(2010) 09 KAR CK 0127

In the Karnataka High Court

Case No : Original Side Appeal No. 26 of 2010

Mrs. Nivedita Mukerjee — APPELLANT

Vs

The Official Liquidator of Technology Media Group Private Limited (in Liquidation) — RESPONDENT

Date of Decision : 20-09-2010

Acts Referred:

Company Court Rules, 1959 — Rule 6, 9
Criminal Procedure Code, 1898 (CrPC) — Section 239

Citation : (2010) 09 KAR CK 0127

Hon'ble Judges : H.S. Kempanna, J;D.V. Shylendra Kumar, J

Bench : Division Bench

Advocate : H. Mujtaba and M.A. Subramani, for the Appellant;

Final Decision : Dismissed

Judgement

D.V. Shylendra Kumar, J.—Appeal u/s 4 of the Karnataka High Court Act r/w Section 483 of the Companies Act, 1958 directed against the order dated 9.6.2010 passed by the Company Judge in Company Application No. 207/2010 which in turn was filed in Company Application No. 717/2009 and both the applications being filed in Company Petition No. 214/2002 which has been ordered, which was a petition u/s 433 by a creditor of Company of which the appellant was a Director and had been ordered to wound up in terms of the order dated 1.3.2005.

2. Of the above applications, an application namely Company Application No. 207/2010 was an application filed by the applicant a former Director of the Company which is wound up as per order dated 1.3.2005 u/s 239 of Cr.P.C. r/w Rules 6 and 9 of the Company Rules seeking for an order of discharge. The appellant had been arrayed as one of the accused persons in an application that had been filed by the Official Liquidator before the Company Court u/s 454 of the Companies Act.

3. The appellant along with another Director have been arrayed as respondent

accused in the Company Application No. 717/09 for their failure to submit the statement of affairs of the Company within the period as prescribed under Sub-section (1) of Section 454.

4. The proceedings before the Company Court had begun on 15.11.2002 by presentation of a petition u/s 433 for winding up of the affairs of the Company by a creditor of the Company.

5. The learned Company Judge after noticing the objections on behalf of the Company and other persons, passed an order to wind up the affairs of the Company in terms of the order dated 1.3.2005.

6. However, it is the case of the appellant that, the appellant who was admittedly the Director of the Company on the day of presentation of winding up petition, ceased to be a Director of the Company with effect from 22.3.2003 and therefore did not have any responsibility to file statement of affairs as a Director on the relevant date on whom alone the obligations is imposed under the provisions of Section 454 of the Act, particularly having regard to the definition of relevant day as it occurs under Sub-section (8). For making good this claim and version, the appellant did appear and had produced the office copy of Form No. 32, a Form in which information of notice is given to the Registrar of Companies about the change in the composition of the Board of Directors of a Company.

7. According to Sri. Mujtaba, learned Counsel appearing for the appellant before us, Form No. 32 had been filed on the very day, on which the appellant ceased to be a Director and therefore, the appellant did not have any obligation or responsibility to file a statement of affairs before the Company Court as existed either as on the date of appointment of the Official Liquidator by the learned Company Judge or on the date of the passing of winding up order.

8. The learned Company Judge who examined this contention however found that, the applicant/appellant had not made good this position about the factum of not being a director of the Company as on the relevant day for the reason that, the appellant/applicant had not produced the Certified Copy of Form 32, intimation revealing the factual position before the Registrar of Companies and therefore, no reliance could be placed on the private copy of the appellant termed as a office copy placed before the Court and therefore dismissed the application for discharge of the appellant from the array of respondent accused persons, in the Company Application No. 717/2009.

9. It is under such circumstances, the present appeal against the order of the learned Company judge.

10. Submission of Sri. Mujtaba, learned Counsel appearing for the appellant is that, in terms of the provisions of Section 454 of the Companies Act reading as under: appellant was not a director of the Company on the relevant date and therefore, there was no obligation on the part of the appellant to comply with the requirements of section nor has committed any contravention attracting Sub-

section (5) of Section 454 of the Act. Section 454 is as under;

454.(1): Where the Court has made a winding up order or appointed the Official Liquidator as provisional liquidator, unless the Court in its discretion otherwise orders, there shall be made out and submitted to the Official Liquidator a statement as to the affairs of the Company in the prescribed form verified by an affidavit, and containing the following particulars, namely:

(a) the assets of the company, stating separately the cash balance in hand and at the bank, if any, and the negotiable securities, if any, held by the company;

(b) its debts and liabilities;

(c) the names, residences and occupations of its creditors, stating separately the amount of secured and unsecured debts; and in the case of secured debts, particulars of the securities given, whether by the company or an officer thereof, their value and the dates on which they were given;

(d) the debts due to the company and the names, residences and occupations of the persons from whom they are due and the amount likely to be realized on account thereof:

(e) such further or other information as may be prescribed, or as the official liquidator may require.

(2) The statement shall be submitted and verified by one or more of the persons who are at the relevant date the directors and by the person who is at that date the manager, secretary or other chief officer of the company, or by such of the persons hereinafter in this Sub-section mentioned, as the Official Liquidator, subject to the direction of the Court, may require to submit and verify the statement, that is to say, persons-

a) who are or have been officers of the company;

b) who have taken part in the formation of the company at any time within one year before the relevant date:

c) who are in the employment of the company, or have been in the employment of the company within the said year, and are, in the opinion of the Official Liquidator, capable of giving the information required;

d) who are or have been within the said year officers of or in the employment of a company which is, or within the said year was, an officer of the company to which the statement relates.

(3) The statement shall be submitted within twenty-one days from the relevant date, or within such extended time not exceeding three months from the date as the Official Liquidator or the Court may, for special reasons, appoint.

(4) Any person making, or concurring in making, the statement and affidavit required by this section shall be allowed and shall be paid by the Official

Liquidator or provisional liquidator, as the case may be, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the Official Liquidator may consider reasonable, subject to an appeal tot he Court.

(5) If any person, without reasonable excuse, makes default in complying with any of the requirements of this section, he shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to lone thousand] rupees for every day during which the default continues, or with both.

(5A) The Court by which the winding up order is made or the provisional liquidator is appointed, may take cognizance of an offence under Sub-section (5) upon receiving a complaint of facts constituting such an offence and trying the offence itself in accordance with the procedure laid down in the Code of Criminal procedure, 1898 (5 of 1898) for the trial of summons cases by magistrates.]

(6) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section, and to a copy thereof or extract therefrom.

(7) Any person untruthfully so stating himself to be a creditor or contributory shall he guilty of an offence u/s 182 of the Indian Penal Code (45 of 1860); and shall, on the application of the Official liquidator, be punishable accordingly.

(8) In this section, the expression "the relevant date" means, in a case where a provisional liquidator is appointed, the date of his appointment, and in a case where no such appointment is made, the date of the winding up order.

11. It is undoubtedly true that the relevant date, very clearly is either the date of appointment of the provisional liquidator or the date of passing of winding up order, whichever is earlier, and the appellant if has ceased to be a Director of the Company on the relevant date, there was no obligation on the part of the appellant to comply with the requirements of Section 454 of the Act.

12. We have bestowed our consideration to the submissions made at the Bar. The argument is undoubtedly attractive and raising a point, which might have mattered further examination, it had been factually made good before the learned Company Judge.

13. We find that, the appellant has not made good the stand by producing any acceptable material before the learned Company Judge and that being the reason as to why the learned Company Judge declined to allow the application for discharge, we do not find any substance in the contention urged before us for further examination, as an application for discharge avoids further scrutiny by the Court, which can achieved only if the applicant has made out a definite case even as is required in terms of Section 239 of the Cr.P.C. which reads as under:

239: When accused shall be discharged: If, upon considering the police report and the documents sent with it u/s 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.

Appellant had not made out a case before the learned Company Judge, to bring her case within the scope of Section 239 Cr.P.C.

14. One another submission of Sri Mujtaba is to the effect that, this Court has already taken a view about the meaning to be attributed to the word relevant day as it appears in Sub-section (8) of Section 454 of the Companies Act and if such a view is to be followed, the appellant as a matter of fact is entitled for discharge. The decision relied upon does not advance the case of the appellant as the fact situation of not being a Director of the Company on the appointed day was not made good before the learned Company Judge and therefore we cannot characterize the order passed by the learned Company Judge as an error in law for interference u/s 4 of the High Court Act.

15. It is for this reason, we dismiss this appeal, but without prejudice to the stand of the appellant for defending the matter under 454 proceedings on such defence as is available to the appellant which can definitely be called in aid during further examination before the learned Company Judge.

16. It is made clear, observation and findings recorded in this Judgment are for the limited purpose of examining the correctness of the order of the learned Company Judge declining to discharge the appellant, as an appellate body and the same are not any expressions on the merits of the application of the Official Liquidator filed u/s 454(5) of the Act.

Subject to this observation, this appeal is dismissed.