The Official Liquidator

Vs

Raghawa Desikachar and Others

Civil Appeal No. 1283 of 1968

(P. Jagmohan Reddy, M. H. Beg, A. Alagiriswami JJ)

26.08.1974

JUDGMENT

JAGANMOHAN REDDY, J. –

1. This appeal is by certificate against the judgment of the High Court of Bombay varying the judgment and decree passed against respondents Nos. 1 to 4 by the District Judge of Nagpur on an application under section 235 of the Indian Companies Act, 1913 (7 of 1913), hereinafter called 'the Act'.

2. It appears that in or about April, 1949, the Industrial & Agricultural Engineering Co. (C.P.) Ltd. - hereinafter referred to as 'the Company' - was formed under the Act with its registered office situated at Nagpur. From the date of the company's incorporation till August 27, 1952, one Shantilal Nemchand Shah, respondent No. 5, was the managing director, while respondents Nos. 1 to 4 were the directors of the company. On August 27, 1952, respondent No. 5 resigned as Managing Director and in his place two Directors, C. V. Krishnamurthi respondent No. 2 and M. Ganpatram respondent No. 3 were appointed directors. These two new directors were the employees and directors of a concern known as Industrial & Agricultural Engineering Co. (Bombay) Ltd. - hereinafter called 'the Bombay company'. Respondent No. 4, T. K. Shamu is the cousin of respondent No. 1, Raghawa Desikachar. There was also a partnership firm consisting of respondent No. 1 and some others. The office of this partnership was located in the office of the Bombay company. After August 27, 1952, respondent No. 5, having resigned the office of managing directors, was only a shareholders and it transpired that as the company was not making profits, the directors called a meeting of the shareholders of the company on July 29, 1954, in order to obtain a special resolution for voluntary liquidation of the company. Even before this meeting took place, respondent No. 5, as shareholders of the company, filed an application on July 26, 1954, in the District Court at Nagpur against the company. Respondents Nos. 1 to 4 are other parties praying for an order for compulsory winding up of the company. The district judge passed an order on July 18, 1955, directing compulsory winding up of the company and appointed one K. S. Misra as the official liquidator of the said company. The official liquidator, Misra, made a report to the District Court on April 28, 1956, asking the court to pass an order for the public examination of respondents Nos. 1 to 4, the directors of the company. The district judge passed the order prayed for under section 196 of the Act on July 7, 1956. Pursuant to the said order respondents Nos. 1 to 4 were publicly examined by the official liquidator and cross-examined by other parties. The official liquidator also asked for the examination of respondent No. 5 who however was directed by the District Judge to be present in the Court. But since the District judge was not in a position to know why and for what purpose respondent was to be examined he directed the official liquidator, Mr. Main, to make an application for that purpose. On June 29, 1957, the official liquidator stated that he did not want to examine respondent No. 5.

Again on July 10, 1957, the official liquidator requested the court to examine respondent No. 5 and the learned judge passed an order on the same day directing examination of respondent No. 5 at 3 p.m. on that day. On July 11, 1957, the official liquidator made an application that as the four directors, respondents Nos. 1 to 4, had illegally withheld or retained certain amounts specified therein they became liable to refund or repay the amounts with costs and with such interest as the court deems fit. The items which were said to be withheld were as follows :

> #(1) Commission in respect of sales of General Motorspumping sets worth about Rs. 5 lakhs at 4 per cent toBombay. .... Rs. 20,000-0-0(2) Three per cent commission on General Motorssupplied, transaction worth Rs. 12 lakhs. .... Rs. 36,000-0-0(3) Commission due on other articles supplied toModel Mills and Power House, etc. .... Rs. 30,000-0-0(4) For stock, furniture, motor car, etc., purchasedby the Bombay Company at a very low price. Theamount mentioned being the difference between the realprice and the purchase price. .... Rs. 30,000-0-0(5) Improperly remitted to a sister concern, I.A.M.C.(Hyderabad) Ltd. .... Rs. 2,686-3-0(6) Commission on the sale of a boiler manufacturedby Stein-Muller to M. P. Electricity Board for ItarsiPower House through the instrumentality of the NagpurCompany. .... Rs. 1,30,000-0-0 ---------- Total .... 2,48,686-3-0 ----------##

Thereafter, the official liquidator applied for certain amendments to the application and for imploding respondents Nos. 1 to 4, directors of the company in liquidation. The district judge by his order dated December 7, 1957, allowed the application and accordingly the application dated July 11, 1956, was amended. Respondents Nos. 1 to 4 by their reply dated December 27, 1957, showed cause against the said application of the official liquidator and requested that they may be allowed to lead evidence in connection with the charges mentioned in the application of the official liquidator. They also requested that they be allowed to cross-examine respondent No. 5, managing director of the said company. The district judge, however, by his order dated September 4, 1958, rejected the application of respondents Nos. 1 to 4 and on October 9, 1958, he passed a decree against respondents Nos. 1 to 4 for items (1), (2), (5) and (6), namely, for Rs. 20,000; Rs. 36,000; Rs. 2,686/3/- and Rs. 1,30,000 with interest at four per cent p.a. The District Judge further directed the official liquidator to furnish a statement in respect of the amounts due on certain charges which was accordingly furnished by him on October 23, 1958. On October 25, 1958, the District Judge ordered respondents Nos. 1 to 4 to pay further amounts of Rs. 36,649.32 p and Rs. 21,700.75 p as per the report of the official liquidator. This order formed part of the decree dated October 9, 1958.

3. Respondents Nos. 1 to 4 preferred an appeal to the High Court of Bombay which by an interlocutory judgment dated January 25, 1963 set aside the order made by the District Judge refusing respondents Nos. 1 to 4 permission to lead evidence and permission to cross-examine respondent No. 5. Accordingly, the Bench ordered the case to be remanded to the City Civil Court at Bombay to record additional evidence in the said matter under Order XLI, rule 27, of the Code of Civil Procedure, and remit to it that evidence.

4. On an application dated February 11, 1963, the Bench of the High Court by its order dated February 12, 1963, refused to allow respondents Nos. 1 to 4 to produce certain documents which were not produced by them at an earlier stage. Pursuant to the aforesaid orders dated January 25, 1963, and February 12, 1963, respondents Nos. 1 to 4 led the evidence of 11 witnesses including themselves and cross-examined respondent No. 5. They also filed certain documents. No evidence was led by the official liquidator or respondent No. 5. After the record of the evidence was transmitted to the High Court, the Bench by its judgment dated March 22, 1963 passed a decree

against respondents Nos. 1, 2 and 3 to pay to the official liquidator of the company a sum of Rs. 11,973/12/- in respect of certain stock-in-trade, furniture, motor cycle and motor car sold by the said company and a further sum of Rs. 2,686-8-3 being a part of the debt remitted by the said company with interest on the aforesaid amounts at 6 per cent from July 25, 1954, until payment. The remaining claim of the official liquidator was set aside and the decree of the District Court was reversed to that extent.

5. The first question that has been urged before us is whether the High Court of Bombay was right in directing additional evidence to be led by respondents Nos. 1 to 4 under Order 41, Rule 27, of the Code of Civil Procedure. This court has, in several decisions, laid down the circumstances in which an appellate court will be justified in directing additional evidence to be recorded for the disposal of the appeal. Order XLI, rule 27, of the Code of Civil procedure, under which additional evidence could be called for, states thus :

> (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. But if -
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> (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
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> (b) the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the appellate court may allow such evidence or document to be produced, or witness to be examined.

> (2) Wherever additional evidence is allowed to be produced by an appellate Court, the Court shall record the reason for its admission.

It is apparent that by the terms of the above rule, it is only where the court has improperly refused to admit evidence or where the appellate court requires additional evidence to be recorded in order to enable it to pronounce judgment that it can make such an order. Under Order 41, Rule 27(1)(b), the court may require additional evidence either to enable it to pronounce judgment or it may require additional evidence to be recorded for any other substantial cause. In Arjun Singh v. Kartar Singh (1951 SCR 258 : AIR 1951 SC 193 : 1951 SCJ 274) it was held that the legitimate occasion for admitting additional evidence in appeal is when on examining the evidence as it stands some inherent lacunae or defect becomes apparent, not where a discovery is made outside the court, of fresh evidence, and an application is made to import it. The true test is whether the appellate court is able to pronounce judgment on the material before it without taking into consideration the additional evidence sought to be adduced. See also State of U. P. v. Manbodhan Lal Srivastava (1958 SCR 533 : AIR 1957 SC 912 : (1958) 2 Lab LJ 273) and Municipal Corporation of Greater Bombay v. Lala Pancham of Bombay ((1965) 1 SCR 542, 543 : AIR 1965 SC 1008 : (1966) 1 SCJ 49). The learned advocate for the appellant, while admitting that the appellate court has power to record additional evidence, submits that the High Court did not go through the evidence, nor did it apply its mind as to whether the case was such that it could not pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. This argument, however, ignores the provisions of Order 41, rule 27(1) (a), under which an appellate court can direct additional evidence to be recorded if the trial courts had refused to allow or declined to record evidence which the party against whom the decree had been passed was

prepared to produce before it. What we must, therefore, see is whether the district judge had improperly rejected the request to record the evidence of the respondents and, consequently, whether the High Court was justified in directing additional evidence to be recorded. On a perusal of the record we have no doubt that the district judge had improperly rejected the prayer of the respondents that they should be allowed to lead evidence in connection with the charges mentioned in the application filed by the official liquidator and that they should be allowed to cross-examine respondent No. 5.

6. The Roznama dated September 4, 1958, shows that on that day the four respondents, namely, respondents Nos. 1 to 4, represented by Mr. Amin, and the official liquidator in person, appeared before the district judge. The order made in those proceedings is as follows :

Mr. Amin for the respondents wanted that the petitioner should be put into the witness box so as to enable him to cross-examine the petitioner on the point of alleged misfeasance. From the record it appears that the petitioner was under cross-examination for a great length of time and it is on the material elicited in his evidence, as also on the record otherwise available here, that the charge of misfeasance is made. Mr. Amin's contention is that when the petitioner was cross-examined by Mr. Mani, Mr. Mani represented the four different companies and not these respondents. This may be so, but I do not think now I should allow another cross-examination of the petitioner when from the record it appears that a detailed and searching cross-examination was made of the petitioner .... Besides, there was no question of leading any evidence, since the case was fixed for argument from January 21, 1958. The only part which the parties had to play was to point out the documents on which each relied for proving or disproving the alleged misfeasance

> ..... I do not think it is possible for me to put the hands of the clock behind by reverting to the stage of leading evidence, when this matter has been fixed for argument since January 21, 1958. Hence, the request is rejected.

7. The above proceedings clearly show that no opportunity was given to respondents Nos. 1 to 4 because proceedings of January 12, 1958, show that as soon as written statement was filed on December 30, 1957, the district judge fixed the case for argument. The proceedings of July 7, 1958, further show that Mr. Amin had brought to the notice of the official liquidator that he should be supplied with materials on which the facial liquidator would rely for the alleged malfeasance on the part of his clients, but no materials were furnished by the official liquidator. Accordingly, on the second hearing after the aforesaid application, a petition for submitting fresh evidence and for cross-examining respondent No. 5 was made but it was rejected. The show-cause notice was given by the official liquidator on the basis of the public examination of respondents Nos. 1 to 4. It is only in answer to the show-cause notice that respondents Nos. 1 to 4 could lead evidence and cross-examine respondent No. 5. It may be mentioned that misfeasance action against the directors is a serious charge. It is a charge of misconduct or misappropriation or breach of trust. For this reason the application should contain a detailed narration of the specific acts of commission and omission on the part of each director quantifying the loss to the company arising out of such acts or omissions. The burden of proving misfeasance or non-feasance rests on the official liquidator. The official liquidator, it may be mentioned, merely relied upon the evidence recorded in public examination of the directors and on a few documents tendered in evidence. At the stage of public examination there was no charge of misfeasance against the directors and they were not in a position to know what would be the grounds that would be alleged against them for recovering any amounts for the loss said to have been caused to the company by reason of such misfeasance. The application made by the official liquidator did not give sufficient particulars which, in our view, it should have. Once a

show-cause notice was given to respondents Nos. 1 to 4 the official liquidator did not lead any evidence nor rely upon any other documents, nor did respondent No. 5, who was instrumental in initiating the misfeasance case against respondents Nos. 1 to 4, lead any evidence. In our view, there was no justification whatsoever for the District Court to reject the evidence which the respondents had intended to lead or to disallow the production of documents other than those already produced, and for that reason the High Court rightly ordered that additional evidence be recorded in this case.

8. Now coming to the merits of the appeal. The first challenge is to the disallowance of Rs. 1,30,000. This amount represented the commission on the sale to M. P. Electricity Board of a Stein-Muller Boiler for Itarsi Power House through the instrumentality of the Nagpur company. The reason why the High Scour disallowed this amount is because the official liquidator failed to establish that there was any connection with the Nagpur company and the sale of this Boiler to the Itarsi Power House of the M. P. electricity Board. On the admitted facts of the case itself this conclusion is amply justified. It appears that there was a partnership firm known as Industrial and Agricultural Engineering Co., hereinafter called 'the I.D.D.'. This partnership firm was the sole selling agent for Stein-Muller machinery and products. On October 31, 1953, the M. P. Electricity Board agreed to purchase from the partnership a Stein-Muller Bolder for a sum of about British pounds 86,000 in respect of which there was an agreement between the I.D.D. and the Electricity Board. The Electricity Board agreed to pay a sum of Rs. 1,50,000 to the I.D.D. for certain services. Out of this sum the official liquidator claimed Rs. 1,30,000 on the ground that it amounted to 10 per cent of the commission which was due to the Nagpur company form the I.D.D. and which was wrongly withheld by the latter company, with the acquiescence of respondent No. 1 who was one of the partners of the I.D.D. The case of the official liquidator was that Shantilal Shah, then managing director of the company, had contacted the officers of the M. P. Electricity Board and it was through his efforts that the ultimate contract was entered upon. Accordingly, a part of the commission which the I.D.D. was claiming on behalf of the Nagpur company may be allowed to the Company.

9. The defence of respondents Nos. 1 to 4 is that the Nagpur company had nothing to do with the I.D.D. and that the order was obtained by the liquidator that there was an agreement under which a part of the commission was payable by the I.D.D. to the Nagpur company and much less is there any justification for our holding that respondents Nos. 1 to 4, even if there was any agreement, which on the evidence we say there was not had intended to withhold the amount. The High Court has gone into the evidence very carefully and we do not see any reason for disagreeing with its conclusion.

10. With respect to item (1), namely commission in respect of sales of General Motors pumping sets worth about Rs. 5 lakhs at 4 per cent., viz., Rs. 20,000, the foundation of the claim is the payment made by one Premnath Transport Co. at Delhi to the Bombay company as infringement commission, because they had sole certain machinery of the General Motors Ltd. in Bhopal area, the agency of which was held by the company, and consequently the company agreed to give an infringement commission of 4 per cent to the Bombay company. This amount of Rs. 20,000 is claimed out of that amount. It is contended that Bhopal was within the area allotted to the Nagpur company and, therefore, it was entitled to the commission. This was denied by the directors. The official liquidator failed to establish that the Nagpur company was entitled to the whole or part of the infringement commission by reason of the fact that it was a sole selling agent of the General Motors parts in that particular area or its had an exclusive sub-agency from the Bombay company. The High Court considered that the evidence in the case was not sufficient to establish either of these claims. We have not been persuaded to hold otherwise.

11. In so far as item (2) for Rs. 36,000 is concerned, here again the Nagpur company was being paid 15 per cent and 20 per cent commission in respect of machinery and spare parts, respectively, by the Bombay company which company was retaining 5 per cent of the commission in respect of the orders placed by the Nagpur company. According to the official liquidator, the Bombay company was only entitled to retain two per cent and consequently the Nagpur company would be entitled to a further three per cent which has been wrongly withheld. Here again the High Court considered that there was not sufficient evidence to sustain the claim. Shantilal Shah who gave evidence did not spell out the actual terms of the agreement between the Nagpur company and the Bombay company by reason of which the Bombay company was entitled to ration only two per cent and not 5 per cent. It was so held, and there is nothing to establish to the contrary. Inasmuch as the evidence of respondents Nos. 1 to 4 as directions of the company was confirmed by the first minutes, the explanation given by the respondents must be accepted. Reliance was placed sub-item (2) of Item 2 of the minutes of the board of directors of the sister companies at which Shantilal Shah was also present. It was agreed and accepted by all the associates that a commission of two per cent on all such imports on the c.i.f. or f.o.b. invoice value, as the case may be, should be paid to the Bombay office. But, in so far as sub-item V of Item III was concerned, it was unanimously agreed that the associated offices should pay a commission of five per cent on their imports covered by the licences owned by the Bombay office.

12. The third item is for Rs. 30,000 in connection with the supplies to Model Mills and the Power House in Nagpur with the products of the Mysore Electric Co. Ltd. There was some suggestion that the Bombay company should reduce its commission from 5 per cent to two per cent but as the High Court pointed out that it had absolutely no connection whatsoever with the inter-company transactions in respect of goods of which agency was held by the Bombay company. The evidence of Shantilal Shah in this regard was considered to be highly unsatisfactory. Apart from that Exhibit T - a letter dated February 2, 1950 - clearly showed that the arrangement between the Nagpur company and the Bombay company was to give commission at a particular rate. The High Court extracted the relevant portion of the letter which merits repetition. It says :

I am glad to inform you that we have been able to get some additional concession by way of extra discounts from the Mysore Lamp Works and as intimated to you personally during your recent visit, we shall give you a portion of this extra commission, thus in all 25 and 2 1/2 per cent discount on the list price.

It is not one's case that the commission according to this letter was not paid, and as the Nagpur company has received this commission it cannot claim any additional commission.

13. In so far as item (4) is concerned, it has reference to four amounts, namely, Rs. 7,689/12/-; Rs. 2,184; Rs. 9,827 and Rs. 2,100. Nothing has been shown as to why these claims were not properly allowed. The appellant, however, challenges the item for Rs. 9,827 as not being the correct amount. In fact, the book value is Rs. 39,309/4/9. The High Court took the difference between the book value and the stock purchased by the Bombay company after August 28, 1952, since the date of resignation of Shantilal Shah. Accordingly, it took the opening stock as per the balance-sheet dated March 31, 1953, at Rs. 53,574-4-0. The closing stock as per audit report dated March 13, 1953, reduced to the extent of 7/9 was Rs. 24,092-0-0 leaving an amount of Rs. 29,482-4-9. This amount was transferred to the Bombay office and the difference between the above amounts amounted to Rs. 9,827. Shantilal Shah was questioned about this, but he did not know how it was made up of. No explanation was also given on behalf of the official liquidator as to how the item was made up of. For this reason this item was not allowed. Similarly, no exception can be taken to the amount of

Rs. 2,100 which was allowed because within few months of its purchase the scooter was sold to the Delhi branch for only Rs. 600. These two items, namely, Rs. 9,827 and Rs. 2,100, which are allowable to the liquidator come to Rs. 11,927. The other two items for Rs. 7,689/12/- and Rs. 2,184 which relate to the purchases actually made by the Bombay company in pursuance of their offer and in pursuance of the majority resolution of April 25, 1953, and the difference between the book value and the purchase value of the car by the Bombay company were also allowed. Apart from this, item (5) for a sum of Rs. 2,686/3/- in connection with the wrongful remission to the Hyderabad company was also allowed. There seems to be no dispute on this account because the whole of the amount as claimed has been allowed.

14. In the result we find no reason to interfere with the judgment of the Bombay High Court under appeal. Accordingly, the appeal is dismissed with costs.

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