

(2008) 11 KAR CK 0013

In the Karnataka High Court

Case No : Company Application No. 193 of 2004 in Company Petition No. 139 of 1997

Official Liquidator of Kadambi Electronics Private Limited (In Liquidation) APPELLANT

Vs

K. Damodar and Another RESPONDENT

Date of Decision : 24-11-2008

Acts Referred:

Companies Act, 1956 — Section 458 A, 543 (1)

Citation : (2009) 2 KarLJ 91

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : Deepak R. and Jayaram, for the Appellant; Aditya Sondhi, for Respondents-1 and 2, for the Respondent

Final Decision : Dismissed

Judgement

Anand Byrareddy, J.—Heard the Counsel for the applicant and the Counsel for the respondents and perused the material on record.

2. The present application u/s 543(1) of the Companies Act, 1956 (hereinafter referred to as "the Act" for brevity) seeks a declaration that respondents 1 and 2 are jointly and severally liable to pay a sum of Rs. 13 lakhs under the head "Trade Debtors" along with proportionate interest from the date of winding up order and to pay a further sum of Rs. 2.10 lakhs under the head Loans and Advances" along with interest, and further to declare that the respondents are liable to pay Rs. 568 lakhs, under the head "Fixed and Current Assets".

3. The respondents having entered appearance have resisted the application. It is contended by the Counsel for the Official Liquidator that by order dated 12-3-1999 of this Court in Company Petition No. 139 of 1997, presented as on 13-10-1997, the present applicant was appointed as the Official Liquidator and that subsequent to the passing of the winding up order, the Official Liquidator has taken possession of those assets of the company which were available after

M/s. Canara Bank, had taken possession of certain other assets of the company prior to the date of winding up order. The respondents not having delivered the books and records of the company, the statement of affairs filed by them was found to be defective and was not taken on record.

4. The Official Liquidator had issued several reminders to the respondents to rectify the defects, which were not complied with. The Official Liquidator would contend that, on examination, it was found that the respondents were due of the amounts aforesaid under the several heads claimed. Since the respondents have failed to deliver the above assets of the company, the said assets could not be sold by the Official Liquidator. These amounts are endorsed by the respondents themselves in their statement of affairs. It is therefore to be presumed that the respondents have misapplied or retained or become liable or accountable for any money or property of the company and hence, they are guilty of misfeasance or breach of trust in relation to the company and would be hence liable to make good the loss suffered by the company in liquidation.

5. In support of the application, the applicant has tendered evidence of a witness, who has reiterated the averments in the application. There is no indication that any further material, apart from the statement of affairs, was produced along with the evidence that was tendered, apart from certain exchange of correspondence between the office of the Official Liquidator and the respondents herein. The respondents, on the other hand, in their statement of objections have, in particular, stated that the allegation that there were no efforts on their part to release the amount under the head of "Trade Debtors" is incorrect. The financial position of the company being in a bad state, on account of various unavoidable circumstances, the respondent-directors were fighting several battles on several fronts, in order to keep the company floating and in any event, the admitted circumstance is that M/s. Canara Bank had seized the records of the respondent-company and the same were in the custody of the said Bank which was unavailable to the respondents, in order that they could take steps to recover any monies due. In any event, the financial position of the company being in a bad State, the respondents were hardly in a position to institute proceedings, since the records were unavailable and that sufficient funds were not readily available to institute any such proceedings.

6. Insofar as the amounts under the head of "Loans and Advances" are concerned, the respondents have stated identical reasons. The respondents have further emphasised that no records or document being available, as the same were in the factory premises, which was seized and taken over by the banker as aforesaid and in respect of one other premises, which was a rented premises, the landlord having taken over the same in connivance with the Bank and its officials and yet another premises having been allotted to the respondents under a lease-cum-sale basis by the Karnataka State Small Industries Development Corporation, the allotment having been cancelled and possession having been resumed, it could not be said that there was misfeasance or breach of trust on

the part of the respondents, in recovering the monies due and available to the credit of the company under liquidation and therefore, the prayer is not tenable.

7. It is further pointed out that the witness for the applicant has admitted in the course of cross-examination the fact that the documents and records of the company were seized and were in the custody of M/s. Canara Bank, even prior to the date of winding up order and the contention that there was misfeasance or negligence on the part of the respondents is not substantiated.

8. The Counsel for the respondent also places reliance on a judgment in M/s. Faridabad Rubber Soles Private Limited (in Liqn) Vs. S.L. Chopra and another, to contend that unless there was an allegation of fraud or dishonesty on the part of the directors in not recovering the amounts due to the company and in the face of the records of the company having been in the custody of a third party, it could not be concluded that the respondent-directors were capable of being held guilty of misfeasance. This judgment would apply on all fours to the present case on hand and the same has placed reliance on a judgment In Re: Kaithal Grain and Bullion Exchange Ltd., Kaithal, and in the case of In Re: Forest of Dean Coal Mining Company (1878) 10 Ch. D. 450, wherein it was held that mere inaction on the part of the directors to recover the amount does not amount to misfeasance within the meaning of the provisions of the Act.

9. On these rival contentions and the material on record, it is seen that insofar as items under the head of "Trade Debtors" are concerned, to be found at Schedule II to the State of Affairs, the names of four debtors are indicated and the transactions having been contracted in the years 1996 and 1995, totalling to Rs. 13 lakhs, which is shown as on 23-11-2000. It is also to be noticed that the respondent-directors had furnished this information on the basis of their personal knowledge and memory. It was, therefore, necessary to verify from the documents which were admittedly in the custody of a third party, namely, Canara Bank or from such other source, which the Official Liquidator would have had access pursuant to the winding up order or if the Official Liquidator had any difficulty in having access to the same, this Court ought to have been taken into confidence in verifying the particulars that were furnished and to ensure that the same were yet capable of recovery as on the date of order of winding up, especially, in the circumstance that the period of limitation to recover any such amounts would stand extended by value of Section 458-A of the Act, which would give extension of the period excluding the date of commencement of the proceedings and one year from the date of winding up order, which in effect, would have brought the amounts allegedly due from the "Trade Debtors" well within the scope of recovery. Hence, in the absence of any such particulars furnished with reference to each of these transactions, it would not be open for the Official Liquidator to allege that there has been misfeasance or that there has been a breach of trust or negligence or fraud on the part of the directors in not having taken steps to recover these amounts.

10. Given the fact that the proceedings were initiated in the year 1997 and

winding up order having been passed on 12-3-1999, the present application filed as late as on 8-3-2004 to allege misfeasance or breach of trust on the part of the respondent-directors is not justified. Similar is the case insofar as the loans and advances are concerned. As can be seen, a vague disclosure, which is on the basis of the personal knowledge and memory of the directors, would indicate the inaction on the part of the respondents insofar as item No. 1 is concerned, which is an amount of Rs. 1.50 lakhs which was paid as advance in the year 1992 and possibly recoverable within a period of three years from that date. In the absence of particulars, it was for the Official Liquidator to have demonstrated that there was misfeasance on the part of the respondents in this regard. The other amounts of Rs. 50,000/- and Rs. 10,000/- attributable to recoveries from the Central Excise Department or from the Sales Tax Department or otherwise is equally vague and it cannot be said that the misfeasance or fraud is established on account of this.

11. Insofar as the items, namely, the estimated irrecoverable value of the assets of the company are concerned, it relates to the value of land and building, the leasehold machinery, the plant and machinery on hire purchase and the value of intellectual property relating to designs, drawings and trademarks. This cannot be construed as a value that is totally irrecoverable. In the absence of material particulars, as to what are the assets that are yet available and in the custody of the Official Liquidator and what has been the irretrievable loss to the company on account of the alleged misfeasance on the part of the respondent-Corporation, it cannot be said that the charge as to misfeasance or breach of trust has been brought home. Therefore, the application is dismissed.