

**(1986) 08 KL CK 0022**

**In the High Court Of Kerala**

**Case No :** Application No's. 269 and 270 of 1985 in MCA No. 12 of 1985 in C.P. No. 43 of 1979

Official Liquidator, South India Saw Mills P. Ltd.

APPELLANT

Vs

Ramakrishna Iyer, Ramanarayanan and Others

RESPONDENT

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**Date of Decision :** 05-08-1986

**Acts Referred:**

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

**Citation :** (1988) 64 CompCas 855 : (1987) 1 ILR (Ker) 362

**Hon'ble Judges :** Varghese Kalliat, J

**Bench :** Single Bench

**Advocate :** T.V. Ramakrishnan, for the Appellant; P. Radhakrishnan, P. Balachandran, P. Ramakrishnan Nair, C.V. Devan and P.K. Madhusoodhanan, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

V. Kalliat, J.—The official liquidator files these two applications in a proceeding u/s 543 of the Companies Act, 1956, hereinafter referred to as " the Act ".

2. The liquidator filed MCA No. 12 of 1985 dated June 13, 1985, under Sections 542 and 543(1) of the Act for an order to direct the respondents in that application to contribute jointly and severally all such sums as they may be found liable to contribute to the assets of the company. There are five respondents in this application.

Now, the official liquidator wants to implead the legal representatives of respondents Nos. 3 and 4. He has filed two applications. Application No. 269 of 1985 is to condone the delay in amending the cause title of the misfeasance application by bringing in the legal representatives of the deceased respondents Nos. 3 and 4. Application No. 270 of 1985 is for adding the names of the legal representatives of respondents Nos. 3 and 4 as additional respondents Nos. 6 to 9 in the misfeasance application.

3. The additional respondents Nos. 6 to 9 have filed counter-affidavits in both the applications. They say that the applications are not maintainable. They tell me that there is absolutely no rational justification for enticing the additional respondents Nos. 6 to 9 in the misfeasance proceedings by the sly and slick method of presenting the two petitions which bear an apparently innocent appearance. Main prayers in the petitions are veiled and it disclose an artful and shrewd design. It is disclosed that the third respondent as well as the fourth respondent died even before the filing of MCA No. 12 of 1985. Additional respondents Nos. 8 to 9 submit that the official liquidator was aware of the death of respondents Nos. 3 and 4 when he filed the application, MCA No. 12 of 1985. The third respondent died as early as on September 6, 1973, and the fourth respondent died on September 18, 1981. They say that there is really no question of impleadment arising in this case. The whole thing is designed to start afresh misfeasance proceedings against the additional respondents.

Obviously, the third respondent died even before the winding up proceeding was initiated before this court. The petition for winding up was filed only in 1979. Additional respondents submit that in a misfeasance proceeding, when once the director dies pending the proceedings, the proceedings cannot be continued against his legal representatives. Further, since the misfeasance proceeding itself is a summary and discretionary proceeding, taking into account the circumstances involved in this case, even if it is found that the legal representatives can be proceeded against as a continuation of the misfeasance proceeding u/s 543 of the Companies Act in certain circumstances, the peculiar facts revealed in this case should tell the court that the court should exercise its discretionary power to drop the proceedings against the legal representatives of the deceased directors.

4. The liability of the delinquent director in a misfeasance proceeding is fundamentally grounded on the principle that a person who has caused loss to the company by an act which would amount to a breach of trust should make good the loss. Section 543 does not create any liability. Really it is a liability that was incurred by the director as soon as he has committed the act which is a breach of trust. Certainly, the section creates no new rights nor imposes any new liabilities for the liability ensued on the commission of breach of trust by the director. It only provides for a summary remedy to determine the amount payable by such director on proof of the necessary ingredients to entertain a breach of trust by the director. It is only a more appropriate, handy and expedient means of enforcing rights and remedies which would have been enforceable by action, if there had been no winding up of the company. In *Official Liquidator, Supreme Bank Ltd. Vs. P.A. Tendolkar (Dead) by Lrs. and Others*, the Supreme Court observed that (at page 397) :

".....This power does not, on the language of these provisions, extend to making compulsive orders against heirs of delinquents. As the power to take these special proceedings is discretionary and does not exhaust other remedies,

although the court may, as a matter of justice and equity, drop proceedings against delinquent directors, managers, or officers who are no longer alive, leaving the complainant to his ordinary remedy by a civil suit against the assets of the deceased, yet where no injustice may be caused by continuing these proceedings against a past director, even though he be dead, the proceedings could continue after giving persons who may be interested, opportunities to be heard,"

5. The section empowers the court, if it thinks just, to order the delinquent director to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the case may be. Certainly, the core of the section is not to punish a delinquent director who has been found guilty of misfeasance. The section only intends a speedy remedy of payment of compensation to the company in respect of the loss occasioned to the company by the misfeasance of the delinquent director.

6. I feel that the language of the section does not empower the liquidator to initiate proceedings against the heirs of the deceased delinquent director.

7. Having now dealt with the nature of the liability and the remedy provided u/s 543 of the Act, I have to examine whether the liability thus incurred by the director can be fastened on the estate of the deceased director in the hands of the legal representatives and in that context whether the legal representatives are answerable to the misfeasance application on the death of the delinquent director pending the proceedings. The Supreme Court has held in *Official Liquidator Vs. Parthasarathi Sinha and Others*, (at p. 173) :

".....Whenever there is a relationship based on contract, quasicontract, some fiduciary relation or a failure to perform a duty, there is no abatement of the liability on the death of the wrongdoer."

8. The norm on which the above said principle is based is this (at page 172) :

"The true doctrine is that whenever you find that the deceased person has by his wrong diverted either property or the proceeds of the property belonging to someone else into his own estate, you can then have recourse to that estate through his legal representative when he is dead, to recover it."

9. In unmistakable terms the Supreme Court held that the proceedings commenced against the delinquent director of a company in liquidation under Sections 542 and 543 of the Companies Act can be continued after his death against his legal representatives and the amount declared to be due in such misfeasance proceedings can be realised from the estate of the deceased in the hands of his legal representatives. The court further held that the legal representatives of course would not be liable for any sum beyond the value of the estate of the deceased in their hands.

10. In this case, it is not a continuation of the proceedings on the death of a

delinquent director. It is in the nature of fresh initiation of action for misfeasance against the legal representatives of the deceased director. It is not a continuation of the proceedings which has been taken against a delinquent director on the death of that director, against the heirs of the delinquent director. This is a significant and vital distinction, I say so since it is clear that when the misfeasance proceedings commenced, respondents Nos. 3 and 4 were not alive. They died on September 6, 1973, and September 10, 1981, respectively. This misfeasance application was filed only on June 13, 1985. In these circumstances, the question is whether I should allow these applications of the liquidator which will enable him to initiate action for the misfeasance of two deceased directors under Sections 542 and 543 of the Act against their heirs, the additional respondents Nos. 6 to 9. I think it is unjust to allow the liquidator to proceed against the legal representatives of respondents Nos. 3 and 4.

11. Even in a case where the delinquent director dies after the commencement of the misfeasance proceedings, I can allow the proceedings to continue against the legal representatives of the deceased director only if I am satisfied that no injustice would be caused by such a course. In a case where, prior to the death of the director, the director had sufficient opportunity to give evidence and occasion to substantiate his evidence before the court, there will not be any prejudice caused in allowing the proceedings to continue against the legal representatives on the death of the director. If the director dies at the threshold of the proceedings before he had full and fair opportunity to defend the case by adducing evidence to substantiate his contentions, I am of the view that it will not be just, fair or equitable to allow continuation of the proceedings against the legal representatives. The mandate of the section is to "examine into the conduct" of the delinquent director. In such circumstances to allow the continuation of the proceedings against the legal representatives would cause great prejudice to the legal representatives inasmuch as the legal representatives may be wholly and roundly nescient of the particulars of the transactions the deceased director had with the company or the disputed dealings which resulted in the alleged loss to the company. In such circumstances, I feel that this court should exercise its power of discretion to disallow the applications of the liquidator to implead the legal representatives, and that will be a proper and judicial exercise of discretionary power under Sections 542 and 543 of the Act. The circumstances and facts I have stated tell me that I should dismiss the applications. I do so.