(2010) 08 RAJ CK 0112

In the Rajasthan High Court

Official Liquidator of India Electronics Ltd. (in liquidation) APPELLANT

Vs

Ravi Kumar Jain and Others RESPONDENT

Date of Decision : 25-08-2010

Acts Referred:

Companies Act, 1956 — Section 2(30), 45, 454(1), 454(2), 454(5)
State Financial Corporations Act, 1951 — Section 29

Citation : (2011) 105 SCL 33

Hon'ble Judges : Ajay Rastogi, J

Bench : Single Bench

Judgement

Ajay Rastogi, J.—Instant Co. application has been filed by Official Liquidator of M/s India Electronics Ltd (In liquidation (the Company) for taking cognizance of offence u/s 454 (5) & (5A) of Companies Act, 1956 ("Co. Act") against respondents-1 to 4 and so also seeking further directions against respondents to file statement of affairs u/s 454(2) of Co. Act.

2. Notices were issued of present application. Pendente proceedings, respondent-1 (Ravi Kumar Jain), Managing Director of the Company expired and as regards respondents-3 & 4, despite notices issued from time to time and when bailable warrants could not have been executed, finally application was filed seeking permission to delete name of respondents-3 & 4 from array of party respondents which was allowed vide order dt. 29/07/2010. After respondent-1 having expired and respondents-3 & 4 having been deleted from array of respondents, respondent-2 has remained sole contesting party. Respondent-2 in his counter filed objection to the instant application that he ceased to be Director of Company in liquidation w.e.f. 27/01/1989 -intimation whereof in Form-32 under the Co. Act was sent to the Registrar of Companies on 11/02/1989 and since winding up order was passed on 25/08/1989, on the relevant date, he being not the Director of the Co., proceedings of committing alleged defaults in furnishing statement of affairs within statutory period could not have been initiated against him.

3. Pendente proceedings, status report has been produced by Official Liquidator on 22/02/2000 in which it has been averred that possession of the Unit along with the records were taken by Rajasthan Finance Corporation ("RFC") in Year-1987 according to provisions u/s 29 of State Financial Corporation Act, 1951 and thereafter possession was handed over to the RIICO and the land & building and plant & machinery were jointly sold by RFC & RIICO to M/s IG Telcom Ltd and M/s Ganpati Resitors (P) Ltd respectively in the year 1989. Similarly the State Bank of Bikaner & Jaipur had sold some spare parts being in possession of the Bank belonging to Co. in liquidation after seeking orders from the Company Court in the year 1996. However, preliminary report u/s 45 of Co. Act was filed by the Official Liquidator before the Company Court on 15/06/1990 and the OL is not holding any fixed or current assets of Company in liquidation.

4. It has also come on record that notices issued by the Official liquidator for submitting statement of affairs were served upon Ex-Directors of Co. in liquidation except respondent-2, against whom the proceedings are allegedly initiated by Official Liquidator. However, after notices being served upon respondent-1 who was Managing Director, he sent his reply on 21/04/2003 while giving complete details that possession of the Unit was taken over along with records of the Co. in liquidation by RFC in the year 1987, itself inasmuch as it was sold jointly by RIICO & RFC in the year 1989 and therefore, there is no record available which, the Ex-Directors could have furnished about statement of affairs of the Company in liquidation to the Official Liquidator after notice u/s 454(1) of Co. Act being served. It is relevant to mention that notice u/s 454(1) was never served upon respondent-2, as has been averred by applicant in para 7 of his application.

5. Main thrust of Counsel for respondent-2 is that neither he was Director of Co. in liquidation on the date of winding up order having been passed by Company Court on 25/08/1989 nor notice u/s 454(1) was served upon him and that apart, when possession of the Unit alongwith records belonging to Co. in liquidation were taken over by RFC in 1987 and the reply by respondent-1 discloses that record of the Co. in liquidation was taken over by secured creditors i.e. RFC, in such circumstances, calling upon respondent-2 to submit statement of affairs u/s 452(2) and continuance of proceedings for prosecution u/s 454 (5) & (5A) against him when he is aged 70 years will be in violation of the Scheme of Company Act.

6. Counsel for respondent-2 further submits that there is no averment made in the instant application that respondent-2 being Director of Company in liquidation was actively associated with day to day activities of the Co. and according to the OL, he is the right person to whom necessary directions be given u/s 454(2) to file statement of affairs - in absence whereof, initiating proceedings against respondent-2 for prosecution or furnishing statement of affairs will be in violation of provisions u/s 454 of the Co. Act.

7. Per contra, Counsel for applicant on the other hand submits that even if

respondent-2 is ceased to be Director of the Co. in liquidation, which itself, will not absolve him from submitting statement of affairs of the Company which is a statutory requirement of Ex-Director to furnish statement of affairs u/s 454(1). Counsel further submits that if ex-Direcftors have failed to furnish statement of affairs, the OL can seek direction from Company Court to call upon them to furnish statement u/s 454(2) apart from initiating criminal proceedings u/s 454(5) of Co. Act. In support, Counsel placed reliance upon judgments of Karnatka High Court in OL of Keonics Pentya v. Bharat B. Narang 2010 (154) Co. Cas 416 and of Kerala High Court in K.R. Subramanian v. Official Liquidator 2009 (147) Co. Cas 213.

8. Counsel for OL further submits that even ex-Directors having been deleted from array of respondents, if at any later point of time, their addresses are made known, proceedings against them can be initiated which at one stage stood drooped, and application u/s 454(2) of Co. Act is maintainable.

9. This Court has considered rival contentions of Counsel for the parties and with their assistance, examined material on record. From a scheme of Section 454, it clearly emerges that Section 454(1) casts a statutory duty upon ex-Directors or other officers of the Company to file statement of affairs in the prescribed format provided they held their office on the relevant date. Even in absence of the Official Liquidator calling upon them to file statement of affairs, it is incumbent upon the said officers to do so within 21 days from the relevant date or within the extended time not exceeding three months from the date as the Official liquidator of the Court may for special reasons appoint as explained in Section 454(3). But at the same time, u/s 454(2), there is no statutory duty cast upon persons mentioned in Cl. (a) to (d) of Section 454(2) to file statement of affairs unless they are called upon to do so, and Officers under the aforesaid clause might not be holding office on the relevant date but were or had been officers of the Company, having taken part in formation of the Company at any time within one year before the relevant date, who were or have been in employment of the Company within the said year, and are, in the opinion of the OL, capable of giving the information required, to which the statement relates. Thus, Sub-section (2) of Section 454 is an enabling provision giving the OL a right to seek information by way of filing a statement of affairs from even ex-Directors or Officers of the Company as referred to u/s 2(30) of Co. Act which defines Officer of the Company to include even a Director.

10. This Court finds substance in the submission made by Counsel for OL that even if one has ceased to be Director of Co. in liquidation on the relevant date, it will not absolve him from filing of statement of affairs u/s 454(2) of Co. Act; more so when application has been made in the Court as in the instant case.

11. However, it has not been alleged by applicant while seeking direction u/s 454(2) to furnish statement of affairs of Co. in liquidation that Ex-Director of Co. in liquidation (respondent-2 herein) was actively associated with day to day activities of the Co. having knowledge as to the affairs of the Company and

according to the OL, he is the right person to whom the necessary direction could be given to file statement of affairs u/s 454(2) of Co. Act.

12. That apart, it has come on record as is evident from status report filed by OL that Ex-Director (respondent-1 herein) has filed the reply and informed that the records were lying in the factory premises and the factory/Unit was sold by the RIICO & RFC which have produced a letter of M/s Kapil Roy & Co. CA being auditor of Company informed that the record of the company has been in possession of respondent-1 (Shri Ravindra Kumar Jain -Ex-Director, now deceased) and it has come on record that Respondent-2 was not in the possession of the record which could have been furnished to the OL after he was being appointed as Provisional Liquidator on passing of winding up order on 25/08/1989.

13. Thus, material having come on record makes it evident that respondent-2 was ceased to be Director of Co. in liquidation on 25/08/1989 and there is no averment in the instant application that respondent-2 being actively associated with day-to-day activities of the Company having knowledge of its affairs and that he is a right person to whom necessary direction can be issued to file statement of affairs - in absence whereof, the direction against respondent-2 u/s 454(2) can not be held to be legally sustainable.

14. However, it is made clear that even if other respondents whose names stand deleted in present proceedings (supra), that will not preclude from proceedings to be initiated u/s 454(5) of Co. Act and if at a later stage, the OL is able to find and point out their whereabouts, present order will not absolve from their obligation to comply with statutory requirement u/s 454(2) of Co. Act and from initiating proceedings u/s 454(5) of Co. Act.

15. However, if the Director has resigned and proved to the satisfaction of the Court that on the relevant date, he had no obligation to comply with provisions u/s 454(1), no action can be taken against him 454(5) or (5A) of Co. Act. It is true that in instant case, it could have been examined after summary trial could have proceeded with; but from the complaint & facts (supra), no material has come on record which could even prima facie satisfy the Court that on the relevant date, respondent-2 was under obligation to comply with provisions of Section 454(1) & Section 454(2) of Co. Act; in these circumstances, to continue proceedings against respondent-2 who is aged about 70 years u/s 454 (5) or (5A) will neither be justified nor in the interest of justice.

16. With the observations made (supra), the complaint fails and stands disposed of. No order as to costs.