

(2012) 07 DEL CK 0174
In the Delhi High Court
Case No : Criminal O. (CO.) 5 of 2008

M/S Daewoo Motors India Ltd.

APPELLANT

Vs

WG CDR (Retd.) H.D. Talwani

RESPONDENT

Date of Decision : 04-07-2012

Acts Referred:

Companies Act, 1956 — Section 2(13), 2(30), 454, 454(2), 454(2)(a)
Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : (2012) 110 CLA 21 : (2012) 175 CompCas 530

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Rajiv Nayyar with Mr. Hemant Gupta, Mr. Kanwal Chaudhary, for the Official Liquidator, for the Respondent

Final Decision : Allowed

Judgement

Indermeet Kaur, J.

CO. A. No. 2137/2010 in CRL.O.(CO.) 5/2008

1 This is an application filed under Rule 9 of the Companies (Court) Rules, 1959 (hereinafter referred to as the "said Rules") read with Section 482 of the Code of Criminal Procedure by Ms. Radhika S. Minocha seeking a discharge in complaint i.e. Crl. O. (CO.) 5/2008 wherein she has been summoned under the provisions of Section 454 of the Companies Act, 1956 (hereinafter referred to as the "said Act") for not filing a statement of affairs. The contention of the applicant is that being an employee of the ICICI Bank Ltd. (hereinafter referred to as the "Bank") she had been appointed as a nominee director on the Board of M/s Daewoo Motors (India) Ltd. (in liquidation) (hereafter referred to as the "Company") to watch and secure the interest of the Bank who was a lender to the Company. Her contention is that in 1999 she had resigned from the company and had consequently migrated to the USA where she is presently residing. Certain dates are relevant which are also undisputed. The applicant had given her letter seeking resignation from the bank on 25.10.1999 which was accepted by the

Board of Directors on 30.10.1999. Form 32 had been filed by the company before the Registrar of Companies (ROC) on 26.11.1999 wherein a perusal of the Form shows that herein also the applicant has been described as a nominee director. The winding up proceedings of the company were initiated on 24.11.2003 and the company was finally wound up on 28.07.2004. Admittedly on the "relevant date" i.e. on the date of winding up order which was on 28.07.2004 and even on the date of filing of the winding up petition which was on 24.11.2003, the applicant Ms Radhika S. Minocha was not a Director of the company; her resignation having been accepted by the company on 30.10.1999.

2. Relevant would it be to state that a similar application had been filed by the applicant which was Co. Application. No. 902/2010 seeking a discharge on the same ground but since Form 32 had not been filed at that stage and the Court having noted this fact, her application seeking discharge was declined on 27.09.2010.

3. Learned counsel for the applicant submits that the applicant not being a director on the "relevant date", no criminal liability can be fastened upon her; admittedly she was only a nominee director and she not having taken part in the formation of the company at any stage (which again is an undisputed fact), criminal proceedings which had been initiated against her are liable to be dropped. Further undisputed submission being that the statement of the applicant has already been recorded before the Official Liquidator under Rule 130 of the said Rules on 22.03.2012. Attention has been drawn to the said statement wherein a specific query has been put to the applicant where she has admittedly been described as a nominee director; her answer to the queries all along being that she only had a nominal role which was non-executive and which was to watch the interest of the company; she had never signed any document on behalf of the company and having resigned from the company in October, 1999 and the statutory Form 32 also having been filed much prior to the date of liquidation of the company, she is not liable to be prosecuted u/s 454 of the said Act.

4. Counsel for the petitioner has drawn attention of this Court to a Circular of the Government of India, Ministry of Corporate Affairs (general circular No 08/2011) No. 2/13/2003/CL-V which is addressed to the ROC and the Official Liquidator wherein the ROC's have been directed to make a proper application of mind in deciding whether a person can be implicated as "an officer in default" within the meaning of Section 5 of the said Act. Subsequent circular dated 29.07.2011 of the Government of India, Ministry of Corporate Affairs (Master Circular No. 1/2011) No. 3/57/2011/CL-II had also noted that penal actions which are initiated against the directors who are not charged with the responsibility including nominee directors nominated by Financial Institutions and Banks to the Board of certain companies have to be examined; this circular has again reiterated that there should be a proper application of mind on the part of the ROC in deciding whether a person to be implicated "as an officer in default" and

this can be answered after examining the annual return, Form 32 (s) and DIN Database available in the Registry; wrongful prosecutions should be avoided.

5. Learned counsel for the petitioner has placed reliance upon a judgment of the Karnataka High Court reported in Mother Care (India) Ltd. Vs. Prof. Ramaswamy P. Aiyar, as also another judgment of the Kerala High Court reported as 2009 KLC 3060 dated 02.01.2009 K. Subramony Vs. the Official Liquidator submission being that directors appointed by the Financial Institutions to the Board of directors of a liquidated company and their appointment being only to protect the interest of the Financial Institution which has advanced funds to the company, such a nominee director has no role in the filing of the statement of affairs before the Official Liquidator. To support this same submission, reliance has also been placed upon a judgment of this Court dated 07.03.2012 Cri. O. CO) No. 13/2008 titled M/s Phoenix Fine Chem Pvt. Ltd. Vs. Samir Omesh Karnik and Another.

6. Submissions have been countered by the learned counsel for the respondent; attention has been drawn to the language of Section 454 of the said Act and particular emphasis has been laid on Section 454 (2) (a) of the said Act; arguments have been predicated on the submission that all persons who have been officers of the company at any point of time are liable to file their statement of affairs and even otherwise the said Act having made no distinction between a working director and a non-working director, technical director and a nominee director, all persons/officers who were at any stage working in the company are liable for prosecution under the aforesaid provision of law.

7. Learned counsel for the Official Liquidator has relied upon a judgment of a Bench of this Court reported as (1989) CCV 66 410 Technical Consultancy House Private Ltd. Vs. Kuldip Raj Narang and Others as also another judgment of Andhra Pradesh High Court reported as 1994 Cri. L. J. 797 The Official Liquidator Vs. Koganti Krishna Kumar; submission being that it is the each and every director of the company who has to explain as to why he should not be responsible for filing the statement of affairs on behalf of the company; the applicant in no manner is entitled to a discharge.

8. Arguments have been heard and submissions have been noted. Relevant would it be to first extract the provisions of Section 454 of the said Act; they read as under:

454. Statement of affairs to be made to Official Liquidator.

(1) XXXXXXXXXXXX

(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.

9. The object of this Section is to facilitate the speedy administration in winding up and to enable the liquidator to get himself apprised without any delay of all the relevant facts relating to the affairs of the company. The statement of affairs is undoubtedly an important document for the Official Liquidator to ascertain the assets and liabilities of the company and to expedite the realization and distribution of its assets. The words " subject to the directions of the Court? imply that the Court may give such directions to the Official Liquidator in exercise of its powers and if any directions are given, the powers of the Official Liquidator must be exercised in conformity with such directions.

10. In (1983) 53 CC 918 Delhi in Re: Beejay Engineers Pvt. Ltd., a Division Bench of this Court has answered two questions of vital import which had been referred to them. The second question is relevant for the controversy before this Court and reads herein as under:

Whether, while exercising jurisdiction under s. 633 of the Act, the court can justifiably draw any distinction amongst the directors who are on the Board purely by virtue of their technical skill or expertise or because they represent certain special interests and those who are in effective control of the management and affairs of the Company.

11. This question was answered as follows:

While we do find some force in the argument that the circumstance of a person being purely on the Board on account of his special skill or expertise may be a relevant factor in deciding whether he has acted honestly and reasonably in conjunction with other circumstances of the case it is per se no ground for exonerating such a director from liability on account of negligence, breach of duty, misfeasance or breach of trust, etc. He has, like any other director, to satisfy the conscience of the court that he fulfills the criteria to earn relief from liability as laid down in the section, and his being on the Board on account of his expertise or special skill will not in itself be enough to exonerate him from liability; it will be just one of the circumstances to be taken notice of as a factor justifying the reasonableness and honesty of the applicant's actions. Looked at from this angle, the fact of a person being on the board of directors because of his special skill or expert knowledge cannot be said to be a wholly extraneous

circumstance having no bearing whatsoever on the point in issue. We are, therefore, inclined to answer this question accordingly.

12. Section 2 (13) of the said Act defines a Director in the following words:

director includes any person occupying position of director by whatever name called.

13. The ratio of the aforementioned judgment as also as is evident from the definition of a director, no distinction has been made between a nominated director or any other director. Thus the first argument propounded by the learned counsel for the petitioner that the applicant was only a nominee director will not by itself be a ground to absolve the said person from the liability of complying with the directions contained in Section 454 (2) of the said Act.

14. In this context, the judgment relied upon by the learned counsel for the petitioner reported as K. Subramany (Supra) and Mother Care (India) Ltd. (Supra) would be inapplicable. While the later judgment has not dealt with the provisions of Section 454 (2)(a) of the said Act {which by itself is a provision independent of the other clauses i.e. clause 454 (2) (b)(c) & (d)}, the former judgment has returned a finding largely based upon the immunity granted to a nominee director u/s 27 of the State Financial Corporation Act, 1957 (hereinafter referred to as SFC Act); as noted earlier the Companies Act has made no such distinction in this legislation i.e. no distinction has been drawn between a nominated director or any other director.

15. Thus the submission of the learned counsel for the petitioner that the applicant should be absolved as she was only a nominee director of the company is not ipso facto by itself a ground to discharge the applicant of all liability.

16. It is however not in dispute that the applicant had resigned from the company on 30.10.1999; Form 32 had been filed by the company before the office of ROC on 26.11.1999; winding up proceedings had been initiated on 24.11.2003; the company was finally wound up only on 28.07.2004. It is thus evident that four years prior to the date of initiation of winding up proceedings, the applicant was no longer a director of the company. Much emphasis has been laid by the learned counsel for the Official Liquidator on the provisions of Section 454 (2)(a) of the said Act; submission being that all the erstwhile "officers" which also includes a director are liable to file the statement of affairs in the absence of which prosecution must follow under the aforementioned statutory period.

17. There is no dispute to the proposition that an "officer" includes a director as per the definition contained in Section 2 (30) of the said Act. The arguments of the learned counsel for the respondent are largely based upon the judgment of Koganti Krishna Kumar (Supra). This judgment (supra) had in fact relied upon a judgment of the Division Bench of the Delhi High Court reported as Devender Kishore Mehra Vs. Official Liquidator (1980) 50 Com Cas 699 as also another judgment of the High Court of Delhi reported as (1974) 44 CC 381 titled as

Official Liquidator of R.S. Motors P. Ltd Vs. Jagjit Singh Sawhney. In Devender Kishore Mehra (Supra) the directors of the company had resigned long ago before the winding up order; it was in this context that the Division Bench had noted that it could not be envisaged that in such a situation nobody can be called upon to file the statement of affairs and as such all Ex-directors of the company who had resigned even more than one year before the winding up order had been directed to file the statement of affairs. However the subsequent argument of the applicant that he should be discharged as he has no knowledge of the affairs of the company had answered by the Division Bench in the following words:

"The next contention on behalf of the appellant is that the official liquidator can only require such other persons to submit a statement of affairs, subject to the directions of the court, as are in a position to give relevant information. This postulates that the Court would apply its mind and decide in each case whether such direction should be given. It is not contemplated that the court would give direction to the official liquidator to require any and every person to file a statement of affairs merely as an academic exercise. The purpose of getting the statement of affairs is to enable effective and proper winding up of the company. The court is not required to give a direction which in effect would be infructuous. We are in entire agreement with this submission. Indeed, our learned brother has noticed that the appellant was not in a position to know anything about the affairs of the company ever since he was ousted from the management, way back in December, 1966. He had ceased to have approach or access to the books and papers of the company. He did not take part in its management. He even refused to sign the provisional balance-sheet for being submitted to the Punjab National Bank in December, 1966. In this view of the matter, asking such a person to file a statement of affairs is an exercise in futility and we see no reason why a mere academic order should be passed.

18. In Jagjit Singh Sawhney (Supra), a Bench of this Court had noted that where the books of the company are not available to the director who is required to file the statement of affairs, it would be a reasonable excuse for him in not submitting the statement of affairs of the company ordered to be wound up. In this context, it had noted inter-alia as follows:

The appellant, as we have already noticed, has been held not to be in a position to have access to the books of the company ever since he was ousted from the management. In these circumstances, calling upon him to file the statement of affairs cannot be justified. Indeed, it cannot be justified for any of the persons unless a clear-cut finding is given that any one of the persons concerned is in a position to or capable of filing the statement of affairs. Such an enquiry is an imperative prerequisite for giving directions under S. 454 on a motion by the official liquidator. We cannot agree with the contention that pleading reasonable excuse is available at the stage of prosecution only. Putting a person in jeopardy of that type without an earlier investigation when it is so required to be made is

not called for.

19. The emphasis on the italicised portion (above) also answers the argument of the learned counsel for the Official Liquidator that it is not in every case that a direction can be given u/s 454 of the said Act to an officer/director to file his statement of affairs; "reasonable excuse" can be pleaded even prior to the prosecution; putting a person in jeopardy without an earlier investigation when it is not so required is not called for.

20. Reliance by the learned counsel for the respondent upon the judgment *Jamuna Datwani (Mrs.) Vs. Official Liquidator*, is misplaced; this was a case where Jamuna Datwani was admittedly a working director of the company; in her statement recorded under Rule 130 of the said Rules, her defence was that her husband had suffered a paralytic stroke in May, 2011 and was bed ridden till the time he expired which was in July, 2004; she had admitted that she has signed documents of the company as also of other companies; her defence being that she had not read these documents and had blindly signed whatever her husband had asked to do so; she did not understand the details in the balance-sheet; during this period of 2001-2004, the affairs of the company were being looked after by managers and chartered accountants. The Court was of the view that this defence could only be established and examined in trial. Facts of the present case are distinct. Admittedly in this case, the applicant was a nominee director; Form 32 submitted before the ROC (admitted document) clearly described her as such; this fact is also evident from the queries raised by the Official Liquidator in her statement which was recorded under Rule 130 of the said Rules; questions No. 3 & 4 have been put to her in her capacity as a nominee director; in this statement she had admitted that she had never signed any document on behalf of the company; she was only watching the financial interest of the ICICI Bank which was a lender to the company; she had hardly attended any board meeting; she was not aware about the knowledge and affairs of the company; significantly no question has also been put to her that she being in possession of the books and accounts of the company was evading her statutory duty. It has also come on record that the applicant had in fact resigned from the company in her capacity as a nominee director more than four years ago. It is also a part of the record that Mr. S.P. Nagarkatte was another director of the company and his statement had been recorded under Rule 130 of the said Rules on 19.02.2004; in para 4 of the present petition (Crl.(o) No. 5/2008), the Official Liquidator has specifically stated that Mr. S.P. Nagarkatte had stated in the said statement that he was a nominee director of the ICICI Bank; relevant would it be to state that Mr. S.P. Nagarkatte has not been arrayed as an accused in the aforementioned proceedings; no prosecution has been launched against him.

21. It is not for the Official Liquidator to adopt a pick and choose policy; he is a statutory body and must maintain transparency. He has admittedly not launched prosecution against Mr. S.P. Nagarkatte having accepted his statement recorded under Rule 130 of the said Rules that he was only a nominee Director of the

ICICI Bank. Role of the present applicant is no different. She was also only a nominee Director of the said bank. The additional circumstance in her favour is that she had resigned four years prior to the date of initiation of the winding up proceedings. In this background, it would be clearly an exercise in futility for the Official Liquidator to continue with the prosecution against the applicant. She having had no access to the records of the company and admittedly not having signed even a single document on behalf of the company, no useful purpose would be served in continuing with the prosecution. The prayer made in the application is allowed. She is accordingly discharged.

CRL.O.(CO.) 5/2008

Renotify on 04.10.2012.