

(2001) 11 KAR CK 0046

In the Karnataka High Court

Case No : Company Application No. 1818 of 2000 in Company Petition No. 49 of 1994

Shivmoni Steel Tubes Limited (In Liquidation), Bangalore

APPELLANT

Vs

A. Murali

RESPONDENT

Date of Decision : 09-11-2001

Acts Referred:

Companies Act, 1956 — Section 257, 543 (1)

Citation : (2002) ILR (Kar) 387 : (2001) 6 KarLJ 563 : (2002) 1 KCCR 58 SN

Hon'ble Judges : Kumar Rajaratnam, J

Bench : Single Bench

Advocate : Thomas V. Peter, for the Appellant; G. Krishnamurthy, for the Respondent

Judgement

The Court

1. The company application is taken up for final disposal with the consent of parties.

2. The company in liquidation represented by the Official Liquidator has taken out this application u/s 543(1) of the Companies Act read with Rule 260 of the Companies (Court) Rules, 1959. The application was taken to declare that the respondent is liable to pay the Official Liquidator of the company, a total sum of Rs. 61,36,824.99 together with interest thereon at 6% from the date of winding up order till the date of payment.

3. Section 543 contemplates the power of the Court to assess damages against delinquent Directors. It reads as follows:

"543. Power of (Company Law Board) to assess damages against delinquent directors, etc.--(1) If, in the course of the proceedings on an application made to the (Company Law Board) u/s 397 or 398, it appears that any person who has taken part in the promotion or formation of the company, or any past or present director, managing agent, secretaries and treasurers, manager 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 (Company Law Board), may, on the application of any creditor or member, examine into the conduct of such person, director, managing agent, secretaries and treasurers, manager or officer aforesaid, and compel him to repay or restore the money or property or part thereof respectively, with interest at such rate as the (Company Law Board) 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 (Company Law Board) thinks just".

4. Before I deal with the facts of the case, it would be necessary to deal with the power of the Court u/s 543.

5. This Court in the case of Official Liquidator, Karnataka High Court v. R.C. Marathe and Ors., has held that there must be a detailed narration of the specific acts of commission and omission on the part of the Director in the application.

6. In the case of Chamundi Chemicals and Fertilisers Ltd. (In Liquidation) Vs. M.C. Cherian and others, , this Court has stated that there is inherent power to reject an application in limine, if no prima facie case is made out against the alleged delinquent. In other words, this Court has held that if a prima facie case is not made out u/s 543 and on a perusal of the records and on the admitted facts, it would be open to this Court to reject the application in limine.

7. In The Official Liquidator Vs. Raghawa Desikachar and Others, , it was held that when action is taken u/s 543 there must be a statement of narration of specific case of misappropriation on the part of the Director quantifying the loss to the Company arising out of such acts or omissions and such commission and omission must be spelt out.

8. In Official Liquidator v. T.J. Swamy and Ors., the Court has held that individual responsibility must be identified and established by the applicant (See Official Liquidator, Madras Oils and Fertilisers (P.) Ltd. Vs. G. Shanmugham and Others, .

9. The legal position is clear. The misfeasance against the director is a serious charge of misconduct or misappropriation or breach of trust. Needless to say it is incumbent on the Official Liquidator to furnish the details of the said act. The averment must disclose the cause of action. In the background of the legal position, it would be necessary to deal with the averments in the company application.

"7. That Official Liquidator submits that the respondents viz., Sri A. Murali, Ex-Director of the Company (in liquidation) had misapplied, retained and became liable or accountable for the money or property of the company or were guilty of

misfeasance and breach of trust in relation to the said company for Rs. 61,36,824.99 with interest at 6% per annum from the date of winding up order till the date of payment as detailed below:

(a) That the respondent in the statement of affairs showed investments in the form of National Savings Certificate Rs. 55,150/- and interest income thereon Rs. 23,919/-. But, said National Savings Certificate has not been delivered to the Official Liquidator for realisation. The respondent simply stated that no certificates are traced in his custody. By not delivering the National Savings Certificate to the Official Liquidator, the respondent is liable and accountable for the property of the company to the extent of Rs. 79,069/-.

(b) As the books of accounts i.e., Debtors Ledger for the year 1989-90 debit balance recoverable from M/s. Shivmoni and Company, Bangalore was Rs. 2,177.45. As per the records of the Company, Directors of the company at relevant time were invested in M/s. Shivmoni and Company, Bangalore which was liable to repay the outstanding amount. By not making recovery, the directors of the company acted against the interest of the company, its body of creditors and contributories. They rendered themselves liable to reimburse the amount of Rs. 2,177.45 with interest.

(c) That the ex-director of the company/respondent herein had furnished in the statement of affairs, a sum of Rs. 20,78,813/- as Trade Debtors. Since the Ex-Director of the company has not taken proper steps to realise the said amount, the Official Liquidator had issued notices to the list of debtors as per books of accounts maintained by the company in liquidation to realise the debt amount before receipt of the statement of affairs. The Official Liquidator had thereafter also issued/filed notices/applications against the debtors on various dates as per the list furnished to the statement of affairs by the Ex-Directors. In reply most of the debtors have requested to furnish the details such as voucher number bills etc., to pay the debt amount due to the company. But such details are not available in the records of the company (in liquidation).

That out of the sum of Rs. 20,78,813/- the Official Liquidator could realise only a sum of Rs. 1,53,551.18 including interest from the debtors as mentioned below:

1.The Executive Engineer, Dharwad 62.00 2.The Executive Engineer, Shimoga 42,909.00 3.The Executive Engineer, Bellary 40,637.00 4.The Executive Engineer, Dharwad 21,261.00 5.The Executive Engineer, Haveri 2,500.00 6.The Executive Engineer, Bellary 28,074.00 7. ECIL, Hyderabad 18,108.00 1,53,551.18 The ex-Director of the company (in liquidation) had committed guilt of misfeasance and breach of trust in relation to the Company for a sum of Rs. 19,25,261.82 as debt.

A copy of list of debtors is enclosed as Annexure-A to this application.

(d) That in the said statement of affairs it was shown a sum of Rs. 1,82,988 as balance at Bank. As per the list furnished to the statement of affairs, notices were issued to Banks concerned on 5-12-1997 to remit the balance amount lying

with them to Official Liquidator. In compliance of the above said notice, one M/s. Kalidasa Co-operative Bank Limited have remitted the balance amount of Rs. 394.83 with the Official Liquidator on 16-1-1998. In reply M/s. Syndicate Bank, Bangalore-9 informed vide letter dated 26-12-1996 that there were no operations nor the company maintained required balance and hence the account stands closed and balance of Rs. 2.07 is partly adjusted towards their service charges. The other Banks neither replied to the notice nor remitted the balance amount with the Official Liquidator and thereby the Bank balance of Rs. 1,82,593.17 remains unrealisable. A copy of names and addresses and account numbers of the Banks is enclosed as Annexure-B to this application.

(e) That the Company (in liquidation) had made loans and advances to the extent of Rs. 39,49,903/- to the various Government Authorities such as Sales Tax, Telephone and Telex, Karnataka Electricity Board etc., including Rs. 2,177.45 showed at para 7(b). A statement is enclosed as annexure. A copy of the loans and advances is enclosed with this application and marked as Annexure-C. The Official Liquidator had issued notices to the above said authorities on 3-3-1998 to refund the deposit amount made by the Company (in liquidation) with the Official Liquidator. In reply the telephone department informed vide letter dated 8-10-1998 that all the telephones were found to have been closed long back and an amount of Rs. 17,494/- is due from the company (in liquidation) to their department. The other Government Departments viz., Sales Tax and Karnataka Electricity Board have not responded to the notices issued by Official Liquidator and thereby the entire amount of loans and advances could not be realised from them till date.

8. The Official Liquidator, the applicant herein therefore submits that the respondent herein himself liable to make good the amount as referred above. This application is filed within time in view of the provisions of Section 543 of the Companies Act, 1956 read with Section 458 of the Act".

10. Although the applicant in the company application has not spelt out the tenure of the respondent as a Director of the Company, it is common ground that the Company was declared sick by the BIFR during the year 1987 in case No. 47 of 1987. Later it recommended for winding up of the Company as not viable for rehabilitation. The order of the BIFR is dated 20-8-1990. During that period when the matter was before the BIFR there were 5 directors. The respondent was not a Director at the relevant time. The 5 directors were:

- (i) Mr. T. Shamanna, Chairman.
- (ii) Mr. Moni Bose, Managing Director.
- (iii) Mr. Kurian John Kurian, BIFR nominee.
- (iv) Mr. Chandrasekhara Shetty, KSFC nominee,
- (v) Mr. S.M. Mohatta, promoter Director.

11. Pursuant to the recommendation, BIFR withdrew its nominee Director, Mr. John Kurian w.e.f. 20-8-1990. Mr. S.M. Mohatta, Promoter Director died on 22-8-1990. KSFC withdrew their nominee Director, Mr. Chandrasekhara on 3-9-1990.

12. Consequently, the strength of the Board was reduced to 2, namely Mr. T. Shamanna and Mr. Moni Bose. The Company was a public limited Company. The statutory requirement was that there should be a minimum of 3 Directors as per Section 252(1) of the Companies Act. The respondent was co-opted as a Director on 17-9-1990 only to fulfill the statutory requirement. On 17-9-1990 when the respondent was made a Director, it is common ground that the Company was still before the BIFR and no transaction took place on 17-9-1990 and subsequently. It is also common ground that the respondent became Director only to render legal assistance to the Company. Annexure-R is the Annual Report of the Company for the year 1989-90. The explanatory statement reads as follows:

"Consequent to the resignation of Sri S.R. Chandrasekara Setty and Sri K.J. Kuriyan from the Board and the death of Sri S.M. Mohatta the strength of the Board was reduced below the minimum requirement, In order to comply with the statutory requirement Sri A. Murali was co-opted by the Board as a Director of the Company. Since Sri A. Murali is an Advocate who has been associated with the Company as a professional for the past several years, the directors felt that it would be in the interest of the Company to appoint him as a Director. Sri A. Murali holds office only upto the date of this annual general meeting. A notice has been received from a member u/s 257 of the Companies ; Act, 1956 signifying his intention to propose the name of Sri A. Murali for appointment as a director of the company at the annual general meeting. The directors recommend the appointment in the best interests of the company".

13. It is clear from the records of the Company that the Company was referred to the BIFR in the year 1987 and thereafter no transaction took place, more so, pursuant to the respondent-becoming a Director of the Company. The respondent became a Director of the Company as stated earlier on 17-9-1990. The Company Petition was admitted in the year 1994 and the Company was wound up by this Court on 8-9-1995.

14. Unfortunately both Mr. Moni Bose and Mr. T. Shamanna died after the Company was wound up. After the Company was wound up, the Official Liquidator seized the unit and took over all the records in their custody. The respondent has filed his statement of affairs furnishing all the available information on the basis of the records that was available with the Official Liquidator.

15. The main bone of contention between the Official Liquidator and the respondent is with respect to an entry in the Balance Sheet of the Company as on 31-12-1995. The entry relates to National Savings Certificate amounting to Rs. 55,150/- and interest thereon. This was the main subject of controversy

between the applicant and the respondent. I shall deal with the rest of the allegations little later. As far as this National Savings Certificate is concerned, both the Official Liquidator and the Counsel for the respondent submitted that purely on the basis of the Balance Sheet, the statement of affairs was filed stating that the Balance Sheet reflected certain credit under the column of National Savings Certificate amounting to Rs. 55,150/-. Neither the applicant nor the respondent knew much about the National Savings Certificate. In these circumstances time was granted to both the applicant as well as the respondent to verify whether the National Savings Certificate is still available as per the Balance Sheet.

16. It is nobody's case that the said sum was encashed during the tenure of the respondent. After a thorough verification, it appears that the said sum of Rs. 55,150/- is still in the books of the Company and the Official Liquidator has fairly submitted that if this amount is still available in the Postal Department as per the records, he will trace the records and encash the amount in favour of the Official Liquidator.

17. It is also nobody's case that the investment under the head of National Savings Certificate was made during the tenure of the respondent. It was also not the case that it was encashed during the said period. Therefore, it is not known how the respondent can be made liable for an act of misfeasance when no allegation has been made that it was invested during his tenure as a Director or encashed during his tenure as a Director. It is for the Official Liquidator to state when it was invested from the records and if it has not been encashed, to trace the amount and to encash it so that some liabilities may be covered by this amount.

18. Therefore, there is no difficulty for this Court to hold that no prima facie case has been made out against the respondent with respect to the National Savings Certificate amounting to Rs. 55,150/-. In fact, it is common ground that after the Company was before the BIFR in Case No. 47 of 1987 right up to the order of winding up on 8-9-1995, there is absolutely no transaction by the Company. When such is the position, it is nothing but an abuse of the process of the Court to file this application calling upon the respondent to make good the said sum of Rs. 55,150/- with interest. There are no averments in the application which could implicate the respondent. When there are no averments and when it is the admitted case that the said investment in the National Savings Certificate was done before the Company was declared sick by the BIFR on 20-8-1990 and when there was no transaction after 1990 and no withdrawals of any amount by the officers of the Company, it would be clearly a fit case where this Court has power to dismiss the application in limine as held by this Court in the case of *M/s. Chamundi Chemicals and Fertilisers Limited*, supra.

19. The learned Official Liquidator fairly submits that after the Company was placed before the BIFR, right till the year of winding passed by this Court, there was no transaction by the Company i.e., from 20-8-1990 till 8-9-1995. The

respondent was co-opted as a Director on 17-9-1990 and ceased to be a Director on 8-9-1995 on the Company being wound up by this Court.

20. As submitted by the Counsel for the Official Liquidator, there is absolutely no material to show that any transaction took place between 20-8-1990 and 8-9-1995. On the contrary it is common ground that no transaction took place during that period when the respondent was the Director of the Company. There is no record produced by the applicant to establish even vaguely that some transactions took place during that period. All transactions related to the period before 20-8-1990.

21. The other allegations mentioned in the application against the respondent are not canvassed before this Court, since it is the admitted case that all these allegations related to a period much before 20-8-1990.

22. In these circumstances, there is no merit in the Company Application. The company application stands disposed of accordingly.