(2015) 12 KAR CK 0018

In the Karnataka High Court

Case No : C.A. No. 1069/2013 in Co. P. No. 56/2008

Kirtivan D. Kotian APPELLANT

Vs

Mohan Singh and Others RESPONDENT

Date of Decision : 11-12-2015

Acts Referred:

Citation : (2015) 12 KAR CK 0018

Hon'ble Judges : Aravind Kumar, J.

Bench : Single Bench

Advocate : Ajesh Kumar S., Advocate for DSK Legal, for the Appellant

Final Decision : Dismissed

Judgement

Aravind Kumar, J.—This is an application filed by one Dr. Kirtivan D. Kotian seeking for being impleaded in Co. P. 56/2008 contending inter alia that he along with his brother and father owned not less than 95% of shares in the company(in liquidation) and were in control of its affairs at an undisputed point of time. It is also stated that during the year 2006 company (in liquidation) had borrowed loan of Rs. 9 Crores for expanding its business and substantial portion of shares held by applicant and family members are said to have been taken by zero cost with an understanding that entire assets and liabilities of company are taken over by Sri. S.N. Ladhani, resident of Bengaluru and therefore shareholding was diluted to less than 2% and remaining shares were held by Sri. Ladhani and his nominees. In addition, it is stated that State Bank of India had extended an additional loan of Rs. 2 Crores against security of company''s assets during the year 2007 and when Sri. S.N. Ladhani and his nominees proposed to manage the company bank accepted their guarantee and thereby there is ''act of novation'' and as such guarantee extended by the applicant had stood dissolved. On these grounds amongst other grounds as mentioned in detail in the affidavit supporting the application, applicant has sought for being impleaded.

2. It requires to be noticed at this juncture itself that applicant herein had made

similar attempt earlier by filing C.A. 327/2013 and same came to be dismissed by this court vide order dated 25.04.2013 and it has been noticed by Coordinate Bench of this court that applicant herein is neither necessary nor proper party and held that applicant having spelt out in unmistakable terms that he is not a shareholder of company (in liquidation) he would not be a necessary party and accordingly application came to be dismissed on 25.04.2013. It also requires to be noticed by this court that said application has been dismissed along with two other applications filed by very same applicant which was for recalling the order dated 18.12.2008 passed in Co. P. 56/2008 directing winding up of the company (in liquidation) and to condone the delay in filing said application. Those two applications undisputedly came to be dismissed by co-ordinate Bench of this court on 25.04.2013. These orders were carried in appeal by applicants in O.S.A. 33/2013 and O.S.A. 44/2013. Division Bench of this court, after considering rival contentions has noticed that only interest of applicant is to the extent that he is a guarantor of loan taken by company (in liquidation) from State Bank of India and he has no shareholding in the company and he had voluntarily exited from the company in the year 2006 itself when he transferred his shareholding in favour of Sri. S.N. Ladhani and his family members and as such he cannot have any say in the matter. It has been further held by Division Bench that when a pointed question was posed to the learned counsel appearing for appellant therein (who incidentally happens to be same counsel in the present application) to the effect as to right of appellant to seek revival of company (not being a shareholder) was not answered to arrive at a conclusion that appellant therein i.e., applicant herein has not been able to explain as to why after having woken up from his slumber in the year 2013 i.e., nearly five years after passing of the winding up order he should be heard, that too at the stage of directions being issued for the sale of property and as such Division Bench declined to interfere with the order dismissing the applications. Thus, the claim of the applicant had become final and undisputedly this has not been pursued by the applicant before Apex Court.

3. However, it is stated by Sri. Ajesh Kumar, learned counsel that a review petition has been filed against order passed in OSA 33/2013 and OSA 44/2013 and he would fairly concede that there is no stay of order dated 25.02.2015. His submission is placed on record.

4. Present application has been filed by the very same applicant contending interalia that liberty was given by the Division Bench and as such he has approached this court by filing present application. In that view of the matter it would be necessary to examine as to whether such liberty had been granted to appellant therein i.e., applicant herein to file similar application yet again. Liberty which applicant claims to have been granted by Division Bench reads as under:

"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."

5. Above order passed by Division Bench does not even remotely suggest that applicant would be entitled to agitate his claim for being impleaded in the present proceedings despite his application to come on record being dismissed earlier and affirmed by Division Bench. By no stretch of imagination liberty given by Division Bench can be construed as one permitting the applicant to re-agitate the matter which has reached finality. In that view of the matter the citations relied upon by learned counsel appearing for applicant which are as under:

"1. Mumbai International Airport Pvt. Ltd. Vs. Regency Convention Centre and Hotels Pvt. Ltd. and Others,

2. S.K. Gupta and Another Vs. K.P. Jain and Another,

3. Civil Appeal No. 3803/2014 - Phatu Rochiram Mulchandani v. Karnataka Industrial Areas Development Board and others.

would not come to his rescue and facts are entirely different and so also principles laid down in the Judgments are contextually different. Hence, these Judgments pressed into service which are perused are held as inapplicable to the facts obtained in the present case.

6. As could be discerned from the order of Division Bench it would clearly indicate that appellant i.e., applicant herein had sought for permission to negotiate with the bank for clearing dues of the bank and thereafter permitted to take over security offered to bank for appellant to revive the company. It has been held by the Division Bench that such prayer is not worthy of acceptance since company under liquidation cannot claim right over properties of such company since such right would not be of any one particular party or creditor. It came to be held that assets of the company will have to be distributed as per terms of the Companies Act. As such it came to be held by Division Bench that even though guarantor was initially promoter of company he cannot be said to be a party interested in the revival of the company as none of the provisions give any right to such a person to revive a company and that too a person who is not even a shareholder. As such all contentions of appellant came to be rejected by the Division Bench.

7. Undaunted by order of rejection passed by the Division Bench dismissing the application for being impleaded, yet again applicant has filed present application and learned counsel for applicant has tried to buttress his arguments contending that in view of liberty given by Division Bench while disposing of OSA 33/2013 connected with OSA 44/2013 on 25.02.2015 such liberty would enable the applicant to file present application, requires to be considered with utmost circumspection for the reasons already indicated herein above inasmuch as liberty granted by Division Bench would not even remotely suggest that applicant would be entitled to reagitate the claim for being impleaded in the present proceedings. As such present application deserves to be dismissed with

exemplary costs.

8. Hence, C.A. 1069/2013 is hereby dismissed with cost of Rs. 25,000/- payable to official liquidator. Applicant shall deposit cost with the official liquidator within four weeks from today failing which registry shall issue a certificate in favour of Official Liquidator, Attached to High Court of Karnataka, No. 12 Raheja Towers, M.G. Road, Bengaluru-560 001 to enable him to recover the same from applicant through jurisdictional Deputy Commissioner as arrears of land revenue.