(2011) 12 CAL CK 0008

In the Calcutta High Court

Case No : A.P.O. No. 34 of 2008 in C.A. No. 418 of 2004 in C.P. No. 477 of 1996

Samdev Dasgupta APPELLANT

Vs

Official Liquidator and Others RESPONDENT

Date of Decision : 13-12-2011

Acts Referred:
Companies Act, 1956 — Section 370, 543, 543(1)
Limitation Act, 1963 — Section 3

Citation : (2012) 4 CHN 357 : (2012) 174 CompCas 453

Hon'ble Judges : Kalyan Jyoti Sengupta, J;Asim Kumar Ray, J

Bench : Division Bench

Advocate : Jishnu Saha, for the Appellant; Surojit Nath Mitra for the Official Liquidator, for the Respondent

Final Decision : Allowed

Judgement

Kalyan Jyoti Sengupta, J.—The above appeal has been filed by the lone appellant against the judgment and order dated December 20, 2007 (In Re: Stiffel Und Schuh (India) Ltd. (In Liquidation),) passed on application made by the official liquidator making a claim u/s 543(1) of the Companies Act, 1956. By the impugned judgment and order the appellant has been held to be guilty of committing misfeasance as having occasioned loss to the company by willful act of misappropriation. Therefore by the impugned judgment and order a direction was given to the official liquidator to recover the Sum of Rs. 59,70,423, Rs. 60,16,012, Rs. 2,99,30,589 and Rs. 37 lakhs from the first respondent with interest at the rate of 10 per cent, per annum from the date of the order, and also award cost of the proceedings in favour of the official liquidator assessed as 3,000 G.M. The company, namely, Stiffel Und Schuh (India) Ltd., was directed to be wound up by the order of the court dated July 15, 1999 and the official liquidator being the first respondent herein was appointed as the liquidator of the company. Thereafter the official liquidator approached this court on or about April 26, 2002, for obtaining a direction to appoint an auditor to investigate into the affairs of the company (in liquidation). Accordingly, in terms of the order of this court an auditor was appointed and one M/s. Sashi Agarwal was appointed as auditor and subsequently the said investigating auditor filed a report as to the affairs of the company. Thereafter based on the report of the said investigating auditor the official liquidator filed application on August 26, 2004, against the appellant herein, one Gautam Mitra, 10, Mahendra Road, Calcutta-700 025, Erich Gutmann, Brigitte Stockmann both residents of Austria, one Pramod Kumar Khaitan of 11/11A, Mayfair Road, 5th Floor Block-Q, Calcutta-700 019, one Ranjit Kumar Banerjee of Salt Lake, one Dr. Nitish Kumar Sengupta, Rajendra Nath Sengupta both residents of New Delhi, Subrata Ghosh a resident of Chetla Road, Calcutta, Salil Kumar Gupta resident of Jodhpur Park, Calcutta, Tapas Sengupta resident of Kamal Gandhar, Sarat Ghosh Garden, Sri Purnendu Gupta a resident of New Road, Alipur, Calcutta and one Arindrajit Chowdhury. In the said application the respondents and each of them are described to be persons having power of management and control of the said company at the time of winding up. They and each of them were charged with misapplication, misappropriation and/or retention of large fund of the company as such they had become liable and accountable for a sum of Rs. 7,30,00,470. They were also charged with guilty of misfeasance and breach of trust with the following particulars of charges :

(a) The respondents and each of them had written off the stocks amounting to Rs. 2,08,83,446 for the period April 1, 1996 to March 31, 1997, whereas such adjustment in quantity had not been recorded in the stock register, therefore the ex-directors/officers of the company had misappropriated/retained a sum of Rs. 2,08,83,446.

(b) The respondents and each of them for the period ending on March 31,1997, on behalf of the company advanced a sum of Rs. 59,70,423 to India Laminating and Packaging Ltd., in which the managing director Samdev Dasgupta (appellant herein) was also a director which was doubtful to be recovered and thereby the respondents have diverted and misappropriated the said amount as such the said respondents and each of them are guilty of misfeasance and breach of trust and are liable to restore the said sum of Rs. 59,70,423 to the till of the company (in liquidation) together with interest at the rate of 24 per cent, per annum.

(c) The respondents and each of them have misappropriated a sum of Rs. 2,99,30,589 by debiting the same amount as prior period adjustment in the profit and loss account for the year ended March 31,1997, whereas the corresponding journal entry shows that there was return of goods which was sold in 1994-95 although the sale was 100 per cent, export sale and the value of the goods returned had not been debited in the inventory account and this has resulted in increasing gross profit margin and as such the said respondents and each of them have committed breach of trust and misappropriated the aforesaid amount and is guilty of misfeasance and are liable to restore the said sum of Rs. 2,99,30,589 to the till of the company together with interest at the rate of 24 per cent, per annum.

(d) The company had given a total advance of Rs. 40 lakhs to M/s. Loyalka Properties P. Ltd., and accordingly Loyalka Properties P. Ltd., had issued two money receipts dated January 11, 1995 and March 24, 1995, wherein it was stated advance payment for Beliaghata Property, but no further development was observed from the company''s end in relation thereto and as such the respondents and each of them have misappropriated and/or misapplied the said amount and as such are guilty of misfeasance and breach of trust and are liable to restore the said amount along with interest at the rate of 24 per cent, per annum to the till of the company (in liquidation).

(e) The company in August, 1994 had given an advance of Rs. 15 lakhs to M/s. Sri Satya Sai Properties and Investment P. Ltd., and to M/s. Bhuwalka Trading and Tea Co. P. Ltd., a sum of Rs. 10 lakhs but no further steps were taken by the company to take back the same and as such the respondent and each of them have misappropriated and/or misapplied and/or retained the same amount and are guilty of misfeasance and breach of trust and as such are liable to restore the said amounts aggregating Rs. 25 lakhs along with interest at the rate of 24 per cent, per annum to the till of the company (in liquidation).

(f) The company in August, 1994 advanced a sum of Rs. 37 lakhs to M/s. Padmawati Merchantile P. Ltd., but no steps have been taken by the company to receive/recover back the same and it appears from the records maintained in the office of the Registrar of Companies, West Bengal, that there is no such company by the aforesaid name and as such the respondent and each of them have misappropriated and retained the same and are guilty of misfeasance and breach of trust and as such are liable to restore the said amount along with interest at the rate of 24 per cent, per annum to the till of the company (in liquidation).

(g) The respondents and each of them have failed and neglected to disclose the expenses incurred for constructing the factory building structure lying and situated at P-15, Kasba Industrial Estate, Phase-I, Kolkata-700 078, although constructed at the cost of the company to the tune of Rs. 60,16,012 and the said respondents and each of them are therefore guilty of misfeasance and as such are liable to restore the said sum of Rs. 60,16,012 to the till of the company together with interest at the rate of 24 per cent. per annum.

It appears from the records that none of the respondents except the appellant herein has filed statement of defence by swearing an affidavit dated December 13, 2004 and thereafter on inspection of the documents being taken filed another affidavit through his constituted attorney, namely, one Sripati Dutta. In these two affidavits the charges of misapplication and further misfeasance have been denied specifically and each and every particulars of charges have been explained in the first affidavit of defence in the manner as follows :

(a) The company at the relevant point of time had received a very substantial export order for footwear after the goods having an export value of Rs. 5.40 crores had been containerised and were lying in the Calcutta Port for exportation and after the export documents had to be sent to the bankers for necessary process, it transpires that the import of the United States of America had gone into liquidation. Accordingly it refused to accept the goods. Inasmuch as the containerised goods had been lying at the Calcutta Port for quite some time, in order to save further demurrage on the same the goods had to be ultimately taken back by the company. Since the profit in respect of the said goods have been booked in the company''s account in the year 1994-95, the company was compelled to pass a reverse entry showing a sum of Rs. 2,99,30,589 as prior period adjustment towards profit of the exports. The statutory auditors did not find any reason to object to such reverse entry and as such made no comment in their report with regard thereto. Accordingly the official liquidator cannot possibly contend that the said sum of Rs. 2,08,83,446 or the said sum of Rs. 2,99,30,589 has been misappropriated/retained by him and as such the question of restoring the said sums to the till of the company also does not and cannot arise.

(b) In due compliance of the provision of section 370 of the Companies Act, 1956 and on obtaining requisite authorisation of its members a loan for a sum of Rs. 59,70,423 was given by the company to M/s. India Laminating and Packaging Ltd., to make construction at P-15, Kasba Industrial Estate, Kolkata on the understanding that the registered office and the factory of the company would be housed there. It was further understood that the said loan amount would be paid back by India Laminating and Packaging Ltd., to the company by adjustments against the rent and other charges payable by the company for such occupation and in respect of leather goods manufacturing machinery of India Laminating and Packaging Ltd., which it had allowed the company to use. In the process, the said loan of Rs. 59,70,423 stood reduced to Rs. 52,85,846 in the financial year 1997-98 as will appear from the annual report of the said report.

(c) The advance of Rs. 40 lakhs was given by the company to Loyalka Properties P. Ltd., for a purchase of the factory premises at Beliaghata in the year 1994-95. Later on, it was, however, decided by the company to house a registered office and factory at P-15, Kasba Industrial Estate upon getting an office and factory building constructed thereat through India Laminating and Packaging Ltd., for which advance of the said sum of Rs. 59,70,423 was made to it. In the circumstances, the company obtained refund of sum of Rs. 40 lakhs from the said Loyalka Properties P. Ltd., which was thereafter given a loan to India Laminating and Packaging Ltd., and formed part of the said sum of Rs. 59,70,423.

(d) In the affidavit the appellant also says he has no recollection of any advance of Rs. 15 lakhs having been given to Sri Satya Sai Properties and Investment P. Ltd., or an advance of Rs. 10 lakhs having been given to Bhuwalka Trading and Tea Co. P. Ltd. It was thus denied that the sum of Rs. 25 lakhs or any portion thereof having been misappropriated, misapplied or retained by him.

(e) In the affidavit the appellant explained that the loan amount of Rs. 37 lakhs were given as the Padmawati Mercantiles P. Ltd., were the promoters of the Ballygunge A.C. Market and office space at the said complex was bought by India

Laminating and Packaging Ltd., by obtaining a loan of Rs. 37 lakhs from the company and about Rs. 60 lakhs from SBI Home Finance Ltd. The said sum of Rs. 37 lakhs was as such paid by the company directly to the said Padmawati Mercantiles P. Ltd., on behalf of the India Laminating and Packaging Ltd. It was agreed that the said office space of India Laminating and Packaging Ltd., would also be used by the company and the said sum of Rs. 37 lakhs paid by the company would be adjusted against the rents payable to it to India Laminating and Packaging P. Ltd., on account of rent therefor. While a portion of the said sum was thus adjusted as rent in respect of the office premises at Ballygunge A.C. Market, a portion thereof was adjusted against machinery rent payable by the company to India Laminating and Packaging Ltd. The adjustment of the balance outstanding loan could not be done in view of liquidation of the company. In the circumstances, there could be no question of the company recovering back the said sum of Rs. 37 lakhs from the said Padmawati Mercantiles P. Ltd.

(f) In the affidavit it has been explained as far as the expenses of Rs. 60,16,012 alleged to have been incurred for constructing the factory building structure lying and situated at P-15, Kasba Industrial Estate, is concerned it includes the sum of Rs. 59,70,423 which has already been explained, was paid by the company to India Laminating and Packaging Ltd., but the construction of the said factory and the office premises at P-15, Kasba Industrial Estate on the understanding the same would be adjusted against the rent payable by the company to India Laminating and Packaging Ltd., for the use of the same and for use of certain machinery for India Laminating and Packaging Ltd.

2. There has been no affidavit filed by the official liquidator to deny and dispute the statement of defence made out as quoted hereinabove.

3. Thereafter the learned trial judge decided to dispose of the matter on witness action.

4. It appears from the records that the said investigating auditor appointed in terms of the order of the court, viz., one Sashi Agarwal was examined who only proved the auditor''s report prepared and submitted by him. It is an admitted position that the said Sashi Agarwal was cross-examined thoroughly. It is an admitted position that the said report was prepared based on the books of account but the original books of account was not produced before the learned trial judge.

5. The appellant did not examine himself however he collected counter opinion of another chartered accountant, namely, one Dr. Sarajit Mitra being an expert on this field. He also gave an opinion and also came to the box to discard the opinion of the investigating auditor, Sashi Agarwal.

6. The learned trial judge after considering the evidence and other materials produced before him considered and decided the matter in his own way.

7. The learned trial judge by the impugned judgment and order rejected the

claim made by the official liquidator save and except the sum of Rs. 59,70,423, Rs. 60,16,012, Rs. 2,99,30,585 and Rs. 37 lakhs respectively as detailed above.

8. Learned Counsel Mr. Jishnu Saha appearing for the appellant while assailing the judgment and order of the learned trial judge submits that both the finding and direction for payment of the aforesaid amount of the learned trial judge is perverse inasmuch as the entire findings were recorded solely relying on the opinion of the investigating auditor.

9. He contends that it is settled position of law the misfeasance action has to be established with cogent evidence and the burden is upon the official liquidator. This position of law has been settled in the judgment of the Supreme Court reported in The Official Liquidator Vs. Raghawa Desikachar and Others,

10. He contends that the charge of misappropriation has to be proved with the standard of beyond reasonable doubt. It will appear from the report of the investigating auditor who deposed before the learned trial judge, the same was prepared on the basis of incomplete accounts and documents

11. The learned trial judge has totally overlooked the evidence of another expert who deposed on behalf of the appellant and opined discarding acceptability of the contents of the report of the investigating auditor. It is not spelt out in the impugned judgment and order with expressed words why the opinion of the expert witness was not acceptable. According to him the findings of the learned trial judge was based on inference and/or presumption. The inference cannot take the place of evidence is the settled position of law.

12. He further contends that no original books of account were, produced before the learned trial judge to establish the case of misfeasance and misappropriation.

13. Mr. Surojit Nath Mitra, Learned Counsel for the respondents official liquidator while supporting the judgment of the learned trial judge contends that the investigating auditor was appointed in terms of the court''s order and after having examined all the books of account and relevant documents came to the conclusion as mentioned in the said report. In the report it has been clearly established that the amounts which were directed to be paid was not at all properly explained. In a case of this nature, the court has to rely on the evidence of the expert as accounting system can only be proved by the expert with his opinion not by any other document or material.

14. He then contends that the books of account were allowed to be inspected by the appellant and the evidence of the so-called expert of the appellant was not believed and accepted by the learned trial judge as the said witness happens to be closely associated with the appellant and as such interested person.

15. He further submits that the case of misfeasance, misapplication and misappropriation as far as the amounts of Rs. 59,70,423, Rs. 60,16,012, Rs. 2,99,30,589 and Rs. 37 lakhs are concerned, have been proved. Thus the appeal court will not interfere with the findings and order of the learned trial judge.

16. We have heard Learned Counsel for the parties and we have gone through the application made by the official liquidator charging misfeasance and/or misappropriation of the large amount on various heads. However, the learned trial judge did not accept the case of the official liquidator fully save and except the amount mentioned in the said order. We therefore confine ourselves to examine the material placed before the learned trial judge and also the findings of the learned trial judge in respect of those amounts only. From the records we find in paragraph 14 of the application misapplication, misappropriation under several heads, for an aggregate sum of Rs. 7,30,00,470 have been made. Those charges were made separately of course with particulars. It appears to us that those particulars of alleged misappropriation and misapplication of funds aiming at to constitute the case of misfeasance or breach of trust made out based on the text of the report being exhibit "Z" of the investigating auditor. Two affidavits, one affirmed by the appellant himself on December 13, 2004 and another by his constituted attorney subsequently on March 11, 2007, have been filed to defend the said charges. While carefully going through the contents of aforesaid paragraphs 11, 12, 13, 14, 15 and 16 of the appellant''s affidavit and those of his constituted attorney it appears to us that the appellant has not only denied and disputed the charges of misappropriation and/or breach of trust and further misfeasance but also have explained allegedly apparent anomaly in the accounting system adopted by the said expert with considerable details. Admittedly there has been no affidavit countering the statement of defence which are considerable extent of alibi, by filing any subsequent affidavit.

17. When the explanation given in the affidavit has not been rebutted by any counter affidavit we think that there was heavy burden on part of the official liquidator to prove the case of misfeasance.

18. It has been correctly pointed out by Mr. Saha that the official liquidator has to prove the case with reliable and legally acceptable evidence. In paragraph 7 of the aforesaid decision of the Supreme Court reported in The Official Liquidator Vs. Raghawa Desikachar and Others, Comp Cas 136 the aforesaid legal principle has been stated and the learned trial judge has noted the same also. We do not need to reiterate the same. But the principle laid therein does not appear to have been applied.

19. The learned trial judge has completely relied on the evidence and the report of the investigating auditor. According to us the opinion of the investigation auditor cannot be evidence as his report was a piece of secondary evidence since it is prepared from some documents. How the report was prepared is sought to be explained by the witness of the official liquidator in examination-in-chief. In answer to question No. 24 he has deposed as follows :

Were the records and accounts of the company complete for your investigation?

Ans : It was not complete but the books of account available from the office of the official liquidator and the records available with the Registrar of Companies, West Bengal, were taken into consideration at the time of preparation of this report.

20. Thus from the evidence of the said witness it is clear as correctly pointed out by Mr. Saha that even the report was not prepared taking into consideration of all the books of account.

21. We are of the view that without production of the original books of account before learned trial judge the evidence expressing opinion and further preparing a report by the investigating auditor, is not acceptable.

22. The learned trial judge as we noticed while coming to the conclusion has recorded as follows:

Given the state of evidence, it was incumbent on the part of the first respondent to demonstrate that the company was to get value for the money made available to ILPL. The official liquidator has established that the money passed from the company to ILPL.

23. We fail to understand what was the evidence made available before the learned trial judge for which the first respondent has to demonstrate anything else. He has explained with details in the affidavit filed in support of the defence and the same was not even controverted by the official liquidator, even no suggestion has been put that the aforesaid amount is alleged to have been misappropriated by the appellant alone.

24. The learned trial judge thereafter concluded as follows;

The person at the helm of the company was closely involved in, and probably also in control of ILPL, and upon realising that the prospects of the company were doomed, he made no attempt to recover the money from ILPL with the intent of having the benefit of such funds in course of his association with ILPL. The motive is established. The facts appear plain enough. The first respondent as the managing director of the company prior to its liquidation has to be held liable for the loss occasioned to the company for the sums of Rs. 59,70,423 and Rs. 60,16,012.

25. We think that the aforesaid findings clearly shows that learned trial judge has blindly accepted the correctness of the report of the official liquidator without any original books of account being produced. The learned trial judge unfortunately did not consider at all the evidence of another expert brought by the appellant nor the learned trial judge made any attempt to consider the explanation given against each and every charges. No bank statement regarding the payment has been produced.

26. Same is the position when we notice the finding in connection with alleged defalcation amount of Rs. 2,99,30,589. We are of the view the learned trial judge without any doubt has proceeded on the basis of inference. We are unable to accept the findings of the learned trial judge the pleadings filed by the first

respondent do not throw any light on this matter. In both the affidavits the appellant has explained in detail with the supportive evidence of the expert who has gone through the books of account of the company on inspection being taken. Therefore other directions are found to be based on the finding without any evidence, consequently without any legal foundation.

27. According to us the charge of misappropriation cannot be established with the opinion of any person howsoever expert in the field. The original books of account ought to have been produced and the bank statement with regard to the payment should have been produced wherever necessary.

28. We think that this matter needs to be reconsidered. With the aforesaid scant evidence it would be gross injustice to charge a person with misappropriation of a large amount. That apart another point though not taken in the pleading nor argued before this court needs attention of the court. While examining the case we find the question of limitation is involved. Under provision to section 3 of the Limitation Act, 1963, the court is duty bound to address the question of limitation even if it is not taken in the pleading. The application u/s 543 sub-section (1) of the Companies Act has to be made within a period as mentioned in subsection (2) of the said Act. The said sub-section (2) of the Companies Act reads as follows :

543(2). An application under sub-section (1) shall be made within five years from the date of the order of 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.

29. In this case the winding up order was passed on July 15,1999 and on the same very date the official liquidator was appointed. The alleged misappropriation or misfeasance have taken place going by the statement and averment made in the application much before the winding up, therefore the five years time has to be computed from the date of passing of the order of winding up. The present application was made on August 26, 2004, of course before that an order for appointment of investigating auditor was obtained in 2002. In view of the language employed in the aforesaid sub-section whether this application is maintainable beyond the period of five years or not has also to be considered. Since this legal point was not taken before the learned trial judge not to speak of agitating the same no decision could be rendered. Bar of limitation should be decided by the court itself. Whether it is taken or not u/s 3 of the Limitation Act, 1963. On that score also this matter is required to be reheard.

30. Accordingly, we set aside the judgment and order of the learned trial judge and remand the matter with request to rehear, calling for the legally acceptable evidence as required in case of this nature to prove the case of misappropriation, misfeasance as alleged by the official liquidator not going by the so-called expert opinion alone and also the point of limitation as above. Therefore, the appeal is allowed. We request the learned trial judge to do the needful in terms of the

judgment and order within a period of four months from the date of production of this order if possible, subject of course to convenience of the learned trial judge.

31. There will be no order as to costs.

Asim Kumar Ray, J.

I agree.