(2010) 03 MAD CK 0304

In the Madras High Court

Case No : O.S.A. No''s. 274 to 277 of 2009 and M.P. No''s. 1, 1 and 1 of 2009 in OSA 274 to 276 of 2009 and M.P. No. 2 of 2009 in OSA 277 of 2009

Scanwell Logistics (India) Pvt. Ltd — APPELLANT

Vs

Blaiklock Compass World Transport (HK) Limited and Others — RESPONDENT

Date of Decision : 18-03-2010

Acts Referred:
Companies Act, 1956 — Section 454(5), 536

Citation : (2010) 155 CompCas 479 : (2010) 1 MLJ 1513 : (2010) 102 SCL 37

Hon'ble Judges : M. Chockalingam, J;C.S. Karnan, J

Bench : Division Bench

Advocate : T. Poornam, for the Appellant; T.K. Seshadri for Srinath Sridevan, for R1, K.K. Senthilvelavan, for R2, C.A. Diwakar Aryaraj, for R4 and R. Saravanakumar, for RR6 to 8, for the Respondent

Final Decision : Dismissed

Judgement

M. Chockalingam, J.—These appeals challenge a common order of the learned Single Judge of this Court made in C.A. No. 1628, 1625, 1626 and 1627 of 2006 respectively in C.P. No. 387 of 2003.

2. The case of the petitioning creditor, the first respondent herein, is that the respondents 3 to 8 herein who are the ex-directors of the company under liquidation, have fraudulently constituted a new company with name M/s. Scanwell Logistics Private Limited, the appellant herein, on 28.5.2004, during the pendency of the company petition in the same premises of the company under liquidation; that out of the five directors of the appellant company, the respondents 3, 7 and 8 herein have transferred the property and business of the company under liquidation; that under the circumstances, they are liable u/s 536 of the Companies Act; that the conduct of these respondents also amounts to misfeasance; that it becomes necessary that the corporate veil of the appellant company has to be lifted to find out the fraud, and hence the above applications were filed for a direction against the respondents 3 to 8 therein to file statement

of affairs, to take cognizance of offence u/s 454(5) of the Companies Act against the respondents 3 to 8 and to direct the Official Liquidator to examine the conduct of affairs of the company under liquidation by the respondents 3 to 8 and file a report on the misfeasance and also for an interim injunction against the appellant company from alienating, transferring or disposing of any assets or movables or immovables of the appellant pending decision in the above applications.

3. The other side was given an opportunity to file counter.

4. The learned Single Judge on enquiry, has directed the Official Liquidator to investigate about the affairs of the appellant company especially with reference to the object of the said company and the transactions which have taken place from the date of its incorporation namely 28.5.2004, till date and file a report to enable the Court to pass final orders thereon. Aggrieved over the same, the appellant has brought forth these appeals before this Court.

5. Advancing arguments on behalf of the appellant, the learned Counsel would submit that the impugned order is beyond the scope of the applications in which the appellant was arrayed as the second respondent; that an investigation into the affairs of the appellant company should not have been ordered by the learned Single Judge; that it is pertinent to point out that the shareholding of the two companies are totally different; that the mere fact that some of the Directors were involved in the incorporation of the Company cannot give rise to suspicion, much less reasonable suspicion to order an investigation into the affairs of the appellant company; that the main allegation of the first respondent herein was that the entire business including funds and assets of the company under liquidation was fraudulently and clandestinely transferred to the appellant herein and that such transfer during the pendency of the company petition is void; that such an allegation is bald and it is also negatived by the fact that the company under liquidation was carrying on business till the Official Liquidator took charge and sealed the company''s premises; that it is pertinent to note that the Official Liquidator after verifying the records, had already initiated misfeasance proceedings against the Ex-Directors of the company; that while so, there can be no investigation against the appellant company; that in any event, the Ex-Directors of the Company in liquidation were not shareholders in the appellant company; and that under the circumstances, the order of the learned Single Judge has got to be set aside.

6. In answer to the above, the learned Senior Counsel Mr.T.K.Seshadri appearing for the first respondent, put forth his submissions in his sincere attempt of sustaining the order of the learned Single Judge.

7. The Court heard the learned Counsel appearing for the other contesting respondents also.

8. The learned Counsel for the fourth respondent brought to the notice of the Court that the names of the respondents 4 and 5 have already been deleted by

an order of the Court in C.A. No. 246 of 2008 dated 17.3.2008.

9. This Court paid its anxious consideration on the submissions made.

10. As could be seen above, while disposing of all the applications in C.A.Nos.1625 to 1628 of 2006 in C.P. No. 387 of 2003, the Company Court has made the following order:

20. In such circumstances, I direct the Official Liquidator of this Court to investigate about the affairs of the second respondent company, viz., M/s. Scanwell Logistics Private Limited, especially with reference to the object of the said company and the transactions which have been taken place from the date of its incorporation viz., 28.5.2004 till date and file a report to enable this Court to pass final orders in the above applications. The petitioning creditor/applicant shall deposit an amount of Rs. 10,000/- (Rupees ten thousand only) with the Official Liquidator towards expenses relating to the said investigation within one week from this date. The Official Liquidator, after giving notice to the Directors of the second respondent company including three Ex-Directors of the first respondent company under liquidation and also after giving opportunity to the petitioning creditor, shall file his report within a period of 8 weeks from the date of receipt of copy of this order.

11. From the reading of the aforementioned order, it could be seen that a direction has been issued to the Official Liquidator to investigate about the affairs of the second respondent company namely M/s. Scanwell Logistics Private Limited, the appellant herein, only with reference to the object of the company and also the transactions which took place from the date of its incorporation namely 28.5.2004, till the date of the order and to file a report. The Company Court has also made it clear that such a report was necessary to enable the Court to pass final orders in the above applications. Thus, it would be quite evident that the direction issued to the Official Liquidator to make an investigation and file the report was not a final order, and it was only an interim order which the Court thought necessary to pass final orders in the applications.

12. Concededly, an order of winding up came to be passed by the Company Court on 22.3.2006, on an application by the creditors directing the Ex-Directors to file the statement of affairs within three weeks. Needless to say that the winding up order would come to effect from the date of the application namely 9.12.2003. The Ex-Directors, who are the respondents 1 to 6 in the application, filed by the Official Liquidator, filed the statement of affairs within time. Hence the Official Liquidator after putting the Ex-Directors on notice, took possession of the movable and immovable properties of the company under liquidation from the sixth respondent on 25.5.2006. He has also brought the movables by way of auction and sold some of the movables for a sum of Rs. 1,62,300/- subject to the confirmation by the Court. From the materials available, it could be seen that the when the Official Liquidator came to know that the company under liquidation paid a sum of Rs. 3,50,000/- towards the rental advance, he sent a

communication to the landlord that the said rental advance was to be ascertained. He received a reply from the landlord that the said advance was actually transferred to the new company namely M/s. Scanwell Logistics Private Limited, which is the second respondent therein and the appellant herein. The said transfer of advance was also pursuant to the letter dated 15.7.2004, according to the report of the Official Liquidator.

13. Before seeking the relief, the Official Liquidator has filed a report before the Court. From the perusal of the report, it is noticed that out of the Directors, two Directors namely Mr. S. Ramesh and V. Babu, put forth the statement of affairs though belatedly, and on verification, the Official Liquidator noticed the bank balance what was indicated in the statement of affairs was not available with the bank, and the cash balance mentioned in the statement was also not available. Though the Directors gave the statement to the effect that a sum of Rs. 1,98,56,336/- was available with the trade debtors and recoverable, but they did not furnish any particulars in that regard. Though a statement was given to the effect that furniture and fittings were worth Rs. 7,00,000/-, they were sold, and only a sum of Rs. 1,62,300/- could be realised. That apart, though it was stated that a sum of Rs. 2,00,95,123.09 was due from various parties, no documents were furnished, and hence the Official Liquidator has pointed out that all the above would be indicative of the mismanagement and also maladministration of the company.

14. The order under challenge came to be passed for investigation by the Official Liquidator as to the object and the transactions of the appellant company in an application in which the first respondent has asked for an interim injunction restraining the second respondent company namely the appellant herein, from acting through its directors, employers, agents and representatives from alienating, transferring and disposing of any assets movable or immovable of the second respondent company pending disposal of the company application. It was mainly urged by the petitioning creditor that the Directors of the company under liquidation have fraudulently constituted the appellant company with the name M/s. Scanwell Logistics Private Limited. The said company came to be constituted on 28.5.2004, and hence it would be quite clear that the appellant company was constituted pending the company petition. The similarity in the names of both the companies is also noticed. Admittedly, three of the Directors of the company under liquidation became the Directors of the appellant company. Though it was contended that they have resigned subsequently, there is no material to indicate that they have resigned from the Directorship of the appellant company. As could be seen from the report of the Official Liquidator, the advance sum of Rs. 3,50,000/- originally paid by the company under liquidation, has been transferred as the advance amount of the appellant company. The contention that the Ex-Directors of the Company did not know about the winding up proceedings or the order cannot be accepted for the simple reason that the winding up order came to be passed only on contest. Even in the counter affidavit, the Ex-Directors have not even whispered about the constitution of the

appellant company.

15. Apart from the above, though it was contended by the appellant that the object and business of the appellant company were entirely different from that of the company under liquidation and that the appellant company was constituted only with the object of service oriented cannot be accepted since no material was placed before the Court. However, there could not have been any impediment for the appellant in placing the memorandum of association of the appellant company in order to appreciate its contention, but not done so. It is pertinent to note that the appellant company has not even disclosed in its counter the object of the company. In view of all the above, the contention put forth by the appellant''s side that subsequent to the termination of the agency of the company under liquidation, the principal company had started its own subsidiary in India in which for the purpose of constitution, three of the Ex-Directors of the company under liquidation were added as Directors cannot be accepted. Though it is contended that the company under liquidation and the appellant company are different entities, the available materials would indicate otherwise. No doubt, all the above would create a suspicion on the conduct of the Ex-Directors whether the second company namely the appellant herein, would have been constituted with a fraudulent design of causing hardship to the creditors. Once the respondents were able to show that there was a transfer of the advance given by the company under liquidation pursuant to a letter given by that company to the appellant company, it can be taken as a prima facie proof of transfer of a part of the assets of the company under liquidation in favour of the appellant company.

16. The contention put forth by the learned Counsel for the appellant that as far as the appellant company was concerned, the business and income for the year 2004-2005 and 2005-2006 was nil cannot take away the circumstances which were in favour of issuing a direction for investigation. When the circumstances are brought to the notice of the Court which are strong and which would make the Court believe that the incorporation of the appellant company might have been a device to defraud the creditors, it becomes necessary to make an investigation. The other contention put forth by the learned Counsel for the appellant that both the companies are two different entities and hence no investigation as to the object and affairs of the appellant company could be ordered in the winding up proceedings of another company cannot be countenanced. The learned Single Judge has rightly pointed out that this was an exception to the celebrated concept that a company at large is a different person from the subscribers. The learned Single Judge has rightly relied on a decision of the Apex Court reported in Delhi Development Authority Vs. Skiper Construction Company (P) Ltd. and another, which reads as follows:

28. The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing

illegality or for defrauding others, the Court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned....

17. Under the above stated circumstances, the view taken by the learned Single Judge ordering investigation by the Official Liquidator as to the affairs of the company, especially with reference to the object and transactions which have taken place from the date of its incorporation namely 28.5.2004, till the date of order and directing him to file a report does not require interference.

18. Lastly, the learned Counsel for the appellant made two contentions. Firstly, even if an investigation of the affairs of the appellant company is to be made by the Official Liquidator, it could be ordered only till the date of order of winding up of the company, and secondly, when the same was to be done by the Official Liquidator, there was no necessity for giving opportunity to the petitioning creditor.

19. In answer to the above, it is contended by the learned Senior Counsel for the first respondent that if an investigation has got to be made as to the affairs of the appellant company in order to find out the truth, it is necessary that the investigation should be done for the subsequent period also. So far as the second contention that opportunity was not necessary to the petitioning creditor is concerned, the learned Senior Counsel would urge that what was all to be done by the petitioning creditor at the time of investigation was only an assistance and nothing more.

20. After hearing the Counsel on either side, this Court is of the considered opinion that as far as the first contention is concerned, the order of the learned Single Judge that the investigation has got to be done till the date of the order has got to be affirmed since, in the considered opinion of the Court, if the investigation is done for the subsequent period also, it would be possible to find out and appreciate the merits of the contention on either side as to whether there was any illegality or fraud committed.

21. As far as the second contention is concerned, this Court is of the considered opinion that once there was a direction issued to the Official Liquidator to investigate into the affairs of the company and in particular, the object and transaction which had taken place from the date of its incorporation namely 28.5.2004, till the date of order, the presence of the petitioning creditor is not necessary. Accordingly, that part of the order of the learned Single Judge directing the Official Liquidator to give opportunity to the petitioning creditor, is set aside.

22. In the light of what is stated above, the order of the learned Single Judge issuing a direction to the Official Liquidator to investigate into the affairs of the appellant company with reference to the object of that company and the transactions which have taken place from the date of its incorporation namely 28.5.2004, till the date of the order and also a direction to the Official Liquidator

to proceed with the investigation after giving notice to the Directors of the appellant company including the three Ex-Directors of the company under winding up is affirmed and the Official Liquidator is directed to file a report within three months from the date of this order.

23. In the result, all these original side appeals are, accordingly, dismissed leaving the parties to bear their costs. Consequently, connected MPs are also dismissed.

