
(2013) 05 GUJ CK 0045
In the Gujarat High Court

Case No : Civil Application No. 288 of 2013 in O.J. Appeal No. 12 of 2013 in Official Liquidator Report No. 17 of 2013 in Company Petition No. 21 of 1984 and Civil Application No. 305 of 2013 in Civil Application No. 288 of 2013 and O.J. Appeal No. 12 of 2013 in Of

Roshan Maganlal Desai

APPELLANT

Vs

Liquidator of Prasad Mills Ltd.

RESPONDENT

Date of Decision : 09-05-2013

Acts Referred:

Companies Act, 1956 — Section 457(1), 459

Citation : (2013) 05 GUJ CK 0045

Hon'ble Judges : R.R. Tripathi, J;A.G. Uraizee, J

Bench : Division Bench

Advocate : Sudhir Nanavati and Mr. Anal S. Shah, s No. 1 in O.J. C.A. No. 288 of 2013 and O.J. Appeal No. 12 of 2013, Mr. Saurabh Soporkar and Mr. A.S. Vakil, s No. 1-2 in O.J. C.A. No. 305 of 2013, for the Appellant;

Final Decision : Allowed

Judgement

Ravi R. Tripathi, J.—The present application is filed by one Roshan Maganlal Desai seeking Leave to Appeal to prefer an appeal challenging order dated 18.04.2013 passed in Official Liquidator Report No. 17 of 2013 by the learned Company Judge. The matter was on Board on 06.05.2013 when learned Senior Advocate Mr. Saurabh Soparkar submitted before this Court that he has instructions and he proposes to appear with learned Advocate Mr. A.S. Vakil for the petitioners in Company Petition No. 264 of 2008. The matter was kept on 08.05.2013. On 08.05.2013, learned Senior Advocate Mr. Soparkar with learned Advocate Mr. Vakil filed an affidavit-in-reply on behalf of opponent nos. 2(A), 2(B) and 3 i.e. proposed opponents. The proposed opponents nos. 2(A), 2(B) and 3 filed O.J. Civil Application No. 305 of 2013 wherein, it is prayed that:-

4(A) To implead the present Applicants as Opponent Nos. 2(A), 2(B) and 3 in O.J. Civil Application No. 288 of 2012 and O.J. Appeal No. 12 of 2013 (as the same is

already numbered by the registry of this Hon''ble Court).

Without going into technicalities whether such application can be filed by the proposed opponents, and taking into consideration the fact that light from any corner will be welcomed, O.J. Civil Application No. 305 of 2013 is allowed, to which learned Senior Advocate Mr. Sudhir Nanavati with learned Advocate Mr. Anal Shah for the appellant in O.J. Appeal No. 12 of 2013, has also not objected.

1.1. Taking into consideration the contents of the application (O.J. Civil Application No. 288 of 2013) and taking into consideration the controversy raised, this Court is of the opinion that this Civil Application deserves to be allowed and the same is, accordingly, allowed. Permission is granted to prefer an appeal, i.e. O.J. Appeal No. 12 of 2013 and it is taken up for consideration.

O.J. APPEAL No. 12 of 2013

2. At the request of learned counsel for the respective parties, O.J. Appeal is taken up for hearing.

3. The present O.J. Appeal is filed, being aggrieved by the judgment and order dated 18.04.2013 passed by the learned Company Judge in Official Liquidator Report No. 17 of 2013 in Company Petition No. 21 of 1984. The learned Company Judge is pleased to reject Official Liquidator Report No. 17 of 2013, which was filed seeking reliefs as under:-

16(A) This Hon''ble Court may be pleased to permit the Official Liquidator to entrust the brief to Shir Roshan Desai, Advocate along with the Panel Advocate of the Official Liquidator in this matter.

(B) This Hon''ble Court may be pleased to permit Official Liquidator to intimate Shri Roshan Desai, Advocate as that in aforesaid cases the fees will be paid as approved and sanctioned by the Hon''ble Company Court.

4. Learned Advocate Mr. Hiren Modi appears for the Official Liquidator and when it is inquired as to what is the reference to context of filing of this Official Liquidator Report No. 17 of 2013, learned Advocate submitted that this Official Liquidator Report is filed pursuant to an order passed by the Division Bench of this Court in O.J. Appeal No. 50 of 2012 wherein, in paragraph 7, the Division Bench observed as under:-

7. In view of the above discussion, this appeal is allowed. The judgment and order dated 18/19th July, 2012 is quashed and set aside subject to the aforesaid directions. In all matters wherein appointment/engagement is not approved by the Court, the Official Liquidator shall move an application seeking approval at the earliest preferably within three months from the date of receipt of a copy of this order. The Official Liquidator is directed to assign the matters to the learned advocate (appellant herein) wherein there is a specific approval granted by the Court or his appointment is approved or ordered by a specific order.

(Emphasis Supplied)

5. Learned Advocate appearing for Official Liquidator also clarified that is the reason why Official Liquidator Report is filed in Company Petition No. 264 of 2008, which is said to be late by about 41/2 years. As stated herein-above, Official Liquidator Report is filed in view of the directions given by the Division Bench and, therefore, it is required to be treated to have been filed in time.

6. Learned Senior Advocate Mr. Sudhir Nanavati appearing for the appellant in O.J. Appeal No. 12 of 2013 submitted that the order of the learned Company Judge is required to be quashed and set aside mainly on the following grounds.

6.1. Learned Senior Advocate for the appellant submitted that in paragraph 9, the learned Company Judge has observed as under:-

9. Considering the entire conduct of the Official Liquidator referred herein above, I am of the view that the Official Liquidator has not complied with the order dated 22.3.2013 passed by this court in its true letter and spirit and instead of that he has handed over the cases which are pending before this court i.e. Company Application No. 34/2013 and OJMCA No. 187/2013 to the Special Arguing Counsel as referred above and also requested the Panel Advocate to give cooperation to the Special Arguing Counsel. prior to filing of the present OLR No. 17/2013, for the reasons best known to him In my view this action of the Official Liquidator appears against the observations made by the Division Bench in paragraph No. 7 of its order dated 6.11.2012 passed in O.J. Appeal No. 50/2012. Moreover, the said conduct of the Official Liquidator appears to be overreaching the process of law because yet the order which has been sought for by this application has not been passed and the Official Liquidator is making his submissions today as referred above, in spite of that, it appears that, to pressurise the court the Official Liquidator has filed detailed and lengthy affidavit referred herein-above along with various documents for which he has no idea as to why the same has been produced. Hence, considering all these, in my view, this application deserves to be dismissed more particularly when the hearing of Company Petition No. 264/2008 is most probably over. The request to avail services of Special Arguing Counsel Mr. R.M. Desai by the Official Liquidator referred above for Company Application No. 34/2013 as well as O.J. M.C.A. No. 187/2012 is also rejected more particularly because the Panel Advocate Dr. (Mrs.) Ameer Yajnik who is in charge of this matter since long does not want the services of any other counsel.

6.2. Learned Senior Advocate for the appellant submitted that it can be seen from the aforesaid paragraph that the learned Company Judge is pleased to observe that:

... Hence, considering all these, in my view, this application deserves to be dismissed more particularly when the hearing of Company Petition No. 264/2008 is most probably over. The request to avail services of Special Arguing Counsel Mr. R.M. Desai by the Official Liquidator referred above for Company Application No. 34/2013 as well as O.J. M.C.A. No. 187/2012 is also rejected more

particularly because the Panel Advocate Dr. (Mrs.) Amee Yajnik who is in charge of this matter since long does not want the services of any other counsel.

(Emphasis Supplied)

6.3. Learned Senior Advocate for the appellant submitted that without going into any other aspect of the matter, only from the aforesaid factors, which are taken into consideration by the learned Company Judge to reject Official Liquidator Report No. 17 of 2013, the order is required to be quashed and set aside and the matter is required to be remitted back to the learned Company Judge to pass a fresh reasoned order. Learned Senior Advocate for the appellant submitted that the fact that the learned Company Judge has used the words "most probably" shows the state of uncertainty, meaning thereby, the learned Company Judge is not sure whether the hearing is concluded or not. Besides that when the learned Company Judge ordered that prayers in Company Application No. 34 of 2013 as well as O.J. Misc. Civil Application No. 187 of 2012 is also rejected, it is suggestive of the fact that the learned Company Judge has not assigned any separate reason for not granting the prayer qua these two applications. Last but not the least, learned Senior Advocate for the appellant submitted that the learned Panel Advocate stated before this Court that the learned Panel Advocate has no objection if the matter is assigned to Special Arguing Counsel Mr. Roshan Desai, and sanction is granted for the same by the Court and if she is required to assist the Special Arguing Counsel, she will be having no objection in that. In light of that statement, the observation of learned Company Judge that "the learned Panel Advocate does not want the services of any other counsel, are of no consequence.

(Emphasis Supplied)

6.4. Learned Senior Advocate for the appellant invited attention of the Court to the relevant paragraph of the judgment of the Division Bench and also attention of the Court to the affidavit-in-reply filed by Official Liquidator in Official Liquidator Report No. 17 of 2013 and other documents. As the Court is to decide this matter on the aforesaid three factors, other submissions are not required to be dealt with by the Court in detail.

7. Learned Senior Advocate Mr. Soparkar for the newly added opponents no. 2(A), 2(B) and 3 in this O.J. Appeal, vehemently submitted that he is not able to understand the insistence on the part of the appellant to appear in this matter [matter of Prasad Mills Ltd. (in liquidation)]. Besides that learned Senior Advocate for the opponents submitted that the order of the Division Bench, which is sought to be relied upon for filing of Official Liquidator Report No. 17 of 2013, is of no avail to the appellant and for that reason, even to the Official Liquidator, because the Division Bench said that:

... In all matters wherein appointment/ engagement is not approved by the Court, the Official Liquidator shall move an application seeking approval at the earliest preferably within three months from the date of receipt of a copy of this

order....

7.1. Learned Senior Advocate for the opponents submitted that this necessarily means about the matters which are pending and which are assigned to the appellant and in which the appellant has appeared.

7.2. Learned Senior Advocate for the opponents strenuously tried to convince this Court that the appellant was not appearing in this matter i.e. Company Petition No. 264 of 2008 and, therefore Official Liquidator Report No. 17 of 2013 has rightly been rejected by the learned Company Judge.

7.3. On perusal of the judgment and order of the Division Bench, it is specifically mentioned in paragraph 3.2., wherein the Division Bench has reproduced paragraph 21 of Official Liquidator Report No. 294 of 2011. Paragraph 21 of Official Liquidator Report is in the form of list of the matters which are entrusted to Shri Roshan Desai, Solicitor & Advocate, by Official Liquidator and in that "Entry No. (f) Revival Scheme in respect of Prasad Mills Ltd.," is also mentioned.

7.4. At this stage, learned Advocate Mr. Hiren Modi appearing for the Official Liquidator made available for perusal a communication dated 31.10.2011, which is addressed to M/s. Roshan Desai & Co., Solicitors & Advocates, by the Assistant Official Liquidator (H.R. Patel), wherein the subject captioned is "In the matter of M/s. Prasad Mills Co. Ltd. (In liqn.) Company Petition No. 264 of 2008 and Company Application No. 427 of 2008."

7.5. Learned Senior Advocate for the opponents tried to convince this Court that the appellant has not appeared in this particular matter for the Official Liquidator but then, Official Liquidator Report No. 294 of 2011 is filed as back as on 27.12.2011 when this controversy was not vogue and, therefore, the Court is not able to accept the statement made by learned Senior Advocate for the opponents in this regard.

8. So far as the propriety part is concerned, learned Senior Advocate for the opponents submitted that this very Advocate (appellant herein) has appeared in Company Petition No. 264 of 2008 for State Bank Of India and later on, for Employees State Insurance Corporation ["ESIC" for short] and it is, thereafter, that now he is going to appear for Official Liquidator. Learned Senior Advocate for the opponents submitted that a judicial notice can be taken of the fact that interest of State Bank of India on one hand and interest of ESIC and Official Liquidator on the other are not similar but different. To an extent, it can be said that they are having conflicting interest and therefore, the appellant ought not to have accepted even if the matter is assigned to him by Official Liquidator in the present proceedings.

9. This Court is of the opinion that in the proceedings before the Court, interest of secured creditors and interest of preferential creditors and Official Liquidator cannot be said to be conflicting, more particularly, when not only the secured creditors are paid but, even the preferential creditors are also paid. Therefore,

the question remains of representing the Official Liquidator only in the present proceedings by the appellant and, therefore, this Court is of the opinion that there will be no breach of propriety if Official Liquidator engages appellant and appellant accepts such assignment.

9.1. Learned Senior Advocate for the opponents submitted that so far as attack on the order passed by the learned Company Judge on the ground that it was not specifically prayed for sanction to the appointment of the appellant in Company Application No. 34 of 2013 as well as O.J. Misc. Civil Application No. 187 of 2012 is concerned, the same is rejected by the learned Company Judge is without any substance because it is specifically recorded by the learned Company Judge in paragraph 2 of the order impugned wherein the learned Company Judge has recorded:

2. Heard the Official Liquidator Mr. B.C. Meena. The Official Liquidator submitted that he wants to file an additional application in support of the application dated 11.03.2013 filed by him which is listed for hearing today. The said request is rejected at the outset.

Similarly in paragraph 4, the learned Company Judge has recorded that:

4. The Official Liquidator has further submitted that by way of prayer made in para 16(A), referred above though prima facie it appears to be a limited one, in fact he wants service of learned Senior Arguing Counsel Mr. R.M. Desai for the other Company Application No. 34 of 2013 as well as O.J. M.C.A. No. 187 of 2012 as well as if any matter will be filed in future related to Prasad Mills Ltd., he wants services of Special Arguing Counsel Mr. Desai.

9.2. Learned Senior Advocate for the opponents submitted that in view of that it may be noted that in Official Liquidator Report No. 17 of 2013 there was no prayer in writing but, there was prayer made by Official Liquidator orally and that was considered and rejected by the learned Company Judge. The question still remains that the learned Company Judge has not assigned any separate reasons for not granting the prayer for these two matters and, therefore, this Court, is of the opinion that the order requires to be examined in light of that.

9.3. Learned Senior Advocate for the opponents then invited attention of the Court to provisions of Section 459 coupled with Section 457(1) and (3) of the Companies Act, 1956 along with Rule 307 of the Companies (Court) Rules, 1959 and submitted that the question of engaging an Advocate by Official Liquidator stands on a different footing and is not at par with the engagement of an Advocate by private client. Learned Senior Advocate for the opponents submitted that the Legislature in its wisdom has placed the matter under the control of the Court and, therefore, firstly, the Official Liquidator should not and in this case, has rightly not felt offended when Official Liquidator Report No. 17 of 2013 is rejected by the Court and upon so, even the appellant ought not to have felt offended by the same and even if he has felt offended, there is no right to file appeal in his favour and certainly no ground for allowing this appeal in his favour.

10. This Court is of the opinion that under the aforesaid provisions, the Company Court is entrusted with the control over the matter of engaging an Advocate and Official Liquidator being the trustee of the Company in liquidation and its property, this provision is made to have a check on his power to spend money from the funds of the Company in liquidation. But, certainly, the Official Liquidator is supposed to get his case presented before the Company Court and for that he can always pray for grant of sanction to engagement of an Advocate or Counsel of his choice. That is the reason this Court is examining as to whether this order of the learned Company Judge can be said to be an order which stands the test of legality and validity or is required to be interfered with by this Court. In view of the aforesaid three factors which are pointed out by learned Senior Advocate for the appellant, this Court is of the opinion that in view of the aforesaid three factors, the order of the learned Company Judge does not clear the test of legality and validity and, therefore, the order is required to be quashed and set aside and the matter is required to be remitted back to the learned Company Judge for being decided afresh, assigning reasons for the conclusion which may be reached by the learned Company Judge, after hearing all the parties concerned.

11. In view of the aforesaid, the judgment and order of the learned Company Judge dated 18.04.2013 passed in Official Liquidator Report No. 17 of 2013 is quashed and set aside. The matter is remitted back to the learned Company Judge for being decided after affording full opportunity of hearing to the parties concerned. On the request of learned Advocates, it is requested that the learned Company Judge may give due priority to the matter and decide the same at the earliest.

12. At this stage, learned Senior Advocate for the appellant, on instructions from the appellant who is present in the Court, states that the appellant will request the learned Company Court to grant him hearing in case Company Petition No. 264 of 2008 is required to be heard again. The appeal is allowed to the aforesaid extent.