(2012) 01 KAR CK 0026

In the Karnataka High Court

Case No : CA. No. 1079 of 2010 in CA. No. 867 of 2010 in COP. No. 168 of 2004

Mr. Ronald D. Colaco — APPELLANT

Vs

Official Liquidator M/s Janamadhyama Prakashana Ltd., (in Liquidation) (Attached to High Court of Karnataka) Corporate Building, No. 26-27, 12th Floor, Rahje Towers, M.G. Road, Bangalore — RESPONDENT

Date of Decision : 06-01-2012

Acts Referred:

Companies (Court) Rules, 1959 — Rule 6, 9
Companies Act, 1956 — Section 449, 454 (4), 537 (1B), 543, 543 (2)

Citation : (2012) 01 KAR CK 0026

Hon'ble Judges : B. Manohar, J

Bench : Single Bench

Advocate : H.N.M. Prasad, for the Appellant; K.S. Mahadevan, Advocate for OL, for the Respondent

Final Decision : Dismissed

Judgement

B. Manohar, J.—These applications are filed under Rules 6 and 9 of Companies (Court) Rules, 1959 praying for deletion of their names from the proceedings initiated u/s 543 of the Companies Act, 1956 (''the Act'' for short). The applicants are the Ex-Directors of M/s. Janamadhyama Prakashana Limited (in liquidation). They are respondents No.7, 11 and 6 respectively in Company Application No. 867/2010 filed by the Official Liquidator u/s 543 of the Companies Act, for recovery of Rs. 5,66,04,164.01 (Rupees five crores sixty six lakhs four thousand one hundred sixty four and paise one only) from the respondents 1 to 15 jointly and severally alleging that, as per the balance sheet as on 31-3-2001, it shows that the respondents have fraudulently or dishonestly failed to hand over the fixed assets, instruments, cash, batik balance, current accounts, loan advanced, sundry debts and statement of accounts of the Company valuing of Rs. 5,66,04,164.01 (Rupees five crores sixty six lakhs four thousand one hundred sixty four and paise one only).

2. In these applications, the applicants have contended that M/s. Janamadhyama Prakashana Limited was ordered to be wound up in COP 168/2004 filed by M/s. Amaravathi Sri Venkatesha Paper Mills Limited on 21-11-2005 by this court. The Official Liquidator attached to this Court has been appointed as Liquidator of the Company by virtue of Section 449of the Act. The Directors of the company, which was under liquidation failed to file the statement of affairs. The Official Liquidator after collecting the details from the Registrar of Companies, Bangalore addressed a letter to the Ex-Directors to submit the statement of affairs and to hand over the books of accounts and other statutory records. The Ex-Directors neither filed the statement of affairs nor handed over the books of accounts. The Official Liquidator initiated the proceedings u/s 454(5) and (5A) of the Act. Further, he also initiated proceedings u/s 543 for the recovery of a sum of Rs. 5,66,04,164.01 (Rupees five crores sixty six. lakhs four thousand one hundred sixty four and paise one only) on the basis of the balance sheet dated 31-3-2001.

3. The specific case of the applicant in C.A. No. 1079/2010 is that he ceased to be the Director of M/s. Janamadhyaroa Prakashana Limited (in liquidation) w.e.f. 4-10-2001. His resignation was accepted and Form No. 32 has been issued by the Competent Authority. Further, he was not in-charge of day to day affairs of the Company. The Liquidation order has been passed on 21-11-2005 much after he ceased to be the director of the company. Further, this Court in C.A. No. 887/2009 dated 25-11-2009 discharged him from the proceedings initiated u/s 454(5) and (5A) of the Act on the ground that as on the date of winding up of the company, the applicant ceased to be the Director of the Company. However, without taking into consideration all these aspects of the matter, the proceedings have been initiated u/s 543 of the Act for recovery of dues. He is not responsible for any of the transactions of the company from the year 2001. Further, there is no specific allegation of fraud or dishonesty on the part of this applicant in the proceedings filed by the Official Liquidator and sought for deletion of his name from the said proceedings.

4. It is the case of the applicant in C.A. No. 291 /2011 that he ceased to be the Director of M/s. Janamadhyama Prakashana Limited (in liquidation) w.e.f. 01-11-2001. His resignation was accepted and Form No. 32 has been issued by the Competent Authority. He is a permanent resident of Abudhabi UAE. Further, he was not in-charge of day to day affairs of the Company. The Liquidation order has been passed on 21-11-2005 much after he ceased to be the director of the company. Further, this Court in C.A. No. 196/2006 dated 12-07-2010 acquitted this applicant from the proceedings initiated u/s 454(5) and (5A) of the Act on the ground that as on the date of winding up of the company, the applicant ceased to be the Director of the Company. However, without taking into consideration all these aspects of the matter, the proceedings have been initiated u/s 543 of the Companies for recovery of dues. He is not responsible for any of the transactions of the company from the year 2001. Further, there is no specific allegation of fraud or dishonesty on the part of the applicant in the proceedings filed by the Official Liquidator and sought for deletion of his name from the said

proceedings.

5. The specific case of the applicant in C.A. No. 292/2010 is that he ceased to be the Director of M/s. Janamadhyaina Prakashana Limited (in liquidation) w.e.f. 22-1-2003. His resignation was accepted and Form No. 32 has been issued by the Competent Authority. As on the date of tendering resignation, he was residing at Sultanate of Oman. Further, he was not in-charge of day to day affairs of the Company. The Liquidation order has been passed on 21-11-2005 much after he ceased to be the director of the company. Further, this Court in C.A. No. 860/2011 dated 25-08-2011 discharged him from the proceedings initiated u/s 454(5) and (5A) of the Act on the ground that as on the date of winding up of the company, the applicant ceased to be the Director of the Company. However, without taking into consideration all these aspects of the matter, the proceedings have been initiated u/s 543 of the Act for recovery of dues. He is not responsible for any of the transactions of the company from the year 2001. Further, there is no specific allegation of fraud or dishonesty on the part of this applicant in the proceedings filed by the Official Liquidator and sought for deletion of his name from the said proceedings.

6. Further, the applicants have contended that the company has taken loan from the MCC Bank, Mangalore and the assets of the company has been attached and sold by the MCC Bank, towards its dues. The Official Liquidator has filed an application C.A. No. 435/2006 u/s 537(1B) seeking for recovery of the properties from the MCC Bank and the said matter is pending before this Court. The investments are in the nature of Government Securities i.e. NSC lodged with the Sales Tax Department of Rs. 1,000/- and 200 shares in MCC Bank of face value of Rs. 100/- each fully paid up and these shares are pledged with the MCC Bank, who are the secured creditors. Inventories are the raw materials and consumables, which are meant for consumption in the course of operation of the company. With regard to sundry debts, cash and bank balance, the applicants states that they are ceased to be the directors from the year 2001 and they were not aware of the affairs of the company. The current assets and loss of the company is not within the knowledge of the applicants since they are ceased to be directors of the company.

7. Sri. H.N.M. Prasad, learned counsel appearing for the applicants relied upon the following judgments in support of his contention stating that unless there is a specific allegations and details of narration of the specific act of commission and omission on the part of the each Director quantifying the loss to the company, the misfeasance proceedings cannot be initiated.

The application filed by the Official Liquidator, no such allegation and the petition is very bald.

(1) AIR 1959 Cal 324 Ganesh Chandra Chakravarthy v. Kalna Town Credit Co-Operative Bank:

(2) Amarjit Kaur Vs. Pritam Singh and Others,

(3) Official Liquidator, High Court Vs. Gautham Dhiraj Mal Ranka and Others,

(4) Sajida Book Shop Vs. Kaumudi Exporters (P) Ltd.,

(5) (2007) 138 Comp Cas 362 (Kar) Official Liquidator of Dunford Fabrics Ltd. v. G.C.Lohia and Ors.

Further, he has contended that the mere fact that no action was taken by the Ex-Directors for recovery of the amount would not amount to act of misfeasance or misconduct. For the above proposition, he relied upon the following judgment:

(1) (2009) 151 Comp Cas 535 (Kar) Official Liquidator of Alliance Leathers P. Ltd. (In Liquidation) v. Nishanth Patel and Ors.

(2) (2007) 138 Comp Cas 262 Official Liquidator of Dunforo Fabrics Ltd. v. G.C.Lohia and Ors.;

(3) Official Liquidator of Kadambi Electronics Private Limited (In Liquidation) Vs. K. Damodar and Another,

(4) ILR 2002 KAR 387 M/s. Shivmoni Steel Tubes Limited (In Liquidation) v. Murali

8. On the other hand, Sri. K.S. Mahadevan, learned counsel appearing for the Official Liquidator argued in support of the proceedings initiated against the applicants and contended that the proceedings under Sections 454 and 543 are different proceedings. Just because the proceedings initiated u/s 454(5) and (5A) of the Act have been discharged against the applicants, they cannot seek for discharge u/s 543 of the Act. Section 543 contemplates misappropriation of funds of the company. Section 543 contemplates that any person who has taken part in the promotion or formation of the company, or any past or present director, manager, liquidator or officer of the company has mis-applied, or retained or become liable or accountable for, any money or property of the company or has been guilty of any misfeasance or breach of trust in relation to the company, the Court on an application filed by the Official Liquidator can take action within a period of five years from the date of passing of the winding up order. Admittedly, the applicants are the Ex-Directors of the company. The applicants in CA. No. 1079/2010 and CA No. 291/2011 resigned as Directors of the company in the year 2001 whereas the applicant in CA 292/2011 has resigned in the year 2003. The balance sheet of the year 2001 clearly disclose that there is fixed assets of Rs. 2,99,27,451.26 (Rupees two crores ninety nine lakhs twenty seven thousand four hundred fifty one and twenty six paise only). The said asset was not handed over to the Official Liquidator on winding up of the company. Further, investment/original script for Rs. 2.01,518/- (Rupees two lakhs one thousand five hundred and eighteen) which was shown in the balance sheet was not handed over. The inventories as shown in the balance sheet of Rs. 11,39.673/- (Rupees Eleven lakhs thirty nine thousand six hundred and seventy three only) was also not handed over. The balance sheet shows that sundry debts of Rs. 2,26,15,819.21 (Rupees two crores twenty six lakhs fifteen thousand eight

hundred and nineteen and twenty one paise only). The particulars were not furnished to the Official Liquidator. The Bank balance shown as Rs. 92,764.12 (Rupees ninety two thousand seven, hundred and sixty four and twelve paise only) and current assets of Rs. 15,094.21 (Rupees fifteen thousand ninety four and twenty one paise only) was also not handed over to the Official Liquidator on winding up of the company. Further in the balance sheet it was clearly mentioned that loan and advances is shown as Rs. 26,11,844.41 (Rupees twenty six crores eleven lakhs eight forty four and forty one paise only). The said amount has not been recovered by the Directors. In all, a sum of Rs. 5,66,04,164.01 (Rupees five crores sixty six lakhs four thousand one hundred sixty four and paise one only) was misappropriated by the Ex-Directors. Since the Ex-Directors of the company failed to file the statement of affairs of the company, the Official Liquidator could not make specific allegation against each of the Ex-Director of the company regarding the act of misfeasance. At the relevant point of time, the applicants are the Directors of the company. Hence, their names cannot be deleted unless full-Hedged trial is conducted after recording the evidence of the applicants. He further contended that the term misfeasance or breach of trust is relatable not only to intentional act of Director, but also the deliberate conduct of erstwhile director which has resulted in the loss to the company in liquidation is constituted a misfeasance. Further, not taking steps for recovery of the amount and non-furnishing the names of the creditors is amount to breach of duty on the party of the Director and he is liable to compensate the company to the extent of loss. He relied upon the following judgments:

(1) P.K. Nedungadi Vs. The Malayalee Bank Ltd. (In Liquidation) and Others, :

(2) (1999) 97 Comp Cas Expo Expert Private Limited v. Jaigopal Angrish and Ors.;

(3) (2001) 103 Comp Cas 1026 Official Liquidator, Janhitkari Alap Bachat Rindayatri Sansthan Pvt. Ltd. v. Vishnu Kumar Pradhan and Ors.

(4) (2009) 152 Comp Cas 177 Official Liquidator, High Court of Madras v. V. Selvaraj and Ors.

(5) (2010) 160 Comp Cas 590 Official Liquidator v. R.Badri Narayanan and Ors.

9. I have carefully considered the arguments addressed by the learned counsel for the parties and judgments referred by them.

10. It is not in dispute that the applicants are the Directors of M/s. Janamadhyama Prakashana Limited which was ordered to be wound up by this Court by its order dated 21-11-2005 in Company Petition No. 168/2004 filed by M/s. Amaravathi Sri Venkatesha Paper Mills Limited. The Official Liquidator attached to this court was appointed as liquidator. It is the specific case of the Official Liquidator that inspite of repeated reminders and requests, the Ex-Directors of the Company failed to file the statement of affairs as required u/s 454 of the Act. In view of that, the Official Liquidator initiated proceedings u/s 454(5) and (5A) of the Act. Further, on the basis of the balance sheet filed before

the Registrar of Companies as on 31-3-2001, it is found that more than Rs. 5.00 crores relating to the company in liquidation was misused/misappropriated by the Directors. Within a period of limitation, as provided u/s 543(2) of the Act, proceedings has been initiated for recovery of the said amount invoking Section 543 of the Act. The defense set by the applicants is that they ceased to be the directors of the Company in liquidation and they have tendered their resignations in the year 2001 and 2003 and they are not concerned with the functioning of the company in liquidation after their resignation. Further, proceedings initiated u/s 454 of the Act has been quashed by this Court and also the applicants are acquitted from the economic offences initiated u/s 538 of Companies Act in CC No. 657/2007. Hence, the proceedings initiated u/s 543 is contrary to law and the assets of the company are already attached by the MCC Bank. Hence sought for deletion of their names from the proceedings initiated u/s 543 of the Companies Act. They have also contended that there is no specific allegation with regard to fraud or dishonesty on the part of the applicants.

11. On the other hand, the learned counsel appearing for the Official Liquidator contended that the proceedings u/s 543 was initiated on the basis of the balance sheet of the year 2001 and at that relevant point of time, the applicants were the Directors of the company. u/s 543 of the Companies Act, any misdeed of the present and past Director can be examined and punished. It is. open to the applicants to defend their action by leading evidence. At this stage, their names cannot be deleted without leading any evidence.

12. On hearing the learned counsel for the parties, I am of the view that there is some substance in the arguments addressed by the advocate for Official Liquidator. The proceedings initiated u/s 543 of the Act is on the basis of the balance sheet of the year 2001. At that time, the applicants were the Directors of the Company. The role of the Directors of the company past as well as present can be considered u/s 543 of the Act. Whether they have misappropriated the funds or failed to recover the dues are to be decided after trial. It is the specific ease of the Official Liquidator that in view of non-filing of the statement of affairs of the company by the Ex-Directors, he could not make any specific allegations on the each of the directors pinpointing a specific act of dishonesty and misappropriation on their part. At tills stage, at the threshold, their names cannot be deleted from the proceedings without any trial. The proceedings u/s 454 as well as Section 543 is altogether different. In the former case, for non-furnishing of the statement of affairs the proceedings have been initiated. Since they are ceased to be the Directors of the company as on the date of winding up of the company, the proceedings against the applicants has been quashed. Whereas in the latter case, the proceedings initiated for recovery of the loss committed by the Directors of the company as on the year 2001. Admittedly, the balance sheet discloses that large number of amount due to the company remained unrecovered. Whether the Directors are liable for non-recovery of the amount has to be examined u/s 543 proceedings. At this stage, their names cannot be deleted. The judgments relied upon by the applicants are not

applicable to the facts of this case, since the trial has not yet been commenced. The application filed by the applicants is premature.

13. Hence, I pass the following:

ORDER

The applications are dismissed.

