
(2003) 06 KL CK 0059

In the High Court Of Kerala

Case No : Criminal M.C. No. 3806 of 2003

Superintendent of Police, C.B.C.I.D.

APPELLANT

Vs

Boby Varghese

RESPONDENT

Date of Decision : 24-06-2003

Acts Referred:

Companies Act, 1956 — Section 446, 456(1)

Citation : (2004) 119 CompCas 112 : (2003) 3 ILR (Ker) 396 : (2004) 54 SCL 229

Hon'ble Judges : R. Rajendra Babu, J

Bench : Single Bench

Advocate : A.G. Ratna Singh, for the Appellant; P.B. Asokan, Geo Paul, G.P. Shinod, Ram Mohan G., Manu V., George Thomas (Mevada) and K. Ramakumar, for the Respondent

Judgement

R. Rajendra Babu, J.—St. Mary's Finance Ltd., a company incorporated under the Companies Act (nidhi company), collected nearly Rs. 18 crores from thousands of depositors. When the money was not repaid, one of the creditors Sri V. Sugandalal, filed C. P. No. 18 of 1999 for winding up of the company. In the meantime the company filed MCA No. 6 of 1999 u/s 391(1) of the Companies Act, 1956, for sanction of a scheme of compromise. This court refused to accept the scheme proposed by the company as it was totally against the interests of the depositors. Instead of passing an order of winding up, as it would cause hardship to the depositors, this court formulated a scheme for running the business without allowing to receive fresh deposits and appointed the provisional liquidator. Though the company challenged the above order by filing MFA Nos. 1250, 1265 and 1266 of 1999, all those appeals were dismissed. The company had diverted Rs. 7.67 crores to another sister company, M/s. St. Mary's Properties Ltd., by unlawful means and violating the provisions of law and the standing orders of the Reserve Bank of India. The scheme formulated by this court was being defeated by the company especially by its managing director Sri Bobby Varghese by all means. All directions issued by this court had been flouted

in one way or the other.

2. The statement of accounts furnished by the company itself revealed that there was gold security worth more than Rs. 2 crores with the company as on March 26, 1999. The statement filed by the company on July 3, 2000, revealed receipt of money including interest and the release of gold for Rs. 1,29,20,039. Yet there was gold security worth more than Rs. 1 crore with the company. Repeated directions were given by this court to the company especially to its managing director to furnish the books of account, registers and the securities including the gold to the official liquidator who was already appointed as the provisional liquidator. Advocate Sri Khalid also was appointed as the agent of the official liquidator for the proper working of the scheme formulated by this court. But the company did not furnish the registers, books of account and other documents and securities. When this court insisted, certain registers were produced before the official liquidator which were found to be forged and fabricated with false entries. On going through the accounts this court further found that in violation of the order passed by this court, the company had released nearly Rs. 2.9 crores in discharge of certain liabilities to the creditors of his choice though there was a direction to retain the entire amount. The above discharge of the so-called liabilities was in violation of the order of this court.

3. The proper, relevant and genuine registers, books of account and other documents of the company were not in the registered office when it was searched by the official liquidator in the presence of respectable persons and the representatives of the company. The case put forward by the company at that time was that all the relevant registers and books of account were with the auditors and their lawyers. But those were not produced even after repeated directions. Later, the liquidator filed C. A. No. 382 of 1999 seeking permission to approach the District Magistrate u/s 456(1)(a) of the Companies Act for recovery of the registers, books of account and other records and documents. Though an order was passed on December 1, 1999, the above order was kept in abeyance for some time. Later, when the premises were searched, the documents, registers, books of account and all valuable securities were not there as those had already been removed and nothing could be recovered.

4. The company had furnished a list of debtors and on the basis of which the official liquidator had issued notice to 237 debtors. Out of such notices, 78 notices were returned unserved with the postal endorsement "the addressee not known" or "the addressee left the place". Out of those who received the notices, only 18 debtors admitted the liability whereas 28 debtors refuted the liability. The official liquidator filed a report stating that the details of debtors furnished by the company was either incomplete or false and they suspected the genuineness of the above alleged transactions too.

5. Several claims had been made before this court by the official liquidator on the basis of the list of debtors furnished by the company and the available registers produced before the court by the official liquidator were found to be forged and

fabricated and those registers did not disclose any earlier transaction and in many cases there was only one entry. In many cases receipts issued by the company, including those issued by the managing director, were produced. But the registers did not disclose the entry of the amounts covered by those receipts. In fact those amounts had been misappropriated by the directors of the company. In many cases though the loan was sanctioned for a higher amount, the entire money was not paid, but some amount had been withheld and entries had been made in the registers as payments made in cash. As per the rules all payments should be made through cheques and cash payment was not permitted. Yet several entries were there showing cash payments which, in fact, were disputed by the borrowers. This court in many such claims had observed that the registers were forged and fabricated and this court found it difficult to adjudicate the claims properly and fairly.

6. This court had on different occasions directed the company to produce the registers, books of account and records, but the company had not complied with the above directions. All lawful methods adopted by this court for getting the recovery of the registers had been defeated in one way or the other by the directors of the company and all the registers and books of account had been withheld by them. When it was found that the directors of the company would not produce the registers complying with the directions, this court passed an order on May 30, 2002, directing the Crime Branch Police to register a case and to proceed to recover the books of account, registers, records and securities of the company. In the above order this court found that without all the genuine registers, books of account and the securities, it would be impossible for the official liquidator to proceed to collect the huge amount due to the company and to disburse the amount to the depositors in accordance with law. Accordingly this court issued certain directions including the following :

"The official liquidator or the agent of the official liquidator shall file a written complaint before the Deputy Superintendent of Police Crime Branch, Ernakulam, relating to the misappropriation, fraud, falsification and forging of documents, concealment of records, documents, securities, etc., within ten days from today. On receipt of the complaint the Deputy Superintendent of Police shall register a case and shall initiate investigation forthwith. All the genuine registers, account books, securities including the gold securities, etc., shall be seized/recovered. The Investigating Officer shall further enquire whether any properties had been acquired by the directors in the name of others as benami with the company's funds. The Investigating Officer shall report the progress of investigation every fortnight before this court. It shall be open to the Investigating Officer to arrest the managing director as well as the directors of the company and to interrogate them under police custody in accordance with law."

7. Accordingly, the police registered Crime No. 258 of 2002 against the directors of the company as well as accused Nos. 5 and 6 who joined with the directors of the company in diverting nearly Rs. 8 crores in the name of the sister company

St. Mary's Properties Ltd. Though the police had made attempt to recover the records, books of account, registers, etc., they also could not recover the same. Now the official liquidator appointed by this court is not in a position to know who are the creditors of the company, what are the amounts due to those creditors, what is the amount due to the company, who are those debtors, what are the assets of the company and which are the securities retained by the company. All these can be ascertained only if all the relevant registers, books of account and records maintained in the regular course of business of the company are made available to the official liquidator. Then only he can proceed, in pursuance to the order of winding up passed by this court, collect the money and disburse the same to the thousands of depositors.

8. Learned counsel for the official liquidator submitted that some of the depositors had already committed suicide due to the paucity of money for meeting their livelihood. It was further submitted that many of the depositors were pensioners who had deposited with the company the entire amount received towards retirement benefits and they are finding it difficult to pull on their day-to-day life. It was the laments of thousands and thousands of those poor depositors which is the cause of action to initiate the present proceedings. All lawful measures adopted by this court for getting the registers, records, documents and securities held by the company had been defeated one way or the other by the directors of the company. It has become imperative on the part of this court to take deterrent steps for procuring the above registers, books of account, records, etc., as without any such registers and books of account, this court is not in a position to proceed with the winding up proceedings in accordance with law and the interests of thousands and thousands of depositors would be in peril. It was at this stage that the Investigating Officer filed an application for cancellation of the bail of the first accused. After hearing the learned Advocate-General, this court found it necessary to give notice to all the accused, why the bail granted to all of them should not be cancelled. The reason for issuing such notice also had been briefly mentioned in the order dated June 2, 2003.

9. The main argument advanced by learned counsel for the accused was that this court had no jurisdiction to cancel the bail which was granted by another Bench of this court and the petition for cancellation of bail should also go before the same Bench which granted the bail. Reliance was placed on the decision of the Supreme Court in *Harjeet Singh alias Seeta v. State of Punjab* [2002] 1 SCC 649. With great respect, I would say that the above decision cannot have any application in the present case. This court (company court) had considered the petition for liquidation of the company St. Mary's Finance Ltd. and had passed an order of winding up of the company. A provisional liquidator had already been appointed as early as in 1999. When this court found that it was impossible to proceed with the liquidation proceedings in accordance with law due to the violation of the lawful orders and directions of this court by the directors and the large scale forging of documents, misappropriation of money and the fraud

committed by the directors of the company by order dated March 25, 2003, this court directed that all the matters including bail matters relating to the St. Mary's Finance and its sister companies should be placed before the company court. The order reads :

"Hence, all matters regarding the investigation of the cases in respect of the companies, i.e., St. Mary's Finance Ltd. and the sister companies shall be under the jurisdiction of the company court and all matters including bail matters shall be placed before the company court as, otherwise, the entire proceedings initiated in accordance with law would become a mockery. The Registry shall post all bail matters in respect of all cases relating to St. Mary's Finance Ltd. and the sister companies before the company court and no criminal courts and sessions courts shall have jurisdiction to deal with any bail matters relating to those cases."

10. The above order passed by this court is fully in accordance with Section 446 of the Companies Act which empowers this court to transfer all cases or proceedings pending before all courts to the company court. Section 446 of the Companies Act reads :

"446. (1) When a winding up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the court and subject to such terms as the court may impose.

(2) The court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of--

- (a) any suit or proceeding by or against the company ;
- (b) any claim made by or against the company (including claims by or against any of its branches in India) ;
- (c) any application made u/s 391 by or in respect of the company ;
- (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company ;

Whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

(3) Any suit or proceeding by or against the company which is pending in any court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that court.

(4) Nothing in Sub-section (1) or Sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court."

11. The only restriction imposed by Sub-section (4) of Section 446 was that the provisions in Sub-sections (1) to (3) would not apply to proceedings pending in appeal before the Supreme Court or a High Court. But in respect of all other proceedings, both civil and criminal, the company court has jurisdiction to transfer all such proceedings or cases before the company court and to decide the same. The Punjab and Haryana High Court in *Official Liquidator, Khosla Fans (India) Pvt. Ltd. (In Liquidation) v. Ramesh Khosla* [1983] 53 CompCas 858 held that in appropriate cases the company court has jurisdiction to take cognizance and try criminal proceedings instituted by the official liquidator because the expression "legal proceedings" in Sub-section (2) of Section 446 was sufficiently wide to confer such jurisdiction. There it was held (headnote) :

"Section 446 of the Companies Act, 1956, is a special provision, which has vested the High Court with jurisdiction to entertain or dispose of any suit or proceedings by or against the company. The prosecution sought to be launched by the official liquidator on behalf of the company is a proceeding by the company against the acts of the office bearers. There are offences against the Act in which the official liquidator has to launch the prosecution proceedings. In appropriate cases, the High Court may exercise jurisdiction in entertaining or transferring the said proceedings to do complete justice between the parties, especially when the company has been ordered to be wound up. Rule 9 of the Companies (Court) Rules, 1959, also provides that nothing in the rules shall be deemed to limit or otherwise affect the inherent powers of the court to give such direction or pass such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court.

Therefore, the High Court can exercise jurisdiction in suits and proceedings, including criminal proceedings in appropriate cases, by or against the company filed by the official liquidator."

12. I am in agreement with the above approach. Crime No. 258 of 2002 was registered at the instance of the official liquidator. The above order dated March 25, 2003, had been passed by this court when it had become impossible for this court to proceed with the winding up proceedings in accordance with law.

13. Another argument advanced by learned counsel for the accused was that the proceedings initiated by this court are biased. Reliance was placed on the decision of the Supreme Court in *Union of India (UOI) and Others Vs. B.N. Jha*, . The above decision also cannot have any application in the present case. The winding up proceedings relating to *St. Mary's Finance Ltd.* was pending before this court for the last more than four years and all the lawful orders issued by this court for the production of the records, registers, books of account, etc., had been defeated by the directors of the company in one way or the other. The company collected nearly Rs. 18 crores from different depositors and the

directors had diverted nearly Rs. 8 crores ignoring the provisions of law and the directions issued by the Reserve Bank of India. They are now enjoying the huge amount collected from the public and leading a luxurious life. Fraud and forgery committed by the directors of the company was beyond all barriers of imagination. It had become practically impossible for this company court to proceed to realise the amount and disburse the same to the real depositors. It had become imperative on the part of the company court to take deterrent action for collection of amount due to the company and for disbursement of the amount due to the surviving depositors, and hence all deterrent lawful proceedings are to be initiated against the directors of the company. They are on bail, yet they are not obeying the directions from this court and they cannot be permitted to be at large when thousands and thousands of depositors are finding it difficult to pull on their day-to-day lives as their whole lifelong earnings has been deposited with the company. When the application filed u/s 391(1) of the Companies Act proposing a scheme of compromise was not approved by this court, the directors of the company were taking all steps for defeating the scheme proposed by this court and for making the proceedings before the company court a mockery. The attempts made by this court to recover the documents by methods contemplated by law had been defeated by the directors. Ultimately this court directed the police to register a case, conduct a search in accordance with law and recover the books of account. I regret to say that at the initial stage the police did not take it so seriously. But at present they have realised the gravity of the offence and misery of the depositors and are rising up to the occasion to lead a proper investigation and to recover the registers and books of account.

14. The genuineness of some of the claims put forward by some of the alleged depositors had been doubted by the official liquidator as no proper registers are there to ascertain whether they were actual depositors. When all the records are with the directors, they are in a position to create bogus claims in the name of men of their confidence or choice and make claim before the company court or before the official liquidator. We do not know how many such bogus or false claims had been created by this time. If the directors are at large, there is every possibility of creating such bogus claims defeating the interests of the real depositors. In the above circumstances, it has become imperative without any other alternative to cancel the bail and to keep them in judicial custody till they produce the registers and books and account. When this matter was being argued on June 16, 2003, this court asked learned counsel for the directors (accused Nos. 1 to 4) whether the directors are ready to produce the books of account, registers, etc. Learned counsel wanted time to consult his parties. Hence the case was adjourned. When the case was taken up after four days, the answer of learned counsel was in the negative. It is not a case of bias, but a case of judicial conscience ; on one side the pathetic conditions of the depositors who find it difficult to pull on their day-to-day affairs, and on the other side the directors leading a luxurious life with the money of others ignoring the directions and orders of this court. It is a case of balancing and not bias.

15. Learned counsel for the accused relying on the decisions of the Supreme Court in Bhagirathsinh Judeja Vs. State of Gujarat, ; Vikramjit Singh Vs. State of Madhya Pradesh, and Gurcharan Singh v. State (Delhi Administration), AIR 1978 SC 179, argued that no circumstances exist for the cancellation of the bail. I respectfully agree with the legal propositions regarding the cancellation of bail. This is not a case where the bail is proposed to be cancelled due to any of the reasons mentioned in the above decisions. It is a case where the lawful directions issued by this court are being violated even now and the directors are in a position to forge more documents and the proceedings under the Companies Act are going to be a standstill. Hence, the abovesited decisions cannot have any application in the present case.

16. Much argument had been made on the application made by the investigating officer for cancellation of the bail of the first accused. This court issued notice suo motu to all accused regarding the cancellation of bail of all of them. The grounds mentioned in the application filed by the investigating officer is irrelevant in view of the discussions made in the earlier paragraphs of this judgment. The case of accused Nos. 5 and 6, in fact, stands in a different footing. They are not directors of the company. Yet it was with their active connivance, nearly Rs. 8 crores had been diverted from St. Mary's Finance Ltd. But as the records are with the directors of the company, for the time being, I do not intend to cancel the bail of accused Nos. 5 and 6, but they shall execute a further bond before this court for their appearance before the investigating officer as and when they are required for investigation purposes. So far as the directors of the company are concerned, viz., accused Nos. 1 to 4, the bail has to be cancelled, otherwise, the public will lose confidence and faith in the judicial system itself. This court cannot take a passive approach in the matter and join with the laments of the poor depositors and express a sort of helplessness, but should rise up to the occasion and take appropriate deterrent measures to meet the ends of justice.

17. Hence, the bail granted to accused Nos. 1 to 4 shall stand cancelled. The investigating officer shall arrest accused Nos. 1 to 4 and produce them before the appropriate magistrate who shall detain them in judicial custody in accordance with law. Their release shall be only as per the directions of this court.