(2015) 01 BOM CK 0149

In the Bombay High Court

Case No : Company Application No. 8 of 1965 in Company Petition No. 14 of 1960

S.V. Kondaskar — APPELLANT

Vs

Gopaldas Bulakhidas Mohta and Others — RESPONDENT

Date of Decision : 16-01-2015

Acts Referred:
Companies Act, 1956 — Section 542, 543, 543(1)

Citation : (2015) 3 MhLj 447

Hon'ble Judges : B.P. Dharmadhikari, J.

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—This is an application under Section 543(1) of the Companies Act, 1956. As the original records of the company were stated to be misplaced, this Court had ordered filing of F.I.R. to trace out the same. Accordingly as per orders of this Court dated 18.02.2005, F.I.R. was lodged, and ultimately it is not in dispute that the records could not be traced. Police Inspector, Sitabuldi Police Station has submitted his report on 30.03.2005. In this background, the present Company Application No. 8/1965 with Company Petition No. 8/1963 and other connected matters were listed before me on 10.07.2014.

On that day, after hearing the respective counsel for the parties, this Court found that when original records were not available, present proceedings may not go on, as it''s effective adjudication may not be possible. After passing orders accordingly and as on that date further progress in F.I.R. lodged was not known, after requesting the learned A.G.P. to assist the Court in the matter, case was required to be adjourned. This order dated 10.07.2014 has been recorded in Company Petition No. 8/1963.

2. On 17.07.2014, the learned Counsel appearing on behalf of the Official Liquidator invited attention to the report submitted by the Police Inspector, Police

Station, Sitabuldi and then this Court found that Company Application Nos. 8/1965, 8/1967, 3/1967, 4/1967, 5/1967 and 6/1967 filed under Section 542 and 543 of the Companies Act were pending against approximately 142 Ex-Directors. The matters were transferred from Bombay to Nagpur. Learned Counsel for the Official Liquidator fairly stated that in changed situation, proceedings under Section 542 of the Companies Act may lapse, but, proceedings under Section 543 will be required to be decided. Contention was, cognizance was taken at Bombay after considering report of Chartered Accountant. Arguments and counter arguments on that basis were recorded. This Court then found that question Whether proceedings under Section 543 of the Companies Act can be continued on the strength of Judge''s Summons issued at Bombay, needed to be decided and at the request of parties, matter was adjourned further. This order dated 17.07.2014 is recorded in Company Petition No. 8/1963. Further order was passed on 24.07.2014, after a communication dated 19th -20th May, 1964 sent by the Firm of Chartered Accountant at Bombay namely Batliboi and Purohit and inspection report Part-I and Part-II prepared by that Firm on 24.12.1962, were produced.

3. It appears that thereafter this matter was placed before the Court on 21.11.2014 and on that day Court decided to consider prayers in Company Petition No. 8/1963. Those prayers were considered on 27.11.2014, and Company Petition No. 8/1963 was disposed of. This Court then found that only question to be gone into in the said Company Petition was about validity of mortgage and that validity was not disputed by any body.

4. In so far as the present matter is considered, order was passed on 31.07.2014, noticing that 3rd part of report of Chartered Accountant Batliboi and Purohit, could not be traced. Official Liquidator then pointed out that he got few corresponding ledgers and cash books, on the basis of which fresh report of Chartered Accountant in relation to claim made in Judge''s Summons can be obtained. Accordingly as requested, this Court granted time of two weeks to the Official Liquidator to complete that exercise. Matter was then considered on 14.08.2014, and said time was extended. On 28.08.2014, Official Liquidator stated that on 15 items, Chartered Accountant found material. He sought time to peruse the report prepared by the new Chartered Accountant on the basis of the available material. Court then adjourned the matter to 11.09.2014.

5. The matter came up before me again on 31.10.2014, when learned Counsel for the Official Liquidator pointed out report dated 27.08.2014 prepared by Chartered Accountant M/s. Pimparkhede and Co. He submitted that enquiry into irregularity for amount of Rs.19,07,679.24 could have been undertaken. This was opposed by other side. The earlier Official Liquidator was transferred and new Official Liquidator, (M.V. Charanarayan) had joined recently. New Official Liquidator sought time to go through the papers. Accordingly, matter was adjourned for one week. On 07.11.2014, this Court has passed the following order.

This Court has on 31st August, 2014 passed a speaking order.

The official liquidator (new incumbent) has obtained a supplementary report from same Chartered Accountant. It is produced on record by Adv. De. It is signed by said Chartered Accountant and also Official Liquidator. Its copies have served upon Adv. Madkhalkar, Adv. Falke, Adv. Bhangde.

Copy is taken on record and marked as Exhibit-X for the purpose of identification. The perusal of first part of the report on summary of parties, in which proceedings can be and cannot be continued shows that out of total 16 instances mentioned there, the Chartered Accountant has opined that misfeasance proceedings can be continued only in three matters. Those matters are at Sr.No. 1.6 on second page, where cash of Rs.4 lacs is alleged to be stolen, Sr.No. 1.11 and Sr.No. 5.4. The details of entry at Sr.No. 1.6 are deliberately given as on first page also from same Serial number has been used for amount of Rs. 1 lac.

It is therefore, obvious that the misfeasance proceedings cannot be continued for items mentioned at Sr.No. 1.2, 1.5, 1.6 on first page of Exhibit-X, 1.7, 1.9, 1.10 and 1.13 mentioned at second page, 1.14, 1.40, 1.80, 1.20, 1.19, 1.20 at third page.

Official Liquidator has accepted this position and he has placed his signature on each page of Exhibit-X.

Respective Counsels Shri Madkhalkar and Shri Bhangde, wish to demonstrate that misfeasance proceedings cannot be continued in relation to three items noted supra. They are given liberty to inspect the documents on the basis of which the Chartered Accountant has given his opinion and thereafter to address the Court.

Adv. Madkhalkar, appearing for some members of Mohta family in application no.38/2005, seeks discharge of immovable property namely ''Marble House'' from the proceedings. According to him, funds with official liquidator are in excess and all liabilities can be satisfied out of those funds. Shri De, is opposing this request. He submits that liabilities are to be worked out finally and thus, after the outcome of Company Application No. 8/1965, the final verdict in that respect can be arrived at.

Points raised by Shri Madkhalkar, are kept open.

List Company Application No. 8/1965 for further consideration with other connected matters after two weeks.

6. The matter was then placed before this Court on 27.11.2014, when time was given to respective Counsel to go through papers. Matter has been again listed before me on 09.01.2015. I have heard the respective Counsel finally on that date in Company Application No. 8/1965.

7. Shri V.V. Bhangde, learned Counsel appearing on behalf of coparcners has

invited attention to three heads under which according to the Official Liquidator, proceedings under Section 543 of the Companies Act can be taken up further. He submits that sum of Rs. 4 lakhs mentioned by this Court on 2nd page of its order dated 07.11.2014, as stolen, needs to be read as Rs. 40,000/-. Parties do not dispute this. Accordingly, order dated 07.11.2014 is corrected only to that extent with consent. Words "Rs. 4 lacs" appearing on 2nd page thereof at its top, are substituted by "Rs.40,000/-". Necessary correction be carried out in the order dated 07.11.2014.

8. Shri Bhangde, learned Counsel submits that the Chartered Accountant Shri Pimparkhede relies upon a statement recorded in books of account, that said amount of Rs. 40,000/- has been stolen. This statement is allegedly made by cashier. Correctness of this statement cannot be decided, and even if it is presumed to be correct, it does not establish that any of the Directors of Company were privy to that theft.

9. Coming to the next item i.e. item No. 1.11, he submits that there is no entry of amount of Rs. 99,168.31/- in Annexure-8 which is at page no.44 of Exhibit A. This Exhibit A, is the report of Chartered Accountant Shri Pimparkhede. There is one entry of Rs. 1 lakh against name Bhikamchand Rekhchand, but, that is not relevant here, hence, item no.1.11 needs to be ignored.

10. Lastly he invites attention to item at Sr.No.5.4 to show that it contains reference to Annexure-16 which is at page no.52 of Exhibit A. Again there is no entry of Rs.2,38,510.93 at that page. He submits that, that document is based upon a secondary evidence which may have some relation with the O.D. limit, but, it does not fasten any responsibility upon any Directors. It only reflects a normal Banking Transaction and party enjoying that limit namely Madhusudan was found solvent enough to pay the amount as per observations entered in the remark column of said Annexure-16. As such there is no misfeasance.

11. According to him total of these three heads works out to Rs.3,40,000/- and even if everything is presumed against the Directors, mere negligence on their part is not sufficient to attract action under Section 543. He therefore, prays for dismissal of the Company Application No. 8/1965, urging that there is no need to record any evidence.

12. Shri P.C. Madkholkar, learned counsel appearing on behalf of legal heirs of Purushottam Mohta, mostly adopts arguments of Shri Bhangde, learned Counsel. He states that as correct documents are not supplied to him he is little handicapped. However, there is nothing on record to show any wrongful gain secured by any Director and there is no material to prove any wrongful loss caused by them to the Company. He argues that term ''misfeasance'' must be strictly construed and as per meaning given to it in Indian Penal Code. In absence of material particulars on record, there is no point in asking the Official Liquidator to enter witness box to prove the alleged misfeasance.

13. Shri De, learned Counsel appearing on behalf of the Official Liquidator has

invited attention to a pursis filed vide Stamp no. 13820/2014. He further states that the Chartered Accountant Shri Pimparkhede has mostly relied upon report of earlier Chartered Accountant Batliboi and Purohit, and then perused the available documents.

14. I have perused that pursis. Except for explaining his own report, the Official Liquidator has not added any new evidence or material in this pursis. Contents of documents pointed out by Shri Bhangde and Shri Madkholkar, learned Counsel are not in dispute. This pursis however, states that Annexure-16 is a statement of cash credit and over draft, as is evident from the title of the document.

15. Shri De, learned counsel further submits that the Official Liquidator has to only demonstrate that Directors have become accountable to the Company under liquidation in terms of Section 543 of the Companies Act. He therefore, seeks rejection of preliminary objection raised by Shri Bhangde and Shri Madkholkar, learned counsel for respondents.

16. Arguments noted supra show that in so far as the first charge of theft of Rs.40,000/-is concerned, it is based upon the day book of Company for Saturday, 05.05.1960. There at page no.60 of the said day book, a remark has been entered in column with heading ''particulars''. This page no.60 of day book is page no.30 of Exhibit A i.e. "report of verification of record and supplementary to the investigation report submitted by M/s. Batliboi and Purohit". This Exhibit-A is prepared by A.G. Pimparkhede and Company, Chartered Accountants. The remark shows that shortage of Rs.40,000/-was reported by the cashier as stolen from his cash box. This remark is then followed by a bracket wherein words ''copy attached'' appear. Amount of Rs.40,000/- is, thus shown against entry of sundry debtors with name M.S. Pande against it. The alleged report of which copy is claimed to be attached, is not available. Thus, for this theft, question is, whether any liability can be fastened against the Directors or their heirs at this point of time. The remark itself is not very firm, and theft and even shortage cannot be established. The said cashier is also not available, hence, this amount under head 1.6 is liable to be ignored.

17. The other entry is item no.1.11, which is in Annexure-8 with Exhibit-A. This annexure is at page no.69 of the day book. Its photocopy shows that it may be for date 03.05.1960. It is not in dispute that there is no reference to sum Rs.99,168.31 in this annexure. There is only one entry of Rs. 1 lakh, which shows withdrawal in cash by Bhikamchand Rekhchand. However, that is not pointed out as an incidence of misfeasance by either the Chartered Accountant or the Official Liquidator. The last exhibit, with which this Court is concerned, is Annexure-16, which is a separate document filed as part of Exhibit-A at its page 52. It is monthly statement of the cash credit and over draft for the period ending on 30.05.1960. There in column no.18 and against the head ''Maximum balance during month" figure Rs. 2,03,084.77 appears.

18. Though the Official Liquidator has attempted to urge that the document at

Annexure-16 is, statement of cash credit and over drafts, it is his interpretation flowing from the heading of the document. Heading of the document is "Monthly statement of cash credit and overdrafts for the period ending 30.05.1960". Thus, this statement is prepared after 30.05.1960 on the strength of some other document and the heading of column no.18 therein shows that amount stated in that column may not be outstanding on 30.05.1960. Maximum amount outstanding and recoverable in the month of May, 1960 is to be reflected and recorded in that column. This maximum amount may be recoverable on any day from 1st May upto 30th May. It may be reduced because of subsequent payment/ adjustments, however, as maximum balance is required to be noted, such subsequent payment or reduction is, not relevant while making entry in that column. Thus, amount of Rs. 2,03,084.77 is not that amount which can be stated to be due and outstanding at all. In remarks column, the fact that borrower is not in position to pay in lump sum, but in installments/part payment, is recorded. Thus, this entry again is not sufficient to implicate the Directors under Section 543 of the Companies Act.

19. The report of Chartered Accountants are required to be proved by showing the same to be correct. For that original documents of Company and truth thereof needs to be established. It is not in dispute before me that report of Batliboi and Purohit Co., cannot be established as no witness competent to depose about it is available. When all ledgers and cash books are not available, merely on the basis of report of later Chartered Accountant, these proceedings cannot continue.

20. The requirement of pleadings and standards in proceedings under Section 543 of the Companies Act is looked into by me in a unreported judgment in Company Application No. 16/1972 in Company Petition No. 5/1996 between Official Liquidator, High Court vrs. M/s. Nathmal Kisanlal and others on 18.11.2005. In paragraph 6(H) and in paragraph 7, I have observed as under:-

H. In The Official Liquidator Vs. Raghawa Desikachar and Others, , Hon''ble Apex Court has held in para 7 "it may be mentioned that misfeasance action against the directors is a serious charge. It is a charge of misconduct or misappropriation or breach of Trust. For this reason the application should contain a detailed narration of specific acts of commission and omission on the part of each director quantifying the loss to company arising out of such acts omission. The burden of proving misfeasance or nonfeasance rests on the Official Liquidator.

7. Thus, burden of proving misfeasance rests on Official Liquidator and the application/Judge''s summons therefore must contain detailed narration of specific acts of commission or omission on part of each director and quantify the loss caused to Company. It is to be noted that while making an application under this provision, it is necessary that the allegations or the charges against the Officer/director must be very specific and it should not be vague and general in nature. It should contain the narration of specific acts or commission or

omissions on the part of the Director or officer of the Company. In the absence of such specific pleadings, the application becomes susceptible for successful attack by the respondents. Even to examine the conduct of the particular Officer or Director to make him personally liable for misfeasance and misconduct, there should be specific evidence and pleadings as regards the conduct of the officer. It is necessary to show that the directors have dishonestly acted or abstained from acting in conflict with their plane duty.......

Similar view is taken by me in the case of Official Liquidator and Liquidator of John GALTLA.vrs. R.S. Songare (2006) (133) Company Cases 258. Both these rulings squarely apply in present matter.

21. These proceedings under Section 543 of the Companies Act are mostly against the deceased Directors and their L.Rs. The pleadings and proof therefore assume importance. Even if report of Chartered Accountant is allowed to be used as a "Pleading" it does not suffice here and does not further the cause. Facts noted above show not only absence of plea, but, also absence of material to even rope in any of the Directors, as such, it is apparent that the proceedings under Section 543 also cannot be proceeded further against the Directors or their legal heirs. Accordingly Company Application No. 8 of 1965 is, dismissed with no order as to costs.

