

THE OFFICIAL LIQUIDATOR

v.

PARTHASARATHI SINHA & OTHERS

B

December 17, 1982

[S. MURTAZA FAZAL ALI AND E.S. VENKATARAMIAH, JJ.]

Companies Act, 1956—Sections 543 and 634—Scope of—Misfeasance and breach of trust alleged against directors of a company in liquidation—Death of a director during pendency of proceedings—Heirs and legal representatives of deceased director, if could be substituted in place of deceased director—After declaration of liability of director, if amount's due could be realised from legal representatives.

C

The respondents were the heirs and legal representatives of one of the directors of a Company in liquidation. When the company was ordered to be wound up, the Official Liquidator took out summons under section 543 (1) of the Companies Act against its directors for a declaration that the said directors were guilty of misfeasance and breach of trust and also for an order directing them to repay or restore the money or property of the company in liquidation which they were alleged to have retained wrongfully. During the pendency of the proceedings one of the directors died intestate leaving behind the respondents as his heirs and legal representatives. At the instance of the Official Liquidator the Company Judge passed an order substituting the respondents in place of the deceased director.

D

Allowing the respondents' appeal, a Division Bench of the High Court held that no further action in the misfeasance proceedings could be taken against the legal representatives of the deceased director. In coming to this conclusion the High Court purported to follow the decision of this Court in *Official Liquidator v. P.A. Tendolkar (dead) by L. Rs.*, [1973] 3 S.C.R. 364.

E

Allowing the Appeal,

F

HELD : The liability arising under the misfeasance proceedings is founded on the principle that a person who has caused loss to the company by an act amounting to breach of trust should make good the loss. Section 543 of the Act provides for a summary remedy for determining the amount payable by such person on proof of the necessary ingredients. The section authorises the Court to direct such persons chargeable under it to pay a sum of money to the Company by way of compensation. This is not a provision intended to punish a man who has been found guilty of misfeasance but is only intended for compensating the company in respect of the loss occasioned by his misfeasance. Whenever there is a relationship based on contract, quasi-contract, some fiduciary relation or a failure to perform a duty, there is no

G

H

A abatement of the liability on the death of the wrong doer. When once the liability is declared, it is open to the Official Liquidator to realise the amount due by resorting to section 634 of the Act and section 50 of the Code of Civil Procedure. In *Tendolkar's case* this Court did not consider the effect of section 634 of the Act which made the relevant provisions of the Code of Civil Procedure relating to execution of decrees applicable to orders passed by the Court under the Act. [223 C-F]

B At the conclusion of the proceedings under section 543 a declaration of the liability is made. Such declaration partakes of the character of a decree in a suit. When once such declaration is made it can be enforced under section 634 of the Act and where the order made by one court has to be executed by another court the procedure prescribed by section 635 of the Act has to be followed. In the course of such execution proceedings the provisions of section 50 of the Code of Civil Procedure have to be applied when the person who is made liable dies before the order is satisfied and the liability of the legal representatives should be determined accordingly. [223 G-H]

D *Official Liquidator, Supreme Bank Ltd. v. P.A. Tendolkar (dead) by L. Rs, & Ors.*, [1973] 3 S.C.R. 364, applied.

Aleykutty Varkey Tharakan & Anr. v. Official Liquidator & Ors., [1978] 4 Comp. Cas. 472, approved.

Shivalik Transport Co. Ltd. (in liquidation) v. Thakur Ajit Singh & Ors., [1978] 48 Comp. Cas. 465, approved.

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3614 of 1982.

Appeal by Special Leave from the Judgment and Order dated the 1st August, 1975 of the Calcutta High Court in Appeal No. 324 of 1970.

Shanker Ghosh, A.K. Verma and P.K. Basu for the Appellant.

The Judgment of the Court was delivered by

G VENKATARAMIAH, J. The short question which arises for decision in this appeal by special leave is whether the proceedings initiated against a director of a company under section 543 of the Companies Act, 1956 (hereinafter referred to as 'the Act') can be continued after his death against his legal representatives and whether any amount declared to be due in such proceedings can be realised from the estate of the deceased in the hands of his legal representatives.

The facts of the present case may be briefly stated thus : Ballygunge Real Property and Building Society Ltd. (hereinafter referred to as 'the Company in liquidation') was ordered to be wound up by the High Court of Calcutta on January 8, 1958. On January 2, 1963, the Official Liquidator took out summons under section 543(1) of the Act against its directors including Dr. S. N. Sinha for a declaration that the said directors were guilty of misfeasance and breach of trust and also for an order directing them to repay or restore the money or property of the Company in liquidation which they were alleged to have retained wrongfully. During the pendency of the said proceedings, Dr. S.N. Sinha died on November 16, 1969 intestate leaving behind his son, Parthasarathi Sinha and two married daughters, Maya Bose and Mira Mitra as his heirs and legal representatives. On February 12, 1970, Judge's summons was taken out at the instance of the Official Liquidator for leave to continue the said proceedings against the said heirs and legal representatives. The learned Company Judge passed an order on November 9, 1970 for substitution of the said heirs and legal representatives in place of Dr. S.N. Sinha, the deceased. Against that order, the heirs and legal representatives of Dr. S.N. Sinha preferred an appeal before the Division Bench of the Calcutta High Court under section 483 of the Act. That appeal was allowed by the Division Bench on August 1, 1975 and save and except that the death of Dr. S.N. Sinha was recorded, the order of the Company Judge was set aside. This appeal is filed against the order of the Division Bench.

Before the Division Bench of the High Court, the principal contention urged on behalf of the heirs and legal representatives of Dr. S.N. Sinha, since deceased was that in view of the decision of this Court in *Official Liquidator, Supreme Bank Ltd. v. P.A. Tendolkar (dead) by L. Rs. & Ors.*⁽¹⁾ no further action in the misfeasance proceedings could be taken against them and we are concerned only with that contention in this appeal. Since the effect of the above decision is understood in one way by the High Court of Calcutta in this case and differently by the High Court of Kerala in *Aleykutty Varkey Tharakan & Anr. v. Official Liquidator & Ors.*⁽²⁾ and by the High Court of Punjab and Haryana in *Shiwalik Transport Co. Ltd. (in liquidation) v. Thakur Ajit Singh & Ors.*⁽³⁾ we

(1) [1973] 3 S.C.R. 364.

(2) [1978] 48 Comp. Cas. 472.

(3) [1978] 48 Comp. Cas. 465.

A shall proceed to discuss the decision in *Tendolkar's* case (supra) at some length. Before doing so, we shall refer to the relevant provisions of law and the specific averments made in this case by the Official Liquidator.

B Section 543 of the Act reads as follows :

"543. Power of Court to assess damages against delinquent directors, etc.—(1) If in the course of winding up of a company, it appears that any person who has taken part in the promotion or formation of the company, or any past or present director, managing agent, secretaries and treasurers, manager, liquidator or officer of the company—

D (a) has misapplied, or retained, or become liable or accountable for, any money or property of the company; or

(b) has been guilty of any misfeasance or breach of trust in relation to the company;

E the Court may, on the application of the Official Liquidator, of the liquidator, or of any creditor or contributory, made within the time specified in that behalf in sub-section (2), examine into the conduct of the person, director, managing agent, secretaries and treasurers, manager, liquidator officer aforesaid, and compel him to repay or restore the money or property or any part thereof respectively, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Court thinks just.

H (2) An application under sub-section (1) shall be made within five years from the date of the order for winding up, or of the first appointment of the liquidator in the winding up, or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer.

(3) This section shall apply notwithstanding that the matter is one for which the person concerned may be criminally liable."

A

Section 634 of the Act reads :

"634. Enforcement of order of Courts — Any order made by a Court under this Act may be enforced in the same manner as a decree made by the Court in a suit pending therein".

B

Section 2(11) of the Code of Civil Procedure defines the expression 'legal representative' as 'a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued'.

C

Section 50 of the Code of Civil Procedure reads :

D

"50. Legal representative — (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

E

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit".

F

The Official Liquidator pleaded before the High Court that due to various breaches of trust and/or breaches of contract, express or implied and/or breaches of fiduciary duties and other acts of misfeasance on the part of Dr. S.N. Sinha, since deceased, loss had been caused to the Company in liquidation and that the assets of Dr. S.N. Sinha had benefitted thereby. He further alleged that the assets of Dr. S.N. Sinha in the hands of his heirs and legal representatives were liable for the claims made in the said misfeasance proceedings.

G

H

A We shall now revert to *Tendolkar's* case (supra). That case arose out of certain misfeasance proceedings commenced by the Official Liquidator in the winding up proceedings of a banking company against the managing director, the other directors and some of the employees of the company. Two of the directors died while the proceedings were pending. The Company Judge dismissed the proceedings against the employees as time barred and held that the heirs of the deceased directors could not be proceeded against. He was of the view that the misfeasance proceedings being of special nature involving an enquiry into the alleged wrongful conduct of directors personally, the liability of a director for such wrong doing was personal in character and, therefore, vanished with the death of the director. But in respect of the managing director and those directors who were alive when he gave his decision, he gave certain directions regarding their individual liability. Against that decision five appeals were filed before the Division Bench of the High Court. In those appeals, the correctness of the decision of the Company Judge to exempt the heirs and legal representatives of the two deceased directors was not questioned by any party. In those appeals, the Division Bench reduced the total liability of the directors and the individual liability of the managing director though it placed a larger share of the burden of contribution on the managing director. Against that judgment, the Official Liquidator appealed to this Court in respect of the liability of the managing director and two other directors. One of the two directors namely, P.A. Tendolkar died pending the grant of his own application for a certificate under Article 133 of the Constitution. His heirs got themselves impleaded and contended that the proceedings against them could not be continued and also that the claim against the deceased director was untenable on merits. Dealing with the liability of the heirs and legal representatives of persons against whom action was taken under section 542 and 543 of the Act, this Court observed at page 380 thus :

G "The *maxim actio personalis moritur cum persona*, as pointed in Winfield's Law of Tort (Eighth Edn. 603-605), was an invention of English Common Lawyers. It seemed to have resulted from the strong quasi-criminal character of the action for trespass. Just like a prosecution for a criminal offence, the action for trespass, which was "the parent of much of our modern law of tort", was

held, by applying this maxim, to be incapable of surviving the death of the wrongdoer, and, in some cases, even of the party injured. The maxim, with its extensions, was criticised by Winfield and found to be "pregnant with a good deal more mischief than was ever born of it". Whatever view one may take of the justice of the principle, it was clear that it would not be applicable to actions based on contract or where a tortfeasor's estate had benefitted from a wrong done. Its application was generally confined to actions for damages for defamation, seduction, inducing a spouse to remain apart from the other, and adultery.

We see no reason to extend the maxim, as a general principle, even to cases involving breaches of fiduciary duties or where the personal conduct of the deceased Director has been fully enquired into, and the only question for determination, on an appeal, is the extent of the liability incurred by the deceased Director. Such liability must necessarily be confined to the assets or estate left by the deceased in the hands of the successors. In so far as an heir or legal representative has an interest in the assets of the deceased and represents the estate, and the liquidator represents the interests of the Company, the heirs as well as the liquidator should, in equity be able to question a decision which affects the interests represented."

At a later stage in the same case, this Court made the following observations at pages 381-382 :

"It will be seen that, while Section 335 of the Act of 1913, like Section 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.

A 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 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."

B

C

D

Again in the same case, it was observed by this Court at page 383 thus :

E "It may be possible (though we need express no final opinion on the matter) where a proceeding under Section 543 is covered also by the terms of Section 542 of the Companies Act of 1956, to give directions to persons other than those whose conduct is enquired into, including directions to heirs and legal representatives, for the purpose of enforcing a declaration. But, we think that the power under Section 235 of the Act of 1913, which corresponds to Section 543 of the Act of 1956, would not extend beyond making a declaration against a deceased Director provided he, in his life time, or his heirs, after his death, have had due opportunity of putting forward the case on behalf of the allegedly delinquent Director. If either a Liquidator or the heir of a delinquent Director, against whom a declaration of liability has been made, can question determination of liability of the deceased delinquent, who was alive at the time of the Judgment against him, it is obvious that the Appellate Court could give a declaration either reducing or increasing the liability even though it may not be able to enforce it by an order under Section 235 of the Act. If

F

G

H

the declaration can be questioned by an appeal, as we think that it can, the liability can be not only wiped off or reduced but also increased on an appeal heard after the death of a Director held liable.

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 to 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."

Finally this Court gave *inter alia* the following direction occurring at pages 400-401 :

"(6) The case is remanded to the learned Company Judge for passing such orders against the Managing Director Samant and Director Ajgaonkar, under Section 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."

Justice Masud of the Calcutta High Court who heard the case under appeal understood the above decision of this Court thus :

"The observation of the Supreme Court give an indication that in a proper case the declaration of the

A liability of a delinquent Director, who subsequently dies, is possible but no order for repayment or restoring the money or property lying in possession of the heirs can be passed against the heirs or legal representatives of such Directors."

B Justice Ghose, the other Judge of the Division Bench observed :

C "In *Official Liquidator Supreme Bank Ltd. v. P.R. Tendolkar (Dead) by L. Rs. and Others*, respondents AIR 1973 S.C. 1104 the Supreme Court held that where a delinquent Director was examined in a proceeding under Section 235 of the Indian Companies Act, 1913, and thereafter dies before an order for payment was made against him, in such proceeding the order that could be passed in the said misfeasance proceeding as against the deceased Director was merely a declaration as to his liability to the Company in liquidation. No order for payment for the discharge of such liability could be made. The Supreme Court observed that before a declaration as to liability could be made against such Director, his heirs and personal representatives should be heard. The Supreme Court, however, expressly negatived the contention that where a Director died after he had been examined in a proceeding under Section 235 of the repealed Act, his heirs or legal representatives or his estate could be directed to pay up the loss occasioned to the Company on account of the misfeasance of such Director in such proceeding. It is, therefore, apparent from a perusal of the above mentioned authorities that Section 543 has not made any departures from the provision contained in Section 235 of the repealed Act and in the premises it has to be held that the cause of action in a misfeasance proceeding initiated under Section 235 of the repealed Act of Section 543 of the Companies Act, 1956 does at all survive against the heirs or legal representatives of a delinquent Director or officer etc. of a company and such heirs or legal representatives cannot be substituted in the place and instead of a deceased delinquent Director, Officer etc."

H The effect of the decision of this Court in *Tendolkar's case* (supra) came up for consideration in *Aleykutty Varkey Tharakan's*

case (*supra*) before the Kerala High Court. In that case the legal representatives of two persons against whom orders under Section 543 of the Act had been passed by the High Court and against which petitions for leave to appeal were pending in this Court after the death of the said two persons questioned before the Kerala High Court an order of appointment of a receiver in execution of the order passed under Section 543 of the Act. The contention urged by them was that in execution of an order under section 543 of the Act, no order such as the one under appeal could be passed against the legal representatives of the persons proceeded against. In that case the Kerala High Court dealing with the decision in *Tendolkar's* case (*supra*) observed thus :

"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 s. 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 developed, 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 appellant put forward before us."

A The above view of the Kerala High Court was approved by the Punjab and Haryana High Court in *Shiwalik Transport Co's.* case (supra). Chinnappa Reddy, J. speaking for the High Court of Punjab and Haryana observed :

B "Section 543 provides for the assessment of the loss or damage suffered by the company consequent on acts of misfeasance or breach of trust committed by directors and officers of the company and for the making of a compulsive repayment against the director. Though the object of assessing the damages is for the purpose of recompensing the loss suffered by the company and, therefore, the cause must survive the death of the director to that extent, the language of the provision insofar as it relates to the compulsive order is so peremptorily directed against the director that it must be held that the compulsive order contemplated by the section cannot be made against the legal representatives. Thus, while the loss or damage may be determined and declared even after the death of the delinquent director, no compulsive order may be made against the legal representatives. The proceedings under section 543 may be continued against the legal representatives for the purpose of determining and declaring the loss or damage caused to the company, but not to make an order for recovery against them. We are relieved of the necessity of considering the matter at greater length because of a recent decision of the Supreme Court in *Official Liquidator, Supreme Bank Ltd. v. P.A. Tendolkar* [1973] 43 Comp Cas 382. The Supreme Court, there, considered the broad question whether a proceeding under Section 235 of the Indian Companies Act of 1913 which corresponded to Section 543 of the 1956 Act, survived the death of the director, though, on the facts of the case, the question really was whether the legal representatives could continue an appeal filed by a deceased director against an order made under Section 235."

G Having given our anxious consideration to the question before us, we are of the view that the Kerala and Punjab and Haryana High Courts have applied the decision in *Tendolkar's* case (supra) correctly and that the two learned Judges of the Calcutta High Court who delivered the judgment under appeal erred in its application. If this Court had really come to the conclusion that on the death of a

person against whom proceedings under Section 543 had been initiated such proceedings could not be proceeded against his legal representatives, the final order would not have been what was actually made therein. "The true doctrine is that whenever you find that the deceased person has by his wrong diverted either property or the proceeds of the property belonging to someone else into his own estate, you can then have recourse to that estate through his legal representative when he is dead, to recover it." The legal representative, of course, would not be liable for any sum beyond the value of the estate of the deceased in his hands.

The liability arising under the misfeasance proceedings is founded on the principle that a person who has caused loss to the company by an act amounting to breach of trust should make good the loss. Section 543 of the Act does not really create any new liability. It only provides for summary remedy for determining the amount payable by such person on proof of the necessary ingredients. The section authorises the Court to direct such persons chargeable under it to pay a sum of money to the company by way of compensation. This is not a provision intended to punish a man who has been found guilty of misfeasance but for compensating the company in respect of the loss occasioned by his misfeasance. Whenever there is a relationship based on contract, quasi-contract, some fiduciary relation or a failure to perform a duty, there is no abatement of the liability on the death of the wrong-doer. When once the liability is declared it is open to the Official Liquidator to realise the amount due by resorting to section 634 of the Act and section 50 of the Code of Civil Procedure. In *Tendolkar's* case (*supra*) this Court did not consider the effect of section 634 of the Act which made the relevant provisions of the Code of Civil Procedure relating to execution of decrees applicable to orders passed by the court under the Act.

At the conclusion of the proceedings under section 543 a declaration of the liability is made. Such declaration partakes of the character of a decree in a suit. When once such declaration is made it can be enforced under section 634 of the Act and where the order made by one court has to be executed by another court the procedure prescribed by section 635 of the Act has to be followed. In the course of such execution proceedings the provisions of section 50 of the Code of Civil Procedure have to be applied when the person who is made liable dies before the order is satisfied and the liability of the legal representatives should be determined

A accordingly. Any other construction of the provisions of section 543 of the Act would make the entire process of determination of the liability of persons under it meaningless.

B We are, therefore, of opinion that the view taken by the Division Bench of the High Court of Calcutta in this case is erroneous. We, therefore, allow this appeal, set aside the judgment of the Division Bench of the High Court and restore the order of the learned Company Judge. The misfeasance proceedings shall now be continued accordingly against the heirs and legal representatives of Dr. S.N. Sinha since deceased.

C There shall be no order as to costs.

P.B.R.

Appeal allowed.