, J

Bench : Division Bench

Advocate : Ajesh Kumar S., for the Appellant; Thomas V. Peter, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Vineet Saran, J.

1. The admitted case of the appellant is that he, along with his family members, held over 95% shares of the Company in question and they were in control of the affairs of the Company till the year 2006. At this stage, the appellant and his family members sold the share holdings to Sri S.N. Ladhani and his family members to the extent that the latter became share holders of 98.76% of the shares and the share holding of the family members of the appellant was reduced to 1.24% only. It is admitted by the learned Counsel for the appellant that at present the appellant himself has no share holding in the Company. At the instance of respondent No. 1-Mohan Singh, who had filed a winding up petition (being COP No. 56/2008) an order dated 18.12.2008 was passed by the learned Company Judge, directing the Company to be wound up and the Official Liquidator was directed to take possession of the affairs of the Company in question being M/s. S. Manikya Plastichem Private Limited.

2. Nearly five years after such order was passed, in the year 2013, a Company application was filed by the appellant with the prayer for recalling the order dated 18.12.2008 whereby direction for winding up of the Company, M/s. S. Manikya

Plastichem Pvt. Ltd. was passed. Further prayer was made for being impleaded in the Company Petition as a party-respondent and also to condone the delay of 1505 days in filing the said application.

3. The application filed by the appellant was rejected by the learned Company Judge vide order dated 25.04.2013, primarily on the ground that the appellant was not even a shareholder of the Company in liquidation and as such, the application of the appellant was without merit. Aggrieved by the said order, these appeals have been filed.

4. We have heard Sri Ajesh Kumar S. learned Counsel appearing for the appellant as well as Sri Thomas V. Peter, learned Counsel appearing for respondent No. 1-Company (Mohan Singh), Sri K.S. Mahadevan, learned Counsel for the Company in liquidation (Official Liquidator) and Ms. Poornima Hatti, learned Counsel appearing for the present majority share holders, who have sought impleadment in these appeals.

5. The submission of learned Counsel for the appellant is that he is a guarantor of the loan which was taken by the Company from the State Bank of India. He contends that he was an interested party and was thus a necessary party in the Company Petition. It is further contended that he has entered into negotiation with the Bank for clearing dues of the Bank and in turn, the properties of the Company which have been pledged as securities with the Bank may be handed over to the appellant so that the appellant could revive the Company, which would be for the benefit of the creditors as well as the shareholders. It is also submitted by the learned Counsel for the appellant that for such purpose, it would be necessary that the order of winding up dated 18.12.2008 be recalled and thereafter the appellant may be permitted to negotiate with the Bank and other creditors for revival of the Company, as the appellant has the expertise to do so.

6. Sri Thomas V. Peter, learned Counsel for respondent No. 1 (Mohan Singh) who filed the Company Petition for winding up has submitted that after passing of the winding up order, the debts of respondent No. 1 have been cleared by the appellant and as such, respondent No. 1 has no interest left in the matter.

7. Sri K.S. Mahadevan, learned Counsel appearing for the Official Liquidator has submitted that the appellant would not be a necessary party in the proceedings, as he is neither a share holder nor a secured creditor and is merely a guarantor of the loan taken by the Company from the State Bank of India. It has been submitted that under law, the appellant would have no right or locus to revive the Company, as he is not even a shareholder of the Company and as such, the entire argument that the purpose of the appellant is to revive the Company would be a futile exercise. It is further submitted that there is no proposal submitted by the appellant for revival of the Company and merely on a bald statement of the appellant that he wants to revive the Company, without there being any provision under which a guarantor can proceed for revival of the

Company, the prayer made is not worthy of acceptance. It is submitted that the rejection of the application filed by the appellant is fully justified in law.

8. Ms. Poornima Hatti, learned Counsel for the shareholders seeking impleadment has submitted that at present there is nothing left in the Company as there are neither any workers, nor there is any plant and machinery left and as such, the question of revival of the Company does not arise; and that the learned Company Judge has, on merits of the case, passed an order for winding up of the Company, which is fully justified in law. She has adopted the arguments of the learned Counsel appearing for the Official Liquidator in submitting that the appeal deserves to be dismissed.

9. From the facts of the present case, it is absolutely clear that the only interest of the appellant is to the extent that he is a guarantor of the loan taken by the Company from the State Bank of India. He has no share holding in the Company and had voluntarily exited from the Company in the year 2006 when he transferred his share holdings in favour of Sri S.N. Ladhani and his family members.

10. On being questioned, learned counsel for the appellant could not place before the Court any provision of the Companies Act under which a proposal for revival of a company at the instance of the outsider (not being a shareholder) can be entertained by the Company Court. Merely because a certain group had promoted the Company several years back, will not entitle the initial promoters to take interest in the revival of the Company unless the same is permitted by law. The stand of the appellant that he may be permitted to negotiate with the bank for clearing dues of the bank and thereafter be permitted to take over the securities of the Company pledged with the Bank, for allowing the appellant to revive the Company, is not worthy of acceptance. Once the Company is under liquidation, claim over the properties of the Company would not be of any one particular party or creditor. The assets of the Company have to be distributed as per the terms of the Companies Act. A guarantor, even though may be the initial promoter of the Company, cannot be said to be a party interested in the revival of the Company as none of the provisions of the Companies Act give any right to such a person to revive a Company, who is not even a shareholder. The Company consists of shareholders and not outsiders.

11. To elaborate on this point we may give an example. A loan may be given by a bank to a Company to the extent of Rs. 50 lakhs, for which the property of the Company worth Rs. 10 Crores may be pledged as security, and one person may be the guarantor. Such guarantor of the loan cannot be permitted to pay the entire loan of Rs. 50 lakhs and take charge of the property of the Company worth Rs. 10 Crores, ignoring the claim of the other creditors. This is by way of an example. There can be several other instances where a guarantor or an outsider may try to take over the securities of the Company and say that it is for revival of the Company. For that reason, the law provides that it is the official liquidator which has to take over the assets of the Company and deal with the same in

terms of the provisions of the Companies Act.

12. As such, in the absence of the appellant having been able to place before us any provision under which a guarantor can be handed over the assets of the Company for its revival, (for which there is no proposal even filed by the appellant before the learned Company Judge or in appeal), we are of the opinion that the prayer for recalling the order of winding up at the instance of such guarantor (appellant) has been rightly rejected by the learned Company Judge.

13. Even otherwise, it is not clear as to why the appellant has woken up from slumber in the year 2013 i.e., after nearly five years of the passing of the winding up order on 18.12.2008 and when directions for sale of the property has already been issued by the learned Company Judge, much prior to the filing of the application.

14. As such, we do not find any good ground to interfere with the order impugned in these appeals. The appeals are accordingly dismissed.

15. However, it may be clarified that dismissal of these appeals will not come in the way of the appellant in filing suitable application in the Company proceedings pending before the learned Company Judge, if he is so entitled to under the provisions of the Companies Act.