IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 5148 OF 2022

J. Maheshkumar Petrochemicals Pvt Ltd.
Through Vipul M. Bhat ...Petitioner
Versus
Official Liquidaor Subhashri Extrusions
Pvt Ltd. & Anr. ...Respondents

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Mr. U.L. Shah, Advocate for the Petitioner.

Mr. Mutahhar Khan, Advocate for Respondent No.1-Official Liquidator.

Mr. Arfan Sait, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.
DATE : 19th JANUARY, 2024.

P.C.:

1. The Petitioner challenges Order dated 9th November, 2021 passed by learned Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai in C.C. No. 2231/MISC/2019 rejecting the Application preferred by the Petitioner under Sections 421 and 431 of Cr.P.C. seeking attachment of property in the sum of Rs.53,00,000/- being an amount of compensation available with the official liquidator High Court Mumbai appointed in company Petition No.357 of 2009.

2. The Petitioner is the original complainant. The complaint

was filed alleging offences under Section 138 of the Negotiable Instruments Act, 1881 (for short 'N.I. Act') against M/s. Shubhashri Extrusions Limited and others. The complainant had alleged that the complainant had raised two debit notes for Rs.26,979 and Rs.2,46,526/- towards interest on delayed payment. The complainant gave credit notes to the Accused. The Accused was liable to pay a sum of Rs.36,84,763/- being the total price of the goods, Rs.9,70,310/-, Rs.26,979/- and Rs.2,46,526/-. Towards discharge of the liability, the Accused issued issued five cheques bearing no.345432 dated 22nd July, 2006 for Rs.10,74,317/-, cheque no.778395 for Rs.4,84,525/-, cheque no.778397 for Rs.3,39,091/-, cheque no.778398 for Rs.3,22,136/- and cheque no.778399 for Rs.27,00,435/-. Cheques were deposited by the complainant. The cheques returned unpaid for the reasons 'Fund Insufficient'.

3. Vide Judgment and Order dated 10th April, 2015, the learned Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai convicted Accused Nos.1 to 3 for the offence punishable under Section 138 of N.I. Act. The Accused Nos.2 and 3 were sentenced to suffer six months imprisonment and Accused Nos.1 to 3 were directed to pay a compensation of Rs.53,00,000/- to the

complainant within four weeks.

4. The Accused Nos.4 and 5 were acquitted. The Accused Nos.2 and 3 preferred an appeal before the Court of Sessions. The Appellants and the complainant arrived at the settlement. The said Appellants paid an amount of Rs.10,00,000/- to the complainant and the offence was compounded in accordance with Section 147 of N.I. Act.

5. The complainant had initiated the proceedings under the Companies Act for winding up Accused No.1 company. The Petition for winding up was allowed. Official liquidator was appointed in respect to the assets of Accused No.1 company.

6. The complainant/Petitioner had preferred an application before the Company Court for crediting the amount of Rs.53,00,000/-. The said application is pending.

7. The Petitioner preferred application under Sections 421 and 431 of Cr.P.C. for warrant of attachment to attach compensation amount in the hands of official liquidator on 1st March, 2016. The official liquidator filed written submission dated 19th May, 2016. It was contended that the complainant presented Company Petition No.357 of 2009. Vide Order dated 23rd September, 2009 the Accused No.1 company M/s. Subhashri

Extrusion Ltd. was ordered to be wound up and the official liquidator attached to the High Court was appointed as liquidator with usual powers under the Companies Act. In terms of order dated 21st October, 2010, the official liquidator has sold the movables and immovable assets of the company and realised a sum of Rs.3,65,00,000/-. The official liquidator had invited the claims of the workers/creditors as per Rule 148 of the Companies (Court) Rule 1959. The liquidator received 42 claims from the workers and one claim from secured creditor. The claim of secured creditor i.e. Abhyudaya Bank and 33 workers have been adjudicated and admitted for an amount of Rs.6,78,45,043/- and Rs.26,31,804/- and 8 claims of workers have been rejected for want of proof. Claim is pending for order on delay condonation. In terms of order dated 13th January, 2012 passed by High Court the official liquidator had declared and paid dividend @ 40 paise in a rupee to Abhyudaya Co-operative Bank Ltd., amounting to Rs.2,71,38,017/- after making provision for workers claim. The complainant has filed company application before High Court for condonation of delay and issuing direction to official liquidator to pay compensation of Rs.53,00,000/- to complainant. Although the said application is pending, the complainant has moved the application before trial Court. While declaring dividend preference will be given to the claim of Employees Provident Fund followed by workers and secured creditors as per provisions of Section 529-A of Companies Act. Thereafter, salary of staff etc. will be considered and paid. The official liquidator is required to act in accordance with provisions of Companies Act. The official liquidator also filed written submissions.

8. The Petitioner filed written notes of arguments and submitted that combined reading of Section 357(3), 421 and 431 of Cr.P.C. makes it mandatory for the official liquidator to pay the compensation to the complainant as in default thereof the official liquidator cannot be made to undergo imprisonment.

9. The learned Magistrate vide order dated 9th November, 2021 rejected the application.

10. Learned Advocate for the Petitioner submitted that the Court of learned Magistrate has erroneously rejected the application. The Accused were convicted. Official liquidator has been appointed qua Accused No.1. The Petitioner was entitled to recover the amount in accordance with Sections 421 and 431 of Cr.P.C. The trial Court has committed an error while rejecting the application on the ground that the Petitioner had compounded the matter with the co-accused. The Accused No.1 was convicted

alongwith the other Accused. Substantive sentence of imprisonment was imposed against Accused Nos.2 and 3. However, the Accused No.1 company was liable to pay the compensation amount. The Accused Nos.2 and 3 were the Directors of Accused No.1 company. Merely, on account of settlement with the Accused Nos.2 and 3, the liability of the Accused No.1 does not get extinguished. Pursuant to Order passed by the Company Court relating to the winding up of Accused No.1 company. Official liquidator has been appointed. The assets of Accused No.1 company are in possession of the official liquidator. The Petitioner is entitled to recover the amount of compensation from official liquidator. The offence was compounded against Accused Nos.2 and 3 and not with the Accused No.1 company. Although the company is wound up. The amount towards compensation can be recovered from the company and since the liquidator is appointed and assets of the company are in possession of the liquidator, the Petitioner is entitled to recover the said amount. The impugned order vitiates mandate of Section 357(3) of Cr.P.C. The official liquidator has been representing the company. The company is ordered to pay compensation. Appeal challenging Judgment of conviction was filed by Accused Nos.2 and 3 in their individual capacity. Offence was compounded against them. The compensation under Section 357(3) of Cr.P.c. and claim under winding up proceedings stand on different footing. The liquidator has sufficient amount to make payment of compensation. The claim filed by Petitioners in company petition was in their capacity of unsecured creditors. The claim is pending since long.

11. Reliance is placed on the following decisions :

i. ***CBI V/s. M/s. Blue Sky Tie Up Pvt. Ltd. & Ors.***[1]

ii. ***A.K. Sinahania V/s. Gujarat State Fertilizer Company Ltd.***[2]

iii. ***B.S.I. Ltd. and Anr. V/s. Gift Holdings Pvt. Ltd. and Anr.***[3]

iv. ***Kusum Ingots and Alloys Ltd. V/s. Pennar Peterson Securities Ltd. and Others***[4]

v. ***Suryakant Babulal Mehta V/s. Shreeshakti Mills Ltd***[5]

vi. ***Kumaran V/s. State of Kerala***[6]

12. Learned Advocate for Respondent submitted that the learned Magistrate has rightly rejected the application preferred by the Petitioner. Having compounded the offence with the Accused Nos.2 and 3, who are acting as a Directors of Accused No.1, the Petitioner cannot proceed against Accused No.1 company. The

1 2012 AIR SCW 1098
2 (2013) 16 SCC 630
3 (2000) 2 SCC 737
4 (2000) 2 SCC 745
5 (2008) 143 COM. Cases 307 (BOM)
6 (2017) 7 SCC 471

Petitioner had filed a company petition for winding up of the company. Pursuant to the said Order the liquidator has been appointed. The Petitioner had preferred an application for recovering the amount which was awarded towards compensation from the official liquidator in respect to the assets of Accused No.1 company. The said application is pending for adjudication. During the pendency of such application the Petitioner ought not to have approached the learned Magistrate for recovery of the amount in accordance with Sections 421 and 431 of Cr.P.C. In terms of Order dated 21st October, 2010 passed by the High Court the official liquidator had sold the movable and immovable assets of the company and realize the sum of Rs.3,65,00,000/-. The official liquidator had invited claims of the workers/creditors as per Rules 959 and response to the same the official liquidator has received 42 claims from the workers and one claim from secured creditor i.e. Co-operative Bank Limited. The claim of the secured creditor and the claim of 33 workers have been adjudicated and admitted for an amount of Rs.6,78,45,043/- and Rs.26,31,804/- respectively and eight claims of workers have been rejected for want of proofs and one same is pending. In terms of Order dated 13th January, 2012 passed by this Court, the official liquidator has declared and paid dividend at the rate of 40 paise in a rupee to the aforesaid branch amounting to Rs.2,71,38,017/-. The complainant had filed an affidavit of proof of that on 8th June, 2015. The official liquidator had issued a letter dated 15th June, 2016 stating that as per the provisions of Rule 17 of the Company Rules the claimant has to obtain a Order of condonation of delay from the Court. The complainant had filed a Company Application No.706 of 2015 before this Court seeking directions to the official liquidator to pay the compensation of Rs.53,00,000/- to the Petitioner in accordance with Judgment of trial Court convicting the Accused. The said application was not placed for consideration before the Court of learned Magistrate. The liquidator is required to act in accordance with the provisions of the Companies Act read with Company Rules. As per Section 529-A of the Companies Act, claims of the workers and secured creditor on *pari passu* wages shall be paid in priority to all other debts. Even before paying the claims as per Section 529-A of the Companies Act, the claim will be paid in priority. The claim of the Petitioner is ordinary and it will be considered and paid after satisfying all the other claims. The present application is being filed under Sections 357, 421 and 431 of Cr.P.C. and the complainant is seeking attachment of the amount recovered by sale of property of the company. Since, the company is in liquidation and the official liquidator has been appointed and liquidator of company as per Section 456(2) of the Companies Act, all the properties and effects of the company shall be deemed to in the custody of the Court from the date of winding up/appointed of liquidator of the company and the amount of Rs.15,70,490/- lying to the credit of the company is assets of company is in liquidation. As per Section 446(1) of the Companies Act no suit or other legal proceedings can be proceeded against the company. The Petitioner is not entitled to recover the amount by invoking the aforesaid provisions and the application for recovery of the amount is already pending in the Company Court.

13. Learned counsel for the Respondent has relied upon the following decisions:

i. Ajay Y. Mafatlal V/s. Mafatlal Dyes Chemicals Ltd.[7]

ii. Sudarshan Chits (I) Ltd. V/s. O. Sukuraman Pillai & Others[8]

iii. Sister of St. Joseph of Cluny V/s. State of West Bengal & Ors.[9]

iv. Vision Millennium Exports Pvt. Ltd. V/s. Stride Multitrade Pvt. Ltd.[10]

v. In the matter of Modi Stone Ltd. (In Liqun.) Board of Industrial and Financial Reconstruction[11]

7 2015 SCC OnLine BOM 7696
8 (1984) 4 SCC 657
9 (2018) 6 SCC 772
10 (2018) 209 Comp Cas 118
11 2017 SCC OnLine Bom 665

vi. Indorama Synthetics (I) Ltd., Nagpur V/s. State of Maharashtra and others[12]

vii. Kamlapur Sugar and Industries V/s. Official Liquidator[13]

viii. Maharashtra Industrial Development Corporation and Ors. V/s. Mahendra G. Wadhwani[14]

14. Undisputedly, the Petitioner is the original complainant. Complaint was filed for an offence under Section 138 of N.I. Act. The Accused were convicted. The Petitioner/complainant had initiated the proceedings for winding up of company. The application was allowed. Official liquidator was appointed. Pursuant to the Orders of the company Court, certain properties were sold and amount was recovered. The official liquidator is giving priority to the secured creditors. The Petitioner had preferred an application for recovery of the amount before the Company Court. The said application is pending for adjudication before the official liquidator.

15. While rejecting the application for attachment in accordance with Sections 421 and 431 of Cr.P.C, the learned Magistrate had assigned reasons. The Court considered the fact that the complainant vide Exh.2 for the first time submitted before

12 (2016) 3 Bom CR (Cri) 130
13 (2015) 127 CLA 81
14 MANU/MH/0086/1995

the Court, that Accused Nos.2 and 3 had preferred criminal appeal and in the said appeal Accused Nos.2 and 3 had settled the dispute with original complainant by making payment of Rs.10,00,000/- as full and final settlement. In view of the settlement arrived between the parties the Court had compounded the offence under Section 138 of N.I. Act committed by Accused Nos.2 and 3 and acquitted them and disposed of the Appeal. The complainant had produced the Roznama dated 18th January, 2016 which indicate that the Appeal was settled and the offence under Section 138 N.I. Act was compounded. The Appeal was disposed off. The Petitioner/complainant had filed company petition. The Petitioner had filed claim for recovery of compensation under Section 353(3) of Cr.P.C. The claim is filed before the official liquidator regarding recovery of compensation. As per Order dated 10th April, 2015 the claim is pending. The learned Magistrate had also observed that the Petitioner filed a Company Application No.706 of 2015 before the High Court. The prayer for issuing directions to the official liquidator for the payment of compensation amounting to Rs.53,00,000/- and the said company application still pending. It is further observed that the official liquidator sold the movable and immovable assets of Accused No.1 company and realized the sum of Rs.3,65,00,000/-. The official liquidator had received 42 claims from the workers and one claim of secured creditor.

16. While convicting the Accused, the trial Court had directed them to pay compensation of Rs.53,00,000/- to the complainant vide Judgment and Order dated 10th April, 2015. The Accused Nos.2 and 3 preferred an appeal. The Accused Nos.2 and 3 settled the dispute for full and final amount of Rs.10,00,000/- and offence was compounded. Learned Magistrate observed that in the light of the aforesaid fact the question whether Accused Nos.2 and 3 filed criminal appeal being Directors of Accused No.1 or any individual capacity, whether the dispute was fully and finally settled for the sum of Rs.10,00,000/- between the parties, whether the complainant has reserved right for the recovery of compensation of Rs.53,00,000/- against the Accused No.1 company in the said settlement or this question remains unanswered and the complainant had not produced copies of relevant documentary evidence of the Appeal. It was further observed that the Petitioner had not stated about Company Application No.706 of 2015 whether the Petitioner had sought similar relief of recovery of compensation Rs.53,00,000/- from official liquidator. The Court then observed that the Petitioner had not come with clean hands. The learned Magistrate then summarized that since the Petitioner

had filed a Company Application No.706 of 2015 before this Court. Similar prayer for recovery of compensation amount Rs.53,00,000/- from the official liquidator cannot be considered by this Court. When the complainant has settled the dispute with the Accused Nos.2 and 3 which was adjudicated by the Judgment of trial Court. The complainant had accepted sum of Rs.10,00,000/- from the co-accused, hence he does not have locus to initiate action for recovery of compensation amount vide Judgment and Order dated 10th April, 2015. The official liquidator is acting as per the provisions of the Companies Act. When the Accused No.1 is under liquidation and official liquidator is appointed by the High Court before whom the complainant has filed an application for recovery of compensation. As per Order dated 10th April, 2015, the trial Court does not have jurisdiction to entertain the application filed by the Petitioner. The application was rejected.

17. I do not find any infirmity in the impugned Order. The learned Magistrate has assigned cogent reasons of rejecting the application. It does not call for interference. The claim of the Petitioner is pending with the official liquidator. The learned Magistrate has rightly observed that the Petitioner had compounded the offence with the Accused Nos.1 and 2 in

accordance with Section 147 of N.I. Act. The Accused Nos.2 and 3 were the Directors of Accused No.1 company. The Accused No.1 was wound up and official liquidator was appointed. There is no record to indicate whether the right to pursue the prosecution against the Accused No.1 company was reserved while compounding the offence with the Accused Nos.2 and 3. The official liquidator is holding the assets of Accused No.1 company and is required to protect the interest of secured creditors. The decisions relied upon learned counsel for the Petitioner were delivered in the facts of those cases. The application is rightly rejected by the learned Magistrate. The Petition is devoid merits.

ORDER

i. Criminal Writ Petition No.5148 of 2022 is dismissed.

ii. The Petitioner is at liberty to move before the appropriate Court for expeditious consideration of his application for recovery of amount.

(PRAKASH D. NAIK, J.)