(1997) 04 KL CK 0020

In the High Court Of Kerala

Case No : C.A. No''s. 191 and 201 of 1996 in M.C.A. No''s. 94 of 1995 and 29 of 1996 etc.

L.K. Prabhu APPELLANT

Vs

S.M. Ameerul Millath and Another RESPONDENT

Date of Decision : 11-04-1997

Acts Referred:
Companies Act, 1956 — Section 2(3), 2(30), 448(2), 457(3), 463

Citation : AIR 1997 Ker 347 : (1997) 3 ILR (Ker) 332

Hon'ble Judges : K.A. Abdul Gafoor, J

Bench : Single Bench

Advocate : K. Moni, for the Appellant; Dinesh R. Shenoy, for the Respondent

Judgement

K.A. Abdul Gafoor, J.—M.C.A. Nos. 94/95 in C.P. No. 23/88 and 29/96 in C.P. 2/87 are filed by Ex-directors of the Company in liquidator, u/s 543 of the Companies Act, 1956 alleging that the 2nd respondent as Official Liquidator, while conducting sale of movable and immovable properties of the Company in liquidation, contumaciously and wilfully acted in a manner detrimental to the interests of the Company and consequentially his action is misfeasance and malfeasance to be proceeded against. They therefore pray for a declaration that the 2nd respondent has committed misfeasance and breach of trust in relation to the company in liquidation and that necessary enquiries be made and accounts taken for ascertaining the liability of the 1st respondent to contribute to the assets of the company by way of compensation for the alleged misfeasance and breach of trust. They also seek an order directing the 1st respondent to contribute to the assets of the company in liquidation as he may be found liable, with 12% interest from the date of his misfeasance to the date of repayment. The averments are almost in same terms, in both the M.C.As.

2. The 1st respondent is the person who was holding the office of Official Liquidator at the material time of sale of the assets of the Company in liquidation and the 2nd respondent is the Official Liquidator. The same person is still holding

the office of the Official Liquidator.

3. In both these M.C.As. the Official Liquidator has filed C.A. No. 191/96 and C.A. 201/96 respectively, taking up preliminary objection that an application u/s 543 of the Companies Act will not lie against the Official Liquidator. Therefore, the parties were heard on the question of maintainability as a preliminary point. Accordingly, C.A. 191/96 and C.A. 201/96 were taken up first to decide the preliminary issue regarding the maintainability of a petition u/s 543 alleging misfeasance against the Official Liquidator. The term ''Officer'' is defined in Section 2(30) of the Act as follows :

" "Officer" includes any director, managing agent, secretaries and treasurers, manager or secretary or any person in accordance with whose directions or instructions the Board of directors or any one or more of the directors is or are accustomed to act, and also includes -

(a) where the managing agent, or the secretaries and treasurers is or are a firm, any partner in the firm;

(b) where the managing agent or the secretaries and treasurers is or are a body corporate, any director or manager of the body corporate;

but, saving Sections 477, 478, 539, 543, 545, 621, 625 and 633 does not include an auditor".

''Official Liquidator'' is not included in the definition of ''Officer''. Section 543(1) reads as follows:

"Section 543. Power of Court to assess damages against delinquent directors, etc. (1) If in the course of winding up a company, it appears that any person who has taken part of the promotion or formation of the company, or any past or present director, manager, liquidator or officer of the company -

(a) has misapplied, or retained, or become liable or accountable for, any money or property of the company; or

(b) has been guilty of any misfeasance or breach of trust in relation to the company;

the Court may, on the application of the Official Liquidator, or the liquidator, or of any creditor or contributory, made within the time specified in that behalf in Sub-section (2), examine into the conduct of the person, director, manager, liquidator or officer aforesaid and compel him to repay or restore the money or property or any part thereof respectively, with interest at such rate as the Court thinks just or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Court thinks just".

Section 543(1) has thus parts. The first part deals with the types of officers and persons of the company against whom an application u/s 543 shall maintain, in respect of the act of misfeasance etc. The second part of the subsection deals with the persons empowered to make an application for misfeasance. The third part deals with persons whose conduct should be enquired into. So, an application for the misfeasance u/s 543 shall only lie against the persons mentioned in the first part of the sub-section. Such an application shall be maintained at the instance of the persons mentioned in the second part. These applications are filed against the Official Liquidator alleging that the Official Liquidator had committed misfeasance during the sale of the property of the company in liquidation. So, the issue is whether such an application can be maintained against the Official Liquidator.

4. As already mentioned above, applications for misfeasance can be maintained only against the officers and persons of the company mentioned in the first part of Section 543(1) which include a promoter, past'' or present director, manager, liquidator or officer of the Company. Applications alleging misfeasance can be filed only against these persons and officers. Official Liquidator is not included in it but only liquidator is included. In the second part of the sub-section the persons who can file such misfeasance application are mentioned. They are Official Liquidator, liquidator, creditor and contributory. Thus, in the second part. Official Liquidator and liquidator are specifically empowered to file such an application. Official Liquidator is included only in the second part enabling him to file such an application alleging misfeasance.

5. The sub-section has also got a third part where it mentions about the persons and officers whose conduct may be examined by the Court during the trial of the application filed by the Official Liquidator or liquidator, creditor or contributory. Among them are included director, manager, liquidator, and officer aforesaid. Among them also Official Liquidator is not included. Thus, Official Liquidator is not included in the third part of Section 543(1) which specify the persons and officers whose conduct shall be examined by the court during the trial of a petition u/s 543. Thus, the applicants in C.A. 191/96 and C.A. 201/96 contend that an application u/s 543 to take action for misfeasance, cannot be maintained against an Official Liquidator, as in the first part of Section 543.

6. Countering this argument, the applicants in M.C.A. 94/95 and M.C.A. 29/96 submit that "Official Liquidator comes within the ambit of "liquidator" appearing in the first and third parts of Section 543(1). As per Section 448 there shall be an Official Liquidator appointed by the Central government attached to each High Court. The counsel submits that in terms of Section 449 the Official Liquidator shall by virtue of his office become the liquidator of the Company. That being the position, the Official Liquidator will come within the ambit of ''liquidator''. That is the meaning attributed by Section 449. But, the Scheme of Sections 448(2) and 463 makes it clear that an Official Liquidator can act as a liquidator but a ''liquidator'' cannot act as an Official Liquidator. He shall be described by the style of "Official Liquidator of the particular Company", in terms of Section 452. Thus, the Official Liquidator and liquidator are different, the Official Liquidator may be

discharging the functions of a liquidator, even then he is Official Liquidator and not liquidator,

7. In Section 543, only liquidator alone is mentioned in first and third parts whereas Official Liquidator and liquidator are separately mentioned in the second part. When the Legislature has used such separate words in a particular section, it shall have to be taken that both these words are used to mean separate officers and not same officers. If the liquidator includes Official Liquidator, then the Legislature would not have the expression "the Court may, on the application of the Official Liquidator, or the liquidator, or of any creditor". Thus, the Legislature has while enacting Section 543(1) had considered ''Official Liquidator'' and ''liquidator'' as separate. That is why, liquidator is included in the first part of Section 543(1) among the persons and officers against whom the misfeasance application will lie and in the third part among those whose conduct shall be examined by the court during the trial of misfeasance application. At the same time including him in the second, part he is enabled to file misfeasance application against other type of persons mentioned in the first part of the subsection. Thus, I am of the view that when Legislature has separately mentioned ''Official Liquidator'' and ''liquidator'' and the term ''Official Liquidator'' is not included in the first part of Section 543, among the officers and persons against whom a misfeasance application will lie and in the third part among those officers and persons whose conduct shall be enquired into by the Court, a petition u/s 543 will not lie against ''Official Liquidator''.

8. Applicants in M.C.A. 94/95 and M.C.A. 29/96 have cited before me the decisions in P.C. Pothen, Liquidator of the Common Wealth Bank Ltd. (in liquidation) ILR (1996) Ker 1, Official Liquidators, Baroda Batteries Ltd. v. Registrar of Companies, Gujarat State (1978) 48 Comp Cas 120 : (1975 Tax LR 1899), V.P. Nanda v. Registrar of Companies, Delhi and Haryana (1978) 48 Comp Cas 552 and Prahallad Bai Lath v. Registrar of Companies, (1979) 49 Comp Cas 317 to contend that the Official Liquidator is also an officer of the company and therefore misfeasance application will lie against an Official Liquidator. All these cases are in relation to Section 633 of the Act dealing with condonation of irregularity, bona fide happened. It was in that respect, the definition of officer in Section 2(30) being an inclusive definition, it was held that ''liquidator'' will also come within the word Officer mentioned in Section 633. But, in Section 543 ''Official Liquidator'' and ''liquidator'' are separately mentioned apart from ''officer''. So, those words have to be separately under stood in the context used. Anyhow, ''Official Liquidator'' and ''liquidator'' will not come within the words ''officer'' mentioned in Section 543 as all these words are separately used in the selfsame section.

9. Apart from that, there is separate provision in Section 457(3) enabling the Court to take action against the Official Liquidator in case when there is lapse or irregularity committed by him. If anybody has go, any complaint against the Official Liquidator he can point out that aspect to the Court and the Court can

take appropriate action. Specifically the counsel was asked whether M.C.A. 94/95 and M.C.A. 29/96 could be taken as application under that section. But, the counsel submitted that the applications shall be dealt with u/s 543 itself.

10. As the words ''Official Liquidator'', ''liquidator'' and ''Officer'' are used separately in Section 543(1) and as the ''Official Liquidator'' is not mentioned in the first and third parts of that sub-section amongst those against whom an application for misfeasance shall be made or against whom enquiry shall be conducted by the Government, I am of the view that, an application u/s 543 cannot be maintained against ''Official Liquidator''. So, the preliminary objection raised in C.A. Nos. 191/96 and 201/96 is upheld and M.C.A. Nos. 94/95 and 29/96 are dismissed as not maintainable. In the circumstances of the case, there will be no order as to costs.

