
(1996) 08 RAJ CK 0030

In the Rajasthan High Court

Case No : Company Application No. 36 of 1991

Official Liquidator

APPELLANT

Vs

Ashok Kumar Dalmia and Others

RESPONDENT

Date of Decision : 02-08-1996

Acts Referred:

Companies Act, 1956 — Section 441, 441(2), 531, 531A

Citation : (1999) 98 CompCas 269 : (1997) 2 RLW 1042 : (1996) 2 WLN 109

Hon'ble Judges : V.K. Singhal, J

Bench : Single Bench

Advocate : G.K. Garg, for the Appellant; Sunil Nath, for the Respondent

Final Decision : Allowed

Judgement

V. K. Singhal, J.—This matter has come up on the application of the creditors that the transfers made by the company be declared as fraudulent under Sections 531 and 531A of the Companies Act.

2. The facts of the case are that Company Petition No. 4 of 1991 was filed on March 13, 1991, for winding up of Ashoka Oil Products Pvt. Ltd. It was alleged that the properties of the company were being transferred fraudulently to defraud the creditors. Notice was issued by this court on March 15, 1991. The official liquidator was directed by the order dated April 12, 1991, to identify the property of the company which has not been transferred. On May 17, 1991, it was found that all the assets of the company had been sold under registered sale deeds before moving the application for winding up of the company. Notices were issued to 75 persons to whom the property was alleged to have been transferred. The report of the official liquidator was received and it was pointed out by learned counsel for the petitioner on February 28, 1992, that the movable and immovable property has been transferred to defendants Nos. 4 to 76. The machinery of the company is likely to be transferred or sold. On September 18, 1992, Mr. Kuhad pleaded no instructions on behalf of respondents Nos. 4 to 76. No reply was filed and, therefore, it was directed that the properties be taken in

possession by the provisional official liquidator so that they may not be transferred and sold hereinafter. Meena, official liquidator was authorised to take the possession of the factory, Ashoka Oil Products Pvt. Ltd., situated at Kherli District Alwar and seal the same. The Superintendent of Police was directed to provide sufficient police force and assistance to Meena to enable him to execute the order of this court. The information regarding appointment of a provisional official liquidator was also given.

3. It has come on record that the sale deed was executed on December 3, 1990/ December 5, 1990, which is alleged to be a mala fide act on the part of the directors.

4. It may be observed that Miss Gayatri Rathore sought time to file reply on February 28, 1992, but reply was not filed. C. P. Khemka was appointed as Commissioner on October 23, 1992, to verify the inventory of the movable/ immovable properties of the company in liquidation. No goods were found in the premises. The almirah was found locked, but nobody could provide the keys to the commissioner. Power was filed on behalf of the respondents Nos. 4, 14 and 40 by Mr. Kuhad. For the rest of the respondents a prayer was made on May 14, 1993, to serve notice by publication in the newspapers. The directors of the company were directed to appear, Bailable warrants for producing documents were not executed. Notices which were issued by this court from time to time were not complied with and, therefore, separate action for presence of the directors is being taken.

5. The controversy is with regard to transfer of movable/immovable properties of the company. The relevant provisions of Section 531/531A of the Companies Act read as under :

"531. Fraudulent preference.--(1) Any transfer of property, movable or immovable, delivery of goods, payment, execution or other act relating to property made, taken or done by or against a company within six months before the commencement of its winding up which, had it been made, taken or done by or against an "individual within three months before the presentation of an insolvency petition on which he is adjudged insolvent, would be deemed in his insolvency a fraudulent preference, shall in the event of the company being wound up, be deemed a fraudulent preference of its creditors and be invalid accordingly : Provided that, in relation to things made, taken or done before the commencement of this Act, this sub-section shall have effect with the substitution, for the reference to six months, of a reference to three months.

(2) For the purposes of Sub-section (1), the presentation of a petition for winding up in the case of a winding up by or subject to the supervision of the court, and the passing of a resolution for winding up in the case of a voluntary winding up shall be deemed to correspond to the act of insolvency in the case of an individual.

531A. Avoidance of voluntary transfer--Any transfer of property, movable or

immovable, or any delivery of goods, made by a company, not being a transfer or delivery made in the ordinary course of its business or in favour of a purchaser or encumbrancer in good faith and for valuable consideration, if made within a period of one year before the presentation of a petition for winding up by or subject to the supervision of the court or the passing of a resolution for voluntary winding up of the company, shall be void against the liquidator."

6. In the application submitted u/s 446 of the Companies Act it is mentioned that respondents Nos. 4 to 35 purchased the movable property on December 3, 1990, and respondents Nos. 36 to 39 purchased the immovable property of the company on December 5, 1990. Respondents Nos. 40 to 44 purchased the property under the sale deed dated December 5, 1990. Respondents Nos. 45 to 54 purchased the property under the sale deed dated December 15, 1990. Respondents Nos. 55 to 59 purchased the immovable property under the sale deed dated December 5, 1990. Under the sale deed dated December 3, 1990, the businessmen of Kherli Vyapar Mandal who are alleged to have the dealings with the company failed to pay their outstanding dues. In the aforesaid sale deed the total value of the machinery has been shown as Rs. 15,40,000. Ashok Kumar Dalmia, Sat-yendra Prasad and Rajkamal Ranka, ex-directors of the company have sold the immovable property to Mahaveer Prasad Jain, Niranjana Lal, Manokar-lal, Pritam Chand Jain for Rs. 65,000 and also to Ramavtar, Manoharlal, Brijeshkumar, Brijbehari and Om Prakash for Rs. 65,000 and also to Ramesh Chand, Hukamchand, Sarpan Kumar Meena, Pooranlal, Pramod Kumar, Ghosh Chand, Raghunath, etc., for Rs. 60,000. It is alleged that the transfers have not been made in the ordinary course of business by the ex-directors and are fraudulent transfers. The sale deed does not bear the common seal of the company nor is there a resolution to transfer the said properties.

7. Attention has been drawn towards the provisions of Section 441 of the Companies Act which contains the provisions regarding winding up of the company. Section 441 provides that where before the presentation of a petition for winding up of a company by the court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution and unless the court, on proof of fraud or mistake thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken. Sub-section (2) of Section 441 provides that in any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for winding up. The petition for winding up was filed by Bhagwan Das Gopal Prasad on March 13, 1991.

8. On behalf of the respondents it has been contended that the transfer cannot be said to be fraudulent. Reliance has been placed on the decision in *Monark Enterprises v. Kishan Tulpule* [1992] 74 Comp Cas 89 wherein resolution not being passed by board of directors, but the company accepting the consideration and implementing the transaction, failure to pass resolution was held not to

vitiates the transaction. The question with regard to Section 531 was considered and it was observed that unless a transaction of transfer of a company's property amounts to a fraudulent preference under the bankruptcy law or insolvency law and it is entered into within a period of six months prior to commencement of winding up of the company, the transaction in question cannot be treated as void u/s 531(1). The burden of proving that the impugned transaction was not entered into in the ordinary course of business or in good faith and for valuable consideration would be on the official liquidator or creditors impugning the transaction.

9. Reliance has also been placed on the decision in *Tansukhrai M. Karundia Vs. The Official Liquidator, Andhra Paper Mills Co. Ltd., (In liqn.)*, wherein it was held that the mere fact that the money was paid within three months prior to the presentation of the petition for winding up is not by itself sufficient to avoid the transfer or payment as invalid u/s 231.

10. Reliance has also been placed on the decision in *Sunder Lal Jain v. San-deep Paper Mills P. Ltd.* [1986] 60 Comp Cas 77 wherein it was observed that an application for annulment of a transfer u/s 531A can be allowed on proof either that there was no consideration for the transaction or that the consideration was so inadequate as to raise the presumption of want of good faith.

11. The Delhi High Court in *Official Liquidator, Victor Chit Fund P. Ltd, v Kanhiya Lal* [1972] 42 Comp Cas 396 observed that to set aside a transaction as a fraudulent preference u/s 531 of the Companies Act, fraud must be clearly alleged, proved and established. A petition containing mere general allegations and lacking in material particulars, is liable to be dismissed.

12. The decision in *Official Liquidator Kerala High Court v. Victory Hire Purchasing Co. (P.) Ltd.* [1982] 52 Comp Cas 88 has also been relied upon wherein it was held that if fraudulent preference was given to creditors and execution of mortgage on the eve of winding up was done in favour of two out of several creditors, the same was void.

13. I have considered over the matter. The provision of Section 531 give protection if the transaction is carried out in the ordinary course of business or if it is in good faith for valuable consideration. The provisions of Section 531 equally apply to a company whose transaction is made within six months before the commencement of winding up proceedings and a deeming fiction has been created. It is an admitted fact that no consideration passed when the sale deed was executed. If the company is on the verge of closure then no preference can be given to one creditor vis-a-vis others. The provisions of Sections 531 and 531A are meant to protect the rights of other creditors so that if the company in liquidation makes the sale, the proceeds may be proportionately distributed. It has to be seen whether favour has been given to respondents Nos. 4 to 76. The object of executing sale deed on December 3/5, 1990, has to be seen whether it is tainted with the element of fraud, dishonesty or preference, It has been

alleged on behalf of the creditors that the sale deed was executed in one day at gun-point. The question whether it was at gun-point or otherwise, need not be gone into by this court but the agreement dated December 1, 1990, is itself sufficient to prove that there was no genuine transaction of transfer of the property and the alleged sale deeds were executed to give preference to a few of the creditors to the exclusion of others. The action of the directors cannot be considered to be bona fide or in good faith or in the ordinary course of business. The intention to give preference to a few of the creditors to the exclusion of others is to be considered fraudulent. I feel that it has been established that the sale deeds executed on December 3/5, 1990, were only to give preference to a few creditors, respondents Nos. 4 to 76 who have paid not a single pie. The procedure for selling the property of the company, namely passing of the resolution and authorising the directors, has not been followed in this case. An agreement dated December 11, 1990, has also been entered into nullifying the sale that if the dues are paid then they will again execute the sale deed in favour of the company. This shows that preference was given to these creditors excluding other creditors similarly situated.

14. In these circumstances, the application is allowed and the sale of movable/immovable property to respondents Nos. 4 to 76 on December 3, 1990, and December 5, 1990, is annulled. The official liquidator is directed to take possession of the movable/immovable property and deal with the same in accordance with law. The superintendent of police is directed to provide sufficient force for taking possession of the said properties.