

(2006) 10 KL CK 0081
In the High Court Of Kerala
Case No : M.F.A. No. 661 of 1997

Sajida Book Shop

APPELLANT

Vs

Kaumudi Exporters (P) Ltd.

RESPONDENT

Date of Decision : 18-10-2006

Acts Referred:

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

Citation : (2007) 135 CompCas 273 : (2007) 1 KLJ 56 : (2006) 4 KLT 763 : (2007) 80 SCL 221

Hon'ble Judges : K.S. Radhakrishnan, J;K. Padmanabhan Nair, J

Bench : Division Bench

Advocate : Mathai M. Paikadey and Sebastian Tharakan, for the Appellant; M. Pathrose Mathai K. Moni, V. Chatambaresh, T.C. Suresh Menon, Antony Dominic and A.M. Shaffique, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, J.—Creditor of the Company in liquidation has filed an application under Sections 542 and 543(1) of the Companies Act, 1956 seeking an order that respondents 2 to 8, the ex-directors and officers of the company by name Kaumudi Exporters (Private) Limited had misapplied, retained or become liable or accountable for any money or property of the company or were guilty of misfeasance or breach of trust in relation to the company. Further applicant also stated that respondents 2 to 8 were former Managing Director or Directors of the company and they had retained or misapplied or misappropriated the funds of the company and had become liable or accountable to refund an amount of Rs. 5,54,910/- to the company and their action in the matter of retention or misapplication or misappropriation of amounts is due to misfeasance or breach of trust in relation to the company. In order to establish the applicant's case P.W. 1 was examined and produced Exts. A1 to A10 documents. No evidence was adduced on the side of the respondents. Learned Company Judge found no reason to grant the reliefs prayed for and dismissed the application holding that the applicant has not succeeded in showing that the directors were guilty of

misapplication or misappropriation of amounts amounting to misfeasance or breach of trust in relation to the company.

2. Shri Mathai Paikaday, Senior Counsel appearing for the applicant submitted that learned single Judge has failed to note that the applicant's case fell under Clause (a) of Sub-section (1) of Section 543 of the Companies Act, 1956 since the Directors have retained the security deposit paid by the applicant. Counsel submitted that in a case where money has been illegally retained by the Directors applicant need not establish that the Directors were guilty of any misfeasance or breach of trust in relation to the company. Counsel submitted that els. (a) and (b) of Section 543 are not conjunctive but disjunctive. Learned Counsel submitted that in any view of the matter, money paid has to be held in trust and consequently petition u/s 543 is maintainable and the Company Judge has got jurisdiction to direct the Directors to return the money held in trust. In support of the above contentions counsel placed reliance on various decisions. Reference was made to the decision of the Calcutta High Court in *Indo-Burma Industries Ltd v. In Re*: 1957 (27) Comp. Cas 390(SC), *Ganesh Export and Import Co. v. Mahadeolal Nathmal* 1955 (25) Comp.Cases 357(SC), *In re, F & C Osier (India) Ltd.* (1976 T L R 1442) and *Official Liquidator, Modern Transporters Pvt. Ltd v. Mulkh Rai Mehta* 1971 (41) Comp. Cas 573(KER).

3. Shri Pathrose Matthai, Senior Counsel appearing for respondents 4,5,7 and 8 on the other hand contended that the appellant has not succeeded in establishing the ingredients of Section 543 and the learned Company Judge has rightly dismissed the application in the absence of any specific allegation against the former Managing Director or the Directors of the Company or the role by them in the alleged misappropriation or misapplication of the money. In support of the contention counsel placed reliance on the decision of the apex court in *The Official Liquidator Vs. Raghawa Desikachar and Others*, . Reliance was also placed on the decision of the Delhi High Court in *Security and Finance Private Limited v. B.K. Bedi and Ors.* (1991) 71 Comp. Cas 101(SC). Reference was also made to the decision of the Gujarat High Court in *Official Liquidator, Dhavalgiri Paper Mills Pvt. Ltd. v. Chinubhai Khilachand and Ors.* 2003 (114) Comp. Cas 277(SC) and also the decision of the Delhi High Court in *Ashoka Auto and General Industries Pvt. Ltd. v. Inder Mohan Puri and Ors.* 2005 (124) Comp. Cas 422(SC). Sri. A.M. Shaffique, counsel for respondents 2 and 3 supported the contention of the Senior Counsel Shri Pathrose Matthai. Counsel submitted that the appellant has not succeeded in showing that any of the directors has misapplied the funds. Counsel submitted that respondents 2 and 3 have no access to the registered office of the company and they have not caused any misfeasance or misutilisation of funds. Counsel placed reliance on the decision of the Andhra Pradesh High Court in *Official Liquidator v. T.J. Swamy and Ors.* 1996 (86) Comp. Cas 696(SC). Sri C. Chitambaresh counsel appearing for the sixth respondent also submitted that some of the shares were also transferred on the basis of a resolution and when the company was wound up on sixth respondent was not a Director and hence cannot be proceeded with u/s 543. In any view of

the matter, counsel submitted that even though C.A. No 164/92 was filed by respondents 2 3 and 6 for production of the accounts of the Canara Bank that was not done.

4. We have heard counsel on either side and perused the documents as well as the oral evidence adduced by P.W.I. We are of the view, the mere fact that the applicant had advanced security deposit does not mean that the amount has been retained or misapplied by any of the Directors personally. Burden, in our view, is on the person who alleges that any of the directors has misapplied or retained to prove that the Directors had misapplied or retained the amount which is legitimately due to him from the company in liquidation. Section 542 of the Companies Act is extracted below for easy reference.

542. Liability for fraudulent conduct of business. (1) If in the course of the winding up of a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or any other persons or for any fraudulent purpose, the Tribunal, on the application of the Official Liquidator, or the liquidator or any creditor or contributory of the company, may, if it thinks it proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Tribunal may direct.

On the hearing of an application under this sub-section, the Official Liquidator or the liquidator, as the case may be, may himself give evidence or call witnesses.

(2)(a) Where the Tribunal makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration.

(b) In particular, the Tribunal may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any person liable or any person acting on his behalf.

(c) The Tribunal may, from time to time, make such further order as may be necessary for the purpose of enforcing any charge imposed under this sub-section.

(d) For the purpose of this sub-section, the expression "assignee" includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(3) Where any business of a company is carried on with such intent or for such purpose as is mentioned in Sub-section (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be

punishable with imprisonment for a term which may extend to two years, or with fine which may extend to fifty thousand rupees or with both.

(4) This section shall apply, notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is to be made.

Person who is seeking relief u/s 542 has to plead and prove the delinquency of the Director. Mere vague and general allegation would not be sufficient. So also the case of Section 543, which is also extracted below.

543. Power of Tribunal to assess damages against delinquent directors, etc. (1) If in the course of winding up of a company, it appears that any person who has taken part in the promotion or formation of the company, or any past or present director, manager, liquidator or officer of the company

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

(b) has been guilty of any misfeasance or breach of trust in relation to the company;

the Tribunal may, on the application of the Official Liquidator, or the liquidator, or of any creditor or contributory, made within the time specified in that behalf in Sub-section (2), examine into the conduct of the person, director, manager, liquidator or officer aforesaid, and compel him to repay or restore the money or property or any part thereof respectively, with interest at such rate as the Tribunal thinks just or 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 Tribunal thinks just.

(2) An application under Sub-section (1) shall be made within five years from the date of the order for winding up, or of the first appointment of the liquidator in the winding up, or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer.

(3) This section shall apply notwithstanding that the matter is one for which the person concerned may be criminally liable.

Section 543 deals with acts of commission and not of omission. u/s 543 of the Act the court is vested with jurisdiction to examine the conduct of the past or present director, manager, liquidator or any other officer of the company to find out whether he has misapplied or retained or become liable or accountable for any money or property of the company, or he has been guilty of any misfeasance or breach of trust in relation to the company. In order to enable the court examine the conduct of an individual director or officer and to pass an effective order to make him personally liable for misapplication, etc. of the money or the property of the company, there has to be positive and specific evidence and pleadings in respect of the individual director of an act of the nature

contemplated by the Section. In the absence of any specific allegation or positive evidence it is not possible or proper for this Court to indulge in a fishing or roving enquiry so as to compel an individual director to reimburse or compensate the company. Apart from the mere allegation that the security deposit has been retained by the directors there is no allegation as to who has retained it, who has misapplied the money and if so in what manner.

5. We are therefore of the view, learned company judge is justified in rejecting the application. We are not impressed by the contention of the counsel that all the directors had diverted the amount which has to be held in trust. No evidence has been adduced to establish the diversion of trust money, and if so by whom and what manner. The mere fact that the company could not repay the security deposit does not mean that the Directors have retained or misapplied the security amount. We therefore fully endorse the principles laid down by the Delhi High Court in *Security and Finance Private Limited's* case, *supra*, *Asokha Auto and General industries'* case and the ruling of the Gujarat High Court in *Official Liquidator, Dhavagiri Paper Mill's* case, *supra*. In such circumstances, the appeal lacks merits and the same would stand dismissed.