

(2003) 10 KAR CK 0009

In the Karnataka High Court

Case No : Company Application No's. 1003, 1263 and 1264 of 2000 and 610, 611 and 612 of 2001 and Company Petition No. 30 of 1997

Mother Care (India) Ltd.

APPELLANT

Vs

Prof. Ramaswamy P. Aiyar

RESPONDENT

Date of Decision : 15-10-2003

Acts Referred:

Companies Act, 1956 — Section 454, 454 (5), 454 (5A), 538 (1) (a) (b) (c), 538 (1) (e)

Citation : (2004) ILR (Kar) 1081 : (2004) 1 KCCR 558 : (2004) 51 SCL 243

Hon'ble Judges : N. Kumar, J

Bench : Single Bench

Advocate : Deepak, for the Appellant; R.B. Krishna Murthy and Kumar, for the Respondent

Judgement

N. Kumar, J.—Company Application No. 1003/2000 is filed u/s 454(5) & (5A) of the Companies Act, 1956, for not complying with the provisions of Section 454 of the Companies Act against three Directors of the Company under liquidation.

2. Company Application No. 1263/2000 is filed u/s 538(1)(e) of the Companies Act, 1956 for a direction to the aforesaid three Directors of the Company to hand over all the books and records of the Company in liquidation and on their failure to do so to take action.

3. Company Application No. 1264/2000 is filed u/s 538(1)(A) of the Companies Act for a direction to respondents 1 to 3, the Directors, to hand over movable and immovable property of the company in liquidation and on their failure to do so to take appropriate action.

4. Professor Ramaswamy P. Aiyar who is the third respondent in the aforesaid three applications has made these applications, i.e. CAs 610, 611 and 612 of 2001, to delete his name in the aforesaid three applications and to afford him appropriate relief u/s 633 of the Act. In support of the prayer, the applicant

contends that though he was a Director of the Company in liquidation, on 5-7-1995 he resigned from the company which resignation was accepted on 9-8-1995. Accordingly, his name is not shown in the annual report of the Company for the year ending 31-3-1995. The auditors of the Company in their letter dated 27-7-1998 addressed to the Tax Recovery Officer indicated that the applicant was not a Director of the Company. Documents evidencing the said fact is also produced. Auditors have also issued a letter dated 18-5-2000 confirming that he ceased to be director by June 1996. It was contended that he was never in possession or control or custody of any movable or immovable property belonging to the Company or any books or papers of the company. It is the first respondent who is responsible for the affairs of the company and he has sworn to an affidavit to that effect and a copy of the same is produced. Therefore, he has sought for deletion of his name from the above applications and to drop all proceedings initiated against him.

5. Opposing the said application, the Official Liquidator has filed his statement of objections. It is stated in the said objections that the applicant was appointed as a Director on 8-8-1990 and the records maintained with the Registrar of Companies shows that he continues to be the Director; company has not filed Form No. 32 u/s 303 of the Companies Act as required under law. Therefore, it cannot be said that the applicant ceased to be the director of the company. The affidavit of another Director of the Company cannot be relied upon to relinquish any liability of the other Director. Therefore, he has sought for rejection of the said applications.

6. The respondent-company was ordered to be wound up by this Court on 15-11-1999. The Director of the Company who is incharge of the affairs of the company under liquidation has sworn to an affidavit stating that the applicant has resigned from the Board as per his letter dated 5-7-1995 which was duly accepted on 9-8-1995. But, due to inadvertence Form No. 32 was not filed. The said fact is also clear from the annual report of the Company for the year ending 31-3-1995 where the name of the applicant is not shown. The letters of the auditor of the Company addressed to the Tax Recovery Officer shows that the applicant ceased to be the Director. It is also evidenced by the certificate issued by the auditors. Under these circumstances, it is clear that the applicant ceased to be the Director of the Company under liquidation from 5-7-1995, the date of resignation letter which was duly accepted on 9-8-1995. Merely because the Company has not filed Form No. 32 as required under law and the same is not registered with the Registrar of Companies it cannot be said that the applicant continues to be the Director of the Company under Liquidation.

7. In the case of *Pandurang Camotim Sancoalar v. Suresh Prabhakar Prabhu* [2003] 53 CLA 265, the Bombay High Court has held that since there was no provision in the Companies Act as to how resignation should be dealt with it had to be considered with reference to the articles of association. Since the Articles of Association of the company in the said case provided how it should be dealt with,

the immediate effect of resignation was that the person resigning would cease to be a Director, without having to wait for its acceptance by the Board of Directors.

8. In the case of *Dushyant D. Anjaria v. Wall Street Finance Ltd.* [2001] Comp. Cas. 655 the Bombay High Court held that the resignation of a Director would be effective from the date it was submitted, for the reason that that letter brings out clearly the intention of the person to resign. So far as other formalities like filling up Form 32 and sending it to the Registrar were concerned, it was for the company to comply with them in conformity with the provisions of Section 302 or Section 303 of the Companies Act. Where there was delay or negligence on the part of the company in intimating the registrar about the date of resignation, the Director who had resigned could not be saddled with responsibility and liability for such delay.

9. In *Glossop v. Glossop* [1907] Ch. D. 370 it was held that the resignation of a Director would become effective on and from the date it was tendered or submitted and from the articles of association of the company it would be clear that resignation of a Director would be effective from the date it was tendered. In the case of resignation of a Director there is no formality that the Board of Directors should accept it before it becomes operative.

10. Chapter II of the Companies Act deals with constitution of Board of Directors and Section 252 provides for minimum number of directors and Section 253 states that only individuals should be the directors. Section 254 provides in default of and subject to any regulations in the articles of a company, subscribers of the memorandum who are individuals, shall be deemed to be the directors of the company, until the directors are duly appointed in accordance with Section 255. Section 255 provides for appointment of directors. It categorically states that the directors are appointed by the company in general meeting and this appointment is for a particular period. Section 264 deals with consent of candidate for directorship to be filed with the company and consent to act as director to be filed with the Registrar. Every person other than a director retiring by rotation or otherwise or a person who has left the office of the company a notice u/s 257 signifying his candidature for the office of a director proposed as a candidate for the office of a director shall sign and file with the company his consent in writing to act as director, if appointed. Section 274 deals with disqualification of directors and Section 283 deals with vacation of office by directors and Section 284 deals with removal of directors. However, there is no provision made in the act for resignation of a director. It is in this background we have to understand the mode in which a Director of a Company could resign and the consequences of such resignation and when exactly the said resignation comes into effect.

11. Resignation means the spontaneous relinquishment of one's own right and in relation to an office, it connotes the act of giving up or relinquishing the office. It has been held that in the general juristic sense, in order to constitute a complete and operative resignation there must be the intention to give up or relinquish the office and the concomitant act of its relinquishment. It has also been observed

that the act of relinquishment may take different forms or assume a unilateral or bilateral character, depending on the nature of the office and the conditions governing it. If the act of relinquishment is of unilateral character, it comes into effect when such act indicating the intention to relinquish the office is communicated to the competent authority. The authority to whom the act of relinquishment is communicated is not required to take any action and the relinquishment takes effect from the date of such communication where the resignation is intended to operate in praesenti. A resignation may also be prospective to be operative from a future date and in that event it would take effect from the date indicated therein and not from the date of communication. In cases where the act of relinquishment is of a bilateral character, the communication of the intention to relinquish, by itself, would not be sufficient to result in relinquishment of the office and some action is required to be taken on such communication of the intention to relinquish, e.g. acceptance of the said request to relinquish the office, and in such a case the relinquishment does not become effective or operative till such action is taken. As to whether the act of relinquishment of the an office is unilateral or bilateral in character would depend upon the nature of the office and the conditions governing it.

12. Under the provisions of the Companies Act as aforesaid a Director is appointed by the company in the general meeting. In other words it is by way of election. It is for a particular period. If a director after being so appointed absents himself from three consecutive meetings of the Board of Directors, or from all meetings of the Board for a continues period of three months, whichever is longer, without obtaining leave of absence from the board, the office a director shall become vacant in terms of Section 283(g) of the Act. Therefore, it is clear a Director ceases to be a director of a company by the happening of the aforesaid event. There is no question of anybody declaring that director has, ceased to be a director or anybody recognizing such a vacancy by any overt act. As the appointment of a Director is not a bilateral character, the question of acceptance of the request to relinquish the office would not arise. Filing of Form No. 32 in terms of Section 303(2) of the Act is only a consequential act to be performed by the company in obedience to the statutory provision. If such a form is filed with the Registrar of Companies it is a proof of a Director ceasing to be a director. But, it is not an act to be complied with in order to make a resignation valid. Therefore, as the resignation by a director relinquishing his office as such director is of an unilateral character it comes into effect when the act of such resignation to relinquish the office is communicated to the Board. In law, the Board to whom the act of relinquishment is communicated is not required to take any action by way of accepting resignation and, therefore, the relinquishment takes effect from the date of such communication where the resignation is intended to operate in praesenti In order to make the said resignation effective, it is not necessary that the Board should accept it. Whether the Board accepts the resignation or not if the resignation is intended to operate in praesenti the resignation comes into effect when such intention to relinquish the office is

communicated to the Board. In that view of the matter, once a resignation letter is submitted to the Board, the date of which the intention to relinquish is communicated to the Board, that is the date from which the Director ceases to be a Director of the Company.

13. A reading of Section 454(2) of the Act makes it very clear that the statement of affairs to be made by the Official Liquidator u/s 454(1) is to be submitted and verified by one or more of the persons who are at the relevant date the directors. Therefore, the relevant date would be the date on which the winding up order is made and it is persons who are on that date directors and who are in charge of the company and its affairs who are expected to furnish the particulars mentioned in 454(1) and if a person has ceased to be a director on that relevant date, there is no obligation cast upon him to furnish the aforesaid particulars contemplated u/s 454(1). Even if a person is not a Director on the aforesaid relevant date in exceptional cases the Official Liquidator can call upon such person who has taken part in the formation of such company at any time within one year before the relevant date to furnish the particulars. Only if a default is committed in furnishing those particulars, the Director would be punishable u/s 454(5) of the Act. Therefore, the intention of the legislature is very clear. After the winding up order, Director on the date of the winding up order commits default in performing his statutory obligation u/s 454(1) of the Act, action may be taken against such director u/s 454(5) of the Act. In exceptional cases even persons who are director one year anterior to the date of the winding up order would be called upon to furnish such particulars. But, if a person has ceased to be director of the company either on the date of the winding up order or one year before the date of the winding up order then no action could be taken against him u/s 454(5) for non-compliance with Section 454(1) of the Act as there is no statutory obligation cast on such director to comply with the said requirement. If the date of communication of the intention to resign is taken into consideration and if that date happens to be anterior to the winding up order, such director who has resigned is under no obligation to comply with Section 454 of the Act, as such no action could be taken u/s 454 (5) and (5A) of the Act.

14. In that view of the matter, in the instant case, the applicant resigned from the Board on 5-7-1995 which resignation was accepted on 8-9-1995. The winding up order was passed on 15-11-1999. Therefore, on the date of winding up order he was not a Director of the Company, as such he was under no obligation to comply with the statutory requirement as contemplated u/s 454 of the Act. Therefore, the action taken by the Official Liquidator against the applicant-Director for non-compliance of Sections 454, 538(1)(a)(b)(c) of the Act is one without jurisdiction and therefore, the same is liable to be ordered to be dropped. Consequently, the applications filed by the applicant for deleting his name are allowed. Hence, I pass the following order :--

The Official Liquidator is directed to delete the name of the third respondent from the applications which he has filed for non-compliance with the statutory

requirements by the Directors of the Company under liquidation. Company applications 610, 611 and 612/2001 are accordingly allowed.