



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 23RD DAY OF MARCH, 2021

B E F O R E

THE HON'BLE Dr.JUSTICE H.B.PRABHAKARA SASTRY

CRIMINAL PETITION No.1159 OF 2012

BETWEEN:

1 . SRI AVINASH SUBRAMANYAM
NO. 37, 30TH CROSS,
EAST END ROAD, JAYANAGAR 9TH BLOCK
BANGALORE – 560 069.

2 . SMT. VANI SHARMA
NO.222, "APARNA" 32ND A CROSS
3RD MAIN, VII BLOCK, JAYANAGAR,
BANGALORE – 560 082.

...PETITIONERS

(BY SRI ADITYA SONDHI SR. ADVOCATE FOR
SMT. NIDHISHREE B.V., ADVOCATE)

AND:

THE OFFICIAL LIQUIDATOR OF
M/S. SHIMBU IMPORTS AND EXPORTS(P) LTD (IN LIQN)
ATTACHED TO HIGH COURT OF KARNATAKA.

...RESPONDENT

(BY SRI K.S. MAHADEVAN, ADVOCATE)

THIS CRIMINAL PETITION IS FILED U/S.482 CR.P.C. PRAYING
TO SET ASIDE THE ORDER DATED 18.11.2011 PASSED BY SPECIAL
ECONOMIC OFFENCES COURT, BENGALURU IN C.C. NO.545/2007

(ANNEXURE-A) AND QUASH THE CRIMINAL PROCEEDINGS IN C.C. NO.545/2007 AGAINST THE PETITIONERS PENDING BEFORE THE SPECIAL ECONOMIC OFFENCES COURT, BENGALURU AND GRANT SUCH OTHER RELIEF AS THE COURT DEEMS FIT IN THE INTEREST OF JUSTICE.

THIS CRIMINAL PETITION HAVING BEEN HEARD THROUGH PHYSICAL HEARING/VIDEO CONFERENCING HEARING AND RESERVED ON 16.03.2021, COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

The present respondent filed a complaint under C.C. No.545/2007 before the learned Special Court (Economic Offences), Bengaluru (for brevity, 'Trial Court') under Section 538(1)(c) of the Companies Act, 1956 (for brevity 'the Act') read with Rule 9 of the Companies (Court) Rules, 1959 (for brevity, '1959 Rules') and Section 200 of Code of Criminal Procedure (for brevity, 'Cr.P.C.') against the present petitioners alleging failure on the part of the petitioners in handing over the books and records of M/s. Shimbu Imports and Exports (P) Ltd. (in liquidation) punishable for default under Section 538(1)(c) of the Act.

2. The present petitioners filed an application under Section 245 of the Cr.P.C. read with Section 633 of the Act

seeking their discharge from the offence punishable under Section 538(1)(c) of the Act.

3. The Trial Court by its impugned order dated 18.11.2011 kept open the said application and posted the case for recording of evidence stating that the same would be in consonance with the provisions of Section 244 of Cr.P.C. and other provisions under Chapter XX of Cr.P.C. and the Act and the 1959 Rules.

4. Aggrieved by the same, the accused Nos.1 and 2 in the Trial Court have preferred the present petition. The respondent is being represented by his learned counsel.

5. Heard the arguments of learned Senior Counsel for the petitioners and also of the learned counsel for the respondent.

Perused the materials placed before this Court.

6. The only point that arises for my consideration is whether the impugned Order of the Trial Court warrants interference by exercise of power under Section 482 of Cr.P.C. by this Court?

7. Learned Senior Counsel appearing for the petitioners in his arguments submitted that this Court in Co.P.85/1998 passed an Order on 19.03.1999 for winding up of the company M/s. Shimbhu Imports and Exports (P) Ltd. The present petitioners are the Directors of the said company. All the books and registers sought for by the Official Liquidator who has taken over the possession of the assets of the company have been submitted to him along with the letter dated 11.07.2003 of the petitioner No.1. A copy of the said letter with the details of the books and registers handed over to the Official Liquidator are produced at Annexure-C. 618 books were handed over to the Official Liquidator. However, without considering the said aspect, the proceeding under Section 538(1)(c) of the Act has been initiated. As such, the same deserves to be set aside.

8. Learned Senior Counsel more vehemently submitted that the Official Liquidator has not obtained the sanction of the Court for instituting the present criminal petition under challenge against the present petitioners which is mandatory under Section 457(1)(a) of the Act, as such, the entire proceeding is vitiated and deserves to be quashed. In his support, he relied upon the Judgment of the Hon'ble Apex Court in **Jaswantrai Manilal**

Akhaney Vs. State of Bombay reported in (1956) 26 Comp Cas 340 and also the Judgment of the Andhra Pradesh High Court in **Official Liquidator Vs. T.J. Swamy and Others** reported in **(1992) 73 Comp Cas 583**. He further submitted that the handing over of books of accounts has been acknowledged and the same has been taken judicial notice of in another action upon a company application No.1196/1999 in Co.P. 85/1998 by this Court on 09.11.2006, a copy of which is produced at Annexure-E. He further submitted that even if this Court comes to a conclusion that the Directors / petitioners have committed a default, the same is unintentional, bona fide, as such, they may be excused under Section 633 of the Act.

9. Learned Official Liquidator in his very brief argument submitted that for initiation of any action under Section 538(1)(c) of the Act for violation of Section 457(1) of the Act, no sanction is required. In his support, he relied upon an Order dated 19.01.2001 passed by the Delhi High Court in **D.K. Kapur Vs. Reserve Bank of India and Others** reported in **90 (2001) DLT 127**.

10. It is an admitted fact that the present petitioners were the Directors of M/s. Shimbhu Imports and Exports Pvt.

Ltd. (under liquidation). The said company was ordered to be wound up by this Court in Co.P.85/1998 under the Order dated 19.03.1999. Admittedly the respondent who is the Official Liquidator has taken over the possession of the assets of the company. It is also not in dispute that the said Official Liquidator issued notices to the ex-Directors i.e. the petitioners calling upon them to handover the books of accounts of the company. According to the respondent (Official Liquidator), neither of the petitioners handed over the books of accounts of the company to him, as such, his Office has got issued a notice under Section 538(1)(c) of the Act to the petitioners (ex-Directors) to which the petitioner No.1 is said to have replied but the demand for handing over of the books of accounts was not complied with. With this, seeking a direction to the present petitioners to disclose all the books of accounts of the company (under liquidation) and to handover the same to the Official Liquidator and also seeking to punish them for default under Section 538(1)(c) of the Act, the respondent (Official Liquidator) filed a complaint under Section 200 of Cr.P.C. read with Section 538(1)(c) of the Companies Act, 1956 and Rule 9 of the

Companies Court Rules, 1959 against the present petitioners in the Trial Court in C.C. No.545/2007 as noted above.

11. Section 538(1)(c) of the Act reads as below:

"538. Offences by officers of companies in liquidation:

(1) If any person, being a past or present officer of a company, which, at the time of the commission of the alleged offence, is being wound up, whether by the Tribunal or voluntarily, or which is subsequently ordered to be wound up by the Tribunal or which subsequently passes a resolution for voluntary winding up, -

(a) xxxx (b) xxxx

(c) does not deliver up to the liquidator, or as he directs, all such books and papers of the company as are in his custody or under his control and which he is required by law to deliver up;

..... shall be punishable with imprisonment for a term which may extend to two years or with fine, or with both....."

12. The main contention of the petitioners is, to institute any criminal proceeding for the alleged violation of Section 538(1)(c) of the Act, though the Official Liquidator has power under Section 457(1)(a) of the Act, but a prior sanction of the Tribunal is mandatory which in the instant case the Official Liquidator has not obtained, as such, the entire proceeding is vitiated.

13. In **Jaswantrai Manilal Akhaney's** case (supra), the Hon'ble Apex Court while dealing with Section 179 of Indian Companies Act, 1913 (which is akin to Section 457 of the Act), discussed the question as to whether leave of the Court was necessary for the Liquidator to go against Managing Director of the company which is under liquidation? In that regard, at page Nos.354 and 355 of its Judgment, Hon'ble Apex Court was pleased to observe as below:

"It now remains to deal with certain objections relating to the illegality or irregularity in the procedure followed in the trial of this case. It was argued that this prosecution was incompetent for the reason that no sanction of the Company Judge had been obtained under section 179 of the Indian Companies Act. The relevant portion of section 179 is as follows:-

"The official liquidator shall have power, with the sanction of the Court to do the following things:

(a) to institute or defend any suit or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company;....."

In terms the section lays down the powers of the official liquidator. Such a liquidator has to function under the directions of the court which is in charge of the liquidation proceedings. One of his powers is to institute prosecutions in the name and on behalf of the company under liquidation with the sanction of the court. This section does not purport to impose any limitations on the powers of a criminal court to

entertain a criminal prosecution launched in the ordinary course under the provisions of the Code of Criminal Procedure. Where a prosecution has to be launched in the name of, or on behalf of, the company, it naturally becomes the concern of the Judge to see whether or not it was worthwhile to incur expenses on behalf of the company and, therefore, the section requires the sanction of the Judge before the liquidator can undertake the prosecution or defence in the name of and on behalf of the company....”

14. In **Official Liquidator's** case(supra), the Andhra Pradesh High Court with respect to obtaining the prior sanction of the Court for instituting any proceeding by the Official Liquidator, was pleased to hold that for an application under Section 543(1) of the Companies Act, 1956, the sanction contemplated under Section 457 of the Act is implied because the application is being presented to the company court itself; express sanction under Section 457 is required where applications are to be made to forums other than the company court.

15. Thus the above two Judgments make it very clear that where a prosecution is to be launched in the name of or on behalf of the company, the Official Liquidator though has got power to launch such a proceeding under Section 457 of the Act but before launching he should obtain the sanction of the

Tribunal (prior to amendment of the year 2003 it was "the court").

16. Admittedly in the instant case, the initiation of proceeding is not before the Company Court in which the winding up proceeding is said to have been pending. On the other hand, it is in a different forum i.e. the Trial Court. Admittedly in the instant case, the Official Liquidator has not obtained the sanction of the Tribunal (then "Court") in the matter.

In ***D.K. Kapur's*** case relied upon by the learned counsel for the respondent, in para 12 of its Order, the Delhi High Court observed as below:

12. Mere look at the aforesaid provisions would show that on the one hand, in Section 457 of the Act, the legislature has empowered the liquidator to institute or defend any 'suit' or 'prosecution' or 'other legal proceedings' civil or criminal in the name and on behalf of company after permission from the court; and by Section 454(5A) of the Act the legislature has empowered the Company Court itself to take cognizance of the offence under sub section (5) of section 454 of the Act and to try such offenders as per the procedure provided for trial of summons cases under the Code of Criminal Procedure, 1974; but on the other hand in sections 442 and 446 of the Act the legislature has used only the expression "suit or other legal proceedings". The words "prosecution" or "criminal case" are

conspicuously missing in these sections. It appears quite logical as purpose and object of sections 442 and 446 of the Act is to enable the Company Court to oversee the affairs of the company and to avoid wasteful expenditure. Therefore the intention of the legislature under these sections does not appear to provide jurisdiction to the Company Court over criminal proceedings either against the company or against its directors. Wherever legislature thought it necessary to provide such jurisdiction it has used the appropriate expressions.”

It is relying upon the above portion of the order, learned counsel for the respondent contended that no sanction was required to be obtained by the Official Liquidator before initiating action against the present petitioners.

17. The said argument of the learned counsel for the respondent is not acceptable for the reason that as evident in para 7 of the very same Order in **D.K. Kapur's** case (supra), the question before the Court was whether the expression “Suit or other legal proceedings” in Section 446(1) and the expression “suit or proceedings” in Section 446 (2) of Chapter II in Part VII of the Companies Act, 1956 encompasses criminal proceedings against the company or not?

18. Admittedly the exercise of the power by the respondent / Liquidator in the instant case in initiating action

against the present petitioners under Section 538(1)(c) of the Act was under Section 457 of the Act but not under Section 446 of the Act. Sections 446 and 457 of the Act are with respect to two different concepts. Section 446 is about continuation of the proceeding against the company whereas Section 457(1)(a) deals with instituting or defending any suit, prosecution or other legal proceeding, civil or criminal in the name of and on behalf of the company. Undisputedly in the instant case, the respondent has instituted a criminal proceeding against the ex-Directors of the company under liquidation. As such, it is institution of a criminal proceeding on behalf of the company by the Official Liquidator against the ex-Directors of the company.

19. Incidentally in D.K. Kapoor's case, the very same Delhi High Court in para 12 of its Order has relying upon **Jaswantrai Manilal Akhaney's** case (supra), distinguished the same with respect to Section 446 of the Act. However, in the said case, nowhere it mentions that for institution of a proceeding, civil or criminal in the name of and on behalf of the company under liquidation, sanction of the Courts is not required. On the other hand, in its Order at para 17, by relying upon **Jaswantrai Manilal Akhaney's** case (supra) it has shown at

para 18 that such a sanction is necessary but it is not required for a proceeding under Section 446 of the Act.

In the instant case, admittedly the proceeding initiated by the Official Liquidator since not being one under Section 446 of the Act but it is under Section 457(1)(a) of the Act, the respondent / Official Liquidator ought to have obtained sanction as mandated and only then proceeded further. Since such a sanction has admittedly not been obtained, the entire proceedings initiated against the petitioners in the Trial Court stands vitiated. Therefore, without going into the aspect of the entitlement of the petitioners for any relief under Section 633 of the Act, suffice it to say that the entire criminal proceeding pending in the Trial Court deserves to be quashed, however, reserving liberty to the petitioner therein (respondent herein) to proceed afresh if it feels like and in accordance with law. Accordingly, I proceed to pass the following:

ORDER

The criminal petition is allowed.

The entire proceeding in C.C. No.545/2007 pending on the Court of learned Special Court (Economic Offences), Bengaluru,

against the present petitioners stands quashed. However, the petitioner therein (respondent herein) is at liberty to initiate the proceeding for the alleged violation of Section 538(1)(c) of the Companies Act, 1956, if it desires so, in accordance with law and after duly obtaining the sanction of the Court as required under Section 457(1)(a) of the Companies Act, 1956.

Registry to transmit a copy of this Order to the concerned Trial Court.

**Sd/-
JUDGE**

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