

# KERALA HIGH COURT

Aleykutty Varkey Tharakan

Vs

The Official Liquidator

(V Gopalan Nambiyar, C.J. K Bhaskaran, J.)

16.01.1974

## JUDGMENT

### **Gopalan Nambiyar, J.**

1. These two appeals arise out of an order on Application No. 33 of 1973 directing the appointment of a Receiver in respect of the properties of the respondents in that application. The matter arises this way. B. C. P. No. 11 of 1960 on the file of this Court was an application for winding up the Palai Central Bank Ltd. Two of the legal representatives of the 1st respondent in that application are the appellants in A. S. No. 332 of 1973: and one of the legal representatives of the 4th respondent in that application is the appellant in A. S. No. 432 of 1973. In B. C. P. 11 of 1960, by an order of a learned Judge of this Court, dated 5-12-1960, the Bank was ordered to be wound up. Misfeasance Application No. 247 of 1963 was made on 4-1-1963 by the Liquidator, under Section 543 of the Companies Act 1956 read with Section 45-H of the Banking Companies Act. On 2-4-1965 there was an order on the said application declaring the respondents 1 and 4 in B. C. P. 11 of 1960 (it is unnecessary to notice the others, if any, made liable by the order) as liable for a sum of over Rs. 16,00,000/- in respect of the B claim (*vide Official Liquidator Palai Central Bank Ltd. v. K. Joseph Augusti<sup>1</sup>*, ). Respondents 1 and 4, preferred separate appeals. These were heard along with several other appeals. The appeals preferred by Respondents 1 and 4 were dismissed (subject to some minor relief afforded on the basis of the statements filed by the liquidator regarding realisations effected). The judgment on appeal is reported in ILR 1973 (2) Ker 268. After the appellate judgment, the 4th respondent died in October 1970. The 1st respondent died after the conclusion of the hearing and before delivery of the judgment on appeal, sometime in December 1968. There were petitions for leave to appeal to the Supreme Court, filed Inter alia, by the legal representatives of Respondents 1 and 4. These applications were allowed- and the matter is now pending in appeal before the Supreme Court as Civil Appeals Nos. 668 and 869 of 1971. E. A. No. 31 of 1973 was filed for execution, and in that, E. A. 33 of -1973 was filed for appointment of Receiver. It is on this latter application that the Court passed the order appointing Receiver, which is the subject-matter of these appeals.

2. The contention strenuously urged by Counsel for the appellants is that in execution of an order passed under Section 543 of the Companies Act, 1956, no order such as the one under appeal, can be passed against the legal representatives of the Director or Directors proceeded against. On first blush, this strikes us to be a rather extreme pro-position. Section 634 of the Companies! Act

provides that any order made by the Court under the Act. may be enforced in the same manner as decree made by the Court, in a suit. Being so, we should have thought the ordinary mode of execution of a decree under the provisions of Section 50 and the allied sections of the Civil P. C. are open. But Counsel for the appellants, drew our attention to the decision of the Supreme Court in *Official Liquidator, Supreme Bank Ltd. v. P. A. Tendolkar (dead) by L. Rs.*<sup>3</sup>, There, proceedings under Section 543 were started against several Directors. The Company Judge gave his decision on 8-11-1963, finding the Directors liable in respect of various claims in various amounts. There was an appeal to a Division Bench, which dismissed the same and an application for leave to appeal, under Article 133 of the Constitution was filed in respect of the appellate judgment. While the said application was pending, one of the Directors namely Sri P. A. Tendolkar died on 10-8-1966. We are concerned to notice only the appeal eventually preferred to the Supreme Court by the legal representatives of the said Sri Tendolkar. Discussing the liability of the legal representatives, the Court observed:

"32. It will be seen that, while Section 235 of the Act of 1913, like Sec. 543 of the Companies Act of 1956, to which it corresponds, gives the power to the Court to enquire into the conduct of "any past or present Director", yet, both Section 235 of the Act of 1913 and Section 543 of the Companies Act of 1956 confine the power of the Court to make orders for repayment or restoration of money or property or contribution to the assets of the Company against the individuals occupying the capacities, either in the past or present, mentioned therein. This power does not, on the language of these provisions, extend to making compulsive orders against heirs of delinquents. As the power to take these special proceedings is discretionary and does not exhaust other remedies, although, the Court may, as a matter of justice, and equity, drop proceedings against delinquent Directors, Managers or Officers who are no longer alive, leaving the complainant to his ordinary remedy by a civil suit against the assets of the deceased, yet where no injustice may be caused by continuing these proceedings against a past Director, even though he be dead, the proceedings could continue after giving persons who may be interested opportunities to be heard. But, even such proceedings can only result in a declaration of the liability, of a deceased director, because the language of Section 235 of the Act of 1913, as already noticed, does not authorise passing of orders to compel heirs or legal representatives to do anything. Such compulsive proceedings as may become necessary against those upon whom devolve the assets or the estate of a deceased delinquent Director, who may have become liable, could only lie outside Section 235 of the Act of 1913."

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34. Applying the principles laid down above to the case before us, we find that Tendolkar had a full opportunity of defending himself against the misfeasance proceedings taken by the liquidator. He also exercised his right of appeal against the order of the Company Judge. The Division Bench, as already observed, reduced his liability. His heirs were heard on merits in the appeal before us. Any order passed by us could only affect the assets or the estate of the deceased Tendolkar. But, as already indicated by us, we cannot, in these proceedings, pass an order against the heirs of Tendolkar so as to compel them to do anything. The Official Liquidator or the Co-Directors may, however, take any other proceeding which may be open to them under the law so as to obtain the contribution of Tendolkar,"

After discussing exhaustively the principle of liability under Section 543 of the Act. the Supreme Court concluded as follows:

"68. The result is that we allow the three appeals of the Liquidator bearing Civil Appeals Nos. 195-197 of 1967 and set aside the orders of the Division Bench determining the liabilities of S. K. Samant and P. A. Tendolkar and L. S. Aigaonkar. We substitute the following determination of their respective liabilities and directions:

X            X            X            X            X

(5) The Directors Tendolkar and Ajgaonkar are held jointly and severally liable in case the amount, if any which, out of the initially separate liability of the Managing Director S. K. Samant, that is to say Rs. 73,500/- cannot be recovered from S. K. Samant only.

(6) The case is remanded to the learned Company Judge for passing such orders against the Managing Director Samant and Director Aigaonkar, under S. 235 of the Act of 1913, as may be needed for discharging the liabilities determined above, but no such orders will be passed against the heirs and legal representatives of deceased Director P. A. Tendolkar under Section 235 of the Act of 1913. although their liabilities are declared. The Official Liquidator and L. S. Ajgaonkar are, however, left free to seek such other remedies, if necessary, by appropriate proceedings under the law, against the estate or assets of P. A. Tendolkar, as may be open to them."

3. Considerable argument turned on the scope and effect of the above decision of the Supreme Court, and in particular, of the observations in the paragraphs that we have quoted above. As we understand the said judgment, we do not think that the decision or the observations made, lend countenance to the proposition sought to be advanced before us that an order under Section 543 of the Companies Act, passed against a Director, or Directors cannot be executed in the modes known to and sanctioned by the Civil Procedure Code, against his estate in the hands of his legal representatives. The proceedings before the Supreme Court, it should be remembered, arose by way of appeal against the proceedings started under Section 543 of the Act itself, and therefore were a continuation of the said proceedings. No question directly arose before the Supreme Court as to whether an order passed under Section 543 could, or could not, be executed against the estate of the deceased Director in the hands of his legal representatives. In paragraph 22 of the judgment, the Supreme Court observed that the possible liabilities of the legal representatives of two of the Directors on whom their assets and properties may have devolved, do not call for a decision from the Court. But the general question of liability of heirs and legal representatives of delinquent Directors had arisen for consideration. It was on this question that the Supreme Court pronounced. We are unable to understand the decision as authority for the proposition which Counsel for the appellants put forward before us.

4. We are of the opinion that the order of the Court below appointing Receiver calls for no interference. We dismiss these appeals with costs.

Cases Referred.

1 AIR 1966 Ker 121  
2AIR (1973 SC 1104