(1995) 01 AP CK 0016

In the Andhra Pradesh High Court

Case No : Company Application No. 312 of 1987 in Company Petition No. 5 of 1981

Official Liquidator APPELLANT

Vs

T.J. Swamy and Others RESPONDENT

Date of Decision : 23-01-1995

Acts Referred:
Companies Act, 1956 — Section 2(30), 454, 543, 543(1)

Citation : (1996) 86 CompCas 696

Hon'ble Judges : G. Bikshapathy, J

Bench : Single Bench

Advocate : S. Ravi, for the Appellant; D. Mohan Rao and P.V.S.S.S. Rama Rao, for the Respondent

Judgement

G. Bikshapathy, J.—The application filed by the official liquidator u/s 543(1) of the Companies Act, 1956, seeks a declaration that the respondents have misapplied, retained the monies and are liable or accountable for the monies and properties of the company, are guilty of misfeasance and in relation to the property of the company and for a consequential direction to the respondents to contribute jointly and severally a sum of Rs. 4.61 lakhs with interest at 6 per cent. per annum and for costs, etc.

2. The averments as mentioned in the application are that the company was incorporated in the year 1972 with an authorised capital of Rs. 1 lakh and thereafter it was increased to Rs. 5 lakhs divided into 5,000 equity shares of Rs. 1,000 each. By order dated January 28, 1987, this court in C. P. No. 5 of 1981, ordered winding up of the company and, consequently, the official liquidator was appointed. It is submitted by the petitioner that the respondents have misapplied, retained, have become liable or accountable for, the monies and properties of the company. The company was having six branches throughout the State and right from the commencement of the company it has started incurring losses. Even in the first year as on June 30, 1973, the loss had accumulated to

Rs. 1.75 lakhs as against a paid up capital of Rs. 25,000 and thus the initial setback continued till it was ordered to be wound up. The setback is attributed to the dishonest and negligent acts of the respondents. The outstanding debts went to the tune of Rs. 35.32 lakhs and no proper documentation was obtained from the debtors. The respondents have not taken any action to recover the amounts due from the debtors. They also violated the provisions of the A. P. Chit Funds Act. The security deposits of the employees were not deposited in the scheduled banks and confirmation letters were not obtained from the debtors or creditors, and no proper accounts were maintained. In spite of the contraventions having been brought to the notice of the respondents, no appropriate action was initiated. Heavy amounts were spent on tours and travels and on administrative expenses. The negligent act on the part of the respondents was also established that when one of the creditors filed a petition for winding up, the managing director admitted the inability which resulted in the winding up. Even after a winding up order has been passed, the respondents have flouted section 454 of the Act. The statement furnished by the company was not complete. In the majority of the cases the debtors were not traced. The assets of the company were allowed to be taken away by the creditors indiscriminately. The account books of the Vijayawada branch were not delivered to the official liquidator. Thus, the respondents committed various acts of misfeasance.

3. Counter-affidavits have been filed by the respondents alleging that the petition is not maintainable and the same is misconceived. It is also barred by limitation. It is specifically averred by the respondents that no specific act of misfeasance or negligence on the part of the director or managing director have been made in the petition. The allegations made against the directors and the managing director en masse cannot be enquired into by this court unless individual specific allegations are made against each respondent. There is no material to support the act of mismanagement or misfeasance. Hence, the respondents party that the application be dismissed.

4. The point that arises for consideration in this application is whether the acts complained of against the respondents have been made out and if so the relief that can be granted to the petitioner?

5. One witness was examined for the petitioner while five witnesses were examined for the respondents, exhibits A-1 to A-47, were marked for the petitioner.

6. PW-1 is Murali Krishna, who was working as a technical assistant in the office of the official liquidator. he deposed on the lines of the affidavit made in the company application. He stated that the books of account were not properly maintained and no efforts were made by the respondents to realise the amounts. The expenses are incurred lavishly. One of the creditors filed an application for winding up and the same was allowed by this court. He filed a number of documents to say that the financial position of the company is in a very dilapidated stage. In the cross-examination he stated that the statements of

affairs of the company are lacking in vital details like names and addresses of debtors, creditors, details of securities, etc. He admits that he also filed certain suits which were decreed. Some of the decrees are in the process of being executed. He stated that in the company application specific allegations were made as regards the misappropriation and diversion of funds for personal gains and various acts of commission and omission and negligence by the directors and the managing director.

7. The witnesses examined on behalf of the respondents have categorically stated that no specific allegation has been made against the individual respondents and that whatever records were available with the company have been handed over. Therefore, they stated that the application is not maintainable and the same has to be rejected.

8. Respondent No. 3 was set ex parte while respondents Nos. 4 and 6 expired. No steps were taken to bring the legal representatives on record. Hence the case against respondents Nos. 4 and 6 abates.

9. On the basis of the evidence adduced, it has to be seen whether the petitioner has established the case as required u/s 543 of the Act. It is the principal contention of the respondents that no specific averment has been made pin-pointing the responsibility of each respondent and the misfeasance alleged to have been done by them in individual capacity. An omnibus allegation cannot be accepted u/s 543 of the Companies Act, and, therefore, at the threshold of the case, the respondents submit that the company application itself is not maintainable and it is to be rejected in limine.

10. For proper appreciation of the case, it is necessary to refer to section 543 of the Act and the same is reproduced below :

"543. Power of court to assess damages against delinquent directors etc. - (1) If in the course of winding up a company, it appears that any person who has taken part in the promotion or formation of the company, or any past or present director, manager, liquidator or officer of the company -

(a) has misapplied, or retained, or become liable or accountable for, any money or property of the company; or

(b) has been guilty of any misfeasance or breach of trust in relation to the company;

the court may, on the application of the official liquidator, or the liquidator, or of any creditor, or contributory, made within the time specified in that behalf in sub-section (2), examine into the conduct of the person, director, manager, liquidator or officer aforesaid, and compel him to repay or restore the money or property or any part thereof respectively, with interest at such rate as the court thinks just or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the court thinks just.

(2) An application under sub-section (1) shall be made within five years from the date of the order for winding up, or of the first appointment of the liquidator in winding-up, or of the misapplication, retainer, misfeasance or breach of trust, as the case may be whichever is longer.

(3) This section shall apply notwithstanding that the matter is one for which the person concerned may be criminally liable."

11. A reading of the said provision stipulates that on an application by the official liquidator, the court may examine the conduct of the person, director, manager, liquidator or the officer with regard to the misapplication, retention of the money or property of the company and also with reference to the misfeasance or breach of trust in relation to the company. Therefore, the provision aims at individual responsibility and liability thereof. So also misfeasance or breach of trust in relation to the company is to be established individually.

12. Misfeasance according to James L. J. in Canadian Land Reclaiming and Colonizing Co., In re (Coventry and Dixon''s case) [1980] 14 Ch D 660 (CA) at page 670) :

"... means misfeasance in the nature of breach of trust, that is to say, it refers to something which the officer of such company has done wrongly by misapplying or retaining in his own hands any monies of the company, or by which the company''s property has been wasted, or the company''s credit improperly pledged. It must be some act resulting in some actual loss to the company."

13. In Central Calcutta Bank Ltd., In re [1959] 29 Comp Cas 437 (Cal), i was held that :

"the court has no power to make an order against the directors en masse for all acts of misfeasance, etc., without any specific finding as to which director is actually responsible for particular acts of misfeasance."

14. The allegations must be very specific and against each delinquent and the burden is on the official liquidator as held in Official Liquidator, Navarashtra Publishing Co. Ltd. (in liquidation) Vs. Ashok Kumar and Another, .

15. Learned counsel for the respondents also relied on the judgments in R. Saraswathi and Others Vs. Shakthi Beneficial Corporation and Others, and Official Liquidator, Madras Oils and Fertilizers (P.) Ltd. v. G. Shanmugham [1979] 49 Comp Cas 903 (Mad). He submits that no specific overt act has been made against the respondents individually. The petitioner proceeded as if the respondents are jointly and severally liable for the acts of misfeasance or misapplication of the funds of the company.

16. I have gone through the averments made in the petition vis-a-vis, the evidence adduced in support of the petition. It is not in dispute that section 543 is introduced in the interest of the company and to protect from the misapplications and misfeasance or breach of trust on the part of the directors.

The power is given to the court to recover or restore the money or property or any part thereof respectively, to the official liquidator in the event it finds that the officers of the company acted to the detriment of the interest of the company. It is to be noted that while making an application under this provision, it is necessary that the allegations or the charges against the officer must be very specific and it should not be vague and general in nature. It should contain the narration of specific acts of commission or omission on the part of the director or officer of the company. In the absence of such specific pleadings, the application becomes susceptible to successful attack by the respondents. Even to examine the conduct of the particular officer of director to make him personally liable for misfeasance and misconduct, there should be specific evidence and pleadings as regards the conduct of the officer as held in Security and Finance Pvt. Ltd. v. B. K. Bedi [1991] 71 Comp Cas 101 (Delhi).

17. It has also been further held by the courts that even if the charge of misfeasance has been established, it should result in loss to the company and then only the court could compel them to compensate. Therefore, any misfeasance or misconduct, without resulting in loss to the company cannot be successfully pressed into service u/s 543 of the Act.

18. After scanning through the evidence adduced on behalf of the parties, I find that the petitioner has not been able to establish that the respondents either misapplied or retained money or property of the company or committed an act of misfeasance or breach of trust in relation to the company. The allegations in the petition and the evidence adduced by the petitioner are most general in nature. No specific or particular allegation has been made in regard to each and every respondent so as to make him responsible for repaying or restoring the money or property of the company. Though the directors and the managing director fall within the category of the officers as defined u/s 2(30) of the Act, yet unless the individual responsibility is identified and established it would be difficult for this court to grant appropriate reliefs to the petitioner. The only documents which are filed are the audit reports and the balance-sheet from which it cannot be established that there was a misfeasance on the part of the respondents. It is also accepted by PW-1 that the company prior to winding up have filed certain suits and after the winding up order the official liquidator also filed the suits and some of them have been decreed and the process is on for execution of decrees. With regard to the alleged excess expenditure incurred by the company on tours and travels etc., no evidence has been adduced to sustain the allegation. The section is very specific that it aims at individual and personal misconduct and, therefore, it is essential to establish the individual acts of omission and commission. Even assuming that the acts and omissions when done jointly and severally by all the respondents, yet there should be evidence before this court to establish such an allegation. This is also lacking in the instant case.

19. Under these circumstances, I find that the petitioner failed to establish the acts complained of in the petition.

20. Accordingly, the application is dismissed. There shall be no order as to costs.

