

(1997) 12 DEL CK 0030

In the Delhi High Court

Case No : C.A. (C) No. 13351 of 1989

Sundram Trading and Chit Fund P. Ltd.

APPELLANT

Vs

Sudhir Kumar Paroothi

RESPONDENT

Date of Decision : 19-12-1997

Acts Referred:

Citation : (1997) 12 DEL CK 0030

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : Ms. Zubeda Begum, Official Liquidator, for the Appellant; Mr. H.S. Dhir and Ms. Kanwaljit Dhir, for the Respondent

Judgement

Dr. M.K. Sharma, J.—This is an application filed by the Official Liquidator u/s 446 of the Companies Act praying for a payment order against the respondent for a sum of Rs. 21,573 with future pendente lite interest of 12% per annum from the date of filing of the application till the date of realisation. The applicant company on whose behalf this application has been filed by the Official Liquidator had its registered office at New Delhi. The main object with which the company was incorporated was the business of chit fund and of finance. In C.A. 91/84, an order was passed by this Court on 11.10.1984 appointing the Official Liquidator attached to this Court as the Provisional Liquidator. Subsequently, the applicant company was wound up by an order passed by this Court on 21.8.1987.

2. The respondent applied and became a member of a chit of the company bearing No. DLD-9/15 for Rs. 20,000/- payable in 40 installments of Rs. 500/- per month. The respondent became the successful bidder at the auction held on 16.8.1983 having bid at a discount of Rs. 5,000/- and thus became entitled to receive the prized amount of Rs. 15,000/- with the attendant liability to subscribe for the remaining installments. The aforesaid amount of Rs. 15,000/- was paid to the respondent by the applicant company by a Cheque No. 787611 dated 13.9.1983 and the said cheque was encashed. As per the account as standing in the chit ledger of the company which is being kept in the regular

course of business, it appears that the respondent made certain payments by way of installments. However, as on 17.7.1984, as per the aforesaid books of account of the company, the respondent was liable to pay an amount of Rs. 12,955.50. From the said ledger account, it further appears that on 27.10.1984 two entries came to be made in the said account and brought the account of the respondent to Nil.

3. The respondent has stated that out of the two entries, an amount of Rs. 5,660.25 was adjusted out of Chit No. DLD-9/14 in which account, according to the respondent the aforesaid amount was due and payable to the respondent. The next entry dated 27.10.1984 is in respect of Rs. 6,039.75 which, according to the respondent was adjusted as against the payment due and payable to Smt. Prakash Wanti who was holding Chit No. DLD-7/30. The respondent has taken a stand that the aforesaid two transactions giving adjustment of the amount on the account of the respondent was made in good faith and the said entries are supported by documentary evidence. It is also further case of the respondent that the aforesaid sum of Rs. 5,660.25 plus Rs. 650/- as dividend was adjusted from Chit No. DLD-9/14 which was a non-prized chit held by the respondent. The respondent Therefore, denies that although a sum of Rs. 12,955.50 was due to the applicant against Chit No. DLD-9/15, the said amount stood paid in full and final settlement on 27.10.1984 against receipts and return of the original documents and, therefore, nothing is due and payable by the respondent to the applicant. The respondent has also placed on record two receipts dated 27.10.1984 showing payment of Rs. 5,660.25 and the receipt for Rs. 6,039.75. The respondent has also placed on record a no-dues certificate dated 27.10.1984 issued by Shri Ashwani Kumar who was a Director of the company. The respondent has also placed on record a copy of the cancelled demand promissory note. Relying on the contents of the aforesaid documents, the respondent stated that the aforesaid transaction by way of adjustment of accounts was made bona fide and without knowledge of appointment of the Provisional Liquidator by the respondent and, Therefore, neither the provisions of Section 531 or 531A of the Companies Act could be attracted to the facts of the present case.

4. Ms. Zubeda Begum appearing for the Official Liquidator submitted that the Provisional Liquidator in the present case as appointed on 11.10.1984 and Therefore the alleged transaction entered into between the then Director of the company and the respondent on 27.10.1984 by giving adjustment of the accounts is void since the same was entered into with dishonest intention and is the outcome of fraud being played on the creditors of the company. My attention was also drawn to the provisions of Section 531 and 531A of the Companies Act in support of her submission that the present transaction alleged by the respondent by way of adjustment showing two entries on 27.10.1984 is void. Mr. Dhir appearing for the respondent on the other hand, submitted that there is nothing on record to show that the respondent had knowledge about the appointment of the Official Liquidator as the Provisional Liquidator on 11.10.1984. According to him, the Official Liquidator has failed to allege, prove

and establish a case of fraudulent transfer in respect of the present transaction.

5. The ledger account of the company on the account of the respondent has been placed on record on careful perusal of which I find that as per entry dated 17.7.1984, an amount of Rs. 12,955.50 was due from the respondent payable to the applicant. The respondent in its reply to paragraph 6 of the application admitted that a sum of Rs. 12,955.50 was due to the petitioner against Chit No.DLD-9/15, but it is the case of the respondent that the said amount stood paid in full and final settlement on 27.10.1984 against receipts and return of the original documents by adjusting the entire amount of the deponent by purported transfer of a sum of Rs. 6,039.75 out of Chit No. DLD-7/30 wherein Mrs. Prakash Wanti was a member and a sum of Rs. 5,660.25 purported to be paid by the respondent out of his own Chit No. DLD-9/14 which was also a non-prized chit. The aforesaid adjustment has been given by one of the Directors of the company on 27.10.1984 after the company was provisionally wound up on 11.10.1984. The company was finally wound up by order dated 27.8.1987. Therefore, if any of the provisions of Section 531 or 531A of the Companies Act is attracted to the facts of the present case, these transactions admittedly could be declared void and consequently a payment order, as sought for by the applicant, could be made.

6. Ms. Zubeda Begum appearing for the Official Liquidator relief upon the provisions of Section 531 to state that it was a pure and simple case of fraudulent preference given by the then Director of the Company to the respondent in order to give the respondent undue and fraudulent advantage. In order to constitute fraudulent preference, there need not be a transfer of property nor is any cash payment necessary. Even when there is payment or transfer of payment or adjustment in accounts or any other act relating to property, then also the provisions of Section 531 of the Act could get attracted provided the other conditions as set out in the said section are fulfilled. To establish fraudulent preference u/s 531, it may not be enough to show that preference was shown to a particular creditor. It must also be shown that it was done with a view to give him favoured treatment. The dominant motive attending the transaction has to be ascertained and if it is tainted with an element of fraud, then only the provisions of Section 531 could get attracted, to set aside a transaction as fraudulent preference u/s 531 of the Companies Act. This Court in Official Liquidator, Victor Chit Fund Vs. Kanhiya Lal & Others reported in 1972 Vol. 42 Company Cases Page 396 held that fraud must be clearly alleged, proved and established. It was also held that the petition containing mere general allegations and lacking in material particulars relating to fraud is liable to be dismissed. To the same effect in the decision in Official Liquidator, Eluru, The Eluru Motor Transport Ltd. Vs. Vankineni Rajagopala Venkataratnam, when it held that onus is on the person who impugned a transaction as being a fraudulent preference to make it out. To prove and establish fraudulent preference, such material particulars for foundation to establish fraudulent preference u/s 531, in my considered opinion, are lacking in

the present case. Therefore, the application cannot plead for relief in this case without laying foundation for making out a case u/s 531 of the Companies, Act. However, the applicant shall be still entitled to a relief provided the provisions of Section 531A could be said to be attracted to the facts and circumstances of the present case. For ready reference, it is necessary to extract the provisions of Section 531A which are extracted below:-

S.531-A. 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 favor 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.

7. The substance of the aforesaid section is that any transfer of property or goods held by a company otherwise than in the ordinary course of business or such transfer in favor of a purchaser or encumbrance not in good faith and valuable consideration would be void if it had been made within one year before the presentation of a winding up petition or the passing of a resolution for voluntary winding up. In my considered opinion, to attract the Provisions of Section 531-A of the Companies Act also, like the provisions of Section 531 of the Companies Act, it is not necessary that payment has to be made in cash. Even payment by transfer or adjustment in accounts or any other act relating to property could also be challenged if the other requirements of the provisions are met with or fulfilled. The expression "good faith" is defined in the General Clauses Act to the effect "an entry shall be deemed to be done in good faith where it is in fact done honestly whether it is done negligently or not". In absence of a separate definition under the Companies Act, in my considered opinion, the definition as given in the General Clauses Act for the aforesaid expression "good faith" must apply.

8. On scrutiny of the records, it is apparent that by making entries in the ledger account on 27.10.1984 and giving adjustment to the respondent in the said account by way of transfer from other accounts, there was indeed transfer of movable property by the company. Therefore, the issue that arises for my consideration is whether such transfer made by way of adjustment to the account of the respondent by making it a nil liability was not made in the ordinary course of business or in good faith. Since the aforesaid entries came to be entered into the ledger account of the respondent on 27.10.1984, that is, after 16 days of appointment of the Provisional Liquidator in respect of the company in question, the said transfer of movable property made by the Director of the Company after appointment of the Provisional Liquidator cannot be said to have been made in the ordinary course of its business.

9. The next issue, Therefore, to be decided in the present case is whether the said entries by way of transfer of property could be said to have been made in

favor of a purchaser or encumbrancer in good faith. On scrutiny of the records, it is disclosed that in the present case adjustment was given in the account of the respondent from the account in Chit No.DLD- 9/14 which also belonged to the respondent. The other adjustment for the balance amount is from Chit No.DLD-7/30 which stood in the name of Smt. Prakash Wanti from whose account an amount of Rs. 6,039.75 is shown to have been adjusted in the present account held by the respondent. Said Smt. Prakash Wanti is stated to have given a no objection certificate which fact is not denied by the Official Liquidator in his pleadings. If said Smt. Prakash Wanti permitted such adjustment by way of transfer from her account, the said transfer cannot be said to be without consent and, therefore, illegal.

10. Although Ms. Begum appearing for the Official Liquidator laid much stress on the issue of time factor of giving the adjustment and thereby absolving the respondent from making any payment to the company, in my considered opinion, it is a pure and simple case of giving adjustment of amount due and payable to the respondent and to Smt. Prakash Wanti by the company to an account of the respondent in respect of which the present claim is made. The intention of giving such a benefit to the respondent by giving adjustment of the amount from one of the chit accounts belonging to the respondent himself and also from another account in respect of which consent was given by its holder, cannot be said to be not bona fide and with honest intention. The said respondent and Smt. Prakash Wanti were entitled to receive back from the company in liquidation the amount due and payable to them, of course, in accordance with the provisions of the Act, after the winding up order was passed.

11. The Official Liquidator has neither alleged nor led any evidence to show and establish that the said transfer made in favor of the respondent by giving adjustment was done with dishonest intention. In terms of the definition of the expression "good faith", as appearing in the General Clauses Act, reference to which has already been made, in my considered opinion, the onus is on the Official Liquidator to allege, prove and establish that the aforesaid entries in favor of the respondent were not done in good faith, that is, the same is not done honestly. There is nothing on record to prove and establish that the aforesaid adjustments were given in favour of the respondent dishonestly. In absence of any evidence in that respect and in the facts and circumstances of the present case, I would hold that the said action of transferring the property by way of giving adjustment was bona fide and in good faith.

12. In this connection, reference may also be made to a decision of the Punjab High Court in the The First National Bank Ltd. Vs. Om Parkash Sharma and Others, wherein it was held that it is open for the Court to validate transactions which is made by the company bona fide entered into by the company for its benefits. It is true that once the Court appoints a Provisional Liquidator and directs him to take over into his possession and custody the assets of the Company, the Director's powers cannot be exercised in respect of the property

and assets of the company, the same having come into the custody of the Official Liquidator. It is also settled law that so long as the order of the appointment of a Provisional Liquidator is operative, the powers of the Directors must remain in abeyance and, Therefore, all dispositions of the property of the company made between the date of presentation of the petition for winding up and the winding up order would be void unless the Court otherwise orders. The Court, however, has also been given the power and jurisdiction to validate such dispositions if they have been made honestly.

13. Since I have already held that the Official Liquidator has failed to prove and establish any dishonest intention in transferring the property by giving adjustment, in my considered opinion, the said entries cannot be held to be void. This is Therefore, not a case where in provisions of section 531-A is attracted. As the aforesaid transfer has been held to have been done bona fide and with honest intention, by giving adjustment of the amount due and payable to the respondent and another depositor to the present account of the respondent this petition is dismissed as having no merit. However, on the facts and circumstances of the case, the parties shall bear their own cost.