

(1978) 05 DEL CK 0011

In the Delhi High Court

Case No : C.A. No. 670 of 1973 in C.P. No. 125 of 1967

Official Liquidator, United India General Finance P. Ltd.

APPELLANT

Vs

H.K. Dass Sharma and Another

RESPONDENT

Date of Decision : 22-05-1978

Acts Referred:

Citation : (1979) 49 CompCas 177

Hon'ble Judges : D.K. Kapur, J

Bench : Single Bench

Advocate : V.V. Shastri, for the official liquidator, for the Appellant; A.K. Jain, (the director), for the Respondent

Judgement

D.K. Kapur, J.—This claim petition is under Sections 446, 477 and 543 of the Companies Act, 1956, in which the respondents are Shri H.K. Dass Sharma, an ex-director of the company, and M/s. Express Financiers (P.) Ltd. The claim raised in the case is concerning a vehicle No. MYW 4666 which had been given on hire purchase to a party in Mysore. The vehicle was repossessed by the company on 25th April, 1965, and the present application is concerned with the fate of that vehicle. According to the first respondent who is an ex-director, he had directed the chowkidar of the company to deliver the vehicle to the second respondent for the purpose of selling the same. This was on 12th June, 1967. There is no receipt on the records of the company showing that the second respondent had received the vehicle. About a year later, the company was ordered to be wound up as per winding-up order dated 12th August, 1968. The official liquidator wrote on 9th September, 1969, to the second respondent requesting intimation regarding the sale proceeds of the vehicle which was a Tata Mercedes Benz Truck, Model 1957, whose engine and chassis numbers were also specified in the letter. Several reminders were sent in June, 1972, August, 1972, and September, 1972, and eventually a reply was received in September, 1972. In that letter, it was denied that any truck was delivered for sale. On these facts, the present application was moved in this court.

2. The case of the company in liquidation through the official liquidator is that this vehicle was worth Rs. 20,263.68 which was the sum due from the hirer. It was also claimed that either the vehicle was taken by Shri H.K. Dass Sharma, an ex-director of the company, or it went to M/s. Express Financiers (P.) Ltd. Hence, some alternative prayers have been made to the effect that either these respondents should be ordered to restore the possession of the vehicle, or its sale proceeds or its market value. It was also claimed that both these respondents should be summoned u/s 477 and the first respondent being an ex-director should be held liable u/s 543 of the Act for breach of trust.

3. Both the respondents were served but neither appeared, so ex parte evidence was ordered to be produced on 30th January, 1974. At the next date of hearing, the first respondent appeared along with his counsel to submit that as the winding-up order was passed on 12th August, 1968, the time-limit prescribed by Section 543 had already expired and hence the claim could not be maintained against him. The case was adjourned to examine the question whether the first respondent should be examined u/s 477 and I concluded on 17th May, 1974, that he could not be examined under that provision because the time limit prescribed by Section 543 of the Act had already expired. At that stage, I gave an opportunity to the first respondent to file a reply.

4. The reply raised some questions regarding the non-joinder of other directors and also claimed that one Shri S.K. Sangle should also be joined as he had given a receipt for the vehicle. In this reply, it was claimed that Shri S.K. Sangle had taken the vehicle on behalf of M/s. Express Financiers (P.) Ltd. It was claimed that the first respondent was not responsible to restore the vehicle or its price. On the basis of these pleadings certain issues were framed on 30th April, 1975. In view of the developments that have since taken place, the issues that now survive are only the following:

" Issue No. 4:--Whether respondent No. 1 has accounted for the vehicle or the value thereof to the company ?

Issue No. 5 :--Whether the application is barred by time ?

Issue No. 6:--To what relief, if any, is the official liquidator entitled ? "

5. The other three issues which I have not specified were directed to be tried as preliminary issues and were in fact decided on 2nd September, 1975, when I held that proceedings could go on u/s 446 of the Companies Act both against the first respondent as well as the second respondent.

6. In support of the claim the official liquidator examined Shri B.L. Soni, who is a junior technical assistant in the office. He proved a number of documents which will be referred to later. At the conclusion of this evidence the court summoned a number of court witnesses in order to find out where this vehicle had gone. The witnesses summoned were Shri Shri L.C. Aggarwal, an ex-director of the company, S.K. Sangle who signed the receipt, and Shri N.K. Saxena, who is

connected with the second respondent. Finally, the first respondent made his own statement as his own witness.

7. One important letter in this case was written by the first respondent to the Chowkidar of the company calling upon him to deliver the Tata Mercedes Benz Truck No. MYW 4666 to M/s. Express Financiers (P.) Ltd. This bears the signatures of Shri S.K. Sangle and is dated 12th June, 1967. The statement of this witness as court witness No. 2 was that he had signed this but he does not remember why he signed. He claimed that he had not taken delivery of the truck for M/s. Express Financiers (P.) Ltd. though he was a friend of Shri N.K. Saxena. When he was examined he was working in the Oriental Fire and General Insurance company. He further added that he was in insurance business at the relevant time. This witness was cross-examined by counsel for the first respondent. In spite of this, he was unable to say why he had signed this letter. He, however, did accept the possibility that he had carried the letter at the instance of Mr. Aggarwal as a special case. He also said that his father deposited Rs. 15,000 with the company in liquidation. Later, in his statement in answer to a court question he appears to have recalled that he had signed this letter in token of receipt of the letter to be delivered to M/s. Express Financiers (P.) Ltd.. As can be seen, this statement is most inconclusive and it may be that this witness acted on M/s. Express Financier's behalf or he might not have. It is, Therefore, necessary to turn to the other court witnesses. Shri L.C. Aggarwal, C.W. 1, who is an ex-director of the company, was definite that the truck was handed over to M/s. Express Financiers (P.) Ltd. for sale and the note was given to enable them to take delivery of the vehicle. His statement is that Shri S. K. Sangle was a friend of the management of M/s. Express Financiers (P.) Ltd. who used to work for that firm as their insurance agent. He was also definite that this truck had remained with M/s. Express Financiers (P.) Ltd. who had not sent the sale proceeds. The third witness was Shri N. K. Saxena who claimed that the company was a big creditor of the company in liquidation to the extent of Rs. 40,000 which has now been reduced to Rs. 1,575. But he claimed that the truck was not delivered. He was told that it was a question of deciding that either the company had the truck or he had got the truck, but he claimed that in that case some document should have been obtained from his company. He said there was no evidence to show that the truck had been handed over to the second respondent. He further claimed that he was looking after the company in June, 1967. In cross-examination by Mr. A.K. Jain, he admitted that Mr. Sangle was working as the insurance agent of the company for several years. He further said that M/s. Express Financiers (P.) Ltd. used to advance money to the company in liquidation. He was asked how the sum of Rs. 40,000 had been paid back but he could not give any details of how and when the payment was made. He said that a letter similar to Ext. P-1 was not received and he had not been able to locate the same in the office of the second respondent in spite of search.

8. The statement of Shri H.K. Dass Sharma is that the letter relating to the truck was signed by him and initialled by Shri L. C. Aggarwal, another director, and

Shri S.K. Sangle had signed it in token of taking delivery of the vehicle. M/s. Express Financiers (P.) Ltd. have not given the proceeds of the truck. He was asked by the court as to how the truck could be sold without documents of transfer. He replied that M/s. Express Financiers (P.) Ltd. was in a better position to finance the truck for higher prices and after adjustment of their dues had to pay the balance. He had to admit that the company in liquidation was still the legal owner of the truck. This is the oral evidence.

9. The material document is the letter addressed to the chowkidar. Another letter concerning the truck was later on received from the Regional Transport Office, Dharwar, showing that, according to the record, the registered owner continued to be Shri Subeg Singh, son of Mustan Singh, with effect from 27th August, 1962 ; this is Ext. P-11. It is stated by the same department that no tax had been paid in respect of this vehicle after 1st October, 1963.

10. Now, turning to the decision to be recorded in this case, it is fit to keep in mind that the first question that arises is whether the claim is within time. The winding-up order was passed on 12th August, 1968, and this claim was made only on 19th October, 1973. If the limitation period is only three years calculated from the date of the winding-up order and there is a further period of one year u/s 458A of the Companies Act, 1956, then the period of limitation expired long ago. However, there are reasons for holding that the claim is within time in respect of respondent No. 1, because of Section 10 of the Limitation Act, 1963. There are some reported cases showing that a director of a company is not an "express trustee", within the meaning of Section 10 of the Limitation Act, 1963. For instance, in the discussion, in *Brahmayya and Co. Official Liquidators, Hanuman Bank Ltd. (In Liquidation) Vs. V.S. Ramaswami Aiyar and Another*, it has been held that the position of a director in England and a director in India is different because though there is no bar of limitation against a director in England the provisions of Section 10 of the Limitation Act do not apply to constructive trustees. Personally, I do not find this distinction correct because for one thing, since the present Section 10 of the Limitation Act of 1963 does not use the term "express trustees", I do not know why it does not apply to constructive trustees. Furthermore, the language of the section is :

" ... no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time....."

11. The problem of interpretation relates to what is meant by "specific purpose" within the meaning of this section. Clearly, when a director has possession of the assets of a company he holds them for a specific purpose. He is not merely a constructive trustee in the sense that he has become a trustee by reason of being a company director, but he is in fact a trustee because a company can only operate through its directors. I am not going deeper into this question because if

the case of the official liquidator is correct and Shri H.K. Dass Sharma obtained the property from the company by means of writing a letter addressed to the chowkidar, then clearly he took away the truck for being used for the company. The principle of the Limitation Act regarding the running of time is that at some stage the person who is being sued must have an adverse interest from which time the limitation period commences. If the property is with an agent, servant, employee or with any other person as a custodian he does not hold that property adversely and accordingly time does not run. Section 10 of the Limitation Act is only an example of this as applied to express trustees. On the same principle a tenant of immovable property can never hold adversely to his landlord and a person who has been custodian of immovable property cannot hold adversely to a person who has given him that property, unless he ceases to hold the property or that relationship is changed. In this case, time does not start running for the purpose of limitation and hence the claim cannot be barred against an ex-director. I would, accordingly hold that the claim is within time qua the first respondent even though the period of five years has expired for the purpose of Section 543.

12. There is another way of approaching the same problem which I will now set out while deciding whether the claim is within time in relation to the second respondent. For this purpose, it is necessary to refer to Article 70 of the Limitation Act which says that a suit for recovery of movable property deposited or pawned from a depositor or pawnee is three years from the date of refusal after demand. The principle applicable to this question is obviously exactly the same as I have just set out in the above discussion relating to Section 10. If say, "A" pawns a watch with a money-lender and takes a loan on the same then the pawn-broker holds the property in a kind of quasi-trust, he does not become an adverse holder to the owner. Any length of time may pass, but the claim for return of the watch will not become time barred unless the pawn-broker refuses to return the watch. From the date of refusal, the period of three years begins to run. The same principle is applicable to any other deposit. It may be necessary here to recall that the Limitation Act, 1963, contains Article 70 in place of the old Article 145 in the previous Act, where the starting point was the date of deposit, but the limitation period was thirty years. At that time, there was a difference of judicial opinion as to which cases the section covered, as the period was thirty years instead of the normal three years. The present provision has been altered to cover some of the judicial problems raised in previously reported cases. The present provision applies if a deposit has taken place in this case. When movable property is given for a specific purpose to any person to be used in a particular way then it is, in my opinion, a deposit with that person and the period of limitation has to commence from the date of refusal to return the article.

13. On the present facts, the application of Article 70 is quite clear. Either this truck, which; was with the company was taken away by Shri H.K. Dass Sharma as a director by writing a letter stating that it should be given to M/s. Express Financiers (P.) Ltd. or the truck was given to M/s. Express Financiers for selling

the same and paying the sale proceeds to the company in liquidation. In either case, the company had deposited the truck with either of these persons for being utilised in a specified manner. The limitation period would, Therefore, start from the date on which they refused to give back the truck and not from the date of the winding-up order or the date on which they took away the truck.

14. Now the question for consideration is what the date was on which either of these individuals refused to give back the truck. The letter addressed to M/s. Express Financiers (P.) Ltd. by the official liquidator is dated 9th September, 1969, and is Ex. P-2. It is a request to the effect that the truck in question had been given to this company and intimation should be given regarding the sale proceeds. Apparently, the second respondent never replied to this letter and hence reminders dated 22nd May, 1972, 28th June, 1972, 23rd August, 1972, and 11th September, 1972, were sent. (I mention these letters though they are not exhibited). But there is a reply, and this is the only reply from M/s. Express Financiers (P.) Ltd., dated 30th September, 1972. It is Ex. P-3. It is by this letter that M/s. Express Financiers (P.) Ltd. said that this truck was not delivered to them and said some other truck had been sold by the company itself. The exact words used are :

" They did not deliver any truck for sale to us. As far as we remember, they had themselves sold one second hand unserviceable truck whose registration number, etc., is not known to us and promised to pay a part of the sale proceeds to us towards the loan they had to pay to us but they did not fulfilll their promise. "

15. This letter can be taken as the date of refusal and the period of three years specified in Article 70 would thus start from 30th September, 1972, qua respondent No. 2.

16. Turning now to the other respondent No. 1 there is Ex. P-4 on record, which is a letter sent on 31st May, 1972, to the first respondent. That letter reads :

" Dear Sir,

I have to say that as per records the vehicle, which was taken by the above debtor on hire purchase, was ultimately seized by the company and was handed over to Express Finance by the company for sale.

In reply to the above you have stated in your letter dated 22-5-71, personally handed by you to this(?) that the vehicle was given to Express Financiers Pvt. Ltd. against their dues. But on the other side you have shown an amount of Rs. 20,263"68 against Shri Satya Pal Bhutani as per statement of affairs filed by you. Please clarify the position. "

17. There are some other letters written by the first respondent which are Exts. P-5, P-6 and P-7 stating that the amount of sale proceeds had either been credited to M/s. Express Financiers (P.) Ltd. or to Shri Satya Pal Bhutani. It is also said in the subsequent letters that the first respondent had visited the office of M/s. Express Financiers (P.) Ltd. who would give necessary information to

confirm the exact entries. The last letter dated 26th August, 1972, says that the vehicle was definitely delivered to M/s. Express Financiers (P.) Ltd., and that firm has not been able to locate the entry but further attempts would be made to verify the facts because it was 5 years since the transaction had taken place. From these letters it is obvious that there was no refusal by Shri H.K. Dass Sharma to return the truck Which he had given it to Express Financiers (P.) Ltd. Hence, it can be said that Article 70 which fixed a period of 3 years from the date of refusal would mean that the claim is not time barred against Shri H.K. Dass Sharma because he had not refused to return the truck by saying that the truck was sold to somebody else or on any other ground.

18. Shortly put, if this truck was given by Shri H.K. Dass Sharma to M/s. Express Financiers (P.) Ltd., in that case the limitation period is to be calculated from 13th September, 1972, but if the truck was retained by Shri H.K. Dass Sharma then he has no excuse for its non-return and has never definitely refused. In either case the claim is within time against both the respondents. I decide this issue by holding that the application is within time against both respondents.

19. Now, turning to the merits of the case for deciding whether the truck went to M/s. Express Financiers (P.) Ltd. or not ? There is on the one hand the letter addressed to the chowkidar coupled with the statements of Shri C. L. Aggarwal, an ex-director, as well as Shri H.K. Dass Sharma himself. There is also a non-committal "statement by Shri S.K. Sangle who has tried to hide the facts from the court by vague statements. M/s. Express Financiers Private Ltd., respondent No. 2, never defended this case, and became ex parte. In spite of a letter being addressed to this company on 9th September, 1969, and being marked immediate (Ex. P-2), no reply was given by M/s. Express Financiers (P.) Ltd. till many reminders had been sent as mentioned above and it was only in September, 1972, that a reply was sent. I think it is fully established from the conduct of this company that they did get the truck and that they did not want to defend this case. I believe the statements of Shri C.L. Aggarwal and Shri H.K. Dass Sharma that the truck was given to them and I reject the evidence of Shri Sangle and Shri Saxena.

20. I accordingly come to the conclusion that this truck was received by the company, respondent No. 2, and they have not given the sale proceeds. It is also apparent that the record of the truck as disclosed by the Regional Transport Office, Dharwar, shows no transfer, and shows the truck has not been used since 1963. Normally, no truck can be sold unless transfer documents are executed. This brings me to the conclusion that possibly this truck was sold as scrap and not as a going vehicle. This is how M/s. Express Financiers were able to dispose of the truck without any transfer documents. Possibly the truck was so old and in such a poor condition, that it could not be sold in the ordinary way. This is an inference from the fact that since 1963 this truck had not been in service, and must, Therefore, have been in unserviceable condition. The inference I draw from the facts is that M/s. Express Financiers (P.) Ltd., who were at one time a

creditor of the company in liquidation to the extent of Rs. 40,000 or so, for the purpose of paying off their dues, were given this truck, but the proceeds of the same have not been paid to the company in liquidation.

21. This brings me to a primary problem in this case regarding the valuation to be put on the truck for purposes of passing a payment order. The reliefs claimed in the case are :

" Return of the truck or payment of the sale proceeds thereof or payment of the market value thereof."

22. As I have come to the conclusion that M/s. Express Financiers (P.) Ltd. have disposed of this truck by dismantling the same, I would ordinarily have passed an order that they should pay the sale proceeds. As I have found it impossible to assess the sale proceeds, I find it difficult to pass the order in this way. According to the books of the company in liquidation the value of the truck shown as outstanding from the hirer of this truck at the time of re-possession was Rs. 20,863.68. Taking this to be the approximate value of the truck as a going vehicle, I would now make a rough estimate that the dismantled parts of such a truck could be sold for at least half this amount. I would, Therefore, assess the value of the dismantled truck as being Rs. 10,431.84. This appears an unsatisfactory valuation, but I feel that the non-production of the books of the second respondent and its failure to contest the case should not result in any advantage to that respondent. It is well settled that whatever the difficulties may be, the court has to compute the quantum of damages as best it can on the material available. In these circumstances, I have assessed the value to be paid at Rs. 10,431.84.

23. Now I have to see against whom the payment order is to be passed. The order is to be passed against the second respondent M/s. Express Financiers (P.) Ltd., because I have held that they have sold the truck by dismantling the same and not paid the proceeds. However, in case the money cannot be realised from this company for any particular reason, then the responsibility will be on the ex-director of the company, Shri H.K. Dass Sharma, who did not take a proper receipt from M/s. Express Financiers (P.) Ltd., before handing over the vehicle and in case the money is lost, he is liable for failure to produce the vehicle which was under his control. I would accordingly assess the amount of the payment order as being Rs. 10,500 including costs which would be realisable from the second respondent in the first instance. In case the entire amount or any portion thereof cannot be realised from that respondent then the balance or the whole amount, as the case may be, can be realised from the first respondent whom I hold liable only if the second respondent is unable to pay the amount or the amount cannot be realised from that respondent. No other order as to costs.