
(1983) 09 P&H CK 0087

In the Punjab And Haryana At Chandigarh

Case No : C.A. No. 126 of 1981 in C.P. No. 191 of 1980

Sunder Lal Jain

APPELLANT

Vs

Sandeep Paper Mills P. Ltd. and Others

RESPONDENT

Date of Decision : 20-09-1983

Acts Referred:

Companies Act, 1956 — Section 286(1), 531A
Provincial Insolvency Act, 1920 — Section 53

Citation : (1986) 60 CompCas 77

Hon'ble Judges : R.N. Mittal, J

Bench : Single Bench

Advocate : Sarat Chandra, for the Appellant; Laxmi Grover, for respondents Nos. 2, 5 and 6 and C.P. Sapra and R.K. Chhibber and P.K. Arora, Official liquidator, respondent No. 4, Party in person, for the Respondent

Final Decision : Dismissed

Judgement

Rajendra Nath Mittal, J.—The petitioner filed this application u/s 531A of the Companies Act, 1956 (hereinafter referred to as "the Act").

2. The case of the petitioner is that he is a creditor of M/s Haryana Rubber Industries (P.) Ltd. (hereinafter called " the company "), against which the petition (C. P. No. 191 of 1980) for winding up was presented on August 21, 1980, on which date notice was issued to the company. It was ordered to be wound up on March 5, 1981. Mr. Gian Singh was its chairman who died in 1979. The company, after his death, stopped functioning in January, 1979. R.K. Grover, respondent No. 2, in collusion with the State Bank of India, respondent No. 3, sold a boiler known as Lancashire boiler of the company having a market price of more than five lakh rupees for a paltry amount of Rs. 85,000 to M/s Sandeep Paper Mills Pvt. Ltd., respondent No. 1, on February 15, 1980. It is alleged that the transfer was not in the ordinary course of business of the company and that it was not bona fide and for valuable consideration.

3. It is further averred that respondent No. 2 started two concerns by the name

of M/s Param Rubber Industries, and M/s Param Rubber and Allied Industries, respondent No. 5. He, along with some others, also floated another concern by the name of M/s Param Rubber Industries P. Ltd., respondent No. 6. All the assets of the company are now either in the name of M/s Param Rubber Industries or M/s Param Rubber and Allied Industries or M/s Param Rubber Industries P. Ltd. Respondent No. 2 took away the mixing mill and 1,500 mandrels of the company illegally and unauthorisedly which are now with either M/s Param Rubber Industries or M/s Param Rubber and Allied Industries or M/s Param Rubber Industries P. Ltd. He did so in collusion with other shareholders of the company in order to defeat the claims of the creditors, who now want to run the factory belonging to the company. It is, therefore, prayed that the transfer of the boiler to respondent No. 1 and that of the mixing mill and 1,500 mandrels to others, as stated above, be declared to be null and void and the official liquidator, respondent No. 4, be directed to take possession of the same forthwith.

4. The application has been defended by respondents Nos. 1, 2, 3, 5 and 6. Three written statements have been filed, one by respondent No. 1, the second by respondent No. 3 and the third by respondents Nos. 2, 5 and 6. Respondent No. 1 pleaded that he purchased the Lancashire boiler bona fide and for valuable consideration of Rs. 85,000. The sale was effected after the legal formalities were duly fulfilled by the company and the State Bank of India. It is alleged that the company had stopped functioning in January, 1979, and the boiler was lying idle since then till the date of its sale, that is, February 15, 1980. It is also pleaded that the transfer of the boiler was made in the ordinary course of business. The respondent has further pleaded that after the purchase, it has spent an amount of about two lakh rupees on its improvement.

5. The State Bank of India, respondent No. 3, in its written statement took similar pleas. It further averred that the company stopped functioning in January, 1979, whereas Gian Singh died on October 22, 1979. It had no knowledge about the validity or otherwise of the board of directors of the company. After the company stopped working, the regional manager of the bank asked his branch manager to serve upon the company and its directors a legal notice calling upon them to return the advances made to the company, and the needful was done. Subsequently, he asked the branch manager to arrange for the disposal of the stocks and other assets pledged/hypothecated with the bank by public auction/private treaty before the final decision to file a suit against the company was taken. Thereafter, the company/borrowers themselves offered to dispose of the assets of the company. The company then resolved, vide its resolution dated November 16, 1979, to sell its assets in consultation with the branch manager of the bank. Respondent No. 1 gave an offer of Rs. 60,000 for the boiler. The technical officer of the bank gave his report dated January 28, 1980, to the effect that the market value of the boiler was estimated between Rs. 75,000 and Rs. 80,000. The regional manager of the bank asked the branch manager to arrange for the sale of the boiler at the price assessed by the technical officer. Subsequently, on February 11, 1980, M/s Northland Conveyors and Beltings (P.)

Ltd. gave a final offer of Rs. 80,000. Thereafter, respondent No. 1 revised its quotation and increased the amount to Rs. 85,000. The undepreciated original value of the boiler was Rs. 40,900 odd. In the above circumstances, the boiler was sold bona fide for a consideration of Rs. 85,000 which was its then market value. It is alleged that it was sold in good faith to respondent No. 1 and the amount of consideration was paid to the bank in order to liquidate the company's debt.

6. Respondents Nos, 2, 5 and 6 supported the version of respondent No. 3 and controverted the allegations of the petitioner. They further denied that M/s. Param Rubber Industries or M/s. Param Rubber and Allied Industries were started out of the illegal gains or illegal sale of the assets of the company. Consequently, all of them prayed that the application was liable to be dismissed.

7. The first question that arises for determination is whether the transfer of the boiler was made in good faith and for valuable consideration. First, I shall deal with the legal aspect and thereafter with the merits of the case. Section 531A relates to avoidance of voluntary transfer. It reads as follows:

"531A. Avoidance of voluntary transfer.--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."

8. It is equivalent to Section 53 of the Provincial Insolvency Act. The reason for introducing the section in the Companies Act, as given in the Notes on Clauses, was that there was no provision in the Act in respect of voluntary transfer dealt with in Section 53 of the Provincial Insolvency Act and, therefore, it was introduced by the Act No. 65 of 1960. It is well-settled that the burden of proving that a transfer, which is sought to be annulled u/s 53, has not been made in good faith and for valuable consideration is on the party seeking annulment of the transfer: (see *Lajje v. Lala Basheshar Nath*, Official Receiver, Delhi [1936] PLR 212 and *N. Subramania Iyer Vs. The Official Receiver, Quilon*,). The same principle will apply in the case of an application made u/s 531A of the Act. Now, the question arises as to how the burden of proof is to be discharged by that party. The following observations of the Supreme Court in *N. Subramania Iyer Vs. The Official Receiver, Quilon*, , as extracted in the headnote, may be read with advantage:

"An application by the Official Receiver u/s 53 for annulment of transfer can be allowed on proof either that there was no consideration for the transaction or that the consideration was so inadequate as to raise the presumption of want of good faith. Alternatively, the Receiver may also succeed on showing that though there was valuable consideration for the transaction impeached, there was want

of good faith in the sense that the transferee knowing all the circumstances of the transferor who had since been adjudged an insolvent entered into the transaction with a view to screening the assets of the insolvent from the Receiver in whom the insolvent's property vests for the benefit of the creditors. Such will be mostly cases of benami transactions in favour of some relative of the insolvent or a person in whom he has full confidence that he will hold it ultimately for the benefit of the insolvent or persons in whom he may be interested. Or it may be that a person finding himself over head and ears in debts wishes to convert his assets into liquid assets with the collusion or connivance of the transferee. In both cases, the intention clearly is to shield the assets against the claims of creditors and in such cases, though the transfer may have been for consideration, either adequate or otherwise, but having been entered into with a view to defraud or delay the creditors, the transferor and the transferee sharing the common intention, the transaction must be annulled and the assets must be brought into the common hotchpot for the benefit of the insolvent's creditors."

9. It is further observed by their Lordships that it is not necessary in annulment proceedings to prove that the transferor who has been subsequently adjudged an insolvent should have been honest and straightforward in the matter of the transaction impeached. If he was really so, there would not be much difficulty in coming to the conclusion that the transaction as a whole was bona fide. Even if the transferors were wanting in bona fides, the crucial question still remains to be answered. It is further held that unless it is found that the transferee was wanting in bona fides in respect of the transaction in question, he cannot be affected by the dishonest course of conduct of the transferor. In the said case, Section 53 of the Provincial Insolvency Act was interpreted and the observations will apply to the instant case as well.

10. Adverting to the facts of the present case, it is not disputed that the sale of the boiler was effected for Rs. 85,000 in favour of respondent No. 1 whereas it was purchased by the company for about forty-one thousand rupees in September, 1974. After purchase, it was used by the company till January, 1979. Thus, it was used for about five years and thereafter from January, 1979, till the date of sale, it remained idle as the factory was closed. It is "true that the petitioner asserts that the price of the boiler was about five lakh rupees but no reliable evidence has been examined by him in this regard. The affidavit of the petitioner cannot be relied upon as he is an interested person. It was incumbent upon him to produce some independent evidence as the burden was upon him. Mr. Sharat Chander has argued that respondent No. 1 spent a huge amount for renovating and installing it and, therefore, it should be presumed that its value was much higher than that for which it was sold. I, however, do not agree with the argument. Rather, it shows that the boiler was not in a good condition, otherwise there was no necessity for respondent No. 1 to spend so huge an amount on its renovation. It is also advantageous to note that earlier, respondent No. 1 made an offer of Rs. 60,000 for it. The company, after having received the

offer, consulted the branch manager of the bank who referred the matter to the regional manager. He deputed a technical officer of the bank to examine the boiler and to submit his report. The technical officer, after examining the boiler, prepared his report dated January 28, 1980 (at page 257 of the paper-book), and opined that taking into consideration its condition and the prices of boilers prevailing in the market, its price was between Rs. 75,000 and Rs. 80,000. The regional manager informed the branch manager accordingly. It may also be mentioned that M/s. Northland Conveyors and Beltings P. Ltd., another intending purchaser, gave an offer of Rs. 80,000 for it. When respondent No. 1 found that the company was not ready to sell it for Rs. 60,000, it raised the offer to Rs. 85,000. In these circumstances, it was sold to respondent No. 1 for the said price. No relationship between the directors of the company and the directors of respondent No. 1 has been established and, therefore, it cannot be expected that they would have sold it for a lesser amount. The company has also not retained the consideration but it has been utilised for repayment of its loan to the bank. Thus, it cannot be held that the price of the boiler was five lakh rupees or thereabout and it was sold for (a much) lesser amount. There is also no evidence that respondent No. 1 entered into the transaction with a view to screening the assets of the company from the liquidator or to defraud the creditors. It also cannot be held that the transferee was lacking in bona fides.

11. Mr. Sharat Chander referred to Official Liquidator, Victor Chit Fund P. Ltd. Vs. Kanhiya Lal and Others, , and Official Liquidator Kerala High Court v. Victory Hire Purchasing Co. (P.) Ltd. [1982] 52 Comp Cas 88 (Ker), wherein the transfers made by the company were held to be invalid and void u/s 531A of the Act. Both the cases, however, are distinguishable on facts as in those cases the transferees were relations of the directors of the transferor company. Therefore, the learned counsel cannot derive any benefit from the observations made therein.

12. After taking into consideration all the above circumstances, I am of the opinion that the petitioner has failed to prove that the transfer of the boiler was not made in good faith and for valuable consideration.

13. The second question that arises for determination is whether the transfer was made within one year before the presentation of the winding up petition. The transfer was made on February 15, 1980, whereas the petition for winding up was filed on August 28, 1980. Thus, it is evident that the transfer was made within a period of one year before the presentation of the winding-up petition.

14. The third question that arises for determination is whether the transfer of boiler was made by the company in the ordinary course of business. The learned counsel for the respondents very fairly conceded that it was not in the ordinary course of business. Consequently, I decide the question accordingly.

15. The last question that requires determination is whether the transfer of the boiler was made by the company. The sale has been made in pursuance of the resolution of the company dated November 16, 1979. Mr. Sharat Chander has

vehemently contended that Messrs R.S. Dugal, Hoshier Singh, S.K. Aggarwal and R.K. Grover, who passed the resolution, were not directors of the company and it was not passed on the said date. Thus, the two things which need to be gone into are whether the aforesaid persons were directors of the company and whether the resolution was passed on November 16, 1979. Reference has been made by Mr. Sharat Chander to the letters dated November 15, 1978, and December 30, 1978, from Gian Singh to the Branch Manager, State Bank of India, Bahalgarh, some other documents, affidavits and oral evidence in order to prove that the above perspns were not the directors.

16. Article 29 of the articles of association provides that Mr. Gian Singh will be the permanent managing director and Mr. R.K. Grover, the permanent director of the company. No record is available as to who were appointed as directors thereafter. Mr. Gian Singh admittedly died in October, 1979. The statement of Mr. Grover is that the books of the company were in the possession of Mr. Gian Singh. The books were summoned from the official receiver and he did not produce the same on the ground that no books were handed over to him. No record from the Registrar- of Companies has been got produced by either of the parties. It is evident from the evidence that the dispute started among the directors inter se and the company was in a very bad shape. It also stopped working in January, 1979. In the circumstances, the only course open is to refer to the affidavits and statements of the parties.

17. The petitioner in his various affidavits has stated that Messrs R.S. Dugal, Hoshier Singh, S.K. Aggarwal and R.K. Grover were not the directors of the company. He has, however, not stated as to who else were the directors. On the other hand, the categorical stand of Mr. Grover in his affidavits as well as in his statement is that the above-said persons were the directors and they authorised him to dispose of the boiler. It is true that in the letter dated November 15, 1978 (at page 225 of the paper-book), Mr. Gian Singh wrote to the manager of the State Bank of India that in the annual general meeting, the number of directors had been reduced to two, namely, himself and Hoshier Singh. However, it was also mentioned therein that the board was likely to be expanded with a few more directors, including Mr. R.S. Dugal, shortly. In the letter dated December 30, 1978 (at page 227 of the paper-book), he again wrote to the branch manager that Mr. R.S. Dugal was no longer a managing director since the last annual general meeting held on October 18, 1978. It is difficult to reconcile the two letters as in the first letter, Mr. Gian Singh said that Mr. R.S. Dugal would be included in the board of directors whereas in the later letter, he said that he had been removed on October 18, 1978. If he had been removed on the said date, why had he not mentioned that fact in his earlier letter ? He also did not enclose a copy of the minutes of the meeting dated October 18, 1978, with either of the letters. It is also not understandable that after removing Mr. R.S. Dugal on October 18, 1978, what necessity was felt to include him again in the board of directors on November 15, 1978, and what necessity arose to write the letter dated December 30, 1978, when no information was sought from him. The letter

dated December 30, 1978, was not written in reply to any letter of the bank. Therefore, the letters are of no help to determine the matter. Mr. Grover is the person who had the knowledge as to who were the directors of the company. In the circumstances, it cannot be held that the above-said persons were not the directors of the company.

18. Mr. Sharat Chander has further argued that Mr. R.K. Grover ceased to be a director of the company as he stopped working as a director in June, 1978, and thereafter he did not attend the meetings of the board of directors till November 16, 1979. u/s 283 of the Act, if the director absents himself from three consecutive meetings of the board of directors, without obtaining leave of absence from the board, he ceases to be a director. u/s 285 of the Act, the board of directors must meet once in three months. In view of the provision of law, from June, 1978, to November, 1979, more than three meetings must have been held but as he did not attend them, he ceased to be a director. He also urges that the meeting dated November 16, 1979, was not a properly convened meeting.

19. I have duly considered the argument. It is not necessary to go into the question as to whether Mr. R.K. Grover ceased to be a director or not as Section 290 of the Act validates the acts of the directors in certain circumstances. It provides that the acts done by a person as a director shall be valid notwithstanding that it may afterwards be discovered that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in the Act or in the articles. Even if it may be assumed that Mr. Grover ceased to be a director in view of Section 283, the resolution dated November 16, 1979, cannot be held to be illegal in view of Section 290 ibid on that ground.

20. Now, I advert to the second part of the argument, wherein it is stated that the meeting dated November 16, 1979, was not a properly convened meeting. Reference has been made by Mr. Sharat Chander to the notice, annexure R-1 (at page 207 of the paper-book) wherein Mr. Grover requested Mr. Dugal to attend the meeting on November 16, 1979, to discuss the future of the company and to pay tributes to the late Ch. Gian Singh. He further requested Mr. Dugal to bring his wife and have lunch with him. It is true that the notice appears to be of an informal type. However, it has not been brought to my notice that the notice is to be served in a particular form. Section 286(1) of the Act provides that notice of a meeting of the board of directors of the company shall be given in writing to every director. The purpose of sending a notice to a director is to inform him about the time and date of the meeting. No grievance has been made by any of the directors that they could not be present because of non-service of the notice. In the circumstances, it cannot be held that the meeting dated November 16, 1979, was not a properly convened meeting.

21. There is another way in which the matter may be examined. It is, that the boiler and other machinery were pledged with the bank. It is well-settled that a

secured creditor is outside the winding up jurisdiction of the court. He can, if he desires, realise the debt without the intervention of the court. In this regard, reference may be made to Lallan Prasad Vs. Rahmat Ali and Another, , wherein it is observed that u/s 176 of the Contract Act, in case of default by the pawner, the pawnee has the right to sue upon the debt and to retain the goods as collateral security or to sell the goods after reasonable notice of the intended sale to the pawner. Thus, in the instant case, the bank, after notice to the company, could sell the boiler itself. If the company had sold the boiler with the consent of the bank, there should be no grievance to the petitioner. The reason is that the bank had to recover several lakhs of rupees from the company and the price of the boiler was only Rs. 85,000.

22. Mr. Sharat Cbander has next urged that the record of the company does not show any entry regarding the sale of the boiler. He submits that even the sales tax recovered by it has not been deposited with the Government. It is not necessary to go into this question as admittedly the amount of Rs. 85,000 has been repaid to the bank and credited to the account of the company and that the question of deposit of sales tax is not relevant in this petition.

23. He has next challenged the resolution of the board of directors dated February 7, 1980, and has submitted that the date of sale of the boiler and some other dates had not been correctly mentioned therein. In the circumstances of the case, it is also not necessary to go into the contents of the resolution. Even if that resolution had not been passed, the sale could not be assailed by the petitioner.

24. The petitioner also moved C. A. No. 42 of 1982 in the abovesaid petition stating that Mr. Sudhma Ram, Mr. R.K. Grover and Mr. S.K. Kalia have perjured and prepared false documents and they should be ordered to be prosecuted. I have already dealt with the affidavits. It is well-settled that a prosecution ought not to be directed unless there is reasonable probability of conviction. After taking the facts and "circumstances of the case into consideration, I do not propose to order prosecution of the aforesaid persons.

25. For the aforesaid reasons, I do not find any merit in both the company applications and dismiss the same. No costs.