(2010) 08 RAJ CK 0009

In the Rajasthan High Court

Case No : Company Application No. 12 of 1995 in Company Petition No. 1 of 1985

Official Liquidator of India Electronics Ltd. (In Liquidation) APPELLANT

Vs

Ravi Kumar Jain and Others RESPONDENT

Date of Decision : 26-08-2010

Acts Referred:
Companies Act, 1956 — Section 2(30), 45, 452(2), 454, 454(1)
State Financial Corporations Act, 1951 — Section 29

Citation : (2011) 162 CompCas 87

Hon'ble Judges : Ajay Rastogi, J

Bench : Single Bench

Advocate : Anuroop Singhi for G.K. Garg for the Official Liquidator, for the Appellant; R.P. Garg, for the Respondent

Judgement

Ajay Rastogi, J.—Instant company application has been filed by the official liquidator of M/s. India Electronics Ltd. (in liquidation) ("the company") for taking cognisance of offence u/s 454(5) and (5A) of the Companies Act, 1956 ("the Companies Act") against respondents Nos. 1 to 4 and so also seeking further directions against the respondents to file statement of affairs u/s 454(2) of the Companies Act, 1956. Notices were issued of present application. Pendente proceedings, respondent No. 1 (Ravi Kumar Jain), managing director of the company expired and as regards respondents Nos. 3 and 4 despite notices issued from time to time and when bailable warrants could not have been executed, finally an application was filed seeking permission to delete the names of respondents Nos. 3 and 4 from the array of party respondents which was allowed vide order dated July 29, 2010. After respondent No. 1 having expired and respondents Nos. 3 and 4 having been deleted from the array of the respondents, respondent No. 2 has remained the sole contesting party. Respondent No. 2 in his counter filed objection to the instant application that he ceased to be a director of the company in liquidation with effect from January 27, 1989, intimation whereof in Form No. 32 under the Companies Act was sent to the Registrar of Companies on February 11, 1989 and since the winding up order was passed on August 25, 1989, on the relevant date, he being not the director of the company proceedings of committing alleged defaults in furnishing the statement of affairs within the statutory period could not have been initiated against him.

2. Pendente proceedings, status report has been produced by the official liquidator on February 22, 2000, in which it has been averred that possession of the unit along with the records were taken by the Rajasthan Finance Corporation ("RFC") in the year 1987 according to the provisions u/s 29 of the State Financial Corporation Act, 1951 and thereafter possession was handed over to the RIICO and the land and building and plant and machinery were jointly sold by RFC and RIICO to M/s. I.G. Telecom Ltd., and M/s. Ganpati Resitors P. Ltd., respectively in the year 1989. Similarly the State Bank of Bikaner and Jaipur had sold some spare parts being in possession of the bank belonging to the company in liquidation after seeking orders from the company court in the year 1996. However, preliminary report u/s 45 of the Companies Act was filed by the official liquidator before the company court on June 15, 1990 and the official liquidator is not holding any fixed or current assets of the company in liquidation.

3. It has also come on record that notices issued by the official liquidator for submitting the statement of affairs, were served upon the ex-directors of company in liquidation except respondent No. 2, against whom the proceedings are allegedly initiated by the official liquidator. However, after notices being served upon respondent No. 1 who was the managing director, he sent his reply on April 21, 2003, while giving complete details that possession of the unit was taken over along with the records of the company in liquidation by RFC in the year 1987, itself inasmuch as it was sold jointly by RIICO and RFC in the year 1989 and therefore, there is no record available which, the ex-directors could have furnished about the statement of affairs of the company in liquidation to the official liquidator after notice u/s 454(1) of the Companies Act being served. It is relevant to mention that notice u/s 454(1) was never served upon respondent No. 2, as has been averred by the applicant in paragraph 7 of his application.

4. The main thrust of counsel for respondent No. 2 is that neither he was the director of the company in liquidation on the date of winding up order having been passed by the company court on August 25, 1989, nor notice u/s 454(1) was served upon him and that apart, when possession of the unit along with the records belonging to the company in liquidation were taken over by RFC in 1987 and the reply by respondent No. 1 discloses that the records of the company in liquidation was taken over by the secured creditors, i.e., RFC, in such circumstances, calling upon respondent No. 2 to submit the statement of affairs u/s 452(2) and continuance of proceedings for prosecution u/s 454(5) and (5A) against him when he is aged 70 years will be in violation of the provisions of the Companies Act.

5. Counsel for respondent No. 2 further submits that there is no averment made

in the instant application that respondent No. 2 being the director of the company in liquidation was actively associated with the day-to-day activities of the company and according to the official liquidator, he is the right person to whom the necessary directions be given u/s 454(2) to file statement of affairs in absence whereof, initiating proceedings against respondent No. 2 for prosecution or furnishing the statement of affairs will be in violation of the provisions u/s 454 of the Companies Act.

6. Per contra, counsel for the applicant on the other hand submits that even if respondent No. 2 is ceased to be the director of the company in liquidation, which itself, will not absolve him from submitting the statement of affairs of the company which is a statutory requirement of ex-director to furnish the statement of affairs u/s 454(1). Counsel further submits that if the ex-directors have failed to furnish the statement of affairs, the official liquidator can seek direction from the company court to call upon them to furnish the statement u/s 454(2) apart from initiating criminal proceedings u/s 454(5) of the Companies Act. In support, counsel placed reliance upon the judgments of the Karnataka High Court in Official Liquidator of Keonics Penta Semi-Conductors Limited (in Liqn.) Vs. Sri Bharat B. Narang, and of the Kerala High Court in K.R. Subramanian Vs. Official Liquidator, High Court of Kerala, .

7. Counsel for the official liquidator further submits that even the ex-directors having been deleted from the 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 dropped, and the application u/s 454(2) of the Companies Act is maintainable.

8. This court has considered the rival contentions of counsel for the parties and with their assistance, examined the material on record. From a scheme of section 454, it clearly emerges that section 454(1) casts a statutory duty upon the ex-directors or other officers of the company to file the statement of affairs in the prescribed format provided they held their office on the relevant date. Even in the absence of the official liquidator calling upon them to file the 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 clauses (a) to (d) of section 454(2) to file the 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 official liquidator, capable of giving the information required, to which the statement relates. Thus, sub-section (2) of section 454 is an enabling provision giving the official liquidator a right to seek information by

way of filing a statement of affairs from even the ex-directors or officers of the company as referred to u/s 2(30) of the Companies Act which defines officer of the company to include even a director.

9. This court finds substance in the submission made by counsel for the official liquidator that even if one has ceased to be a director of the company in liquidation on the relevant date, it will not absolve him from filing of statement of affairs u/s 454(2) of the Companies Act; more so when application has been made in the court as in the instant case.

10. However, it has not been alleged by the applicant while seeking direction u/s 454(2) to furnish the statement of affairs of the company in liquidation that ex-director of the company in liquidation (respondent No. 2 herein) was actively associated with the day-to-day activities of the company having knowledge as to the affairs of the company and according to the official liquidator, he is the right person to whom the necessary direction could be given to file the statement of affairs u/s 454(2) of the Companies Act.

11. That apart, it has come on record as is evident from the status report filed by the official liquidator that the ex-director (respondent No. 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 and RFC which have produced a letter of M/s. Kapil Roy and Co., chartered accountant being auditor of the company informed that the record of the company has been in the possession of respondent No. 1 (Shri Ravindra Kumar Jain, ex-director, now deceased) and it has come on record that respondent No. 2 was not in possession of the record which could have been furnished to the official liquidator after he was appointed as the provisional liquidator on the passing of the winding up order on August 25, 1989.

12. Thus, material having come on record makes it evident that respondent No. 2 ceased to be the director of the company in liquidation on August 25, 1989 and there is no averment in the instant application that respondent No. 2 being actively associated with the 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 the statement of affairs, in absence whereof, the direction against respondent No. 2 u/s 454(2) cannot be held to be legally sustainable.

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

14. 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 the provisions u/s 454(1), no action can be taken against him u/s 454(5) or (5A) of

the Companies Act. It is true that in the instant case, it could have been examined after summary trial could have been proceeded with; but from the complaint and facts (supra), no material has come on record which could even prima facie satisfy the court that on the relevant date, respondent No. 2 was under obligation to comply with the provisions of section 454(1) and (2) of the Companies Act; in these circumstances, to continue proceedings against respondent No. 2 who is aged about 70 years u/s 454(5) or (5A) will neither be justified nor in the interest of justice. With the observations made (supra), the complaint fails and stands disposed of. No order as to costs.

