

(2010) 11 MAD CK 0346

In the Madras High Court

Case No : Company Application No. 2366 of 2008 in Company Petition No. 6 of 2001

Official Liquidator High Court

APPELLANT

Vs

S. Ravishankar

RESPONDENT

Date of Decision : 03-11-2010

Acts Referred:

Companies Act, 1956 — Section 542, 543, 543(1)

Citation : (2011) 161 CompCas 390 : (2011) 3 CompLJ 184

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : M. Jayakumar, for the Appellant; V. Ramakrishnan, for the Respondent

Final Decision : Dismissed

Judgement

P. Jyothimani, J.—This application is taken out by the official liquidator for a declaration that the Respondents are personally liable for the debts and other liabilities of the company under liquidation; to examine the conduct of the Respondents under Sections 542 and 543(1) of the Companies Act, 1956, and order that they are jointly and severally liable to contribute to the assets of the company in liquidation by way of compensation for the loss caused by them to the company in liquidation to the extent of Rs. 2,36,49,643 and the future claims from the creditors with interest at the rate of 12 per cent per annum thereon from the date of winding up, viz., 17 September, 2003, till the date of recovery of the entire amount; to declare the liabilities of Respondents Nos. 1 to 4 for the said amount and the future claims of the creditors together with interest thereon shall constitute the first charge on the property and effects in their possession; and to direct payment of costs.

2. By an order dated 17 September, 2003, passed in Company Petition No. 6 of 2001, Indus Marketing Ltd., was wound up and the official liquidator was directed to take charge of the assets and effects of the company. The said company was

incorporated on 21 June, 1991, with a nominal capital of Rs. 10 lakhs and its latest registered office was at No. 4, Mannar Reddy Street, T. Nagar, Chennai. The main objects of the company were to market, distribute, stock, trade, import, export, buy, sell or otherwise deal in all consumer durables, household articles, industrial products, electrical, electronic, mechanical goods and other goods of any nature.

3. As per the records of the Registrar of Companies, the Respondents were the directors and the company had two secured creditors, viz., the Bank of Baroda, and the Union Bank of India. The liquidation was at the instance of Sundaram Finance Ltd. As against the order of winding up, the company under liquidation has filed OSA No. 372 of 2003 and there was an order of interim stay granted on 22 October, 2003, which was extended on 4 December, 2003, up to 15 April, 2004, on condition that the company in liquidation will deposit one third of the amount due to Sundaram Finance Ltd., on or before 15 April, 2004. Since the amount was not deposited, the appeal was dismissed and the official liquidator took possession of all the movable assets lying at the rented registered office situated at No. 4, Mannar Reddy Street, T. Nagar, Chennai on 12 May, 2004.

4. As per the direction of this Court dated 22 February, 2008, the official liquidator has appointed Murray & Company, auctioneers, who sold the movables assets belonging to the company under liquidation by public auction and realised an amount of Rs. 1,03,000. After the sale consideration was received from the auction purchaser, as per the order of this Court dated 17 April, 2008, an official from the office of the official liquidator had handed over the vacant possession from the registered office to Mrs. Kothai Rajan, the owner of the premises on 22 April, 2008.

5. It is stated that the statement of affairs was filed by the ex-directors belatedly, after the delay of 1,033 days. On going through the statement of affairs as on 31 March, 1993, it is revealed that the stock-in-trade has not been valued, while as per the audited balance-sheet as on 31 March, 1993, the stock-in-trade has been given as Rs. 14,07,045 and there was No. clarification in respect of that.

6. It is stated that in the statement of affairs in list E regarding unsecured creditors, it is shown that an amount of Rs. 2,29,24,615 is due to unsecured creditors, whereas as per the balance-sheet as on 31 March, 1993, the unsecured loans is stated as Rs. 8,33,786 only and the vast variation is not clarified by the ex-directors. 7. Further, as per the balance-sheet as on 31 March, 1993, the sundry debtors were shown for a total amount of Rs. 5,57,212.57, whereas in the statement of affairs filed on 17 August, 2006, it is shown as "nil". That apart, No. particulars regarding the names, address, etc., are furnished and No. explanation is provided by the ex-directors for showing trade debtors as "nil" in the statement of affairs.

8. In the balance-sheet as on 31 March, 1993, under the heading "fixed assets",

a vehicle was shown for an amount of Rs. 1,67,816 after providing depreciation for the year 1992-93, while that is not finding place in the statement of affairs and that was not handed over to the official liquidator.

9. The official liquidator has neither called for the claims from the creditors of the company in liquidation, nor received any claims voluntarily.

10. The fund position of the company as on date is as follows:

Rs.

(i)

Cash

2

(ii)

Bank

44,578

(iii)

Investment

Nil

Total

44,580

11. According to the official liquidator, the ex-directors have failed to furnish the amount regarding stock-in-trade to the tune of Rs. 14,07,045 and defaulted in submission of proper explanation; that while the amount due from the trade debtors as per the balance-sheet as on 31 March, 1993, was given as Rs. 5,57,212.57, it is shown as "nil" in the statement of affairs and there are No. details of names, address and other particulars; that there is a difference of Rs. 2,20,90,829 in the matter of dues towards unsecured creditors shown in the statement of affairs and the balance-sheet as on 31 March, 1993, and there is No. clarification given by the ex-directors for the said excess amount shown in the statement of affairs and, therefore, it should be presumed to be an amount accrued due to the mismanagement and maladministration of ex-directors in the day-to-day affairs of the company and they are liable for the said amount; and that as per the balance-sheet as at 31 March, 1993, there is movable asset, viz., vehicle, and the same has not been shown in the statement of affairs and the same was not handed over to the official liquidator. With the above averments, the official liquidator has filed the said application for the relief stated above.

12. In the counter affidavit filed by the first Respondent, it is stated that there is No. specific instance of intentional act or deliberate conduct of the Respondents

resulting in loss to the company in liquidation. It is stated that the fourth Respondent has resigned as a director of the company on 15 November, 2000, long prior to the passing of the order of winding up dated 17 September, 2003. It is also stated that Form No. 32 has also been filed to that effect, a reference to which shows that the fourth Respondent has resigned on 15 November, 2000.

13. It is the case of the first Respondent that the official liquidator has considered arithmetical differences and filed the present application, which is not proper. There is a difference of ten years between the date of the balance-sheet and the date of the statement of affairs and during these 10 years, the company was carrying on business and the values given in the balance-sheet have changed from year to year in the normal course of business and that change cannot be attributable to the directors with any motive.

14. It is stated that the company was originally engaged in the business of marketing and distribution of various automation, consumer durables, office equipment and telecommunication products and the business was declining over the years and the company was selling its existing stocks and did not have the wherewithal to purchase new stocks and the unsold stocks had negligible realisable value at the time of winding up. It is also stated that since the financial position of the company was low, it had to borrow amounts. Therefore, the list of unsecured creditors increased over the last ten years and the debtors of the company declined over the years.

15. As regards the motor vehicle, it is stated that the vehicle was shown at a depreciated value of Rs. 1,67,816 as on 31 March, 1993 and due to wear and tear over the years, the value of the vehicle declined and it was ultimately sold and therefore, the statement of affairs did not disclose the particulars of vehicle.

16. It is also stated that the accounts of the company with the Bank of Baroda were closed in the last quarter of 1998-99 and the cash credit account with the Union Bank of India was also satisfied and closed in the year 2006-07 and it was settled and closed in the month of June, 2006. In view of the said categorical statement made by the Respondents in the counter affidavit regard the two secured creditors, there is No. necessity to presume that there are secured creditors in existence.

17. It is stated that the ex-directors have not acted against the interest of the company. It is also stated that inasmuch as action to be taken under Sections 542 and 543 of the Companies Act, 1956, is quasi-criminal in nature, there must be specific allegation and proof regarding the acts of dishonesty by each and every director in the affairs of the company for the purpose of making the directors liable.

18. In the additional affidavit filed by the first Respondent, it is stated that the company was originally enjoying various facilities from the Bank of Baroda to the extent of Rs. 30 lakhs and discharged all its dues to the bank in full in the year 1999 and the company has borrowed fund from the Union Bank of India to

discharge the dues to Bank of Baroda and as stated in the original counter affidavit, the Union Bank of India has also been satisfied and the account has been closed in the month of June, 2006.

19. It is also stated that the first Respondent has given collateral security to the Union Bank of India and he has borrowed money from his family members and settled with the Union Bank of India as a one-time settlement and he has also enclosed the said proceedings from the Union Bank of India accepting the onetime settlement, apart from producing a letter from the Bank of Baroda stating about the clearing of loan. The Bank of Baroda in the letter dated January 20, 1999, has stated that the company under liquidation has discharged its dues in full, while the Union Bank of India has given a certificate on 26 June, 2006, stating that the cash credit account has been closed under one-time settlement and the company had remitted the interest on delayed payment of instalments and there is No. due from them.

20. I have heard learned Counsel for the applicant and the Respondents and given my anxious thought to the issue involved in this case.

21. Section 543(1) of the Companies Act, 1956, makes it clear that the liability is attributable to the ex-directors only if it is found that the moneys of the company under liquidation have been misapplied or there has been misfeasance or breach of trust. The term misfeasance or breach of trust is certainly relatable not only to intentional act of the directors, but also to the deliberate conduct of the ex-directors which has resulted in the loss to the company under liquidation. Therefore, to constitute misfeasance under the said provision, the intentional act or deliberate conduct which is detrimental to the interest of the company under liquidation on the part of the ex-directors is a sine qua non.

22. It is trite that when an application under Sections 542 and 543 of the Companies Act, 1956, is made relating to allegations of fraud or breach of trust or misapplication, to prove such allegation, which is criminal in nature, it is necessary that there should be mens rea on the part of the erstwhile directors either in committing fraud or causing loss to the company in liquidation. The charges in these sort of cases have to be specific and it must be brought to the notice of this Court that the term misfeasance or breach of trust is certainly relatable not only to intentional act of the directors, but also to the deliberate conduct of the ex-directors which has resulted in the loss to the company under liquidation, for the rule *actus non facit reum nisi mens sit rea* is applicable in these cases of misfeasance.

23. This Court in *Official Liquidator, High Court Vs. V. Selvaraj and Others*, while construing Sections 542 and 543 of the Companies Act, 1956, has held as follows:

... it is clear that when an application under Sections 542 and 543 of the Companies Act is made relating to the allegation of fraud or breach of trust or misappropriation, to prove such allegation which is being criminal in nature, it is

necessary that there should be mens rea aspect on the part of the ex-director either in committing fraud or causing loss to the company under liquidation. Such conduct of fraud or breach of trust must be specifically pleaded and proved and in the absence of such specific pleading and proof, on the facts of the present case, it is not possible to accept the contention of the learned official liquidator that there has been deliberate conduct of fraud or breach of trust on the part of the ex-directors of the company under liquidation.

24. On a reference to the factual aspect, which has been stated above, it is clear that there is No. specific instance of misfeasance which has been pointed out. There is nothing on record to show that the loss is only on account of misfeasance. It must be noted that for the purpose of proceeding u/s 542 of the Act, the essential ingredient is that the directors must have taken the company on a route which they are consciously aware of as leading to a case of total mismanagement, thereby bringing down the company's existence. In the absence of any material to substantiate the allegation, one cannot go in a mechanical manner to sustain the contention put forth in the application.

25. In the case on hand, the Respondents have given explanation about the clearing of dues with the two secured creditors and the same is borne out on records. As regards the vehicle, the Respondents have given a reasonable explanation stating that even though the vehicle was shown at a depreciated value of Rs. 1,67,816 as on 31 March, 1993, due to wear and tear over the past ten years, the value of the vehicle declined and therefore, the same was ultimately sold. This, in my considered view, cannot be a reason for the purpose of invoking Sections 542 and 543 of the Companies Act, 1956.

26. Having regard to the seriousness of the provisions and there being No. material against the ex-directors, the allegations stand unproved. This application does not merit acceptance and therefore, the same stands dismissed.