

(2012) 03 KAR CK 0108

In the Karnataka High Court

Case No : Company Application No. 678 of 2005 and Company Petition No. 70 of 1991

Official Liquidator of Automac (Mysore) (P.) Ltd. (In Liqn.)

APPELLANT

Vs

Chindan

RESPONDENT

Date of Decision : 08-03-2012

Acts Referred:

Companies Act, 1956 — Section 456, 537
Company Court Rules, 1959 — Rule 9

Citation : (2012) 112 SCL 734

Hon'ble Judges : A.S. Bopanna, J

Bench : Single Bench

Advocate : K.S. Mahadevan and V. Jayaram, for the Appellant; N.R. Nagaraj and Ashok Patil, for the Respondent

Judgement

A.S. Bopanna, J.—The instant application is filed by the Official Liquidator u/s 537 of the Companies Act read with Section 456 and Rule 9 of the Company (Court) Rules, 1959. The prayer made in the application is to declare the sale held during the petition period as null and void and consequently to direct respondent Nos. 1 and 2 to remit a sum of Rs. 85,000/-, being part of the sale proceeds to the Official Liquidator. The applicant has also sought for direction to respondent No. 4 to remit Rs. 1,70,000/- to the Official Liquidator. Heard the learned counsel and perused the application papers.

2. The company known as M/s. Automac (Mysore) Pvt. Limited was ordered to be wound up by this Court vide the order dated 27.02.1997 in Company Petition No. 70/1991. The respondent Nos. 1 and 2 are the erstwhile Directors of the said Company-in-liquidation. The Company Petition No. 70/1991 was instituted before this Court on 02.08.1991. It is in that context, the applicant contends that the sale of the movables as made by respondent Nos. 1 and 2 on 29.03.1996 is contrary to Section 537 of the Companies Act keeping in view the provisions contained in Section 441 of the Companies Act. Out of the sale proceeds of Rs. 2,55,000/-, a sum of Rs. 1,70,000/- is stated to have been paid by respondent

Nos. 1 and 2 to the 4th respondent, who was a secured creditor of the Company-in-liquidation. The 3rd respondent herein is the purchaser of the movables. It is therefore contended on behalf of the applicant that the sale made on 29.03.1996, being contrary to the provisions of law, the amount of Rs. 1,70,000/- could not have been paid to the secured creditor by preferring one creditor over others. Hence, it is in that context the refund of said amount is sought. The balance of Rs. 85,000/- stated to have been retained by respondent Nos. 1 and 2 is the amount against which a direction has been sought against respondent Nos. 1 and 2.

3. The respondent Nos. 1 and 2 have filed their objection statement to the application. The sale made on 29.03.1996 is not disputed by them. However, it is contended that they had no knowledge of the pendency of the winding up petition and therefore the sale made was bona fide. It is also their contention that the circumstances under which the sale was made also needs to be noticed. In this regard it is contended that the Company-in-liquidation was running into financial problems and therefore, the same was closed at the end of respondent Nos. 1 and 2 themselves on 30.04.1993. Further, they were ordered to be evicted from rented premises, wherein the activity of the Company-in-liquidation was being conducted and since in that circumstances, the movables were taken out from the said premises, the same was immediately brought to sale as otherwise the condition would have further deteriorated and the sale made was also in the interest of the Company-in-liquidation. Further, out of the said amount of Rs. 2,55,000/- as evident, a sum of Rs. 1,70,000/- has been paid to the secured creditor and the balance sum of Rs. 85,000/- has been paid to one of the employees Sri. P. Ravindra, who was working as a Manager prior to the closure of the company. It is also pointed out that the dues towards E.S.I and Provident Fund has also been paid by respondent Nos. 1 and 2, even after the date of the winding up order, which would only indicate that the respondent Nos. 1 and 2 were making all bona fide attempts to settle the dues and therefore, in such circumstances, the refund of the amount in any event would not arise.

4. In view of the contentions raised by the respondents, the matter had been set down for evidence. On behalf of the applicant, the assistant, working in the office of the Official Liquidator was examined by filing an affidavit and marking the documents, on which the applicant had relied. It is to be noticed that respondents have produced certain documents along with the objections. But, the same has not been formally marked in the evidence. Insofar as the contention put forth in the application, the notice issued by the Official Liquidator relating to the filing of the statement of affairs are marked as Ex-P1 to P3. The reply of the 1st respondent to the Official Liquidator is marked as Ex-P4 and P5. The basis on which the claim has been made on behalf of the application is the document at Ex-P6, wherein, while rectifying the defects pointed out in the statement of affairs, respondent. Nos. 1 and 2 had indicated the list of assets which were machineries, electrical fittings, air-conditioners, Jigs, furniture and fixtures and other equipments, which in fact were sold to the 3rd respondent for

the sale amount of Rs. 2,55,000/-. The facts being evident in the instant case, the said evidence would only disclose that the movables which belong to the Company-in-liquidation had in fact been sold by the respondents during the period subsequent to filing of the winding up petition on 02.08.1991. This in fact is not in dispute.

5. In that view of the matter, the case put forth by respondent Nos. 1 and 2 through their objection statement and the documents relied on require to be noticed in the peculiar facts of the instant case, to find out as to whether the prayer as made in the application requires to be granted. As noticed, the fact that the movables were sold for a sum of Rs. 2,55,000/- on 29.03.1996 is not in dispute and also the fact that the company was ordered to be wound up on 27.02.1997 is also a matter of record. Though, a sum of Rs. 1,70,000/- has been settled by respondent Nos. 1 and 2 in favour of respondent No. 4, a further sum of Rs. 85,000/- was available with respondent Nos. 1 and 2. The payment made to one Sri P. Ravindra, an employee has been stated. Therefore, to the extent of the amount which has been recovered by respondent Nos. 1 and 2, the payment which has been made is to the secured creditor and the former employee of the Company-in-liquidation.

6. However, the said disbursement in a normal procedure is required to be made by the Official Liquidator, pursuant to the winding up and in any event, the respondent Nos. 1 and 2 could not have assumed that role. But, the fact of disbursement has to be noticed from the angle as to whether the payments made bona fide could be taken into consideration in the facts herein and in that regard, whether respondent Nos. 1 and 2 could be absolved from any direction being issued against them. In addition to the said payments which have been indicated, the challan of the Provident Fund Organisation would indicate that there was a demand for Rs. 1,00,770/- with regard to the Employees Provident Fund dues from the Company-in-liquidation. The said demand was made in the year 2006 through the Official Liquidator. On the same being intimated to respondent Nos. 1 and 2, they have paid the said amount of Rs. 1,00,770/- to the Employees Provident Fund Organisation on 26.07.2006 as indicated from the challan which bears the receipt from the State Bank of India.

7. In addition to the said documents, respondent Nos. 1 and 2 have also furnished a list of employees numbering 24 persons and 24 receipts drawn during the year 2005-06 to indicate that the amounts outstanding to the employees has been paid vide the said receipts. The said aspect of the matter would indicate that even though the company was wound up on 27.02.1997, respondent Nos. 1 and 2 have made certain payments on their personal account to the Employees Provident Fund Organisation and the former employees of the Company-in-liquidation. If this act of respondent Nos. 1 and 2 of bearing the burden of paying the outstanding amounts in respect of the Company-in-liquidation from their personal funds even after the date of winding up order is kept in view, the manner in which the sale of movables has been

made by respondent Nos. 1 and 2 and the amounts having been utilised to pay the secured creditor and an employee cannot be brushed aside.

8. Therefore, keeping this aspect in view and considering the fact that respondent Nos. 1 and 2 have paid amounts from their personal account even subsequent to the date of winding up order and the said amount is much more than the amount for which a direction has been sought for, I am of the opinion that the direction as against respondent Nos. 1 and 2 to refund the same would not arise. The question however is with regard to the amount which has been paid to the secured creditor amounting to a sum of Rs. 1,70,000/-. The said amount also is towards discharge of the liability of the Company-in-liquidation. In the peculiar facts of the instant case, as noticed, respondent Nos. 1 and 2 who are the erstwhile Directors have made subsequent payments and keeping this aspect in view, the course to be adopted requires to be moulded instead of directing the respondent No. 4 to refund the amount though it is clear that it is paid during the pendency of the petition.

9. At present, no claim has been invited by the Official Liquidator. Since there is no other asset relating to the company, the provision as contained in Section 529A of the Companies Act would provide for pari passu distribution of the assets first amongst the secured creditors and the workmen concerned. In the instant case, at present, there is nothing to indicate that there is more than one secured creditor. Further the payments of the employees are shown to have been made by respondent Nos. 1 and 2. However, the possibility of any other claims by employees or statutory claims cannot be ruled out. If in the event of there being any other claims, the entire amount of Rs. 1,70,000/- in any event cannot be appropriated by the respondent. No. 4 alone to the detriment of any other claims of the secured creditors or employees which would have to be considered on a pari passu basis and along with the fourth respondent who was one of the secured creditors. However, since at present there is no other claims, in my view, there need not be a direction to the fourth respondent to refund the amount of Rs. 1,70,000/- which has been received by them. However, to enable the fair distribution of the assets of the Company-in-liquidation but without disturbing the present status, a direction is issued to the fourth respondent to bear the advertisement expenses (not exceeding Rs. 10,000/-) for the Official Liquidator to invite claims from any persons who may have claims against the Company-in-liquidation in terms of the rules. In the event of there being no other claims, the Official Liquidator could close the matter at that stage. However, if in the event of there being claims from any other secured creditor or the erstwhile employees of the Company-in-liquidation, at that stage, the Official Liquidator would have the liberty of approaching this Court for seeking appropriate directions against the fourth respondent. In that view of the matter, there need not be any specific order for refund of the amount as claimed in the instant application except the limited direction to respondent No. 4 to bear the advertisement expenses.

The above application therefore stands disposed of in terms of the observations

made above.