

(1957) 09 BOM CK 0047

In the Bombay High Court

Case No : Misc. First Appeal No. 85 of 1955

Shamji Kheta and Another

APPELLANT

Vs

A.V. Patwardhan and Another

RESPONDENT

Date of Decision : 20-09-1957

Acts Referred:

Companies (Amendment) Act, 1956 — Section 468, 543
Companies Act, 1913 — Section 185, 2, 202, 235

Citation : AIR 1959 Bom 474

Hon'ble Judges : Mudholkar, J

Bench : Single Bench

Advocate : V.B. Mandpe, for the Appellant; G.S. Padhye and C.B. Parakh, for the Respondent

Judgement

Mudholkar, J.—This is an appeal u/s 202 of the Indian Companies Act, 1913. The relevant facts are briefly these: There was a limited company called the Midland Laboratories which went into voluntary liquidation on 25-3-1951. Shri C.L. Verma of Nagpur was appointed a liquidator. During the course of liquidation, he realised between 15,000 to 16,000 rupees. Out of this amount he made disbursements to four creditors including himself to the tune of about Rs. 7,000/-. Upon an application made by the respondent No. 1 and another person Shri Verma was removed from his position as liquidator and in his place the respondent No. 2 Shri K.S. Mishra, Advocate, Nagpur, was appointed a liquidator by the District Judge, Nagpur. Shri Mishra issued notices to the four persons including Shri Verma whose debts had been paid off by Shri Verma to refund the amount paid to them. Shri Verma was ordered by the Court to repay the amount which he had paid to himself. An appeal preferred by him before the High Court against the order requiring him to pay the amount was dismissed by Sinha C.J. A letters patent appeal was preferred from the decision of Sinha C.J. and it was dismissed by this Court on 4-7-1957.

2. The appellants before me are two of the creditors whose debts were paid by

Shri Verma. Upon an application of the respondent No. 2, the District Judge ordered the appellants to refund the amounts received by them. They now challenge the correctness of the order of the District Judge.

3. It is urged before me on behalf of the appellants that the District Judge erred in holding that the appellants were liable to refund the amounts received by them. The learned District Judge has acted under the provisions of Section 185 of the Indian Companies Act. That section reads thus:

"The Court may, at any time after making a winding up order require any contributory for the time being settled on the list of contributories and any trustee, receiver, banker agent, or officer of the company to pay, deliver, surrender or transfer or transfer forthwith, or within such time as the Court directs, to the official liquidator any money, property or documents in his hands to which the company is prima facie entitled."

Now, this provision is applied only if it is shown that the person concerned holds the capacity of a trustee receiver, banker, agent or officer of the company and in such capacity has received any assets or any money belonging to the company. It is said on behalf of the respondents that the appellants were at the relevant time directors of the company and therefore they come within the expression officer of the company" as defined in Section 2 of the act. It is true that the definition of "officer" is wide enough to include a director of a company but the matter does not end there. A person may be a director of a company but unless he has received any money in his capacity of a director the provisions of Section 185 would not be attracted. It may be mentioned to the company for enabling it to carry on its activities which had been thwarted because of want of funds. They did not advance the monies as directors, that is to say, the monies advanced by them were not required to be advanced by them in their capacity as directors by virtue of any contract between them and the company or otherwise. Therefore, though each of the appellants was at the relevant time a director of the company he was also a creditor. When Shri Verma paid off the amounts due to them he paid them off to the creditors of the company and not to the directors of the company. In the circumstances, therefore, disagreeing with the learned District Judge, I hold that Section 185 did not apply.

4. Then comes another provision on which reliance has been placed. That provision on which reliance has been placed. That provision is Section 235 of the Act which reads thus:

"Where, in the course of winding up a company, it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any mis-feasance or breach of trust in relation to the company, the Court may, on the application of the liquidation, or of any creditor or contributory made within three years from the date of the first

appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer examine into the conduct of the promoter director, manager, liquidator or officer and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court 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 Court thinks just."

For, this provision to apply, two conditions must be satisfied. The first is that the person against whom an order is made must belong to one of the categories specified and the second condition is that he must have either misapplied or retained any fund or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust in relation to the company. Now, as already stated, the appellants did not come by the money which is now sought to be recovered from them in their capacity as directors. Being creditors they were paid, though perhaps wrongly, what was due to them by the former liquidator and could not, therefore, be said to be in possession of any funds as such of the company. They only received repayment of the loans advanced by them. Therefore there could be no question of their having misapplied or retained or become liable or accountable in any way for any money or property of the company or being guilty of any misfeasance or breach of trust. In these circumstances collate is difficult to see how they can be asked u/s 235 to refund what they have received.

5. Upon this view, I set aside the order of the District Judge and dismiss the application of the liquidator. Costs in both the Courts will be borne by the liquidator.

6. Order set aside.