

(2002) 12 MAD CK 0027

In the Madras High Court

Case No : Company Application No's. 888 of 1995 and 1321 of 2001 in
Company Petition No. 88 of 1989

Official Liquidator

APPELLANT

Vs

T. Sudarsan and Others
B. Rajagopal and Another Vs
Official Liquidator

RESPONDENT

Date of Decision : 13-12-2002

Acts Referred:

Companies (Court) Rules, 1959 — Rule 130, 260, 261
Companies Act, 1956 — Section 2(30), 433, 478, 519, 542

Citation : (2003) 116 CompCas 88 : (2004) 49 SCL 694

Hon'ble Judges : P. Sathasivam, J

Bench : Single Bench

Advocate : Arvind P. Datar, for the Appellant; R. Vedantham Srinivasan and Nalini Chidambaram for S. Silambanan and P.N. George Graham for Devadasan Sagar, for the Respondent

Judgement

P. Sathasivam, J.—Company Application Nos. 888 of 1995 is by the official liquidator appointed by this court as liquidator of Messrs.

Dhanalakshmi Funds (India) Ltd., praying for certain directions. Company Application No. 1321 of 1995 is by B. Rajagopal and B. Muralidhar,

ex-directors of the company in liquidation seeking for an order to discharge them from the proceedings under Sections 542 and 543 of the

Companies Act, 1956, initiated by the official liquidator in Company Application No. 888 of 1995 in Company Petition No. 88 of 1989.

2. The case of the official liquidator as set out in his report dated November 14, 1995, is briefly stated hereunder.

3. Messrs. Dhanalakshmi Funds (India) Ltd., was ordered to be wound up by an order of this court dated November 16, 1990, in Company

Petition No. 88 of 1989 and the official liquidator became the liquidator of the said company. The company in liquidation was incorporated on

August 9, 1985, by the Registrar of Companies, Tamil Nadu. It was declared as a ""Nidhi"" on August 22, 1986, u/s 620A of the Companies Act,

1956. The main object of the company is to encourage and afford all facilities on mutual basis for cultivating thrift, saving and to render all types of

financial assistance to its members only by receiving long and short-term deposits from the members and in particular recurring time deposits, term

deposits, fixed deposits and other deposits and to grant loans only to members on securities. As per the memorandum of association of the

company in liquidation, the authorised share capital is Rs. 2,00,000 divided into 2,00,000 equity shares of Re. 1 each. As per the records of the

Registrar of Companies, Tamil Nadu at Madras, based on the annual return made up to February 16, 1987, the following are the directors of the

company : (1) V.S. Sridhar ; (2) T. Sudarsan ; (3) V. Para-meswaran; (4) P.C. Varghese. There were 48 branches of the company in liquidation.

The official liquidator has taken into his custody available books and records of the company in liquidation at 41 branches and at the registered

office of the company in liquidation. The official liquidator has taken into his custody and control the available assets and effects of the company in

liquidation in respect of the registered office and 26 branches of the company in liquidation. The assets and effects of the company are not taken

possession of in respect of 22 branches, since the whereabouts of the assets are not known. The funds position as on November 9, 1995, of the

company is Rs.75,41,123.85. The former directors of the company in liquidation have not filed the statement of affairs as required u/s 454 of the

Act and the official liquidator has filed an application, viz., C. A. No. 428 of 1991 reporting the default of non-submission of the statement of

affairs and the said application is pending.

4. It is stated by the official liquidator that in the course of liquidation proceedings, the business of the company in liquidation has been carried on

with intent to defraud the creditors of the company in liquidation or any other persons or for fraudulent purposes and that it appears that the

respondents have misapplied or retained or became liable or accountable for the money or property of the company in liquidation and have been

guilty of misfeasance or breach of trust in relation to the company in liquidation. Therefore, the official liquidator has filed an application in C. A.

No. 2224 of 1993 for permission to appoint an auditor to investigate the affairs and accounts of the company in liquidation and by order dated

November 26, 1993, this court has appointed N. T. Arasu and Company, chartered accountants, to carry out the investigation of the affairs and

accounts of the company in liquidation. The auditors have submitted their reports to the official liquidator and based upon those reports of the

auditors as well as the available books and records of the company in liquidation, the official liquidator submitted the report for appropriate orders

under Sections 542 and 543 of the Companies Act, 1956.

5. There were two partnership firms, (1) Asian Integrated Finance and Industrial Corporation; and (2) Dhanalakshmi Consolidated Finance and

Industrial Investments. K.V. Sasidhar and B. Muralidhar were the partners of the first above-mentioned firm and B. Rajagopal Nair and K.V.

Sasidhar were the partners of the second above-mentioned firm. According to the statement of the former director P.C. Varghese recorded by the

official liquidator on January 4, 1994, and January 6, 1994, under rule 130 of the Companies (Court) Rules, 1959, B. Rajagopal is the group

president of the Dhanalakshmi group of companies and K.V. Sasidhar is the group chairman of the Dhanalakshmi group of companies and they

were the promoters of the company in liquidation. The registration expenses were met by K.V. Sasidhar and B. Rajagopal and they took steps for

the incorporation of the company in liquidation. Respondents Nos. 1 to 7 in this application are the signatories to the memorandum of association

and articles of association of the company in liquidation. According to P. C Varghese, ex-director of the company in liquidation, respondents Nos.

1 to 7 were the employees of those two firms and they have signed the memorandum of association and articles of association of the company in

liquidation only at the behest of respondents Nos. 8 and 9 herein.

6. The partners of the two firms did not repay the depositors of the two firms and in order to overcome the provisions of Section 455 of the

Reserve Bank of India Act, 1934, promoted the company in liquidation with respondents Nos. 1 to 7 herein as subscribers to the memorandum of

association and as the first directors of the company in liquidation and continued

the business of the partnership firms by indicating that the company in liquidation is the proprietor of the two firms and by issuing fresh deposit receipts in renewal of the earlier deposit receipts issued in the name of those two firms to the depositors and paying the interest to the depositors of those two firms from and out of the funds of the company in liquidation. They have adopted this procedure in order to circumvent and to escape their liability towards the depositors under the provisions of Section 455 of the Reserve Bank of India Act, 1934, and are therefore liable for the said fraudulent purpose and they have carried on the business of the company in liquidation with intent to defraud the depositors/ creditors of the company in liquidation. Even though respondents Nos. 8 to 10 do not appear to have been inducted as directors, the facts and circumstances as available clearly indicate that the said respondents Nos. 8 to 10 have been actually carrying on the business of the company in liquidation and they have misapplied, retained, become liable or accountable for money and property of the company in liquidation and they are guilty of misfeasance or breach of trust in relation to the company in liquidation in addition to respondents Nos. 1 to 7 as the former directors of the company in liquidation who have acted in aid and assistance of respondents Nos. 8 to 10 in carrying on the affairs of the company in liquidation with intent to defraud the creditors of the company in liquidation and for having misapplied and retained and become liable or accountable for the money and property of the company in liquidation and have been guilty of misfeasance and breach of trust in relation to the company in liquidation.

7. A perusal of the books and records of the company in liquidation as well as the statement of P.C. Varghese recorded by the official liquidator on January 4, 1994, and January 6, 1994, under rule 130 of the Companies (Court) Rules, 1959, it is seen that no formal agreement appears to have been executed between respondents Nos. 8 to 10 as partners of the two firms herein and the company in liquidation for taking over either the assets and effects or the liability or the business of those two firms by the company in liquidation. The original balance-sheets for the years ended December 31, 1986, and December 31, 1987, are not available among the records taken possession by the official liquidator. In this regard, the solemn statement made by V.S. Sridhar and V. Parameswaran, directors of the

company in liquidation, in their affidavit in W. P. Nos. 1948 of 1986 and 12900 of 1987 is relevant.

8. Even though the official liquidator has not called for claims from eligible persons, he has received 4,421 claims filed voluntarily claiming various amounts aggregating to Rs. 7,04,03,266.22.

9. Respondents Nos. 1 to 7 and 8 to 10 have incurred the liability in view of the fact that all the assets and effects of the said two firms were not

made over to the company in liquidation, but deposit receipts issued by those two firms in favour of the creditors of those two firms were renewed

by issuing deposit receipts in the name of company in liquidation and by making payments towards interest on the deposit amounts with the two

firms from and out of the funds of the company in liquidation. According to the statement of P.C. Varghese, recorded on January 4, 1994 and

January 6, 1994, by the official liquidator those writings in pencil have been made by B. Rajagopal. It is evident from this that B. Rajagopal is the

pivotal person in respect of the affairs and business of the company in liquidation. From the available records of the company in liquidation and the

report of the auditors N. T. Arasu and Company, as well as the proceedings in C. P. No. 88 of 1989, it is seen that the company in liquidation did

business with non-members also. As per the statement of P.C. Varghese recorded by the official liquidator on January 6, 1994, consequent to the

inspection conducted by the Reserve Bank of India on the accounts of the two firms, B. Rajagopal gave instructions to write up the minutes of the

company in liquidation and accordingly the minutes of the company in liquidation were written up at the residence of V. Parameswaran and that

most of the minutes were written up on a particular day as if the meetings were held periodically. It is clear that proper minutes books were not

maintained and that the minutes of the board of directors as well as the minutes of the general body of company in liquidation were written up after

the search and seizure on March 1, 1986, by the CB CID at the instance of the Reserve Bank of India, Bangalore. The details of various

companies working under the name and style Dhanalakshmi groups of companies have been mentioned in para. 27 of the report. During the

inspection of the records of the Registrar of Companies, Tamil Nadu, it is found that K.V. Sasidhar and B. Rajagopal were either the signatories to

the memorandum and articles of association or the directors of the companies except in some of the companies of the group. In the records

available B. Rajagopal is termed as group president and K.V. Sasidhar is termed as chairman of the Dhanalakshmi group of companies.

10. As per the statement of the administrators in their report in October, 1990, filed before this court in C. P. No. 88 of 1989, a total sum of Rs.

33,57,350.16 was due and payable to the company in liquidation by the sister concerns of the Dhanalakshmi group. In spite of request by the

concerned authorities, the books and accounts of the associate companies were not produced. The very fact that the books of account of the said

associate companies were not produced lends credence to the diversion of funds from the company in liquidation to its associate concerns. P.C.

Varghese has submitted to the official liquidator a copy of his letter dated October 10, 1988, to K.V. Sasidhar, B. Rajagopal, B. Muralidhar and

K.V. Vijayakumar to the effect that on various occasions on their advice, he had been transferring heavy amounts to their sister concerns and that

they have not left sufficient assets to answer the creditors and that they are responsible for all their and his acts since the same was done at their

instigations. The report further says in that letter they have clearly stated that with their full knowledge and clear mind own their responsibilities,

liabilities, claims, etc., in respect of any consequences, actions, either civil, criminal or statutory that may arise on account of the acts of P.C.

Varghese of commissions, omissions, non-fulfilment of certain legal formalities, etc., which have been done solely on account of their advice and on

their behalf. P.C. Varghese has also produced a copy of the letter dated January 27, 1986, signed by B. Rajagopal as the corporate director of

Dhanalakshmi group wherein it is stated that he takes immense pleasure in informing that with effect from December 7, 1985, the company in

liquidation has taken over the entire rights, assets, liabilities, guarantees, staff, management and other related obligations of M/s. Asian Integrated

Finance and Industrial Corporation. P.V. Varghese has also produced a copy of the deposit certificate in the name of A. Rosaline jointly with Mrs.

M. Mary for Rs. 3,000 issued on July 19, 1986, the date of maturity being July 19, 1989, to indicate that it was issued by Dhanalakshmi Funds

(India) Ltd., as proprietor of the firm Dhanalakshmi Consolidates Finance and Industrial Investments and signed by director/authorised signatory

B. Rajagopal. In the statement recorded by the official liquidator on January 6, 1994, P.C. Varghese has stated that there were transfer of funds from the company in liquidation to various sister concerns of the group as per the instructions of B. Rajagopal and K.V. Sasidhar. He has further stated that B. Rajagopal and K.V. Sasidhar are the promoters of the company in liquidation and that they have been giving directions and instructions to manage the day-to-day affairs of the company in liquidation. After referring to the report of the administrators, auditors and the details regarding various fixed deposits, it is stated that the partners of the two firms, namely, respondents Nos. 8 to 10 are the pivotal persons who have conducted the business in the name of the company in liquidation and they are equally liable to the depositors/creditors of the company in liquidation even though not inducted as directors of the company in liquidation. They have siphoned off funds of the company in liquidation to their sister concerns.

11. In para. 41 of the report of the official liquidator, various charges levelled against respondents Nos. 1 to 10 have been enumerated. It includes payment of Rs. 3,50,00,000 to various depositors, loss of Rs. 9,44,114 incurred due to disbursement of housing loans, false promissory notes to the extent of Rs. 77,63,210, jewel loan to the extent of Rs. 57,69,200, teachers' loan to the extent of Rs. 3,12,120, utility loan to the extent of Rs. 1,65,83,950, loss of Rs. 69,47,900 towards loans on deposits, a sum of Rs. 1,15,241.95 towards diversion of funds against vehicle maintenance, loss of Rs. 3.94 crores due to transfer of funds to the sister concerns. Thus, the company in liquidation has lost an aggregate sum of Rs.

18,32,39,002 and respondents Nos. 1 to 10 are liable to make good the loss and to compensate the said loss. They are jointly and severally liable for the said amount. All of them are guilty of misfeasance and breach of trust in relation to the affairs of the company in liquidation.

12. The respondents have filed a separate counter affidavit disputing various averments made by the official liquidator. I am of the view that instead of referring to those averments in the counter affidavit, it is suffice to refer to the affidavit filed by B. Rajagopal for himself and on behalf of B.

Muralidhar in Company Application No. 1321 of 2001 seeking for an order to discharge them from the proceedings under Sections 542 and 543

of the Companies Act initiated by the official liquidator in C. A. No. 888 of 1995 in C. P. No. 88 of 1989. It is stated that both of them were

carrying on business of accepting deposits from members of the public at interest and advancing the money on interest. The firm was regularly

paying interest to the depositors and the principal amount on maturity, Section 45B of the RBI Act imposed restrictions on entities other than

incorporated companies from accepting deposits from public. In the circumstances, the first applicant, namely, B. Rajagopal and the second

applicant K.V. Sasidhar, respondents Nos. 8 and 10 in C. P. No. 888 of 1995 decided to close down the finance business run by the firm. A

company promoted by respondents Nos. 1 to 7 in C. P. No. 88 of 1989 offered to take over the assets and liabilities of the firm and accordingly,

the assets and liabilities of the firm were taken over by the company as reported by the official liquidator. The said company, namely,

Dhanalakshmi Funds India Ltd. was incorporated with the object of accepting deposits and lending money on interest to its members as a "Nidhi

company. The applicants in this application were not inducted as directors of the company. They were not involved in the day-to-day management

of the company. For a while, the first applicant was helping K.V. Sasidhar to evolve broad policy matters as requested by him. In Priya Rubber

Estates and Plantations Pvt. Ltd., the first applicant was a non-executive director and K.V. Sasidhar was the chairman and managing director who

was controlling the affairs of the company. All investment decisions were made by K.V. Sasidhar only. The board of management in the two

companies were vested with the relatives and confidants of K.V. Sasidhar. But misunderstandings arose between the applicants herein and K.V.

Sasidhar and the applicants herein resigned from the directorship in consequence of the misunderstanding during end of 1986. Though the

company was regularly paying interest and deposit amounts to the depositors, due to adverse business conditions the company was unable to pay

interest to the deposits and repay the matured amounts. In these circumstances, one of the depositors filed C. P. No. 88 of 1989 for winding up

the company u/s 433(e) and 433(f) of the Companies Act. By order dated November 16, 1990, the company was ordered to be wound up and

the official liquidator was appointed as the liquidator of the company. Though the official liquidator has filed the above application in 1994, the

same was not pursued for many years after it was filed. If the official liquidator's office had pursued the applications diligently in the context of the

affidavit filed by K.V. Sasidhar owning responsibility for the conduct of the business of the company and offering to settle the dues by sale of

assets worth Rs. 14 crores the official liquidator would have been able to realise substantial amounts and paid off the depositors.

13. The signatories to the memorandum and articles of association of the company at the time of formation did not include the signature of the

applicants. Neither of the applicants were on the board of directors of the company. In the course of carrying on the business of the company

certain management decisions had been proved to be unwise later on and because of that the company incurred loss. The object of the company

was to carry on business as a ""Nidhi"" company which purpose is lawful and cannot be stated as fraudulent. To fall within the mischief of Section

542 the company ought to have carried on business and incurred debt at a time when there is, to the knowledge of the directors, no reasonable

prospects of creditors ever receiving payments. Taking over the business of the firms by incorporated companies is an accepted method of

carrying on business. No irregularity or illegality can be attributed to it. The take over of the business of the two firms were in pursuance of the

board's resolution dated August 31, 1985, confirmed by a general body resolution in extraordinary general meeting held on September 1, 1985.

P. C. Var-gheze was an executive director holding wide powers in the company and the other directors were persons with profound banking

experience. P.C. Varghese was in charge of the affairs of the company. That being the case, he had vested interest in making the statement and his

statements have to be taken with a pinch of salt and cannot be relied upon and had to be put to independent proof. The applicants had no financial

interest in the company, neither were they holding any shares in the company. The pencil notings can, at the most, be considered as suggestions in

structuring the minutes made on casual consultation. K.V. Sasidhar himself has owned complete responsibility for the conduct of the business of the

company. On an overall perusal of the official liquidator's report, it is evident that K.V. Sasidhar and his family members were having substantial

stake and interest in the companies stated to be in the group, and K.V. Sasidhar alone was the moving spirit behind all the concerns. The first

applicant at all points of time had little financial interest in any of the companies. For some time, the first applicant acted in the capacity of a non-

executive director in some of the companies and due to difference of opinion he had resigned and relinquished the said position. The statement of

P.C. Varghese is self-serving and it has no evidentiary value. It was K.V. Sasidhar who had control over the assets of various companies and he

was the pivotal person behind the group of companies where neither of the applicants had beneficial interest. K.V. Sasidhar passed away on

February 13, 1999. It is totally unfair to take action against the applicants after having failed to take action in terms of the offer made by K.V.

Sasidhar during his lifetime. The present proceedings under Sections 542 and 543 are vexatious and is the result of a conspiracy to cover up the

misdeeds of the official liquidator and is an abuse of the process of this court. The applicants cannot be held liable either jointly or severally for the

said loss. The present proceedings u/s 542 of the Act are misconceived and is a result of afterthought.

14. Though the other respondents have filed a counter affidavit highlighting their stand, in view of their stand taken therein, namely, accusing

respondents Nos. 8 to 10 for all misdeeds, I am of the view that it is unnecessary to refer to the same.

15. In the light of the above pleadings, I have heard Mr. Arvind P. Datar, learned senior counsel for applicant/official liquidator ; Mr. R.

Vedantham Srinivasan, learned senior counsel and Mrs. Nalini Chidambaram, learned senior counsel for respondents Nos. 8 and 10 ; Mr. P. N.

George Graham for the seventh respondent and Mr. S. Rajeswaran for the third respondent.

16. For convenience I shall refer to the parties as described in Company Application No. 888 of 1995. The material particulars, relevant dates and

events are stated hereunder. Dhanalakshmi Consolidates Finance and Industrial Investments, a partnership firm in which K.V. Sasidhar, the ninth

respondent herein and B. Rajagopal, the eighth respondent herein were partners. The business of the firm was to accept deposits from the public

for interest and deploy the funds in various activities and pay the interest and principal from the income arising from the said business. On

November 2, 1983, P.C. Varghese, the seventh respondent herein, was appointed as junior accounts officer in the firm. The Banking Laws

(Amendment) Act, 1984, introduced Chapter III-C to the Reserve Bank of India Act, 1934. Section 45B of the Act provides that deposits are

not to be accepted in certain cases. The Reserve Bank of India prohibited partnership firms from carrying on finance business. In view of the

statutory restrictions, the firms ceased carrying on business. On August 9, 1985, Dhanalakshmi Funds (India) Ltd. (in short "DFIL") was

incorporated as a "Nidhi" company with the object of receiving long and short-term deposits from the members and granting loans to the members

against securities. On August 22, 1986, DFIL was declared a "Nidhi" u/s 620A of the Companies Act, 1956 (hereinafter referred to as "the Act").

It is further seen that P.C. Varghese, seventh respondent herein, signed the memorandum and articles of association. The following persons,

namely, (1) V. S. Sridhar ; (2) T. Sudharshan ; (3) V. Parameshwaran ; (4) C. P. Viswanathan ; (5) M. V. Krishnan ; (6) V. Prabakaran ; and (7)

P.C. Varghese were the signatories to the memorandum and articles of association and first directors of the company. Those persons are arrayed

as respondents Nos. 1 to 7 in Company Application No. 888 of 1995. It is further seen that a resolution was passed on August 31, 1985, by the

board of directors of the company in liquidation to take over the assets and liabilities of two firms, namely, (1) Asian Integrated Finance and

Industrial Corporation ; and (2) Dhanalakshmi Consolidates Finance and Industrial Investments. It is also seen that the two firms were taken over

by the company in liquidation on December 7, 1985, and the firms dissolved. On July 26, 1989, one of the depositors, namely, O. V.

Subramanian filed C. P. No. 88 of 1989, before the company court for winding up DFIL on the ground that the company is unable to pay its debts

u/s 433(e) of the Companies Act. As per the orders of this court, K.V. Sasidhar, the ninth respondent herein and T. Ramakrishnan, advocate of

this court were appointed as administrators of the company in liquidation. On November 16, 1990, DFIL was ordered to be wound up by this

court in Company Petition No. 88 of 1989 and the official liquidator was appointed as liquidator of the company. The two joint administrators

referred to above were discharged in the same order for non-submission of returns. On August 9, 1991, on the appointment of the liquidators, the

official liquidator took into the custody of all the books and records of the company. It is further seen that a sum of Rs. 3,80,345 has been realised

by official liquidator by sale of movable assets. Rs. 64,20,286 is in deposit in the name of DFIL in Catholic Syrian Bank, Royapettah, Madras 14

remitted to the account of official liquidator in C. A. No. 1202 of 1991. On November 26, 1993, this court appointed M/s. V. T. Arasu and

Company as auditors to carry out the accounts and affairs of the company. On January 4, 1994, and January 6, 1994, former director P. C

Varghese, seventh respondent herein, made a statement and the same was recorded by the official liquidator under rule 130 of the Companies

(Court) Rules, 1959 (hereinafter referred to as the ""Rules""). In the statement, P.C. Varghese has asserted that B. Raja-gopal, eighth respondent

herein is the group president of the Dhanalakshmi group of companies, K.V. Sasidhar, ninth respondent herein, is the group chairman of the

Dhanalakshmi group of companies and the two were the promoters of the company. He also stated that respondents Nos. 1 to 7 were the

employees of the erstwhile firms and signed the memorandum and articles of association at the behest of respondents Nos. 8 to 10. In Company

Application No. 2224 of 1993 filed by the official liquidator for permission to appoint an auditor to investigate into the affairs and accounts of

DFIL. The auditors submitted a report to the official liquidator. Based on the report, the official liquidator filed a report for orders under Sections

542 and 543 of the Act.

17. Now I shall refer to the relevant details from the report of the official liquidator. It is seen that the business of the company in liquidation has

been carried on with the intent to defraud the interest of the company in liquidation and the respondents, i.e., the directors of the company and B.

Rajagopal and B. Muralidhar, respondents Nos. 8 and 10 respectively have misappropriated and retained or became liable or accountable for the

money or property of the company in liquidation and have been guilty of misfeasance or breach of trust in relation to the company in liquidation.

Even though B. Rajagopal, K.V. Sasidhar and B. Muralidhar, respondents Nos. 8 to 10 respectively were not directors of the company, they have

been actually carrying on the business of the company and misapplied the funds or money or property of the company and are guilty of

misfeasance and breach of trust In addition to these respondents, respondents Nos. 1 to 7, the directors of the company, who had acted in aid and

assistance of respondents Nos. 8 to 10, with intent to defraud the creditors of the company, are also guilty of misfeasance and breach of trust. The

board of directors of the company on August 31, 1995, passed resolutions for taking over the assets and liabilities of the two firms. Even though

the firms were taken over and dissolved on December 7, 1985, there is no reference to this event either in the directors' report or audited annual

accounts for the year ended December 31, 1986, dated January 16, 1987. The official liquidator has received 4,421 claims claiming various

amounts aggregating to Rs. 7,04,03,266.22, some of the claims are based on F. D. receipts issued by the two firms and some based on F. D.

receipts issued by the company. According to the statement of P.C. Varghese, certain pencil notings in the minutes books are of B. Rajagopal and

hence it is evident that B. Raja-gopal is the pivotal person in respect of the affairs and business of the company. The minutes of the meetings signed

by the directors does not contain the list of members attended the meeting. The report of the auditor as well as proceedings in C. P. No. 88 of

1989 shows that the company did business with non-members also. As per P.C. Varghese's statement, B. Rajagopal gave instructions to write up

the minutes books of the meeting at the residence of V. Parameswaran, another director. P.C. Varghese also stated that he had never attended the

board meeting. Based on the above aspects, the official liquidator concluded that it is clear that the minutes of the board meetings was not

maintained properly.

18. From the statement of P.C. Varghese, it is evident that B. Rajagopal has given an advertisement in News Today that the two firms have been

taken over by the company. Respondents Nos. 8 to 10 are common directors in most of the companies. I have already referred to the fact that as

per the records available, B. Rajagopal is termed as group president and K.V. Sasidhar is termed as chairman of the Dhanalakshmi group of

companies. It is further seen that the Department of Company Affairs has taken up inspection of books and accounts of three of the limited

companies to examine the flow of funds from the company in liquidation to the said companies. As far as the company M/s. Mazda Agro

Engineering and Exports Private Limited is concerned, K.V. Vijayakumar was the managing director from January 31, 1987 and K.V. Sasidhar

and A.V. Prabhakar were inducted as additional directors in the board meeting held on October 4, 1989. The managing director of the said

company has evaded to produce the books and records of that company for inspection by the Department of Company Affairs. Dhanalakshmi

Consolidates Transports Private Limited was incorporated on September 12, 1983 and B. Rajagopal and K.V. Sasidhar are the subscribers to

the memorandum and articles of association of the company and the annual return was made up to June 22, 1987 only and the balance-sheet as on

December 31, 1986, was filed with the Registrar of Companies, Tamil Nadu. Since the books of account were not produced, it is presumed that

there are diversion of funds from the company in liquidation to its associate concerns.

19. It is further seen that P.C. Varghese produced a copy of letter dated October 10, 1988, to K.V. Sasidhar, B. Rajagopal, B. Muralidhar and

K.V. Vijayakumar stating that on various occasions, on their advice, he had been transferring heavy amounts to their sister concerns and that they

have not left sufficient assets to answer the creditors and that if they do not take corrective measures to set things right, they will be personally

liable. A copy of the letter dated October 11, 1988, from K.V. Sasidhar and B. Rajagopal and P. C Varghese shows that they have admitted and

owned financial responsibilities and liabilities on account of P.C. Varghese's actions done by him on their behalf and also exonerated P.C.

Varghese.

20. It is further stated that a copy of the letter dated January 27, 1986 signed by B. Rajagopal as the corporate director of Dhanalakshmi group

stating that with effect from December 7, 1985, DFIL has taken over M/s Asian Integrated Finance and Industrial Corporation. Before the official

liquidator, P. C. Var-ghese has produced a copy of the deposit certificate in the name of A. Rosaline jointly with M. Mary for Rs. 3,000 issued on

July 19, 1986, the date of maturity being July 19, 1989, to indicate that it was issued by Dhanalakshmi Funds (India) Limited as proprietor of the

firm Dhanalakshmi Consolidates Finance and Industrial Investments and signed by director/authorised signatory B. Rajagopal.

21. P.C. Varghese has also stated that after the firms were taken over, the deposit certificates were signed by B. Rajagopal in respect of the firm

Dhanalakshmi Consolidates Finance and Industrial Investments and by K.V. Sasidhar in respect of the firm M/s. Asian Integrated Finance and

Industrial Corporation and the certificates of the company in liquidation were issued by renewing the deposits of the firm. P.C. Varghese has also

stated that there was transfer of funds from the company in liquidation to various concerns of the group as per the instructions of B. Rajagopal and

K.V. Sasidhar. He described B. Rajagopal and K.V. Sasidhar as the promoters of the company giving directions and instructions to manage the

day-to-day affairs of the company and that he had been carrying out their instructions. He further stated that K.V. Sasidhar and B. Rajagopal

instructed him to open bank accounts with various banks at Madras and other places wherever the company's branches were situated. He also

stated that the bank accounts were opened in the name of the company in liquidation and the accounts were operated by K.V. Vijayakumar and

thereafter he was instructed by K.V. Sasidhar and B. Rajagopal to sign the cheques prepared and verified by the accounts department and V. S.

Sridhar has been operating the bank accounts.

22. P.C. Varghese has stated that jewel loans were given by Asian Integrated Finance and Industrial Corporation and he is unaware of the quantity

of jewels held by the said firm. The official liquidator has not been given custody of the jewels and the administrator appointed in respect of the

company also has not handed over any jewels to the official liquidator.

23. It is further seen from the report that the minutes of the first meeting of the administrator (K.V. Sasidhar and advocate T. Ramakrishna) held on

July 19, 1990 shows that K.V. Sasidhar explained in brief the history of the company. He also apprised of the non-participation of erstwhile

directors creating a deadlock in the day-to-day administration of the company. By report dated October 4, 1990, submitted by auditors R. Ranga

Rao, it is observed that the authenticity of the loans purported to have been given by the company to the various borrowers appears to be in

doubt.

24. A careful analysis of the report of the official liquidator would show that the partners of the two firms, namely, B. Rajagopal, K.V. Sasidhar

and B. Muralidhar, i.e., respondents Nos. 8 to 10 respectively are the pivotal persons who have conducted the business on DFIL and they are

equally liable to the depositors. The report also shows that they have siphoned off funds to the sister concerns. The directors viz., respondents

Nos. 1 to 7 also cannot escape their joint and several liability since they acted in collusion with respondents Nos. 8 to 10.

25. Mr. Arvind P. Datar, learned senior counsel for the official liquidator, after taking me through the report of the auditors, followed by the official

liquidator, would contend that respondents Nos. 1 to 10 are liable for (1) disbursement of housing loans ; (2) creating false pronotes ; (3) jewel

loan ; (4) teachers' loan; (5) utility loan; (6) diversion of funds against vehicle maintenance; and (7) transfer of funds to sister concerns. According

to Mr. Arvind P. Datar, the company had lost Rs. 18,32,39,002 under the above accounts and respondents Nos. 1 to 10 are liable to make good

the loss. He also contended that they are jointly and severally liable and pay to the official liquidator a sum of Rs. 18,32,39,002. He further

requested that in the light of the details from the report as well as the statement of P.C. Varghese to declare that respondents Nos. 1 to 10 have

misapplied, retained or become liable or accountable for the money and property of the company or were guilty of misfeasance and breach of trust

and that a total amount of Rs. 18,32,39,002 was totally lost to the company and respondents Nos. 1 to 10 are liable to contribute to the assets of

the company by way of compensation.

26. Mr. R. Vedantham Srinivasan, and Mrs. Nalini Chidambaram, learned senior counsel for respondents Nos. 8 and 10, after referring to the

relevant provisions from the Companies Act and Rules, would contend that since proceedings under Sections 542 and 543 of the Companies Act

are quasi-criminal in nature, the standard of proof is beyond reasonable doubt and not based on preponderance of probabilities. In addition to the

above contentions, learned senior counsel point out that the reports state that the two firms of which B. Rajagopal and B. Muralidhar were

partners, were collecting substantial sums from the public under special F. D. Scheme. The assets of the two firms were taken over by the

company Dhanalakshmi Funds (India) Limited which was incorporated on August 9, 1985. The company became a nidhi company and thereafter

accepted deposits from the public. The allegation is that the deposits were mobilized by B. Rajagopal and K.V. Sasidhar and the deposit receipts

were signed by B. Rajagopal. All the deposit receipts are of the firm Dhanalakshmi Consolidates Finance and Industrial Investment, a partnership firm in which K.V. Sasidhar was the managing partner and B. Rajagopal was a partner. All the deposit receipts produced are in the name of the firm. While B. Rajagopal accepts that he was a partner in the firm, after the company was incorporated, K.V. Sasidhar was in total charge of the company. Some of the printed receipts of the firm have been used by the company. All the deposits receipts carry B. Rajagopal's printed signature. But the receipts are signed by secretaries. Some of the receipts carry the signature of P.C. Varghese. In so far as the letter dated January 21, 1986, is concerned, the description of B. Rajagopal as a corporate director has no significance since the letter was written soon after the take over of the assets of the firm by the company. The contents of the letter only indicate that B. Rajagopal is informing about the transfer of the assets from the firm to the company. As far as the document relating to the information regarding the take over of the M. G. Brother Lorry Service is concerned, it is only a printed circular bearing the printed signature of B. Rajagopal. It is not a letter inviting deposits from the public as made out by the auditor. The letter dated May 6, 1987, pertains to Dhanalakshmi Consolidated Trust Limited and hence has got no connection with the Dhanalakshmi Funds (India) Limited which took over the assets of the firm. The public notice does not pertain to DFIL. The documents do not pertain to DFIL. The self-serving letter of P.C. Varghese dated October 10, 1988 and the letter dated October 11, 1988, allegedly written in reply to the letter of P.C. Varghese are fabricated documents. B. Rajagopal denies having written the said letter. The document pertains to the annual return for the year ending December 31, 1987, filed by the company on November 30, 1988, wherein P.C. Varghese and V.S. Sridhar have signed and forwarded the document for filing with the Registrar of Companies. If in fact P.C. Varghese had disowned the responsibility for his conduct, it is improbable that he would have signed annual return of the company on November 30, 1988, just one month after his alleged letter dated October 10, 1988. The letter dated October 10, 1988, alleged to have been sent by P.C. Varghese to four different addresses by registered post with acknowledgment due and the reply letter dated October 11, 1988, are concocted documents to extricate himself from any

liability which may arise out of his functioning as finance manager and secretary of the company. If according to P. C Varghese he had disowned all

his responsibilities and V. S. Sasidhar and B. Rajagopal have owned the responsibility, it is curious that B. Rajagopal will be writing to the assistant

manager, DFIL, to co-ordinate with P.C. Varghese to set right the accounts issue. Also it is curious that P.C. Varghese would have acted on the

letter dated December 15, 1988, written by one Thirunavuk-karasu, if P.C. Varghese had already downed his responsibilities from DFIL. What is

relevant is whether B. Rajagopal was in charge of running the company and whether he can be held liable u/s 543 of the Companies Act. The most

significant documents are the two affidavits filed by K.V. Sridhar owning responsibility for the conduct of the business of the company and

curiously both the affidavits are missing both from the file of the official liquidator's office and this Court Registry.

27. Pursuant to the orders of this court dated November 16, 1990, ordering winding up of the company in liquidation, auditors were appointed to

go into the affairs of the company. After collecting books of account from various places and after scrutiny, they submitted a report. Based on the

report of the auditors and after considering the statement of P.C. Varghese made on January 4, 1994, and January 6, 1994, under rule 130 of the

Rules, the official liquidator has arrived at a conclusion that the respondents, more particularly respondents Nos. 8 to 10 committed several

irregularities, mismanaged the affairs of the company in liquidation, diverted funds of the company for their use, transferred funds to sister concerns

and because of their act, the company in liquidation has lost an aggregate sum of Rs. 18,32,39,002. It is the specific case of the official liquidator

that all of them are guilty of misfeasance in relation to the affairs of the company in liquidation.

28. Now I shall consider whether the present proceedings initiated under Sections 542 and 543 of the Companies Act are maintainable ; whether

the statement of P.C. Varghese can be taken note of; and whether the official liquidator is entitled for any relief in Company Application No. 888

of 1995 ? Incidentally I shall also consider the claim of respondents Nos. 8 and 10 in Company Application No. 1321 of 2001.

29. Learned senior counsel for respondents Nos. 8 and 10 by referring a decision in Smt. Abhilash Vinodkumar Jain Vs. Cox and Kings (India)

Ltd. and others, , would contend that the proceedings u/s 630 of the Companies Act is a quasi-criminal in nature. While construing Section 630 of the Act, their Lordships of the Supreme Court have held that the provisions are quasi-criminal and that they have been enacted with the main object of providing speedy relief to a company when its property is wrongfully obtained or wrongfully withheld by an employee or officer or an ex-employee or ex-officer or anyone claiming under them. They further held that a proper construction of the section would be that the term ""officer or employee"" of a company in Section 630 of the Act would by a deeming fiction include the legal heirs and representatives of the employee or the officer concerned continuing in occupation of the property of the company after the death of the employee or the officer. The said decision makes it clear that action can be taken even against the legal heirs and representatives of the employee or the officer concerned continuing in occupation of the property of the company after the death of the employee or the said officer. The said decision is not with reference to Sections 542 and 543 of the Act; hence the same is not helpful to the respondents.

30. It is contended on the side of respondents Nos. 8 and 10 that misfeasance is a serious charge, accordingly the application should contain specific acts of commissions and omissions on the part of the each of the directors. They also contended that the burden of proof is on the liquidator. It is also contended that the liquidator is under a misconception that proceedings relating to misfeasance are summary in nature. It is their contention that the proceedings being in the nature of quasi-criminal, the liquidator is bound to examine himself and witnesses giving a right of cross-examination to the directors and persons charged with misfeasance. They also contended that the confession of a co-accused cannot form the basis of proceedings against another accused. According to them, the statement of P.C. Varghese cannot be construed as evidence within the meaning of Section 3 of the Indian Evidence Act. It is further contended that the self-serving documents and statements of a director, who is also impleaded as a respondent in misfeasance proceedings, cannot be the basis for proceedings against B. Rajagopal and B. Muralidhar. It is relevant to refer a decision of the Supreme Court in Ramanbhai Nagjibhai Patel Vs. Jashvant Singh Udesingh and Others, , wherein the Supreme Court has

held that in election case, the charge of bribery should be proved beyond reasonable doubt. The Supreme Court has also held that the evidence must be (1) clear cut; (2) wholly credible; and (3) reliable. I have already extensively referred to the report of the official liquidator and the chartered accountant. As rightly contended by Mr. Arvind P. Datar, the report of the official liquidator and the chartered accountant satisfied the three requirements as pointed out by the Supreme Court. The other decision referred to by the learned senior counsel for respondents Nos. 8 and 10 is in the case of *Anantharam Veerasinghaiah and Co. Vs. Commissioner of Income Tax , Andhra Pradesh, ,* which related to penalty proceedings under the Income Tax Act wherein the Supreme Court has held that the tax authority must consider the matter afresh in penalty proceedings. As rightly pointed out, this case will have no relevance at all to the present case. Another decision, namely, *Laxmi Narayan Nayak v. Ramratan Chaturvedi : AIR1991SC2001* by the contesting respondents relates to corrupt practice under election case under the Representation of People Act, 1951, wherein the Supreme Court has held that the evidence was inconsistent and vague and that strict proof is necessary. The other decision, namely, *H.V. Panchaksharappa Vs. K.G. Eshwar, ,* referred to by the learned senior counsel for respondents Nos. 8 and 10 relates to professional misconduct of an advocate and the other decision in *J.R. Parashar, Advocate and Others Vs. Prasant Bhushan, Advocate and Others,* relates to the Contempt of Courts Act. After going through the factual details, I am of the view that these cases are not helpful to respondents Nos. 8 and 10. On the other hand, it is demonstrated before me by learned senior counsel for the official liquidator that the facts necessary to establish liability under Sections 542 and 543 of the Act have been established in the light of the detailed report filed by the auditors and the pleadings of the parties as well as the subsequent documentary evidence.

31. The report of the official liquidator contains specific acts of omission and commissions on the part of respondents Nos. 8 and 9. It also refers to the role of the tenth respondent as a promoter of the company. The burden of proof has been discharged by the official liquidator in placing the evidence of fraud, misfeasance etc., before this court. The details furnished by the official liquidator satisfied the requirements specified in Official

Liquidator v. Raghawa Desikachar [1975] 45 Comp Cas 136. Sections 478 and 519 of the Act confer discretionary powers on the court and the

right of cross-examination will depend on the facts and circumstances of the individual case. Admittedly, respondents Nos. 8 and 10 have not

challenged the official liquidator's report by filing counter affidavit and also have not been able to controvert or dispute the averments in the official

liquidator's report. In such a circumstance as rightly contended, the question of cross-examination does not arise.

32. Coming to the argument relating to "confession of co-accused", the principles regarding confession of co-accused and evidence will have no

application in the present case. The report is primarily regarding fraudulent diversion of funds into various new companies, bogus entries regarding

jewel loan, teacher loan, utility loan etc. There is ample evidence from the auditor's report and the statement of P.C. Varghese corroborates the

findings of the auditor.

33. A reading of Section 477 of the Act shows that it enables the court to summon the persons not only who have property of the company but

also persons who are concerned with the promotion, formation, dealings etc. or affairs of the company. In such a circumstance, there is no

requirement that recovery has to be only under the general civil law. Further, Section 542 applies not merely to officers or directors but also to a

person described as "group president", if he has exercised control over the affairs of the company. The entire evidence clearly points to the deep

involvement of B. Rajagopal, K.V. Sasi-dhar and B. Muralidhar and they cannot escape by taking the plea that they are not directors. Section

2(30) of the Act defines an officer to include persons in accordance with whose directions or instructions, the board of directors is accustomed to

act. Section 7 excludes cases where the advice is given by a person in professional capacity. By reading both these provisions together, it is clear

that these persons, namely, B. Rajagopal, K.V. Sasidhar and B. Muralidhar respondents Nos. 8 and 10, though not directors of the company, are

officers in terms of Section 2(30) and will be liable under both Sections 542 and 543 of the Act, The particulars furnished in the official liquidator's

report show that the company was never a board managed company. It was run like a partnership firm which respondents Nos. 8 and 10 acting

like managing partners. It also shows that various investments have been made in promoting new companies by diverting funds of Dhanalakshmi

Funds (India) Ltd. These decisions were not taken by the board but respondents Nos. 8 to 10 unilaterally. The liability of these persons is not

merely on the statement of any outsider, but it is clear from the report of the auditor and also various documents filed before this court.

34. Now I shall consider the liability under Sections 542 and 543 of the Act. The language used in Section 542 covers ""any other person"" ;

accordingly this will apply to group president, chairman and B. Muralidhar. As far as Section 543 is concerned, it will apply to promoters of the

company. A reading of Sections 542 and 543 and the report of the official liquidator based on the auditor's report and statement of P.C.

Varghese would show that the conditions stated in both these provisions will cover B. Rajagopal and B. Muralidhar, respondents Nos. 8 and 10

respectively. I have already referred to the fact that the chartered accountants M/s. N. T. Arasu and Co. had submitted their report after

examination of whatever records were available. Based on the report of the chartered accountants, the official liquidator has made his report in

support of the present application under Sections 542 and 543 of the Act. No doubt, respondents Nos. 8 and 10 (ninth respondent is no more)

filed a counter affidavit in this application as well as Company Application No. 1321 of 2001 wherein they completely denied their involvement in

the company. However, the auditor in his report on examination of documents/ letters/correspondences, arrived at a conclusion that B. Rajagopal

was the group president and K.V. Sasidhar was the group chairman. During the course of argument, learned senior counsel for the official

liquidator has produced certain original documents and xerox copies of all the documents. The signature of B. Rajagopal, eighth respondent found

in the original and in the affidavit filed before this court tallies with the signature in all other documents filed in this court. Mr. Arvind P. Datar has

also stated that the documents filed are only samples and there are numerous letters written by B. Rajagopal and K.V. Sasidhar. In , so far as B.

Muralidhar is concerned, he had been the erstwhile partner in the firm (M. G. Brothers Lorry Co.) which were then converted into companies. A

perusal of the official liquidator's report shows that there are several serious charges. They are :

(1) Formation of Dhanalakshmi Funds (India) Ltd., by take over of all assets and liabilities of the two firms ;

(2) Non-repayment of deposits by the two firms, formation of company to circumvent obligation, though respondents Nos. 8 to 10 were not

directors, as per available records, they have been actually carrying on the business of the company in liquidation ;

(3) Balance-sheets for December 31, 1986, and December 31, 1987, are not available amongst records of the company ;

(4) Criminal cases pending against the erstwhile two firms for non-repayment of deposits ;

(5) All the assets and effects of the aforesaid two firms were not made over to the company in liquidation but deposit receipts were issued by the

two firms in favour of the creditors by the company in liquidation, thus the company was made liable without transfer of corresponding assets ;

(6) B. Rajagopal was the pivotal person in respect of the affairs of the company and the business in liquidation ;

(7) Several new companies were started and no information as to the status of these companies, and how the funds were invested, sources of

funds, assets and liabilities, etc. B. Rajagopal has himself written family letters regarding acquisition of M. G. Brothers and Gangothri Chemicals.

(8) Letter dated October 10, 1988, of P.C. Varghese and admission of B. Rajagopal and B. Muralidhar (letter dated October 11, 1988) ;

(9) Company have 14,000 deposit holders with deposits of Rs. 10.5 crores. Loans of Rs. 3.9 crores had been advanced to sister concerns ;

(10) Serious charges regarding falsification of records, non-existence of borrowers for jewel loans, housing loans, teachers loan, false pronote

loans, etc.

(11) Total loss to the company in liquidation is Rs. 18,32,39,002. Though B. Rajagopal, eighth respondent initially has stated that himself and 10th

respondent have nothing to do with the company, on examination of the records, it was found that B. Rajagopal was the group president and B.

Muralidhar was in charge of the MG Brothers Lorry Services. In view of the stand taken by him, original documents were placed before this

court. A careful perusal of the same would show that he had signed various letters as group president. Several letters produced contain the

signature of B. Rajagopal as group president. It was he who took decision regarding posting of persons, as branch managers. He signed in fixed deposit receipt and also informed all deposit holders about the take over of different companies. The records produced also show that Rajagopal along with K.V. Sasidhar and B. Muralidhar were de facto in charge of the affairs of the company. As rightly contended, they have not placed themselves as directors in order to avoid any statutory liability. In view of the details furnished in the official liquidator's report I am not referring to each and every incident elaborately in this order. The documents and records as well as the auditor's report clearly show that B. Rajagopal, and K.V. Sasidhar and B. Muralidhar, respondents Nos. 8 to 10 were in charge of the affairs of the business. As rightly contended, except the general denial in the counter affidavit, they have not substantiated their defence by placing acceptable materials before this court. There is ample evidence to show that respondents Nos. 8 to 10 received deposits and used them to start new companies. At that time the funds were used recklessly and carelessly. The funds were invested with full knowledge that there was no reasonable prospects of repaying the deposits. As pointed out in Official Liquidator, Palai Central Bank Ltd. (in liquidation), Ernakulam Vs. K. Joseph Augusti, Kayalackakam House, Palai and Others, , misapplication u/s 543 need not involve mens rea. Likewise, if there is gross negligence, Section 633 cannot afford any relief. It is settled position that if a person has been grossly negligent, it can scarcely be said that he has acted reasonably. As rightly argued, once misapplication is proved, the burden of proving that he acted honestly and reasonably lies on the alleged delinquent.

35. Both the learned senior counsel appearing for respondents Nos. 8 and 10 contended that they lost the right of cross-examination due to non-examination of witnesses before this court. In this regard, learned senior counsel for the official liquidator has pressed into service a judgment of the Supreme Court in K.L. Tripathi Vs. State Bank of India and Others, . With regard to ""requirement of natural justice"" the following observation of their Lordships is relevant (paragraphs 31 to 33) :

31. Wade on Administrative Law, fifth edition, at pages 472-475 has observed that it is not possible to lay down rigid rules as to when the principles of natural justice are to apply : nor as to their scope and extent.

Everything depends on the subject matter, the application of principles of natural justice, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject matter of the case. In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and the circumstances of the case, the nature of the inquiry, the rules under which the Tribunal is acting, the subject matter to be dealt with and so forth.

32. ... The concept of fair play in action must depend upon the particular lis, if there be any, between the parties. If the credibility of a person who has testified or given some information is in doubt, or if the version or the statement of the person, who has testified, is, in dispute, right of cross-examination must inevitably form part of fair play in action but where there is no lis regarding the facts but certain explanation of the circumstances there is no requirement of cross-examination to be fulfilled to justify fair play in action. When on the question of facts there was no dispute, no real prejudice has been caused to a party aggrieved by an order, by absence of any formal opportunity of cross-examination per se does not invalidate or vitiate the decision arrived at fairly. This is more so when the party against whom an order has been passed does not dispute the facts and does not demand to test the veracity of the version of the credibility of the statement.

33. The party who does not want to controvert the veracity of the evidence from record or testimony gathered behind his back, cannot expect to succeed in any subsequent demand that there was no opportunity of cross-examination, specially when it was not asked for and there was no dispute about the veracity of the statements. Where there is no dispute as to the facts, or the weight to be attached on disputed facts/ but only an explanation of the acts, absence of opportunity to cross-examination does not create any prejudice in such cases.

36. I have already referred to the fact that none of the respondents filed objection questioning the contents of the report of the official liquidator. Only in this application, some of them filed counter affidavit disputing certain averments. The principles of natural justice do not stipulate a

mandatory right of cross-examination against all persons who have either sworn to affidavits or filed their reports. It is clear from the above

decision that cross-examination is not an absolute must, it is only one of the rules and its applicability will depend on the facts of the individual case.

There is no dispute that if witnesses are examined, the other side is entitled to cross-examine them. In other words, cross-examination will be

necessary if witnesses are examined. Accordingly/ where a report is filed (here in the present case the official liquidator has filed only as a report),

cross-examination may be permitted only if the contents of the report are seriously disputed or the court seriously doubts the statement/report or

where some explanation is required. In this regard, it is relevant to note Rules 260 and 261 of the Rules. These rules (Rules 260 and 261) refer to

making of claims and making a statement of defence. There is no specific procedure that has been prescribed. As rightly argued, it is only

necessary that reasonable particulars should be given to the respondents to make out their case in defence. I have already referred to the factual

position that the contents of the report have not been challenged on the merits or on facts. In such a circumstance, in the light of the law laid down

by the Supreme Court and in view of the factual position, in the absence of controvertible averments in the report, there is no question of cross-

examination and violation of natural justice. The perusal of Rules 260 and 261 leaves the entire matter to the discretion of the court and no

mandatory duty has been cast upon the court to follow a particular form of procedure. In this regard it is relevant to note the judgment of the

Calcutta High Court in *A Stock and Co Ltd., In re* [1992] 1 Comp LJ 323 wherein it is held that ""Rule 261 read as a whole would show that the

matter is entirely discretionary and no mandatory duty has been cast upon the court to follow a particular form of procedure"". I have already

referred to the fact that subsequent to the order of winding up, this court appointed N. T. Arasu and Co. as auditors to go into the affairs of the

company in liquidation. Pursuant to the said direction, the auditors collected the books of account from various places and after gathering

information regarding the affairs of the company, submitted a report to the official liquidator. By virtue of the powers conferred on him, the official

liquidator recorded a statement from P.C. Varghese, seventh respondent herein and based on all the above materials, including the documents

collected, he filed the present application under Sections 542 and 543 of the Act, hence I am satisfied that in view of the abundant materials

available in this application, the need to examine the parties does not arise. It is settled law that it is left to the opinion of the court as to whether a

director or any other person should be publicly examined. Once full and fair opportunities have been given to the respondents, they cannot

complain that there is a violation of natural justice or deprive the opportunity of cross-examination, etc. Apart from this, it is clear that public

examination under Sections 477 and 478 of the Companies Act is not mandatory. It is also relevant to refer a decision of the Supreme Court in

State of Jammu and Kashmir Vs. Bakshi Ghulam Mohammad, , wherein their Lordships have considered the right of cross-examination. It was

said that the rules require that Bakshi Gulam Mohammed should have been given a right to cross-examine all those persons who had sworn

affidavits supporting the allegations against him. It was argued that rules of natural justice require that a party against whom an allegation is being

inquired into should be given a hearing. It was further argued that the right to the hearing included a right to cross-examine. The Supreme Court has

rejected the contention saying that ""we are unable to agree that that is so"".

Next I will consider whether a criminal case is made out and action u/s 545 of the Act is to be taken ? Section 545 of the Act enables the

company court to direct the liquidator to prosecute the offender or refer the matter to the Registrar. Section 2(30) defines ""officer"" as follows :

"officer" includes any director, manager or secretary or any person in accordance with whose directions or instructions the board of directors or

any one or more of the directors is or are accustomed to act.

37. I have already referred to the factual details that B. Rajagopal, eighth respondent held himself as group president and issued directions to the

board of directors who were none else than the employees of the company itself. In the letter dated October 11, 1988, written by B. Rajagopal

and K.V. Sasidhar, they have accepted the fact that they are responsible for all the affairs of the company. It is also clear that respondents Nos. 8

to 10 were persons in accordance with whose directions or instructions, the board is accustomed to act. Since K.V. Sasidhar, ninth respondent,

died on February 13, 1999, B. Rajagopal and B. Muralidhar, respondents Nos. 8

and 10 alone are liable for prosecution u/s 545 of the Act.

38. Learned senior counsel for the official liquidator has also pressed into service a decision of the Kerala High Court in *Official Liquidator, Palai*

Central Bank Ltd. (in liquidation), Ernakulam Vs. K. Joseph Augusti, Kayalackakam House, Palai and Others, . The following observation is

relevant (page 363) :

The word "misapplication" by itself involves no mens rea. It imports no mental element such as dishonesty or fraud, not even negligence. It only

means wrong or incorrect application, not necessarily a wrongful application, and there can be a perfectly innocent misapplication. But it is well-

settled that liability u/s 543 can be imposed only if there has been dishonesty, or fraud or at least negligence, not ordinary negligence but gross and

culpable negligence. If u/s 543 standing by itself, at least gross negligence has to be found before liability can be imposed it is difficult to see how

Section 633 can afford relief from such liability since, if a person has been grossly negligent, it can scarcely be said that he has acted reasonably.

Yet, Section 633 expressly refers to liability on account of breach of trust and that points to the statutory basis being the combined effect of the

two sections. If that be so it would appear that once misapplication is proved, the burden of proving that he acted honestly and reasonably lies on

the alleged delinquent.

A bare statement that the directors did not know what was going on is no defence. Their duty as directors was to know. They cannot be allowed

to throw up their hands and say "we knew nothing and believed that everything was all right". . .

39. I am in respectful agreement with the above view. As stated in the above decision, once misapplication is proved, the burden of proving that he

acted honestly and reasonably lies on the alleged delinquent. I have already referred to the materials placed by the official liquidator, namely, his

report, auditor's report, statement of P.C. Varghese supported by a number of documents which prove the role played by respondents Nos. 8 to

10 in the affairs of the company in liquidation. The mere statement that they did not know what was going on or mere denial is no defence. I am

satisfied that the company had lost Rs. 18,32,39,002 under various accounts and respondents Nos. 1 to 10 are liable to make good the loss. They

are jointly and severally liable to pay the official liquidator the sum of Rs. 18,32,39,002. The materials placed by the official liquidator clearly show

that respondents Nos. 1 to 10 have misapplied or retained or became liable or accountable for the money and property of the company or are

guilty of misfeasance and breach of trust and that a total amount of Rs. 18,32,39,002 was lost to the company; accordingly respondents Nos. 1 to

10 are liable to contribute to the assets of the company by way of compensation. Among the respondents, B. Rajagopal, K.V. Sasidhar and B.

Muralidhar, respondents No. 8 to 10 (ninth respondent is no more) were at the helm of the affairs and in charge of day-to-day affairs of the

company; hence they are guilty of misfeasance and breach of trust. They are liable to be proceeded against under Sections 542 and 542 of the

Companies Act. They are also liable to be prosecuted u/s 545 of the Companies Act.

40. In the result, prayers (a) to (i) in Company Application No. 888 of 1995 are ordered ; consequently, Company Application No. 888 of 1995

filed by the applicant-official liquidator is allowed ; and Company Application No. 1321 of 2001 filed by B. Rajagopal and B. Muralidhar is

dismissed. No costs.