

Devindar Kishore Mehra Vs. Official Liquidator and ors.

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Court : Delhi

Decided On : May-09-1979

Reported in : [1980]50CompCas699(Delhi); 16(1979)DLT150

Judge : Prakash Narain and; Shila Seth, JJ.

Acts : [Companies Act, 1956](#) - Sections 454

Appeal No. : Company Application Appeal No. 35 of 1976

Appellant : Devindar Kishore Mehra

Respondent : Official Liquidator and ors.

Judgement :

Prakash Narain, J.

(1) This appeal is directed against an order of the learned Company Judge giving certain directions under Section 454(2) and (5) of the [Companies Act, 1956](#). In order to appreciate the points involved in the case it would be desirable to briefly set out the salient facts leading to the passing of the order under appeal.

(2) M/S Sipso Agencies Private Ltd. was incorporated on October 24, 1964. The first directors or the founding directors of the Company were Devinder Kishore Mehra, the appellant, Gaj Raj Singh, respondent No. 2, Dr. (Mrs.) Pushpa Gupta, Mrs. Prem Dulari Kohli, wife of Roshan Lal Kohli, respondent No. 4, Smt Nirmal

Kumari respondent No. 5 and Srnt. Ved Kumari Ahuja, respondent No. 6. Om Parkash Gupta, respondent No. 3, was appointed Secretary of the company. On December 16, 1965 Roshan lal Kohli was appointed Director in place of his wife Mrs. Kohli. Om parkash Gupta, respondent No 3, was appointed Directors-cum-Secretary in January, 1966. In December, 1966 certain disputes started between the Directors in respect of the provisional balance sheet to be submitted by the company to Punjab National Bank The appellant, Devinder Kishore Mehra, is claimed to have refused to sign .it and as a consequence of that, it is claimed, he was ousted from the management of the company and was not even given access to the company's records. In 1968 the appellant moved an application to this court under Section 633 of the Companies Act for being relived of the consequences of diverse defaults which the company arid its officers were making and for which they could be prosecuted. Some of the parties before us were parties to that application. This application was allowed by S.K. Kapur,J.onJanuary13, 1969 and the applicant was relieved of all consequences of any alleged defaults. On January 14, 1969 the appellant submitted his resignation as Director of the company and informed all the parties concerned including the Registrar of Companies of that fact. The Registrar launched prosecution for various defaults against diverse parties. No prosecution was launched against the appellant. Another application by the appellant under Section 633 of the Companies Act was allowed by this court on November 24, 1969. It is claimed by the appellant that he moved the Central Government June 16, 1969 to take appropriate steps againstthe company and the management alleging that no Annual General Meetings were being held by the company. The application was, however not pursued. A winding up petition, C P No. 53 of 1973, was filed in this court on May 25, 1973. winding up order was made on November 6, 1974. The Official Liquidator moved C.A. No. 664 of 1975 in November 1975 praying for direction under Section 454(2) and (5) of the Companies Act as no statement of affairs was filed by anybody. Notice of this application was given to the appellant and respondents 2 to 6 before us. The appellant filed his reply and affidavit on July 31, 1966 giving all the facts enumerated above and prayed that no directions, at least qua him, should be given. Other parties also filed replies. The order under appeal was passed on August 4, 1976. By this order our brother D. K. Kapur, J. has directed as under:

'.....I would, therefore, prefer to pass an order directing the respondents to file the statement of affairs. I make it clear that it is not necessary that all of them must file a statement of affairs but any one of them may file it, which will be sufficient compliance with the Section. However, if none of them file a statement of affairs then all will risk a prosecution, subject of course, to any defense that may be open to them.'

Aggrieved by the above order the appellant has filed the present appeal. (3) The relevant provisions of the Companies Act read as under :-

"454, Statement of affairs to be made to Official Liquidator.-

(1) Where the Court has made a winding up order or appointed the Official Liquidator as provision liquidator, unless the Court in its discretion otherwise orders, there shall be made out and submitted to the Official Liquidator a statement as to the affairs of the company in the prescribed form, verified by an affidavit, and containing the following particulars, namely :- (a) the assets, of the company, stating separately the cash balance, in hand and at the bank, if any, and the negotiable securities, if any, held by the company; (b) its debts and liabilities; (c) the names, residences and occupations of its creditors, stating separately the amount of secured and unsecured debts, and in the case of secured debts, particulars of the securities given, whether by the company or an officer thereof, their value and the dates on which they were given; (d) the debts due to the company and the names, residences and occupations of the persons from whom they are due and the amount likely to be realised on account thereof; (e) Such further or other information as may be prescribed or as the Official Liquidator may require.

(2) The statement shall be submitted and verified by one or more of the persons who are at the relevant date the directors and by the person who is at that date the manager, secretary or other chief officer of the company, or by such of the persons hereinafter in this sub-section mentioned, as the Official Liquidator, subject to the direction of the Court may require to submit and verify the statement, that is to say, persons- (a) who are or have been officers of the company; (b) who have taken part in the formation of the company at any time

within one year before the relevant date; (e) who are in the employment of the company or have been in the employment of, the company within the said year, and are, in the opinion of the official Liquidator, capable of giving the information required; (d) who are or have been within the said year officers of, or in the employment of a company which is, or within the said year was, an officer of the company to which the statement relates.

(3)

(4)

(5) If any person, without reasonable excuse, makes default in complying with any of the requirements of this Section, he shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one hundred rupees for every day during which the default continues, or with both.

(5A) The Court by which the winding up order is made or the provisional liquidator is appointed may take cognizance of an offence under sub-section

(5) upon receiving a complaint of facts constituting such an offence and try the offence itself in accordance with the procedure laid down in the Code of Criminal Procedure, 1898, for the trial of summons cases by magistrates.

(6) ...

(7) ...

(8) In this section, the expression 'the relevant date' means, in a case where a provisional liquidator is appointed, the date of his appointment and in a case where no such appointment is made, the date of winding order.' S. 2(30) 'officer' includes any director, managing agent, secretaries and treasurers, manager or secretary or any person in accordance with whose directions or instructions the Board of directors or any one or more of the directors is or are accustomed to act, and also includes- (a) where the managing agent, or the secretaries and treasurers is or are a firm, any partner in the firm; (b) where the managing agent or the secretaries and treasurers is or are a body corporate, and director or manager of the body corporate; (e) but save in sections 477, 478, 539, 545, 621, 625 and

633 does not include an auditor;' S.

633. Power of Court to grant relief in certain cases-(1) If any proceeding for negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company, it appears to the Court hearing the case that he is or may be liable in respect of the negligence, default, breach of duty, misfeasance or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused, the Court may relieve him, either wholly or partly, from his liability on such terms as it may think fit : Provided that in a criminal proceeding under this sub-section the Court shall have no power to grant relief from any civil liability which may attach to an officer in respect of such negligence, default, breach of duty, misfeasance or breach of trust.

(2) Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for relief and the High Court on such application shall have the same power to relieve him as it would have had if it had been a Court before which a proceeding against that officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought under sub-section (1).

(3) No court shall grant any relief to any officer under sub-section

(1) or sub-section

(2) unless it has, by notice served in the manner specified by it, required the Registrar and such other person, if any, as it thinks necessary, to show cause why such relief should not be granted.'

(4) The first point which arises for determination is whether an ex-Director like the appellant falls within the ambit of sub-section (2) of Section 454 of the Companies Act. Our brother DK.. Kapur, J, revising an earlier opinion given by him, has held that an order under Section 454 of the Companies Act can be passed in respect of persons who were directors of the Company even more than one year prior to the

passing of the winding up order. What led our learned brother to revise his opinion was a peculiar circumstance disclosed in this case. It seems that all the respondents in C.A. 664 of 1975 claimed that they had resigned as directors between the years 1965 and 1969 long before the winding up order was passed. Thus, in the case of M/s Sipso Agencies Private Ltd. it appeared that there was nobody who could be called upon to file a statement of affairs as none was a Director on the relevant date. Analysing Section 454 of the Companies Act, the learned Judge, therefore, came to the conclusion that it could not be envisaged that nobody could be called upon in such a situation to file a statement of affairs of the company and so, ex-Directors of a company who resigned even more than one year before the winding up order could be directed to submit a statement of affairs. We are in agreement with the approach of the learned Judge that sub-section (2) of Section 454 speaks of two categories of persons—first, person who are on the relevant date the Directors or other officers of the company and second, such persons other than the first category whom the Official Liquidator, subject to the directions of the court, may call upon to submit and verify the statement of affairs. The second category is comprised of persons, inter alia, mentioned in clause (a). There is no conflict between persons falling in the category under clause (a) of sub-section (2) and clause (d) thereof. The learned Judge, we say with respect, was right in observing that at first sight clause (d) seems to refer to officers of the company which is being wound up but 'in fact it refers to person employed by a person which itself is a company being wound up.' therefore, ex-Directors of the company who resign even more than one year before the winding up order could in appropriate cases be directed to submit a statement of affairs.

(5) The next contention on behalf of the appellant is that the Official Liquidator can only require such other persons to submit a statement of affairs subject to the directions of the court as are in a position to give relevant information. This postulates that the court would apply its mind and decide in each case whether such direction should be given. It is not contemplated that the court would give direction to the Official Liquidator to require any and every person to file a statement of affairs merely as an academic exercise. The purpose of getting statement of affairs is to enable effective and proper winding up of the company.

The court is not required to give a direction which in effect would be infructuous. We are in entire agreement with this submission. Indeed, our learned brother has noticed that the appellant was not in a position to know anything about the affairs of the company ever since he was ousted from the management way back in December, 1966. He had ceased to have approach or access to the books and papers of the company. He did not take part in its management. He even refused to sign the provisional balance-sheet for being submitted to the Punjab National Bank in December, 1966. In this view of the matter asking such person to file a statement of affairs is an exercise in futility and we see no reason why a mere academic order should be passed.

(6) The third contention is with regard to the effect of the orders relieving the appellant made on two occasions and the Registrar himself not filing any prosecutions against him. Our learned brother has noticed this but it seems to have escaped his attention in making the final order. If an officer of the company or a person is relieved under Section 633(2) of the Companies Act it is inherent in the situation that he cannot be called upon to discharge those duties once again. In our view the absolution or relief granted would bar calling upon the appellant to discharge the same duties again. The first order in favor of the appellant that was passed under the provision of Section 633(2) of the Companies Act was on January 13, 1969. The respondents in that matter (C.P. 36 of 1968) were the Registrar of Companies, Gaj Raj Singh, Roshan Lal Kohli, On Parkash Gupta, Smt. Ved Kumari Ahuja and Smt. Nirmal Kumari Puri. Our learned brother late S.K. Kapur, J. had dealt with the affairs of the company at some length in his judgment. The situation then obtaining was the same as has been commented upon by D.K. Kapur, J. in the judgment under appeal. Each party was throwing the blame on the other in not calling a general meeting of the company, preparing accounts and balance-sheet or presenting the same at a general meeting of the shareholders. Holding that the appellant who was the petitioner before S.K. Kapur, J. was not in a position to either prepare the accounts or balance-sheet or call a general meeting, exoneration was granted for the year ending December 31, 1966. The second exoneration was granted to the appellant herein by S.N. Andley, J. (as he then was) by his judgment dated November 24, 1969. Agreeing with the observations of S.K. Kapur, J. It had been held that relief under Section 633(2)

was called for. The appellant was excused for not holding the annual general meeting by June 30, 1967, for not filing annual return for the period ending June 30, 1967 and for not having filed copy of the balance-sheet as on December 31, 1966 with the Registrar of Companies and all other defaults in respect of the year 1967-68. As already noticed the appellant had resigned from directorship on January 14, 1969. The winding up order was made by Rangarajan' J. in C.P. 53 of 1973. The fact that the appellant had been exonerated twice and had ceased to be director was noticed by Rangarajan, J. In these circumstances it is inconceivable that the appellant should be saddled with the responsibility for filing the statement of affairs. Indeed, we are of the view that despite knowing the incapacity or incapability of the appellant, which has even been noticed in the order under appeal, directing him to file the statement of affairs virtually amounts to negating the earlier orders of exoneration. The court should see who is capable of filing a statement of affairs if the exercise is to have any meaning. That some one may be in a likely position to file the statement of affairs would not be the proper approach.

(7) It is not in dispute and indeed it is noticed in the order under appeal that there is a great deal of controversy as to who was in possession of the relevant records of the company. One thing is certain and that is that the appellant was not, having been ousted from the management as far back as in December, 1966, which fact has been acknowledged in the two applications under Section 633(2) which he moved. In these circumstances no directions could be given to the appellant to file the statement of affairs. We are in agreement with the rule enunciated by the Calcutta High Court in *Sarkar Estates (P) Ltd. v. Gostho Behari Sarkar*. I.L R. 1967 (1) Cal 360.

(8) The question that now arises is what directions, if any, could be issued under Section 454 on a motion by the Official Liquidator. A direction under Section 454 has to be a judicial direction. With respect we must say that the sort of directions that have been given by the learned Company Judge that he would rather give directions to all than determine at this stage to whom and what directions should be given is not the correct approach. There is no other stage at which any further directions can be given and criminal trial would not be the stage to give any proper

direction. Reading Rules 125 and 126 of the Companies (Court) Rules it is obvious that the court has to decide the matter at this stage. The Official Liquidator's opinion may be subjective in making a motion to the court but it has to be based on some material. The court may require him to provide the material and give directions to first hold a proper enquiry. The court cannot allow the matter to drift. It is not an exploration trip which has to be taken. The responsibility has to be fixed as to who is to file the statement of affairs if the exercise is to be worthwhile. Of course, mere pleading by a party that he is not in a position to file a statement of affairs is neither here nor there. The pleas have to be heard and decided and if a person is capable of filing a statement of affairs he must be called upon to do so on pain of being prosecuted. Statement of affairs is the very basis of winding up proceedings. It is not a proceeding which can be called a fact-finding enquiry or a fishing enquiry. Fact-finding is to be done by invoking the provisions of Sections 477 and 488 of the Companies Act. Furthermore, the statement of affairs postulated by Section 454 of the Companies Act is to obtain as full an information as possible, not piecemeal information. This statement of affairs is to be filed by persons in a position to do so and not by persons who are or were directors or officers in name or have never had opportunity to know the affairs of the company. It is for this reason that the Official Liquidator is to obtain the directions of the court before calling upon anyone to file statement of affairs. No doubt, in the present case the parties are throwing responsibility on each other. All the same, on a full enquiry it can be found out at this stage as to who is really the person concerned who should be called upon to file a statement of affairs. Once a person is directed to file a statement of affairs under section 454 of the Companies Act onerous responsibility falls upon him with penal consequences in case of default. So, even on principles of natural justice each person sought to be made responsible should be heard, his individual case considered and a decision given whether he should be called upon to file the statement of affairs. Making a general order applicable to each and every one who at any point of time may have been connected with the management of the company will serve no useful purpose.

(9) It has been urged that even past officers may be able to give valuable information and Section 454(2)(a) in terms talks of past officers. So the date of resignation of the appellant is immaterial. There is some force in this contention

but in the circumstances of this case we do not see how any useful information or rather any information at all can be furnished by the appellant. As has been held by DK. Kapur, J. Official Liquidator of M/s R.S. Motors (P) Ltd. (in liquidation) v. Shri Jagjit Singh Sawhney and another; I.L.R.1974(1)Del 243 if the books of the company are not available to a director who is required to file a statement under Section 454, then it will be a reasonable excuse for him in not submitting the statement of affairs of the company ordered to be wound up in a prosecution launched against him for failure to file the statement of affairs. The appellant, as we have already noticed, has been held not to be in a position to have access to the books of the company ever since he was ousted from the management. In these circumstances calling upon him to file the statement of affairs cannot be justified. Indeed, it cannot be justified for any of the persons unless a clear-cut finding is given that any one of the persons concerned is in a position to or capable of filing the statement of affairs. Such an enquiry is an imperative prerequisite to giving directions under Section 454 on a motion by the Official Liquidator. We cannot agree with the contention that pleading reasonable excuse is available at the stage of prosecution only. Putting a person in jeopardy of that type without an earlier investigation when it is so required to be made is not called for.

(10) The books of account and other papers in this case, as it appears, would be either with Kohli or Gaj Raj Singh. Kohli is alleged to have handed over charge to Gaj Raj Singh in September, 1969. Kohli was in charge of the Indore Branch. So, company was not defunct in the end of 1966. The appellant, however, seems to have been ousted in the end of 1966. We notice these facts on the basis of the pleadings of the parties. We should not be understood to have made any observation that either Kohli or Gaj Raj Singh or both are persons who should have been called upon to file the statement of affairs. Why we have noticed this aspect is to show that the appellant, in any case, could not have been called upon to do so.

(11) The result is that we accept the appeal, set aside the order of the learned Company Judge and direct re-hearing of the application of the Official Liquidator for directions under Section 454 of the companies Act. Parties will bear their own

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