Santosh

SANTOSH SUBHASH KULKARNI

Digitally signed by SANTOSH SUBHASH KULKARNI
Date: 2022.12.26 14:17:03 +0530

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

OFFICIAL LIQUIDATOR'S REPORT NO. 27 OF 2021
IN
COMPANY PETITION NO. 488 OF 2015

In the matter of Companies Act, I of 1956
And
In the matter of Elder Pharmaceuticals Limited, (In Liqn.)

Puspasen Jhaveri ...Petitioner

Mr. Jehangir Jejeebhoy, for the Official Liquidator.
Mr. Rajiv Hingu i/b L. H. Hingu & Co., for Ex-Independent Directors/Noticee Nos.1 and 2.
Mr. Dinesh Kumar Dubey, for Noticee No.3.
Mr. Bhavin Gada, for Noticee No.4 – Shalini Kumar.

CORAM: N. J. JAMADAR, J.
DATED : 21st DECEMBER, 2022

ORDER:-

1. The Official Liquidator has filed this report seeking permission to file complaint under Section 454(5) of the Companies Act, 1956 ("the Act, 1956") read with Rule 132 of the Companies (Court) Rules, 1959 ("the Rules, 1959") against the Ex-Director(s)/Secretary of the Company (in liquidation) and also direct Ex-Director(s)/Secretary of the Company (in liquidation) to appear before the Official Liquidator and record their statements under Rule 130 of the Rules, 1956. The Official Liquidator also seeks permission to delete Mr. Alok Jagdish

Saxena, Ex-Director of the Company, since he passed away on 7th November, 2017, from the array of parties.

2. By an order dated 19th September, 2016 passed by this Court in Company Petition Nos.488/2015, 504/2015 and 990/2015, the Official Liquidator came to be appointed as the Provisional Liquidator of Elder Pharmaceuticals Limited, the Company (in liquidation). By a subsequent order dated 4th December, 2017 passed in Company Petition No.488 of 2015, the Official Liquidator was appointed as the Liquidator of the Company (in liquidation) with usual powers under the provisions of the Act, 1956.

3. In accordance with the provisions contained in Section 454 of the Act, 1956, the Ex-Director(s)/Secretary of the Company (in liquidation) were required to file statement of affairs. Despite communications dated 16th November, 2016 and 6th July, 2020 the Ex-Director(s)/Secretary of the Company (in liquidation), failed to comply with the statutory mandate under Section 454 of the Act, 1956. On account of non-cooperation of the Ex-Director(s)/Secretary of the Company (in liquidation) and failure on their part to file the statement of affairs the Official Liquidator could not proceed effectively in winding up proceedings. The Ex-Directors and Secretary have not paid heed to the repeated requests of the Official Liquidator. Hence this report.

4. According to the Official Liquidator, Mr. Abdul Khader Mohammed Ravani (Noticee No.1), Mr. Kader Mohamed Davawala (Noticee No.2) are the Ex-Directors of the Company (in liquidation) apart from Mr. Alok Saxena, who passed away, and Mr. Vijendra Kumar Jain (Noticee No.3), is the then Secretary of the Company (in liquidation).

5. The Official Liquidator, post alleged discovery of facts, prayed for issue of notice to Ms. Shalini Karan Kumar (Noticee No.4), purportedly another Ex-Director of the Company (in liquidation). An additional affidavit is filed by the Official Liquidator placing on record the documents which show the role of Ms. Shalini Karan Kumar (Noticee No.4).

6. The Noticees have filed affidavits-in-reply. Noticee Nos.1 and 2 claimed that they were independent Directors of the Company (in liquidation) in a non-executive capacity. They were never involved in the day to day affairs of the company (in liquidation). Nor were they privy to any decision of the Board of Directors. They further claim that they were even unaware of the order appointing Provisional Liquidator. Therefore they are not liable to file statement of affairs under Section 454 of the Act, 1956.

7. Noticee no.3 Mr. Vijendra Jain, in his affidavit-in-reply, contends that he was relieved from the post of the Secretary of the company (in liquidation) by Late Alok Saxena, the then Managing Director, with effect from 25th October, 2016 as he had tendered resignation on 26th September, 2016. The Noticee No.3, therefore, contends that he is not in a position to file the statement of affairs.

8. Ms. Shalini Kumar, Noticee No.4, contended that she was never appointed as the Director of the Company (in liquidation). She was entrusted with the task of sales and marketing. She was paid salary for the work which was assigned to her. She was unaware as to what designation was shown in her service record. She had lastly drawn the salary from the Company (in liquidation) in the month of December, 2014.

9. Ms. Shalini Kumar further contended that after the death of her father, disputes arose between Late Alok Saxena and Mr. Anuj Saxena, on one side, and she and her mother, on the other side, resulting in multiple proceedings. Ms. Shali Kumar alleged that vide letter dated 2nd December, 2014 Mr. Anuj Saxena, the then Chief Operating Officer of the Company (in liquidation), had terminated her services from the company with immediate effect. Since then she has not been associated with the Company (in liquidation).

10. Affidavits-in-rejoinder are filed by the Official Liquidator to deal with the contentions in the affidavits-in-reply.

11. I have heard Mr. Jejeebhoy, the learned Counsel for the Official Liquidator, Mr. Hingu, the learned Counsel for Noticee Nos.1 and 2, Mr. Dubey, the learned Counsel for Noticee No.3 and Mr. Gada, the learned Counsel for Noticee No.4.

12. Mr Jejeebhoy submitted that the liability to file the statement of affairs consequent to the winding up order is not only that of the Directors of the Company (in liquidation). Mr. Jejeebhoy submitted that the provision contained in Sub-section (2) of Section 454 of the Act, 1956 casts the liability on the Directors and other Officers and persons in employment of the Company, who were in the know of the things, to file the statement of affairs, upon being required by the Official Liquidator.

13. For the purpose of determination of the question in controversy, it may be advantageous to note the provisions contained in Section 454(2) and (8) of the Act, 1956. They read as under:

> **"Section 454 Statement of affairs to be made to Official Liquidator.--**
>
> **(1)** .....
>
> **(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 to the (Tribunal), 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;
>
> (c) 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 offices 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.
>
> ....
>
> **(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 the winding up order."

14. On a plain reading, the aforesaid provisions enjoin the persons, who were at the relevant date, the Directors, Manager, Secretary, Chief Officer, Officers or who took part in the formation of the company or who were in the employment of the company or have been in the employment of the company within one year before the relevant date, and who are in the opinion of the Official Liquidator capable of giving the required information to submit a statement of affairs. The relevant date for the purpose of Section 454 is the date of the appointment of Provisional Liquidator and, in the absence thereof, the date of the winding up order.

15. In view of the aforesaid provisions, it has to be seen whether the Noticees were the persons who were holding any of the aforesaid positions in the Company (in liquidation) on the relevant date i.e. 19^{th} September, 2016, the date of the appointment of Provisional Liquidator.

16. Mr. Jejeebhoy, the learned Counsel for the Official Liquidator, fairly submitted that in the face of the material on record to demonstrate that Noticee Nos.1 and 2 were the independent Directors of the Company (in liquidation) and did not participate in the day to day affairs of the Company (in liquidation), they may not be called upon to submit the statement of affairs. In any event, Noticee Nos.1 and 2 do not appear to be capable of giving the required information. Hence, the prayer qua Noticee Nos.1 and 2 cannot be sustained.

17. As regards Notice No.3 Mr. Vijendra Jain, the then Secretary of the Company (in liquidation), Mr. Jejeebhoy would urge that indisputably Noticee No.3 was the Secretary of the Company (in liquidation) on the date of the appointment of the Provisional Liquidator. Noticee No.3 allegedly tendered the resignation on 26th September, 2016, which was accepted with effect from 25th October, 2016. Resultantly, Noticee No.3 is liable to furnish the statement of affairs.

18. Mr. Dubey, the learned Counsel for Noticee No.3, joined the issue by canvassing a submission that Noticee No.3 was not aware of the passing of the order appointing the Official Liquidator as the Provisional Liquidator. It was further submitted that Noticee No.3 was called upon to furnish the statement of affairs vide letter dated 6th July, 2020 only. This time-lag, according to the learned Counsel for Noticee No.3, disables Noticee No.3 from furnishing the statement of affairs as he has no access to the record of the Company (in liquidation).

19. Evidently, on the date of appointment of the Provisional Liquidator i.e. 19th September, 2016, Noticee No.3 was the Secretary of the Company (in liquidation). From the own showing of Noticee No.3, he tendered the resignation on 26th September, 2016 and it was accepted with effect from 25th October, 2016. To my mind, the liability to submit the statement of affairs can not be avoided by taking a contention that the Secretary was not aware of the order of appointment of Provisional Liquidator. As noted above, on the relevant date i.e. on the date of appointment of the Provisional Liquidator, Noticee

No.3 was firmly in the saddle as the Company Secretary. In my view, Noticee No.3 is statutorily enjoined to furnish the statement of affairs.

20. Since Noticee No.3 resigned from the Company, under a week of the order of appointment of Provisional Liquidator, in my view, it would be expedient to provide an opportunity to Noticee No.3 to furnish the statement of affairs within a period of one month from today and, in the event of default, permit the Official Liquidator to file the complaint under Section 454(5) of the Act, 1956.

21. Mr. Jejeebhoy strenuously submitted that the record which the Official Liquidator could obtain from the authorities, indicates that Ms. Shalini Kuamr, Noticee No.4, was a Director of the Company (in liquidation). In any event, according to Mr. Jejeebhoy, the record indicates that Ms. Shalini Kumar was the key managerial personnel or responsible officer of the Company (in liquidation). Thus Ms. Shalini Kumar cannot be permitted to wriggle out of the liability to furnish the statement of affairs.

22. Attention of the Court was invited to the Form-5 of the Employees Provident Fund Scheme, 1952, which indicates that the applicant was working with the Company (in liquidation). In the salary slip, for the month of December, 2013, her designation was shown as Director. Mr. Jejeebhoy also banked upon a letter dated 1st October, 1996 issued by the then Managing Director of the Company (in liquidation) that Ms. Shalini Kumar was appointed as the Director in Medical Electronics Division, a group company of Elder Pharmaceuticals Co. Ltd. Reliance was also placed on the related party disclosure in the balance-sheet of the Company (in liquidation) wherein Ms. Shalini Kumar was shown as one of the key managerial personnel and their relatives. In affidavit-in-rejoinder, the Official Liquidator asserted that as per the details available on the website of the MCA, Ms. Shalini Kumar, Noticee No.4, was shown as the Director in four companies. An endeavour was made to show that three out of those four companies were the related entities of Elder Pharmaceuticals Ltd.

23. In opposition to this Mr. Gada, the learned Counsel for Noticee No.4, submitted that the material relied upon by the Official Liquidator itself shows that Ms. Shalini Kumar was not one of the Directors of the Company (in liquidation). Though Ms. Shalini Kumar was associated with the Company (in liquidation) in the capacity of Manager, Sales and Marketing, yet she was relieved of her responsibility in the month of December, 2014 itself in the wake of the dispute amongst the members of Saxena family. Thus, Noticee No.4 can not be roped in even in the capacity of the Officer or employee of the company since her association with the company ceased much prior to the date of the appointment of the provisional liquidator.

24. I find substance in the submission of Mr. Gada, the learned Counsel for Noticee No.4.

25. In the affidavit-in-rejoinder the Official Liquidator has asserted that MCA Website shows Ms. Shalini Kumar as the Director in four companies. The Company (in liquidation) is not one of those four companies. Even the letter dated 1st October, 1996, does not advance the cause of the submission on behalf of the Official Liquidator as under the said letter Ms. Shalini Kumar was appointed as directer in Medical Electronics Division, a group company of Elder Pharmaceuticals Ltd. There is no document to show that Ms. Shalini Kumar was appointed as the Director of the Company (in liquidation) at any point of time.

26. It is pertinent to note that the association of Ms. Shalini Kumar with the Company (in liquidation) was for more than 18 years (i.e. 1996 -2014). Had Ms. Shalini Kumar been appointed as the Director of the Company (in liquidation), at any point of time, the said fact could have been reflected in the record. In the circumstances, the fact that in the salary slip her designation was shown as a Director does not carry the matter any further.

27. The endeavour of the Official Liquidator to rope in Ms. Shalini Kumar as a key managerial personnel and/or Officer of the company in liquidation also does not merit countenance. In the balance-sheet for the period ending March, 2013, she was shown as one of the management personnel and their relatives. In contrast, Ms. Shalini Kumar has placed on record the letter dated 2nd December, 2014 whereby her services were discontinued from the Company (in liquidation) with immediate effect. There is no material to show that Ms. Shalini Kumar had been thereafter associated with the Company (in liquidation) in any capacity. Thus, Ms. Shalini Kumar does not appear to be one of the persons who are liable to furnish the statement of affairs under Section 454(2) of the Act, 1956.

28. Hence, the following order:

: **O R D E R** :

(i) The Official Liquidator's Report stands partly allowed.

(ii) The prayer seeking direction to Noticee Nos.1, 2 and 4 to furnish the statement of affairs stands rejected.

(iii) Mr. Vijendra Jain, the then Secretary of the Company (in liquidation), shall file a statement of affairs in accordance with the provisions of the Act, 1956 and the Rules 1959 with the Official Liquidator within a period of one month from the date of uploading of this order.

(iv) In the event of default, the Official Liquidator shall be at liberty to file complaint against Mr. Vijendra Jain, for the offence punishable under Section 454(5) of the Act, 1956.

Official Liquidator's Report accordingly stands disposed.

[N. J. JAMADAR, J.]