
(1997) 03 KL CK 0030

In the High Court Of Kerala

Case No : M.C.A. No. 33 of 1991 in C.P. No. 45 of 1989

Sajida Book Shop

APPELLANT

Vs

Kaumudi Exporters (P) Ltd. and Others

RESPONDENT

Date of Decision : 24-03-1997

Acts Referred:

Companies Act, 1956 — Section 543

Citation : AIR 1997 Ker 285 : (1999) 96 CompCas 544 : (1997) 3 ILR (Ker) 180

Hon'ble Judges : K.A. Abdul Gafoor, J

Bench : Single Bench

Advocate : Mathai M. Paikadey and Mohan Pulikkal, for the Appellant; C.M. Devan, G. Vaidyanathan and K. Moni, for Official Liquidator, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Abdul Gafoor, J.—The petitioner in the Company Petition has come up with this application under Sections 542 and 543(1) of the Companies Act seeking an order that respondents 2 to 8 shall jointly and severally contribute the assets of the 1st respondent-company in liquidation and pay the Official Liquidator all the sums that they are liable to contribute together with interest. The applicant alleges that respondents 2 onwards as the former Managing Director and Directors of the 1st respondent-company in liquidation have misapplied the funds of the Company including the amount made as security in the Company during trade arrangement between the Company and himself and thereby they have become liable to be proceeded against u/s 543 of the Companies Act.

2. Earlier the applicant filed C.P.45/89 alleging that "the respondent-Company is indebted to him to the tune of Rs. 5,54,910/- (Rupees Five Lakhs fifty four thousand nine hundred and ten only) with 12% interest from 9-8-1986". It had been alleged in the Company Petition that he "applied to the company for payment of the debt by their notice of demands and served on the respondent-Company at its registered office..... But Company has failed and neglected to pay the same or any part thereof. The applicant alleged in the

Company Petition that the Company was "unable to pay its debts and is also insolvent". Accordingly, he sought an order to wind up the respondent-Company. Accordingly by order dated 7-11-1990 the Company was ordered to be wound up.

3. It is after an year he has again approached with this Miscellaneous Company Application u/s 543 which enables any creditor or contributory, apart from Official Liquidator or liquidator, to apply to the Court, if it appears that any person who has taken part in the promotion or formation of the Company or any past or present Director, Manager or Officer,

(a) has misapplied, or retained, or become liable or accountable or, any money or property of the Company; or

(b) has been guilty of any misfeasance or breach entrust in relation to the Company.

While trying such an application the Court can examine into the conduct of the person or Director against whom the allegation of commission or omission which resulted in mis-application or misfeasance has been made. It is invoking that provision the applicant has approached this Court with mis M.C.A. The allegation in respect of the respondents 2 to 8 who are the former Managing Director or Directors or Officers of the Company is that they retained or mis-applied or mis-appropriated the fund of the Company and they have become liable or accountable to refund the said sum of Rs. 5,54,910/- to the Company and their action in the matter of retention or misapplication or mis-appropriation amounts to misfeasance or breach of trust in relation to the Company.

4. A reading of the Miscellaneous Company Application shows that there is no specific allegation against any of the former Managing Director or Directors as to the role they have played in the alleged mis-application or mis-appropriation and consequent misfeasance. No details have been supplied in the application so that the respondents can answer to such allegation. Even in evidence, the applicant has no definite case about the role of any, or each of the respondents. A bold allegation regarding purchase of land by another company of which the respondents 2 to 8 are stated to be Directors alone, is made.

5. The allegation in support of an application u/s 543 shall always be specific with reference to each of the persons against whom allegations are made. What is to be found in an enquiry u/s 543 being personal liability, positive pleading shall be there in respect of each of the Directors or officers against whom allegations of mis-application or mis-appropriation or consequent misfeasance is made. The nature of allegations against the Directors for being proceeded u/s 543 shall always be serious and therefore the application should contain specific acts of commission or omission on the part of each of the Directors against whom allegations are made. This aspect has been considered by the Supreme Court in *The Official Liquidator Vs. Raghawa Desikachar and Others*, . It has been held as follows (Para 7):

"..... It may be mentioned that misfeasance action against the Directors is a serious charge. It is a charge of misconduct or mis-appropriation or breach of trust. For this reason the application should contain a detailed narration of the specific acts of commission and omission on the part of each Director quantifying the loss to the Company arising out of such acts or omissions."

This is a burden cast on the applicant to make liable the former Directors. The applicant has not discharged that heavy burden cast on him. There is barely no substance in the application except a vague averment that "the respondents 2 to 8 who are former Managing Director and Directors and Officers of the Company retained or mis-applied or mis-appropriated and they have become liable or accountable to refund the said amount". Applying the principles laid down by the Supreme Court in the decision cited above, the applicant cannot successively maintain the petition with this allegation.

6. The applicant submits that he had made a deposit of Rs. 5,54,910/- with the Company in liquidation as a security of trade deposit when there was trade arrangement between the applicant and the Company in liquidation. That being a security deposit, the applicant submits that he is not a creditor to the Company. That amount is not a debt or credit but it is an amount held by the Company in liquidation at the material time as a trust. To support this condition, the applicant relies on the decision in the matter of the Travancore National and Quilon Bank Ltd. AIR 1939 Mad 337. Even if it is a trust, the applicant's remedy is not u/s 543. The Madras High Court has subsequently considered in The Karnataka Films Ltd. Vs. The Official Receiver, Madras, as such the Official Liquidator of Chitrakala Movietone Ltd. and Others, a situation

"Where a sum of money is deposited by the sole distributor of a film producing company with the company as a permanent deposit for a period of five years",

and it was held that,

"The fact that the Directors utilised the money in the business of the Company without the knowledge and express consent of the depositor cannot be taken as a test to find out whether a trust had been created.

The depositor is entitled to a preferential treatment from the Company but the remedy of the depositor is to proceed against the assets of the Company....."

So, even if there is a trust created as contended by the applicant his remedy is to proceed against the assets of the Company in accordance with law and not to file an application to file an application u/s 543. In his evidence, the applicant has, during cross-examination, made it amply clear that he has approached this Court with this application to get back his money and not make the persons who had alleged to have mis-applied the funds of the Company to contribute to the assets of the Company. Thus, the application itself is a result of mis-conception.

7. Even if the contention of the applicant that mis-application will amount to misfeasance as laid down in Indo-Burma Industries Ltd. (1957) 27 Com Cas

390 : AIR 1956 Cal 1648), is accepted, in the absence of specific allegations which are necessary to pin point the mis-application or mis-appropriation to each of the respondents, the application cannot be entertained. This aspect has been reiterated by Delhi High Court in 1971 Com Cas 101 (sic) following the decision in The Official Liquidator Vs. Raghawa Desikachar and Others, .

In the aforesaid circumstances, the M.C. A. 33/ 91 fails. It is dismissed. No costs.