(1949) 08 MAD CK 0046

In the Madras High Court

Case No : A.A.O. No. 193 of 1947

M.A. Malik APPELLANT

Vs

V.S. Thiruvengadaswami Mudaliar RESPONDENT

Date of Decision : 23-08-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 51
Companies Act, 1913 — Section 235

Citation : AIR 1950 Mad 208 : (1950) ILR (Mad) 742 : (1949) 62 LW 784

Hon'ble Judges : Horwill, J;Balakrishna Ayyar, J

Bench : Division Bench

Advocate : C.A. Mahamed Ibrahim and T.S. Santaram, for the Appellant; D. Narasaraju and T.T. Srinivasan, for the Respondent

Final Decision : Dismissed

Judgement

Horwill, J.—In misfeasance proceedings taken by the liquidator during the course of a winding up of a company of which the appellant was

a Director for a year or so, this Court on the Original Side directed that the appellant do pay the Official Liquidator the sum of Rs. 2991-14-0 and

Rs. 4866-6-0 ""being the amounts of loss occasioned in respect of the share brokerage, preliminary expenses and investments in unauthorised

banks respectively."" The respondent having taken an assignment of the decree proceeded against the appellant in execution and applied to the

Court, for his arrest. The question arose whether u/s 51, Civil P. C., the respondent was liable for arrest. He pleaded that he was a pauper and

was quite unable to raise the money to discharge the decree. The Court, however, found that since he was a director and it was on account of his

breach of duty that the loss had been sustained by the company, Clause (c) of the proviso to Section 51 applied, and ""that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

2. It is not contended by the respondent that a Director is an express trustee of the property of the company; but it has always been held that the

relationship between a Director and a member of a company is that of trustee and cestui que trust, and Directors have been described as

commercial trustees, quasi trustees, and the like. In Cavendish Bentinck v. Fenn, (1887) 12 A. C. 652: 67 L. J. Ch. 552 Lord Macnaghen said

that the expression ""misfeasance"" in Section 165, Indian Companies Act was not misfeasance in the general sense of the word but as being in the

nature of a breach of trust. The learned advocate for the appellant has attempted to draw a distinction between misfeasance, or active wrong

doing, and nonfeasance, or mere negligence. One does not find in Section 235, Indian Companies Act the word ""nonfeasance"". A Director is

under an obligation to assist in the management and supervision of the affairs of the Company; and if a breach of his duty to the company results in

a loss to the company, he is bound to make compensation to the company in respect of the ""misapplication, retainer, misfeasance, or breach of

trust"". A failure on the part of a person to do his duty with regard to the property of a company over which he has control by virtue of his being a

Director amounts to misfeasance within the meaning of Section 235 , Companies Act.

3. Mr. Gopalswami Iyengar for the appellant has sought to take us through the facts of the case in an attempt to prove to us that the appellant was

in no way responsible for the loss that occurred; but we cannot, as the learned District Judge pertinently pointed out, go behind the decree itself.

The judgment of this Court also shows that the appellant failed to do his duty.

4. One of the earliest Indian cases that dealt with the duties of a Director towards the members of the company is the New Fleming Spinning and

Weaving Co. Ltd. v. Kessowji Naik, 9 Bom. 373., the learned Judge said:

My conclusion is that, (a) although the directors are not trustees in every sense of the term, they stand in a fiduciary relation towards their

shareholders with respect to the funds and the business placed in their charge, (b) It follows that they are liable to be sued for a breach of trust, in

case they have not dealt with the property and watched over the business as carefully as a man of ordinary prudence would deal with such property and watch over such business If they were his own.

Again at p. 396:

If, instead of performing their duty and showing reasonable diligence, the defendants delegated all the control to the agent, and so enabled him to

misapply the company''s money, they must, on the authority of the rule laid down by Lord Langdale, be held liable for that misapplication.

Ramasami v. Sreeramulu Chetti, 19 Mad. 149 , also considered the relationship between a Director and the members of a company. Reference is

made therein to certain English cases in which it had been held that the relationship of trustee and cestui que trust subsists between the Directors of

Joint Stock Companies and the shareholders, it being held in such cases that misfeasance by a Director was a breach of trust. Even in In re Forest

of Dean Coal Mining Co., (1879) 10 Ch. D. 450: (1879) 27 W. R. 594, relied on by the learned advocate for the appellant, we find at page 453

this passage :

Again, directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control....

We have not been referred by the learned advocate for the appellant to any case in which it was held that the relationship between a director and

the members of a company is not that of trustee and cestui que trust. Although, as already stated, he is not an express trustee, yet he certainly

occupies a fiduciary position with regard to the members of the company.

5. It is next argued that even though a Director occupies a fiduciary position in relation to the members of a company, he is not liable to account to

them. It seems to us that his liability to account flows from his fiduciary position, which requires him to hold the property of the company over

which he has control for the benefit of the members of the company. If he holds the position of a trustee with regard to the members of the

company, it means that the members of the company can call upon him to account for the property over which he has control on their behalf. This

is expressed in the opening sentence of paragraph 533 of Halsbury''s Laws of England, Vol. 5: ""Directors are trustees of the property of the

company in their hands or under their control and must account to the company for all such property."" We are, therefore, satisfied that the learned

District Judge was right in holding that an order for arrest could issue against the appellant even if his allegation that he had no money were true.

6. The appeal is dismissed with costs.

