

(1980) 02 KL CK 0023

In the High Court Of Kerala

Case No : Application No. 55 of 1978 in Company Petition No. 17/78

The Official Liquidator

APPELLANT

Vs

P.K. Narendran

RESPONDENT

Date of Decision : 15-02-1980

Acts Referred:

Companies (Court) Rules, 1959 — Rule 232, 234, 243, 244, 245
Companies Act, 1913 — Section 185, 186, 235
Companies Act, 1956 — Section 2(30), 446, 446(2), 456(2), 457

Citation : (1980) 02 KL CK 0023

Hon'ble Judges : M.P. Menon, J

Bench : Single Bench

Advocate : T.V. Ramakrishnan, for the Appellant; S. Sankara Subban and M. Abdul Azeez, for the Respondent

Judgement

M.P. Menon, J.—The Wandoor Jupiter Chits (P) Ltd. was ordered to be wound up on 20th December 1973. The Respondent was the manager of its Coimbatore Branch. The branch had a motor cycle, and the prayer, in the Application originally filed by the liquidator u/s 468, was for an order to return the motor cycle. It was later found out that the vehicle had been transferred to a third party on 11th December 1973. An "additional prayer" was therefore made, apparently in the alternative, that the Respondent be ordered to pay Rs. 6,780 as damages for the loss suffered by the unauthorised sale.

2. The Respondent's case is this. The motor cycle was purchased in his name, with company's funds, under a hire purchase agreement, for the use of one Hameed, who was Divisional Officer at Coimbatore. Hameed was using it all the time, and it was under his custody and control. Hire purchase instalments were being paid by the company. In July or August 1973 Hameed was transferred to Madras and he took away the vehicle with him. The Respondent never knew what had happened to it thereafter. As the vehicle was not in his custody or under his control, he could not be called upon to deliver the same to the liquidator, u/s 468.

3. Except what the Respondent says as R.W. 1, there is no direct evidence as to who was having custody or control of the motor vehicle at the relevant time. Winding up had commented on 1st October 1973 and provisional liquidator was appointed on 11th November 1973. P.W. 1, the Regional Transport Officer of Coimbatore, speaks only with reference to the records. Some papers have also been summoned from the financiers, and marked. These disclose that the vehicle was registered in July 1972 in the personal name of the Respondent, noting H.P. arrangement with the Mercantile Credit Corporation of Coimbatore. This agreement was cancelled and accounts settled on 11th December 1973 and the vehicle was transferred to one Moinudeen on the same date. Moinudeen transferred the vehicle to one Thangamuthu in May 1974. The initial payment made to the Mercantile Credit Corporation was Rs. 1,30,795; and under the H.P. agreement a further amount of Rs. 6,645.50 had to be paid in 24 monthly instalments. Hameed was guarantor to the agreement. By 21st June 1973, only ten instalments of Rs. 280 each had been paid. And on 11th December 1973, the H.P. account was settled, obviously by paying off the balance due at the time of the transfer in favour of Moinudeen. P.W. 1 says that transfers are allowed only when an application is made by the transferor, and that the usual practice is to verify the signature in the transfer application with that in the application for registration. If the two agree, transfer is recorded without any further enquiry. The transfer application of December 1973 is not available as such records are destroyed after one year. The implication is that the Respondent must have made an application in December 1973 for transferring the vehicle to Moinudeen. R.W. 1 however asserts that he had made no such application. There is thus evidence to show that the H.P. agreement was terminated and the motor cycle sold away, after the appointment of provisional liquidator and a few days before winding up; but the evidence as to who was responsible for this is not very clear.

4. Since the vehicle was not with the Respondent or under his control at the time this application was filed in 1978, there is no question of ordering him to return it to the company; and the only question is whether he could be ordered to pay the amount of Rs. 6,780 as claimed by the liquidator. The Respondent's contention is two-fold:

(i) unless it is established that the Respondent had sold away the vehicle himself and was in custody of the company's moneys on that account, no direction could be issued for its payment u/s 468; and

(ii) the prayer is for "damages" and this is a matter to be adjudicated in misfeasance proceedings u/s 543, and cannot be the subject matter of summary proceedings u/s 468.

5. The decision in *In re E.T.M. Corporation Ltd.* 41 C.W.N. 975 rendered u/s 185 of the Indian Companies Act, 1913 (corresponding to Section 468 of the present Act) seems to support at least one of the above contentions. That was a case where the liquidator had sought for an order against the Lloyds Bank for payment of an amount due to the company in liquidation, but it was found that

the Bank had parted with the money long before. The court held that the question whether the Bank could have parted with the money was not one to be adjudicated u/s 185; and unless it was shown that the money was "In the hands of the bank" at the time of the application, no order under that Section could issue. Reference was made to the Rules framed under the Act and the forms prescribed, all of which indicated that only moneys "for the time being in the hands" of the Respondent could be ordered to be paid. Mr. Sankara Subban likewise refers to Rule 234 of the Companies (Court) Rules, 1959 which uses the same phraseology, and to Form No. 99 which speaks of property or money "now in your hands". But such an approach appears to be open to two objections. The first is that the rules were framed at a time when the Section itself spoke of money, property, or books and papers "in his hands". Section 468, was amended by Act LXV of 1960 introducing the words "in his custody or under his control" in the place of "in his hands ", so that the court can now direct return of property or money under the control of the Respondent, and not only those in his hands. The second is that a rule framed u/s 643(2) delegating the courts powers to the liquidator cannot control the scope of Section 468 itself, if the language is otherwise clear.

6. Counsel for the liquidator, on the other hand, refers to this Court's decision in *State of Kerala v. Official Liquidator, Sitaram Spinning and Weaving Mills Ltd.* 1972 Com. Cases 628 which apparently proceeds on the basis that the only limit on the court's power is its own discretion. Shortly after the *Sitaram Spinning and Weaving Mills Ltd.* of Trichur was ordered to be wound up, the court permitted the liquidator to execute a possessory mortgage of" the mills for Rs. 8.25 lakhs, in favour of the State Government which was willing to take over its management. Under the terms of the mortgage deed the Government was obliged to insure the mills, and they insured it for Rs. 5.53 lakhs. A fire broke out later destroying a portion of the mills; and the liquidator then claimed, in report No. 197 filed before the Company Court (Additional District Court, Trichur), that the State Government should have insured the mills for Rs. 20 lakhs which was the estimated market value and that the difference was payable by the Government. The latter objected to the Company Court's jurisdiction to decide the claim and this was overruled. The Government appealed to this Court, but the Division Bench dismissed the appeal by observing that though Section 185 did not contemplate an elaborate enquiry, it was a matter of discretion for the Company Court to decide whether a particular claim could be conveniently dealt with under that section. This was a ease, argues Counsel for the liquidator, where the money claimed was not in the hands of the Government and the claim itself was for damages; and if such a claim could be fee subject matter of an enquiry u/s 185, the present claim could also be likewise adjudicated u/s 468 of the 1956 Act, he asserts. But there are one or two aspects to be kept in mind before such a broad inference could be drawn from the decision. In making the observations referred to, the Division Bench was only following a similar approach made by the Madras High Court in *Venkatrama Iyer v. Sarvothama Rao* AIR 1937 Madras

401 where the claim was not for damages but for certain amounts admittedly in the hands of the Respondent who was formerly a managing agent of the company. Again, the order of the Additional District Judge, Trichur (in M.P. Nos. 482/62, 523/60 and Report No. 197 in Company M.P. 4/53) which was under challenge before the Division Bench shows that the learned Judge had squarely rejected the liquidator's contention that a claim for damages could be gone into u/s 185. The Company Court had found jurisdiction to deal with the claim not u/s 185, but in its "general power" to realise the assets of the company, and in view of the circumstances that the Government had earlier taken steps to sell some of the assets of the company in enforcement of its rights as a mortgagee, and that certain disputes relating to accounting between the mortgagor and the mortgagee, were already before it. The claim of the liquidator based on the insurance Clause in the mortgage deed, the Court held, was part of the process of accounting which had been set in motion and which the court was obviously competent to deal with.

7. The Supreme Court decision in *Gaya Sugar Mills Ltd. Vs. Nand Kishore Bajoria and Another*, does not also throw much light on the rival propositions urged by the liquidator and the Respondent. *Gaya Sugar Mills Ltd.* had embarked upon an ambitious scheme of expansion and raised its capital for the purpose. The expansion scheme floundered and a scheme for its future working was drawn up. Pending sanction of the court for the scheme, the Director Board of the company took a decision to sell the shares it had in another company and to pay off the debenture holders and preference shareholders, with the sale proceeds. Two persons were appointed as trustees for the purpose. They sold the shares and realised a substantial sum. The company was in the meanwhile wound up, and no sanction from the court had been obtained for the scheme of reducing capital. The liquidator moved the company court u/s 185 claiming that the two persons were bound to return to him the amounts they had realised by sale of the shares. And the question that arose for decision was whether the two were trustees or agents of the company, for the purpose of Section 185. The company court held that they were trustees, but on appeal, the Appellate Bench of the High Court held that they were not. The Supreme Court concurred with this view, but held that the two persons could be considered as agents for the purpose of the section. The money involved admittedly belonged to the company and admittedly again, it was in the hands of the two persons. No question of damages or of the type of relief that could be granted u/s 185 had arisen for consideration.

8. The only other decision cited is the one in *Peoples Bank of Northern India v. Harikishen Lal* AIR 1936 Lah 403 where the Chairman of a company had unauthorisedly taken away funds belong to it and purchased property in his own name, and the liquidator had asked for possession of the property on the footing that it rightfully belonged to the company. The Respondent-Chairman contended that the property stood in his name and that questions relating to disputed title could not be adjudicated in proceedings u/s 185; but the court held that only a

prima facie examination of the title was required under the section, and that a final decision could be left to other proceedings u/s 186 or 235 (corresponding to Section 469 and 543 of the 1956 Act). This again was a case where the property was admittedly in the hands of the Respondent and where no question of damages had arisen.

9. The above being the state of authorities, at least to the extent cited, all that I could do is to find out, after examining the relevant provisions of the Act, whether the direction sought for by the liquidator in this case could be granted under any of them. Section 467 imposes a duty on the winding up court to collect all the assets of the company and apply them in the discharge of its liabilities; and under Rule 232 of the Companies (Court) Rules, 1959 this duty shall be discharged by the Official Liquidator as an officer of the court. u/s 456(2), all the properties and effects of the company shall be deemed to be in the custody of the court as from the date of the winding up order. Section 446(2) provides that the winding up court will have jurisdiction, notwithstanding anything contained in any other law, to entertain and dispose of any suit, proceedings or claims made by or against the company. Section 457 confers powers on the liquidator to institute or defend any suit or other legal proceedings on behalf of the company, with the sanction of the court and subject to its control. Section 468 empowers the court to call upon any contributory, trustee, receiver, banker, agent, officer or other employee of the company to pay, deliver, surrender or transfer forthwith to the liquidator money, property, books and papers to which the company is prima facie entitled; and it is settled law that the object of this provision is to provide a summary procedure for enabling the liquidator to avoid expensive litigation in the discharge of one of his primary duties, viz. the collection of the assets of the company. Section 469 also provides a summary procedure for realising moneys due from contributories other than those payable by them in respect of calls. Section 477 confers almost an inquisitorial power on the court to summon and examine persons who are known or suspected to have in their custody any property of the company, and also persons known or supposed to be indebted to the company. Section 531 declares as invalid any transfer of property or payment of money by way of "fraudulent preference" i.e., the Section enables the court to collect assets which would have been the company's, but for the fraudulent transfer. Section 542 which strikes at fraudulent trading by the company also enables the court to declare that persons who were knowingly parties to such conduct are responsible for the debts and liabilities of the company. Then comes Section 543 dealing with misfeasance, where under the court can call upon directors and others responsible for misconduct and for causing loss to the company, to contribute to its assets. Thus, the company court is invested with power to collect the assets of the company in liquidation by resort to various proceedings, and even to collect assets which legally did not belong to the company at the time of winding up, but should have belonged to it but for fraud, misfeasance, etc. Some of the proceedings are summary in nature, while others are elaborate with built in

safeguards of various kinds. Only admitted liabilities are enforceable u/s 477 where the proceedings are of an unusual nature, and Rules 243 to 248 control the proceedings themselves. Avoidance of fraudulent transfers u/s 531 is restricted to transactions made within six months before the commencement of winding up. Proceedings in misfeasance are also subject to limitation; and Rules 260 to 262 govern all proceedings under Sections 542 and 543. In other words, the powers conferred on the court u/s 446 and other relevant provisions are very wide; but the different kinds of proceedings noticed can be resorted to only against the classes of persons where they are so specified, and subject to other conditions including limitation and rules of procedure. No doubt a claim u/s 446(2) can be made against any person, but that can only be under some known rule of law, and subject to the extended limitation prescribed u/s 458A.

10. Turning now to the facts of the case on hand, the Respondent admits that the motor cycle was acquired with the funds of the company and belonged to it, subject to the hire purchase agreement. Admittedly, he was the person in charge of the Coimbatore Branch till September, 1973; and admittedly again, he was responsible to the company for the assets of the branch. He was not a mere employee. When Hameed took away the vehicle to Madras in July or August 1973 the Respondent did not object. He did not obtain any acknowledgment, nor was the matter reported to the Head Office. The decision to get the vehicle registered in his own name was his. He enquired about the vehicle only after receipt of notice of this application. On these admitted facts, it appears to me that even if the vehicle had been taken away and sold by Hameed or any other person, without any complicity on the part of the Respondent, it was his gross negligence as branch manager, if not connivance, that was responsible for the loss. He could not have come away during the Onam holidays (September 1973), never to return, without caring for the assets, books and other effects of the branch which were under his custody or control, and without enquiring as to what happened to them during the years that followed. Misfeasance consists of a breach of duty on the part of a person who occupies a fiduciary position in relation to a company, and a consequent loss to it. u/s 543 officers are persons occupying such a position, and are accountable for the loss under that section, if not u/s 468. But the question still remains whether the present proceedings originally initiated u/s 468 can be used for recouping or restoring the amount said to have been lost.

11. That leads to an examination of the scope of Section 543 and the nature of the proceedings thereunder. The Section enables the court to direct the class of persons named therein to contribute to the assets of the company if it appears that they have misapplied, retained, become liable or accountable for any money or property of a company. And what the court is to examine is their conduct. Proceedings under the Section have to be initiated within five years of winding up, and admittedly, the present application was filed within this time. Rule 260 requires that the summons shall state the nature of the declaration sought and set out the grounds. Rule 261 confers a direction on the court as to the procedure to be followed after the return of the summons; points of claim and

defence may be delivered, evidence can be taken orally or on affidavit, and cross-examination may be allowed. Rule 262 applies only when a direction for delivery of points of claim and defence is made. The present application when it was originally filed in February, 1978 was of a simple nature, seeking delivery of possession of the motor cycle. But Application No. 441/78 was later filed in August, 1978 to incorporate another prayer:

to direct the Respondent to pay a sum of Rs. 6,780 as damages for the loss suffered by the company on account of the illegal and unauthorised transfer of the motor cycle....

The application was supported by an affidavit in which the declaration sought for and the grounds were clearly specified. It is seen averred that the Respondent had caused loss to the company by selling the vehicle to another "without any legal authority and with a view to deprive the company of one of its valuable assets". This application was not even opposed and was allowed on 3rd November 1978. In my view, this had the effect of converting the proceedings u/s 466 into one u/s 543. It is true that there was no allegation of negligence as such; but what was alleged was something more, viz., dishonesty. Points of claim and defence were not directed to be delivered, but that is not a must in all misfeasance proceedings. The procedure followed was not summary. Witnesses were examined and their depositions were recorded verbatim. An elaborate enquiry admitting oral and documentary evidence has been held. If the Respondent had any objection to entertaining the additional or alternate prayer, he should have raised it at the time Application No. 441 was taken up. And if he had a case that he was not an "officer" within the meaning of Section 543, he could have raised it at least after the amendment was allowed. Section 2(30) contains only an inclusive definition, and if the Respondent had no authority to direct and control other employees of the branch, that was a matter to be specifically pleaded. Rule 9 saves the inherent powers of the court to give such directions or pass such orders as may be necessary for the ends of justice. To hold now that the relief prayed for cannot be granted for the only reason that what was originally invoked was Section 468 will have the effect of defeating the ends of justice, as fresh proceedings u/s 543 will be time-barred. Having regard to the duty imposed on the court by Section 467, the wide powers vouchsafed to it u/s 446(2), the failure of the Respondent to object to the amended prayer, his submission to jurisdiction thereafter and the circumstance that the requirements of Rules 260 and 261 in the matter of fair procedure have been substantially complied with, I think this is a fit case where relief should be granted to the company on the basis of the amended prayer. Sections 468 and 543, as also the other provisions noticed earlier serve a common purpose. Where property or money to which the company is prima facie entitled is found to be in the custody or under the control of the Respondent, a direction for their return is contemplated u/s 468; and where the company is found to have suffered loss by a breach of duty on the part of the Respondent, that can be recouped u/s 543, with the difference that the procedure is somewhat more elaborate. There is no

antithesis between the two in the sense that resort to the one altogether excludes the other.

12. The amount claimed by the liquidator is Rs. 6,780 which is said to represent the total amount paid under the hire purchase agreement. But there is no case that the whole amount was paid from out of the company's funds. R.W. 1 states that eight or nine instalments might have been paid before the branch was closed in September, 1973. Ext. A-8 shows that ten instalments were paid by 21st June 1973 and that the next payment was on 11th December 1973 for Rs. 3,880 in full settlement of the hire purchase account. Obviously this was not paid by the company. Deducting the above, therefore, the claim is sustainable only to the extent of Rs. 2,900.

I therefore hold that the Respondent is liable to contribute Rs. 2,900 to the assets of the company together with interest at 6 per cent from this date, and order accordingly. In the circumstances of the case, parties are directed to bear their own costs.