IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Company Application [CAO] No.160 of 2016
with
Company Application [CAO] No.161 of 2016
with
Company Application [CAO] No.162 of 2016
with
Company Application [CAO] No.228 of 2016
in
Official Liquidator Report No.18 of 2015
in
Company Petition No.17 of 2009

Appellant : Official Liquidator & Liquidator of
M/s. Wopolin Plastics Ltd. (In Prov. Liqn)
High Court Bombay, Bench at Nagpur,
N.S. Bldg. 2nd Floor, Opp. V.C.A. Ground,
Civil Lines, Nagpur.

-- Versus –

Non-Applicants : 1] Shri Hargovind Gangabisan Bajaj,
Saket, SS, Farmland, Ramdaspeth,
Nagpur.

2] Shri Vinodkumar Gangabisan Bajaj,
254, Pandit R.S. Shukla Marg,
Civil Lines, Nagpur – 440 001.

3] Shri Kishor V. Rathi,
A/20, Jeevan Chhaya, Ramdaspeth,
Nagpur – 440 010.

4] Shri Nareshprasad Falgoprasad Tiwari,
100/1, Shantinagar Colony, Behind Garden,
Shantinagar, Nayapura, Mangalvari,
Nagpur – 440 002.

5] Shri Sudhakar Pandharinath Kolarkar,
Qtr. No.80/B, Rameshwari Road,
Empress Mill Colony, PO Bhagwan Nagar,
Nagpur – 440 027.

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Shri A.C. Dharmadhikari, Advocate for the Non-Applicants.
Dr. Anjan De, Advocate for the Applicant/Official Liquidator.
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CORAM : S.M. MODAK, J.
RESERVED ON : 29th JULY, 2021.
PRONOUNCED ON : 7th SEPTEMBER, 2021.

JUDGMENT :-

The directors of the company by name M/s. Wopolin Plastics Ltd., formerly known as M/s. Bajaj Plastics Ltd., are asking for discharge from the present proceedings. It is for the reason that the allegations in the report submitted by the Official Liquidator are vague.

02] These applications for discharge are filed in a report submitted under Section 543 of the Companies Act requesting for issuing summons to the non-applicants-directors. This Court has already issued notice to the non-applicants. On this background, I have heard learned Advocate Shri A.C. Dharmadhikari for the non-applicants and learned Advocate Dr. Anjan De for the Official Liquidator.

03] The sum and substance of their applications is as follows :

i. The Official Liquidator has blindly accepted the report dated 19/10/2015 given by the Chartered Accountant without applying his mind.

ii. The Official Liquidator has not ascertained as to whether the case of misfeasance is made out against the non-applicants.

iii. Clarification or explanation of the non-applicants were not called by the Chartered Accountant.

iv. The allegations made in the Official Liquidator Report are vague and they are general in nature.

v. The exact role played by the individual director in causing alleged losses to the company is not pleaded in the report.

vi. There is a specific ground taken by non-applicant No.5 about his nomination as a director in the year 2009. Whereas, the Chartered Accountant has prepared the report on the basis of balance-sheet and profit and loss account audited up to 31st March, 2008.

04] By way of an additional affidavit, non-applicant Nos.1, 2, 4 & 5 have taken the following grounds :

i. Even though there was a demand of custom duty to the tune of Rs.9.31 crores by the Commissioner, the applicant-company obtained favourable order from the Tribunal and it was apprised to the Official Liquidator, but he has not intimated this fact to the Chartered Accountant.

ii. Assets Reconstruction Company [India] Limited ('ARCIL' for short) has sold the assets of the company to one M/s. Haripack Extrusions (Vidarbha) Pvt. Ltd. as per the tender and they have taken the responsibility to discharge all the liabilities and, hence, these non-applicants are not responsible for any alleged losses.

iii. Debit balance of profit and loss account is shown in the Chartered Accountant Report, however, it is not explained how it is attributable to the acts of the non-applicants.

iv. IDBI was appointed as an operating agency by BFIR for the period from 11/11/1999 to 12/09/2005. During that period, there was a loss of Rs.7.93 crores and it was caused because there was no control of the non-applicants over the functioning of the company.

v. No actual loss is caused to the company as 100% financial creditors debt was satisfied and their NOC was received by ARCIL

05] Learned Advocate Shri A.C. Dharmadhikari for the non-applicants relied upon the following judgments:

i. *Narayan vs. The Official Liquidator of Maharashtra Asbestos Pvt. Ltd. - (Division Bench of Bombay High Court, Nagpur Bench in Company Appeal No.13/2008)*

ii. *Official Liquidator, High Court, Madras vs. Gautham Dhiraj Mal Ranka & others - (2007 SCC OnLine Mad 888).*

iii. *Security and Finance Pvt. Ltd. vs. B.K. Bedi & others - (1990 SCC OnLine Del 102)*

iv. *The Official Liquidator vs. M/s. Nathmal Kisanlal & others - (Bombay High Court in Company Application No.16/1972)*

v. *The Official Liquidator & Liquidator of M/s. John Galt Laboratories Ltd. vs. Shri R.B. Sangare & others - (Bombay High Court in Company Application No.16/1972).*

06] Whereas, the Official Liquidator has opposed the prayer for discharge on the following grounds:

i. Official Liquidator was appointed as a Provisional Liquidator as per the order dated 22/10/2010.

ii. Non-Applicant No.1-Hargovind Bajaj and non-applicant No.2-Vinodkumar Bajaj are the promoters/directors of the company since incorporation.

iii. Official Liquidator has taken possession of books of accounts of the company from ex-directors on 04/02/2011.

iv. ARCIL has taken over the assets of the company on 22/06/2006 as per the provisions of SARFAESI Act, 2002.

v. The Chartered Accountant was appointed to carry out the investigation as per the order of this Court.

vi. ARCIL has sold the assets of the company including stock for an amount of Rs.29.03 crores, however, break up of aggregate consideration is not available.

vii. This was prior to winding up order. The Chartered Accountant in his report has considered the factors prior to holding the ex-directors responsible for the losses to the tune of Rs.42,22,20,742/-.

viii. Non-applicant Nos.1 & 2 have resigned on 03/03/2009 and in their place, non-applicant No.4-Nareshprasad Tiwari and non-applicant No.5-Sudhakar Kolarkar were appointed in a casual vacancy from 03/03/2009.

ix. The developments in the appeal filed before the Appellate Tribunal subsequent to the investigation report of the Chartered Accountant.

OBSERVATIONS

08] If the judgments relied upon by the non-applicants are perused, the following principles emerge :-

i. In the case of *Narayan* (cited supra), the Division Bench of this Court has discharged the non-applicants therein by setting aside the order of the Company Court. Active engagement in the administration or management of the affairs of the company is required prior to making declaration under Section 543 of the Companies Act.

ii. In the case of *Gautham Dhiraj* (cited supra), the High Court of Madras was pleased to discharge the directors as the misfeasance and non-feasance charges were found general in nature without pinpointing a specific act of dishonesty and misappropriation.

iii. In the case of *B.K. Bedi* (cited supra), the High Court of Delhi was pleased to discharge the directors, because there were no specific allegations. When the allegations are not specific and details of fraud are not given, then the Court cannot indulge in a fishing or roving enquiry. The enquiry is to be confined to the purpose with which the business of the company had been carried on and the persons who were knowingly parties to that act. There has to be positive and specific evidence and pleadings in respect of the individual director.

iv. In the case of *M/s. Nathmal Kisanlal* (cited supra), this Court was pleased to reject the request of the Official Liquidator to take action under Section 543 of the

Companies Act. This Court has laid down similar principles as mentioned above. However, this order was passed after the evidence was recorded.

v. So also in the case of *R.B. Sangare* (cited supra), this Court was pleased to drop the request of the Official Liquidator for taking action under Sections 542 & 543 of the Companies Act. Similar principles were laid down. However, this order was passed after the oral evidence was recorded.

09] If the above principles are applied to the case before us, we can find that in the report of the Chartered Accountant, no doubt, he has quantified the loss to the tune of Rs.42,15,20,742/-. He has also categorized the different heads. While giving his opinion, he has considered the record made available up to 31/03/2008. According to him, it was incomplete. He has noted the fact of selling of assets to ARCIL. However, when the report is perused, one can come to an inevitable conclusion that, there is no specific mention as to which director is liable and to what extent. In general, he has said about the total loss without specifying about the individual liability of the directors. Before making a declaration under Section 543 of the Companies Act, the Court must satisfy itself about the liability of individual directors, without that, declaration cannot be made.

10] One may say that these lacunae in the report of the Chartered Accountant can be filled in, if the evidence is allowed to be adduced. However, it has already been held that if the report is lacking in those particulars, the Court cannot hold a roving enquiry. It was incumbent on the Official Liquidator to rectify these defects. He ought to have considered those defects prior to filing of Official Liquidator Report in this Court. It has also been observed that "the *general principle of liability of joint tortfeasors cannot apply to misfeasance.*

In order to prove misfeasance, it must be proved

(I) that there was a breach of trust and

(ii) it has resulted in pecuniary loss to the company.
(Paragraph 22 of *B.K. Bedi's* judgment).

11] It is also pertinent to note that this Court as per the order dated 11/03/2021 passed in Company Petition No.17/2009 allowed the winding up of the company under Section 433(a) of the Companies Act and the appointment of the Provisional Liquidator was confirmed.

12] In view of the above circumstances, I do not think that the proceedings against all the non-applicants can be continued. I have not expressed any opinion about the objection taken by the non-applicants other than vagueness of the allegations. Therefore, the applications deserve to be allowed. Hence, the following order :

I. The non-applicants are discharged from the proceedings.

II. The Official Liquidator Report is dismissed.

III. All the civil applications are allowed and disposed of accordingly.

IV. Interim applications pending, if any, are disposed of.

JUDGE

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