

(2008) 09 P&H CK 0071

High Court Of Punjab And Haryana At Chandigarh

Case No: None

Shivalik Savings and General
Investments Ltd. (In Liquidation)

APPELLANT

Vs

C.J. Singh and Others

RESPONDENT

Date of Decision: Sept. 15, 2008

Acts Referred:

- COMPANIES ACT, 1956 - Section 478, 538, 542, 543
- Constitution of India, 1950 - Article 20

Citation: (2008) 147 CompCas 22 : (2009) 3 CompLJ 356 : (2008) 152 PLR 299

Hon'ble Judges: Permod Kohli, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Permod Kohli, J.

Present Company Application No. 131 of 1995 has been preferred by the Official Liquidator attached to this Court against respondent Nos. 1 and 2 and 4 with the following prayers:

- As respondents be called upon to make good the loss of Rs. 11,98,724.82 caused to the company (in Liq.);
- the respondents may be directed to restore the property, movable & immovable held by them out of the funds of the company;
- they may also be punished with imprisonment u/s 538(p) of the Companies Act, 1956;
- any such other order being fit & proper in the circumstances of the case may also kindly be passed.

2. It is stated that the learned District and Sessions Judge (V), Haryana, after recording evidence has submitted his report dated 31.03.1995 and returned a finding that a fraud has been committed by the Directors of the Company in the promotion, formation and conduct of the business of the Company. It is further mentioned that the creditors have claimed a sum of Rs. 11,98,724.82 which is required to be recovered from the respondents.

3. Briefly stated, the facts leading to the filing of the present application are that the Company, namely, M/s Shivalik Savings & General Investment Limited, was wound up vide order dated 27.01.1989, passed in C.P. No. 34 of 1988. Statement of affairs was filed by the Ex Directors on 10.04.1990. The Official Liquidator ordered investigation by the Chartered Accountant on 6.7.1992. The Official Liquidator pointed out various discrepancies based upon the report of the Chartered Accountant M/s A.K. Chadha and Company. The Official Liquidator also found that the Ex. Directors of the Company have committed fraud in the formation and promotion of the company in liquidation. Based upon the aforesaid reports, the Official Liquidator filed C.P. No. 26 of 1993 u/s 478 of the Companies Act (hereinafter referred to as "the Companies Act") read with Rules 249 to 254 and 256 of the Companies (Court) Rules", for public examination of the Ex Directors of the Company. In proceedings initiated in C.P. No. 26 of 1993, this Court, prima facie, formulated an opinion that fraud has been committed by the Ex. Directors of the Company and the Ex. Directors were directed to attend the Court on 27.01.1994 for public examination in terms of Section 478 of the Companies Act, vide order dated 18.11.1993. The aforesaid order was challenged in appeal and a Division Bench of this Court vide order dated 15.03.1994 dismissed the appeal. The afore-said order was followed by another order dated 24.03.1994 whereby the District and Sessions Judge (V), Haryana, was asked to examine the Ex Directors of the Company publicly in terms of Section 478 of the Companies Act and the Ex Directors were directed to appear before the said officer for public examination and the District and Sessions Judge (V), Haryana, was asked to submit his report on conclusion of the examination.

4. The District and Sessions Judge (V), Haryana, submitted his report dated 31.3.1995. The concluding part of the report is as under:

For the reasons given above, it is fully established that fraud has been committed by the Directors of the Company in the promotion, formation and conduct of the business of the Company as propounded in the application moved by the Official Liquidator.

5. On the basis of the aforesaid report, present application has been filed for the relief's mentioned above.

6. In the reply filed by the respondents, they have sought dismissal of this application on the following grounds:

1. That the only prayer made in C.P. No. 26 of 1993 was for public examination and the relief having been granted, the said petition stands disposed of. Hence, no action is warranted through the fresh application.
2. That the application is beyond limitation. It has been stated that u/s 543(2) of the Companies Act, an application under Sub-section 1 of the Act can be filed within a period of 5 years from the date of the passing of the winding up order. The period of five years expired on 26.01.1994.
3. That the District and Sessions Judge (V), Haryana, was not required to give his findings in the report.
4. That the claim of the creditors for Rs. 11,98,724.82/- is also not sustainable having been made after more than six years and is barred by time.
7. It has been vehemently argued that C.P. No. 26 of 1993 stands disposed of in terms of the order dated 24.03.1994.
8. I have perused the aforesaid application and order dated 24.03.1994.
9. In C.P. No. 26 of 1993, following prayer was made:

In view of the above stated facts and documents attached, this Hon"ble Court may kindly direct the respondents to be publicly examined with respect to the promotion, formation and management of the Company u/s 478 of the Act read with Rules 249 to 254 and 256.

It is further prayed that proceedings against the respondents be initiated u/s 538 read with Rule 9 of the rules and the respondents be accordingly punished, or any other order to which the petitioner, the creditors and debtors are found entitled in law and equity be passed.

10. Two fold prayers are made in this petition. In the first part, public examination of the respondents was sought whereas in the second part, further prayer is made for initiating consequential penal proceedings against the respondents in terms of Section 538 of the Companies Act. Vide order dated 24.03.1994, first prayer was granted and a direction was issued for the public examination of the respondents to the District and Sessions Judge (Vigilance), Haryana, who was asked to file the report along with record before this Court. It is clearly spelt out that only first prayer was allowed at that stage and further proceedings in the petition would be possible after the report is received. Since the report has already been received, this Court has to consider the second prayer in C.P. No. 26 of 1993 on the basis of the report of public examination. Therefore, the first objection raised by the respondents that no further action is warranted in C.P. No. 26 of 1993, is without any substance and is rejected.

11. Before the question of limitation raised by the respondents is considered, it is important to consider the third objection raised by the respondents. It has been stated that the District and Sessions Judge (Vigilance), Haryana, was not required to

give his findings. Since the officer deputed by this Court has recorded his findings of guilt, it has prejudiced the respondents and, thus, the report is vitiated in law. Reliance is placed on the judgment of the Apex Court in the case of [Official Liquidator, Popular Bank Ltd. Vs. Madhava Naik and Others](#). However, from the reading of the judgment, it appears that the judgment is not relevant on the issue sought to be raised. In this judgment, the Hon'ble Apex Court has held that object of Section 478 is not to consider any accusation of an offence. The allegations are only for the purposes of holding the enquiry and cannot amount to accusation under Article 20(3) of the Constitution of India. This judgment has no application to the present case and the plea raised. This plea also seems to be misdirected. This Court vide its order dated 18.11.1993 directed the public examination of the respondents which order was upheld in appeal. Thereafter, another order came to be passed on 24.03.1994. The concluding part of the order reads as under:

The Official Liquidator and the respondents are directed to appear before the District & Sessions Judge (Vig.), Haryana, on 2.5.1994 who will after publicly examining respondents 1, 2 and 4 submit his report along with record of the proceedings within two weeks from the conclusion of the examination.

12. In the aforesaid order, District and Sessions Judge (Vigilance), Haryana, was specifically directed to submit his report along with the record of the proceedings within two weeks from the conclusion of the public examination. The direction is clear and categorical in its terms. The District & Sessions Judge (Vigilance), Haryana, was not only required to publicly examine respondent Nos. 1, 2 and 4, but also to record his conclusion of the examination and submit his report. It is pursuant to the directions of this Court that the report dated 31.3.1995 containing conclusion has been submitted by the Officer. Order dated 24.3.1994 has not been challenged by the respondents before any appropriate forum.

13. The next question to be considered is regarding the period of limitation for initiating action in terms of Section 543(2) of the Companies Act. Section 538 of the Act deals with the offences by officers of Companies in liquidation. It refers to various acts of omission and commission by such officers which constitute offences punishable under law. Section 542 of the Act empowers the Tribunal to impose liability for fraudulent conduct of business whereas Section 543 of the Act also empowers Tribunal to assess damages against delinquent Directors. Both these Sections are quoted here under:

Section 543: Liability for fraudulent conduct of business: (1) If in the course of the winding up of a company, it appears that any business of the company has been carried on, with intent to defraud creditors of the Company or any other persons, or for any fraudulent purpose, the Tribunal, on the application of the Official Liquidator, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any person who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible,

without any limitation of liability, for all or any of the debts or other liabilities of the Company as the Tribunal may direct.

On the bearing of an application under this sub-section, the Official Liquidator or the Liquidator as the case may be, may himself give evidence or call witnesses.

(2)(a) Where the Tribunal makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration.

(b) In particular, the Tribunal may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any person on his behalf, or any person claiming as assignee from through the person liable or any person acting on his behalf.

(c) The Tribunal may, from time to time, make such further order as may be necessary for the purpose of enforcing any charge imposed under this sub-section.

(d) For the purpose of this sub-section, the expression "assignee" includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(3) Where any business of a company is carried on with such intent or for such purpose as is mentioned in Sub-section (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to fifty thousand rupees, or with both.

(4) This section shall apply, notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is to be made.

Section 543: Power of Tribunal to assess damages against delinquent Directors, etc.

(1) If in the course of winding up a company, it appears that any person who has taken part in the promotion or formation of the company, or any past or present director, manager, liquidator or officer of the company-

(a) has misapplied, or retained, or become liable or accountable for, any money or property of the company; or

(b) has been guilty of any misfeasance or breach of trust in relation of the company;

The Tribunal may, on the application of the Official Liquidator, or the liquidator, or of any creditor or contributory, made within the time specified in that behalf in

Sub-section (2), examine into the conduct of the person, director, manager, liquidator or officer aforesaid, and compel him to repay or restore the money or property or any part thereof, respectively, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Court thinks just.

(2) An application under Sub-section (1) shall be made within five years from the date of the order for winding up, or of the first appointment of the liquidator in the winding up, or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer.

(3) This section shall apply notwithstanding that the matter is one for which the person concerned may be criminally liable.

14. Sub-section (1) of Section 542 imposes liability upon a person who is responsible for defrauding the creditors of the Company in the course of the conduct of the business of the Company for all or any of the debts or other liabilities of the Company. Subsection (3) of Section 542 provides punishments of imprisonment for a term up to two years or with fine upto Rs. 50,000/- or with both for a person who is found responsible for carrying on the business of the Company in fraudulent manner as mentioned in Subsection (1) of this Section. Section 543 further authorizes the Tribunal to recover from the person responsible for acts of misfeasance and malfeasance, such money or property as may be found retained by such person on account of any act of misapplication, wrongful detention or fraudulent act of misfeasance, malfeasance or breach of trust in relation to the affairs of the Company. The punishment referred to in this Section, however, can be imposed on the application of the Official Liquidator or the Liquidator or any creditor or contributory within the time specified under Sub-section (2) of Section 543. Sub-section (2) provides the period of limitation for making such application which is five years from the date of the order for winding up or of the appointment of the liquidator or of the act complained of which ever may be longer.

15. Mr. K.D. Aggarwal has vehemently argued that limitation for initiating action under Sections 542 and 542 of the Act has since expired, no action is permissible beyond the period of limitation of five years prescribed u/s 543 of the Act. It has been contended that winding up order was passed on 27.1.1989. Statement of affairs was filed on 10.4.1990 and the Official Liquidator was appointed simultaneously with the passing of the winding up order i.e. 27.1.1989 whereas the present application for initiating proceedings u/s 538 read with Sections 542 and 543 was filed on 4.7.1995 through the Company Application No. 131 of 1995. Thus, the application is beyond period of five years and is liable to be dismissed on that ground. It is not in dispute that the winding up order was passed and the Liquidator was appointed on 27.1.1989 and the present application has been filed on 4.7.1995 i.e. after a period of more than five years. However, from the record, it is evident

that public examination of the respondents was ordered vide order dated 18.11.1993. Respondents challenged this order in appeal (Company Appeal No. 4 of 1994) which came to be disposed of on 15.3.1994. After conclusion of the public examination, report was received by the Court on 1.4.1995. It is only after the report was received that the present application under Sections 538, 542 and 543 was filed on 4.7.1995. Under these circumstances, the acts complained of could only be ascertained after the public examination of the respondents and on submissions of the report by the District and Sessions Judge (Vigilance), Haryana. Under the above circumstances, the question arises as to when the period of limitation would commence?

16. Sub-section 2 of Section 543 envisages three situations to apply the limitation prescribed under Sub-section 1 of this Section. Indisputedly, the period of five years has elapsed from the date of winding order, or of the first appointment of the Liquidator in the winding up. The third situation deals with misapplication, retainer, misfeasance or breach of trust. Action warranted u/s 543 becomes possible only when the acts of misapplication, retainer, misfeasance or breach of trust are made known. The Directors of the Company manipulated the actions in such a manner that it prevented the concerned authorities including the Official Liquidator from detecting the acts of misapplication, retainer, misfeasance, breach of trust etc. It was only after the public examination of the Ex-Directors that there are acts of breach, malfeasance and misfeasance came to surface with the report of the public examination dated 31.3.1995. In my considered opinion, the limitation of five years prescribed in Sub-section 1 of Section 543 would and should commence from the date of acts complained of came to surface and became known. The limitation of five years will, thus, commence from 31.03.1995. The present application was filed on 4.7.1995 and, thus, has to be treated within the prescribed period of limitation.

17. For various acts of malfeasance, misfeasance, breach of trust etc., the Ex-Directors are liable for criminal prosecution u/s 542(3) as also for action u/s 543(1) of the Companies Act. In the report of the learned District and Sessions Judge (Vigilance), Haryana, it has come that an amount of Rs. 11,98,724.82/- was legally and fraudulently retained, mis-utilised by the Ex. Directors. In fact, this is a public money in the hands of the Company. The Ex-Directors have mis-utilised the amount and, thus, are liable to reimburse the same to the Company.

18. In view of the above, the present application is allowed and I direct the Ex-Directors of the company to reimburse a sum of Rs. 11,98,724.82/- along with interest at the rate of Rs. 6 per cent per annum with effect from the date of the report of the learned District and Sessions Judge (Vigilance), Haryana, i.e. 31.03.1995 till actual payment, within a period of two months from today. No costs.