
Official Liquidator High Court Vs S. Ravishankar

Company Application No. 2366 of 2008 in Company Petition No. 6 of 2001

Court: Madras High Court

Date of Decision: Nov. 3, 2010

Acts Referred:

Companies Act, 1956 " Section 542, 543, 543(1)

Citation: (2011) 161 CompCas 390 : (2011) 3 CompLJ 184

Hon'ble Judges: P. Jyothimani, J

Bench: Single Bench

Advocate: M. Jayakumar, for the Appellant; V. Ramakrishnan, for the Respondent

Final Decision: Dismissed

Judgement

P. Jyothimani, J.

This application is taken out by the official liquidator for a declaration that the Respondents are personally liable for the

debts and other liabilities of the company under liquidation; to examine the conduct of the Respondents under Sections 542 and 543(1) of the

Companies Act, 1956, and order that they are jointly and severally liable to contribute to the assets of the company in liquidation by way of

compensation for the loss caused by them to the company in liquidation to the extent of Rs. 2,36,49,643 and the future claims from the creditors

with interest at the rate of 12 per cent per annum thereon from the date of winding up, viz., 17 September, 2003, till the date of recovery of the

entire amount; to declare the liabilities of Respondents Nos. 1 to 4 for the said amount and the future claims of the creditors together with interest

thereon shall constitute the first charge on the property and effects in their possession; and to direct payment of costs.

2. By an order dated 17 September, 2003, passed in Company Petition No. 6 of 2001, Indus Marketing Ltd., was wound up and the official

liquidator was directed to take charge of the assets and effects of the company. The said company was incorporated on 21 June, 1991, with a

nominal capital of Rs. 10 lakhs and its latest registered office was at No. 4, Mannar Reddy Street, T. Nagar, Chennai. The main objects of the

company were to market, distribute, stock, trade, import, export, buy, sell or otherwise deal in all consumer durables, household articles, industrial

products, electrical, electronic, mechanical goods and other goods of any nature.

3. As per the records of the Registrar of Companies, the Respondents were the directors and the company had two secured creditors, viz., the

Bank of Baroda, and the Union Bank of India. The liquidation was at the instance of Sundaram Finance Ltd. As against the order of winding up,

the company under liquidation has filed OSA No. 372 of 2003 and there was an order of interim stay granted on 22 October, 2003, which was

extended on 4 December, 2003, up to 15 April, 2004, on condition that the company in liquidation will deposit one third of the amount due to

Sundaram Finance Ltd., on or before 15 April, 2004. Since the amount was not deposited, the appeal was dismissed and the official liquidator

took possession of all the movable assets lying at the rented registered office situated at No. 4, Mannar Reddy Street, T. Nagar, Chennai on 12

May, 2004.

4. As per the direction of this Court dated 22 February, 2008, the official liquidator has appointed Murray & Company, auctioneers, who sold the

movables assets belonging to the company under liquidation by public auction and realised an amount of Rs. 1,03,000. After the sale consideration

was received from the auction purchaser, as per the order of this Court dated 17 April, 2008, an official from the office of the official liquidator

had handed over the vacant possession from the registered office to Mrs. Kothai Rajan, the owner of the premises on 22 April, 2008.

5. It is stated that the statement of affairs was filed by the ex-directors belatedly, after the delay of 1,033 days. On going through the statement of

affairs as on 31 March, 1993, it is revealed that the stock-in-trade has not been valued, while as per the audited balance-sheet as on 31 March,

1993, the stock-in-trade has been given as Rs. 14,07,045 and there was No. clarification in respect of that.

6. It is stated that in the statement of affairs in list E regarding unsecured creditors, it is shown that an amount of Rs. 2,29,24,615 is due to

unsecured creditors, whereas as per the balance-sheet as on 31 March, 1993, the unsecured loans is stated as Rs. 8,33,786 only and the vast

variation is not clarified by the ex-directors. 7. Further, as per the balance-sheet as on 31 March, 1993, the sundry debtors were shown for a

total amount of Rs. 5,57,212.57, whereas in the statement of affairs filed on 17 August, 2006, it is shown as "nil". That apart, No. particulars

regarding the names, address, etc., are furnished and No. explanation is provided by the ex-directors for showing trade debtors as "nil" in the

statement of affairs.

8. In the balance-sheet as on 31 March, 1993, under the heading "fixed assets", a vehicle was shown for an amount of Rs. 1,67,816 after

providing depreciation for the year 1992-93, while that is not finding place in the statement of affairs and that was not handed over to the official

liquidator.

9. The official liquidator has neither called for the claims from the creditors of the company in liquidation, nor received any claims voluntarily.

10. The fund position of the company as on date is as follows:

Rs.

(i) Cash 2

(ii) Bank 44,578

(iii) Investment Nil

Total 44,580

11. According to the official liquidator, the ex-directors have failed to furnish the amount regarding stock-in-trade to the tune of Rs. 14,07,045 and

defaulted in submission of proper explanation; that while the amount due from the trade debtors as per the balance-sheet as on 31 March, 1993,

was given as Rs. 5,57,212.57, it is shown as "nil" in the statement of affairs and there are No. details of names, address and other particulars; that

there is a difference of Rs. 2,20,90,829 in the matter of dues towards unsecured creditors shown in the statement of affairs and the balance-sheet

as on 31 March, 1993, and there is No. clarification given by the ex-directors for the said excess amount shown in the statement of affairs and,

therefore, it should be presumed to be an amount accrued due to the mismanagement and maladministration of ex-directors in the day-to-day

affairs of the company and they are liable for the said amount; and that as per the balance-sheet as at 31 March, 1993, there is movable asset, viz.,

vehicle, and the same has not been shown in the statement of affairs and the same was not handed over to the official liquidator. With the above

averments, the official liquidator has filed the said application for the relief stated above.

12. In the counter affidavit filed by the first Respondent, it is stated that there is No. specific instance of intentional act or deliberate conduct of the

Respondents resulting in loss to the company in liquidation. It is stated that the fourth Respondent has resigned as a director of the company on 15

November, 2000, long prior to the passing of the order of winding up dated 17 September, 2003. It is also stated that Form No. 32 has also been

filed to that effect, a reference to which shows that the fourth Respondent has resigned on 15 November, 2000.

13. It is the case of the first Respondent that the official liquidator has considered arithmetical differences and filed the present application, which is

not proper. There is a difference of ten years between the date of the balance-sheet and the date of the statement of affairs and during these 10

years, the company was carrying on business and the values given in the balance-sheet have changed from year to year in the normal course of

business and that change cannot be attributable to the directors with any motive.

14. It is stated that the company was originally engaged in the business of marketing and distribution of various automation, consumer durables,

office equipment and telecommunication products and the business was declining over the years and the company was selling its existing stocks

and did not have the wherewithal to purchase new stocks and the unsold stocks had negligible realisable value at the time of winding up. It is also

stated that since the financial position of the company was low, it had to borrow amounts. Therefore, the list of unsecured creditors increased over

the last ten years and the debtors of the company declined over the years.

15. As regards the motor vehicle, it is stated that the vehicle was shown at a depreciated value of Rs. 1,67,816 as on 31 March, 1993 and due to

wear and tear over the years, the value of the vehicle declined and it was ultimately sold and therefore, the statement of affairs did not disclose the

particulars of vehicle.

16. It is also stated that the accounts of the company with the Bank of Baroda were closed in the last quarter of 1998-99 and the cash credit

account with the Union Bank of India was also satisfied and closed in the year 2006-07 and it was settled and closed in the month of June, 2006.

In view of the said categorical statement made by the Respondents in the counter affidavit regard the two secured creditors, there is No. necessity to

presume that there are secured creditors in existence.

17. It is stated that the ex-directors have not acted against the interest of the company. It is also stated that inasmuch as action to be taken under

Sections 542 and 543 of the Companies Act, 1956, is quasi-criminal in nature, there must be specific allegation and proof regarding the acts of

dishonesty by each and every director in the affairs of the company for the purpose of making the directors liable.

18. In the additional affidavit filed by the first Respondent, it is stated that the company was originally enjoying various facilities from the Bank of

Baroda to the extent of Rs. 30 lakhs and discharged all its dues to the bank in full in the year 1999 and the company has borrowed fund from the

Union Bank of India to discharge the dues to Bank of Baroda and as stated in the original counter affidavit, the Union Bank of India has also been

satisfied and the account has been closed in the month of June, 2006.

19. It is also stated that the first Respondent has given collateral security to the Union Bank of India and he has borrowed money from his family

members and settled with the Union Bank of India as a one-time settlement and he has also enclosed the said proceedings from the Union Bank of

India accepting the onetime settlement, apart from producing a letter from the Bank of Baroda stating about the clearing of loan. The Bank of

Baroda in the letter dated January 20, 1999, has stated that the company under liquidation has discharged its dues in full, while the Union Bank of

India has given a certificate on 26 June, 2006, stating that the cash credit account has been closed under one-time settlement and the company had

remitted the interest on delayed payment of instalments and there is No. due from them.

20. I have heard learned Counsel for the applicant and the Respondents and given my anxious thought to the issue involved in this case.

21. Section 543(1) of the Companies Act, 1956, makes it clear that the liability is attributable to the ex-directors only if it is found that the moneys

of the company under liquidation have been misapplied or there has been misfeasance or breach of trust. The term misfeasance or breach of trust is

certainly relatable not only to intentional act of the directors, but also to the deliberate conduct of the ex-directors which has resulted in the loss to

the company under liquidation. Therefore, to constitute misfeasance under the said provision, the intentional act or deliberate conduct which is

detrimental to the interest of the company under liquidation on the part of the ex-directors is a sine qua non.

22. It is trite that when an application under Sections 542 and 543 of the Companies Act, 1956, is made relating to allegations of fraud or breach

of trust or misapplication, to prove such allegation, which is criminal in nature, it is necessary that there should be mens rea on the part of the

erstwhile directors either in committing fraud or causing loss to the company in liquidation. The charges in these sort of cases have to be specific

and it must be brought to the notice of this Court that the term misfeasance or breach of trust is certainly relatable not only to intentional act of the

directors, but also to the deliberate conduct of the ex-directors which has resulted in the loss to the company under liquidation, for the rule actus

non facit reum nisi mens sit rea is applicable in these cases of misfeasance.

23. This Court in Official Liquidator, High Court Vs. V. Selvaraj and Others, while construing Sections 542 and 543 of the Companies Act, 1956,

has held as follows:

... it is clear that when an application under Sections 542 and 543 of the Companies Act is made relating to the allegation of fraud or breach of

trust or misappropriation, to prove such allegation which is being criminal in nature, it is necessary that there should be mens rea aspect on the part

of the ex-director either in committing fraud or causing loss to the company under liquidation. Such conduct of fraud or breach of trust must be

specifically pleaded and proved and in the absence of such specific pleading and proof, on the facts of the present case, it is not possible to accept

the contention of the learned official liquidator that there has been deliberate conduct of fraud or breach of trust on the part of the ex-directors of

the company under liquidation.

24. On a reference to the factual aspect, which has been stated above, it is clear that there is No. specific instance of misfeasance which has been

pointed out There is nothing on record to show that the loss is only on account of misfeasance. It must be noted that for the purpose of proceeding

u/s 542 of the Act, the essential ingredient is that the directors must have taken the company on a route which they are consciously aware of as

leading to a case of total mismanagement, thereby bringing down the company"s existence. In the absence of any material to substantiate the

allegation, one cannot go in a mechanical manner to sustain the contention put forth in the application.

25. In the case on hand, the Respondents have given explanation about the clearing of dues with the two secured creditors and the same is borne

out on records. As regards the vehicle, the Respondents have given a reasonable explanation stating that even though the vehicle was shown at a

depreciated value of Rs. 1,67,816 as on 31 March, 1993, due to wear and tear over the past ten years, the value of the vehicle declined and

therefore, the same was ultimately sold. This, in my considered view, cannot be a reason for the purpose of invoking Sections 542 and 543 of the

Companies Act, 1956.

26. Having regard to the seriousness of the provisions and there being No. material against the ex-directors, the allegations stand unproved. This

application does not merit acceptance and therefore, the same stands dismissed.