

(2005) 07 MAD CK 0091

In the Madras High Court

Case No : O.S.A. No's. 99 and 100 of 2005 and C.M.P. No's. 7957 and 7958 of 2005

Sarala Srinath rep. by her Power of Attorney Agent, M.R.
Bhaskaran and M.R. Bhaskaran

APPELLANT

Vs

M. Muthusamy, Additional Administrator, R.P.S. Benefit Fund
Ltd. (In Liquidation) Madras Bar Association and The Official
Liquidator High Court, As Liquidator of RPS Benefit Fund Ltd.,
(In Liquidation)

RESPONDENT

Date of Decision : 28-07-2005

Acts Referred:

Companies Act, 1956 — Section 434, 531A, 536(2)
Provincial Insolvency Act, 1920 — Section 28, 55

Citation : (2005) 5 CTC 176 : (2006) 66 SCL 107

Hon'ble Judges : P.K. Misra, J;N. Kannadasan, J

Bench : Division Bench

Advocate : T.V. Ramanujam, for T.V. Krishnamachari, for the Appellant; Aravind
P. Dattar and M. Muthuswamy, Administrator, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Misra, J.—These two appeals are directed against the common order dated 17.12.2004 passed by the learned Company Judge in Company Appln.Nos.1170 & 1172 of 2004 arising out of Company Petition Nos.233 to 238 of 1999.

2. Company Petition Nos.233 to 238 of 1999 were filed on 26.7.1999 for winding up of R.P.S. Benefit Fund Limited, a company registered under the Companies Act. By order dated 28.6.2004 in C.A.No.287 of 200 4, arising out of C.P.Nos.233 to 238 of 1999, the learned Company Judge granted permission to effect paper publication for sale of 221.5.9 acres of land in Kancheepuram district. The present dispute relates to 4.50 acres of land in Sirukaveripakkam and 12.72 acres of land in Keelambi. Pursuant to the said order, sale notice was published on 21.7.2004. On 31.8.2004, two applications were filed by the present appellants. The affidavits in support of the applications were sworn to by Mr.

Bhaskaran, who is the power of attorney holder of the applicant in C.A.No.1170 of 2004 and the applicant himself in C.A.No.1172 of 2004. The averments in the two applications are as follows:-

One M.N. Rajaraman, the father of the two applicants, had invested Rs.18,50,000/- in Nimmathi deposit in R.P.S. Benefit Fund Ltd., as per several fixed deposits. Such deposits after maturity became due for payment by May, 1999, but, R.P.S. Benefit Fund Ltd. expressed its difficulty in paying the maturity value working out to Rs.55,50,000/-. The Company agreed to convey 16.32 acres of land towards investment of Rs.16,50,000/- and accordingly the Company executed an irrevocable power of attorney dated 28.7.1999 in favour of M.N. Rajaraman, authorising him to sell the disputed properties. Accordingly, M.N. Rajaraman, as the power of attorney holder on behalf of the Company, has executed sale deeds between 9.8.1999 and 12.8.1999 in favour of the two applicants and the applicants were in possession after the sale deeds were executed in their favour. The applicants were surprised to see the advertisement dated 18.8.2004 indicating about the auction of various properties including the disputed properties. In C.A.No.287 of 2004, the applicants have not been made parties and the Administrator without bothering to find out about the sale in favour of the applicants, which was much before the date on which the Administrator has sought permission to sell the property, had obtained the order from the Court, and therefore, such order dated 28.6.2004 should be recalled.

3. In the common affidavit filed on behalf of the Administrator, it was indicated as follows :-

The petition for winding up was filed on 26.7.1999 and the irrevocable power of attorney was executed by the then Vice President of the R.P.S. Benefit Fund Ltd. in favour of the applicants on 28.7.1999 and the sale deeds were executed between 9.8.1999 and 12.8.1999, and therefore, the sale deeds having been effected after presentation of the winding up petition, were void. The deposits were made by M.N. Rajaraman in the name of his son and daughter (Applicants). At the time of execution of the sale deeds in August, 1999, only some of the fixed deposits had become matured, but not all the fixed deposits as alleged. Possession of the land was with the custodian and not with the applicants. The father of the applicants was a necessary party, but he had not been impleaded. The power of attorney in favour of M. N. Rajaraman was executed by the then Vice President, who had no authority to execute such power of attorney on behalf of the company. The power of attorney was nothing but a fraudulent preference to defeat the other creditors and depositors of the company. Pursuant to the direction issued by the Court in C.A.No.287 of 2004, first paper publication was made on 20.3.2004 and at that time an offer was made, but such offer had been rejected by the Court and thereafter, the subsequent paper publication was effected. Even though the value of the property was much higher, the applicants want to grab the property for a lesser amount. Paper publication was effected after obtaining a report from Mr. Y. Thyagrajan, who was appointed as

Administrator for Kancheepuram farm lands and in the report dated 18.8.2000, he had indicated that there was no encumbrance over the properties. It was further indicated that ...negotiation process of selling of the property is yet another device adopted by the former Chairman, Mr. P.G. Saranyan to sell the company's properties for a very low consideration on paper and to receive the secret balance of the market value by collecting the same in cash, thereby cheating the company and committing fraudulent preference to defeat the rights of other depositors and creditors of the company.

4. On behalf of the appellants/applicants, the main contentions, which were raised before the learned Company Judge, were to the effect that the registered sale deeds were executed in August, 1999 and the purchasers were in possession and the Administrator/Official Liquidator should have ascertained the aforesaid facts by obtaining the encumbrance certificate and without doing so, they obtained order regarding sale of the properties to the detriment of the applicants without impleading such applicants.

The applicants were bona-fide purchasers for valuable consideration in view of the matured money value in respect of the deposits made by their father, and therefore, the sale effected by the company in liquidation should not be construed as fraudulent preferences. It was further contended that burden of proving that the transaction was not in good faith was on the Official Liquidator/Administrator. In the alternative, it was contended that even assuming that Section 536(2) of the Companies Act was applicable, the ratio of the decisions u/s 531-A of the Companies Act would be applicable and the Court should not annul such transaction unless it was proved that the transaction was not for a valuable consideration and was not in good faith.

5. Learned counsel, who was appearing for the Administrator, had contended that the provisions of Section 531-A was inapplicable and since the transactions were made subsequent to filing of the winding up petition, the transactions were void u/s 536(2), unless the Court otherwise directed.

6. Learned Company Judge, on consideration of the submissions made by the learned counsels for the parties, came to the conclusion that the liquidation proceedings were initiated on 26.7.1999 and the company in liquidation executed power of attorney in favour of the father of the applicants on 28.7.1999, authorising him to sell the properties, and subsequently the sale deeds were executed between 9.8.1999 and 12.8.1999. The winding up orders were passed on 23.7.2002, which obviously related back to the date of presentation, and in such view of the matter, provisions of Section 531-A were not applicable and the provisions of Section 536(2) of the Companies Act were applicable. Learned Company Judge further held that even though the Court u/s 536(2) is authorised to uphold a transaction completed after the presentation of the winding up, there was no particular reason to save the present transaction. Learned Company Judge observed that by 3.6.1999, the date on which demand notices u/s 434 of the Act were issued by the creditors, the deposits to the extent of Rs.9 lakhs had

matured and the deposits to the extent of balance of Rs.9.50 lakhs was to mature after 4.8.1999. Learned Company Judge concluded that in the absence of any legal compulsion, a particular depositor, namely, the father of the applicants alone was preferred and the power of attorney was executed to sell lands to an extent of about 18 acres and no acceptable reason whatsoever to justify the transaction had been indicated. Learned Company Judge has also concluded that undue preference was shown to a particular creditor without any rhyme or reason. Learned Company Judge further concluded that the decisions rendered u/s 531-A of the Companies Act or Section 55 and Section 28 of the Provincial Insolvency Act laying down the proposition that burden was on the Official Liquidator/Administrator to show that the transaction was not in good faith, were not applicable. Learned Company Judge further concluded that since the transfer had been made even before the part of the deposits had become due and no lawful or compelling reason had been stated justifying such transfer, there was no necessity to recall the order dated 28.6.2004.

7. In the present appeals, the main contentions which were raised before the learned Company Judge have been reiterated. Learned Senior Counsel appearing for the appellants has submitted that even assuming that the entire fixed deposits had not become due, the consideration money indicated in the sale deeds was much less than the amount of about Rs.27 lakhs, which was admittedly due by June, 1999. Moreover, under the impugned sale deeds, the depositors were giving up their entire right and since the deposits had been made to the extent of Rs.18 .5 lakhs, purchase of about 16 acres of land for the said amount cannot be said to be for any low consideration. It is further submitted that at any rate, the order dated 28.6.2004 was vulnerable because the applicants should have been given opportunity of hearing before the said order was passed and merely because the Administrator had not bothered to obtain a "No Encumbrance Certificate", the purchasers should not be prejudiced. It is further submitted that the order dated 28.6.2004 granting permission to sell should have been recalled and the opportunity of hearing should have been given.

8. Though the learned Senior Counsel has placed reliance upon several decisions throwing light on the question of burden of proof in proceeding u/s 531-A of the Companies Act or under Sections 55 and 28 of the Provincial Insolvency Act, in our opinion, the ratio of the said decisions regarding burden of proof cannot be made applicable to the transactions which are covered u/s 536(2) of the Companies Act. The relevant provisions are as follows :-

531-A. Any transfer of property, movable or immovable, or any delivery of goods, made by a company, not being a transfer or delivery made in the ordinary course of its business or in favour of a purchaser or encumbrancer in good faith and for valuable consideration, if made within a period of one year before the presentation of a petition for winding up by or subject to the supervision of the Court or the passing of a resolution for voluntary winding up of the company,

shall be void against the liquidator.

536(2) In the case of a winding up by or subject to the supervision of the Court, any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall, unless the Court otherwise orders, be void.

9. In the present case, admittedly the sale deeds were effected in August 1999. Even the power of attorney executed in favour of the depositor and constituting him a power of attorney for the company to sell the property was executed on 28.7.1999, whereas the petition for winding up had been presented on 26.7.1999. It is thus obvious that the provisions contained in Section 536(2) of the Companies Act were applicable.

10. Learned counsel appearing for the appellants has however contended that on 26.7.1999, a letter had been written by the appellants to the Company, which clearly indicates about an earlier oral agreement, and therefore, it must be taken that the subsequent sale deeds executed in August, 1999 related back to the date of earlier agreement and therefore, the transactions must be judged in the light of Section 531-A and not in the light of Section 536(2) of the Companies Act.

11. It is of course true that in such letter dated 26.7.1999, reference is made to various discussions M.N. Rajaraman had with the President of the Company. The recital further indicates that the applicants and others had agreed to take over 18.50 acres of land from the company. The letter concludes by indicating 'We now request you to confirm the arrangement agreed upon orally between us and do the needful urgently, failing which we will be taking appropriate action against you.' There is an endorsement in such letter signed by R. Venkatesan, Vice President indicating Above Arrangements agreed by us. It is however to be noted that in the Special Power of Attorney, which is executed by one S. Prem Chand, Vice President of M/s. R.P.S. Benefit Fund Limited, nothing is indicated about any earlier oral agreement. Even in various sale deeds, nothing is indicated about the earlier oral agreement. It may be that there were certain preliminary discussions, but it cannot be said that there was an agreement unless the parties were *ad-idem* on the terms of the agreement. Therefore, considering the materials on record, it is difficult to come to a conclusion that in fact there was an agreement to sell the property on an earlier date even though it may be concluded that certain discussions were being carried on. Keeping in view the dates of the sale deeds and even the date of irrevocable power of attorney, we do not find any error in the conclusion of the learned Company Judge that in fact the transactions being after presentation of winding up petition, should be judged in the light of Section 536(2) of the Companies Act.

12. The provisions contained in Section 531-A and 536(2) had been extracted earlier. A careful reading of the two sections clearly indicates the difference in the

two. u/s 531-A, a transaction which is made within one year prior to the date of presentation of the winding up petition, if made for valuable consideration and in good faith, is saved, whereas, u/s 536(2), a transaction made after presentation of the winding up petition is considered as void ? unless the Court otherwise directs?. Though the underlying principle for considering both type of transactions may be almost similar, it is obvious that in order to protect a transaction u/s 536(2), the purchaser has to make out a stronger case as compared to one coming within the scope of Section 531-A. Keeping in view this fine distinction, the admitted facts in the present case are required to be considered.

13. It is apparent from the counter affidavit of the Administrator filed before the learned single Judge that statutory notice as required u/s 434 of the Companies Act had been issued on 3.6.1999 . It is thus evident that the persons in management of the Company were aware that the creditors were taking steps to file winding up petition. It is obvious that by the said date and on the subsequent dates, there were many other depositors like the present applicants whose deposits had matured or about to mature for payment. In such a background, nothing has been indicated as to why the President of the Company or the Vice President of the Company, who was the son of such President, chose the present applicants or their father to alienate considerable extent of land in their favour. It may be that the value of the deposit made by the applicants' father was commensurate with the value of the land sold to them, but then there is nothing to indicate as to why the applicants or their father were preferred for such preferential treatment. In such view of the matter, we do not find anything illegal or erroneous in the order of the learned Company Judge refusing to save the impugned transactions.

14. In course of hearing, the learned Senior Counsel appearing for the appellants has submitted that the question of good faith and other relevant matters could have been decided only after giving adequate opportunity of hearing to the applicants and they should have been afforded opportunity of adducing oral evidence. However, from the records it does not appear that at any time the applicants had insisted any oral evidence to be adduced in the matter.

15. Learned Senior Counsel for the appellants has also submitted that it was the duty of the Administrator to find out as to whether there was any encumbrance in respect of the property sought to be sold. It is of course true that the Administrator/Liquidator could have been more careful while obtaining proper information. But, that by itself would not have the effect of saving the present transactions. As per the provisions contained in Section 536(2) of the Companies Act, the transactions after the date of presentation of the petition for winding up are void, unless the Court otherwise directs. It is therefore for the applicants to present before the Court the necessary circumstances in order to protect the transactions in their favour which had been effected after the date of presentation of the petition. Mere fact that the Administrator or the Liquidator

should have been more careful in obtaining the relevant particulars would not save the transactions. When the applicants filed application to recall the earlier order, it is for them to bring to the Court the relevant circumstances. The circumstances brought to the notice of the Court have been considered by the learned Company Judge and we do not find anything substantial to come to any different conclusion.

16. In the above context, it is relevant to note that the applicants filed applications to recall the order dated 28.6.2004 regarding the sale notice. However, it is apparent that before such permission was granted on 28.6.2004, the Court had granted similar permission and paper publication had been made on 20.3.2004 and some offers have been made pursuant to such notice. The applicants had never raised any objection at that stage and objection has been raised only after the subsequent notice has been published on 21.7.2004.

17. While exercising jurisdiction u/s 536(2) of the Companies Act, it is obvious that the Company Court is expected to exercise jurisdiction keeping in view the equitable principles in mind. It is well known that equity favours the vigilant and not the indolent. Apart from the fact that there is nothing special in the transactions where under the applicants or their father were favoured by the President/Vice President, his son without any justifiable reason, the fact that the applicants had kept quiet when first publication was made is also an aspect which cannot be ignored.

18. For the aforesaid reasons, we do not find any reason to interfere with the order of the learned Company Judge and the appeals are accordingly dismissed. Even though the transactions made in favour of the applicants cannot be sustained, it goes without saying that the case of the applicants for repayment must be considered along with other eligible creditors and their case should not be ignored merely because they had not complied with any formality on earlier occasion, and opportunity should be given to them to submit their formal applications, if so required. It would be also open to the applicants to participate in the auction if not already held and finalised. There would be no order as to costs.