

JUDGMENT

Before Muhammad Anwar Khan Kasi, CJ

OFFICIAL ASSIGNEE OF KARACHI---Petitioner

Versus

Mrs. FAUZIA TARIQ and 2 others---Respondents

Writ Petition No. 424 of 2015, decided on 22nd May, 2018.

MUHAMMAD ANWAR KHAN KASI, C.J.---

This petition is directed against the orders dated 21.2.2011, 18.4.2011 and 18.10.2014 passed by learned Civil Judge Ist Class and learned Additional District Judge, Islamabad respectively whereby on an application under section 12(2), C.P.C. filed by petitioner [official assignee) to set aside ex parte Judgment and Decree dated 19.10.1994, issues were framed and evidence was summoned while through order dated 18.04.2011, application for appropriate order was dismissed and revision petition thereagainst met the same fate vide order dated 18.10.2014.

2. Brief facts of the case are that respondent No.2-Shahid Akhtar purchased House No. 181, Street No. 35, Sector G-9/1 Islamabad [hereinafter referred as suit house) which was transferred in his name vide letter dated 14.03.1987 issued by CDA. Subsequently, respondent No.2 executed sale agreement dated 02.04.1988 with respondent No.1 [Mrs. Fauzia Tariq] and another agreement to sell with one Muhammad Akbar on 24.03.1988. The respondent No.2 had been running investment business in the name of Messrs Shahid Akhtar and Company, an un-registered partnership firm, which collected amounts from general public for investment. Subsequently, due to regulatory campaign against illegal investment companies in the year 1988-1989, the said respondent/proprietor absconded, consequently claims of aggrieved investors landed in the Sindh High Court. The respondent No.2 failed to appear before the High Court, therefore, winding up of the firm was ordered under section 444 of Companies Ordinance, 1984 vide Judgment dated 27.11.1990 and petitioner was appointed official assignee. It is pertinent to mention that respondent No.2 had incorporated a Private Limited Company under the title of Shahid Akhtar and Co. (Pvt.) Ltd. on 12.01.1988.

3. In the meantime, respondent No.1 instituted suit for specific performance of agreement to sell dated 02.04.1988 regarding the suit house against the vendor/respondent No.2 which culminated upon ex parte Judgment and Decree dated 19.10.1994. The official assignee/official liquidator came to know about ex parte Judgment and Decree dated 19.10.1994 while searching for properties owned by respondent No.2, contributory of the un-registered firm subject of the proceedings under section 444 of Companies Ordinance, 1984. As a result, he moved application under section 12(2), C.P.C. for setting aside Judgment and Decree dated 19.10.1994 whereupon vide order dated 21.02.2011 following issues were framed:

- i. Whether Mr. Shahid Akhtar had purchased the suit house by using the public money, hence the judgment and decree passed in the suit titled "Fauzia Tariq v. Shahid Akhtar" is illegal, based on fraud and misrepresentation and liable to be set

aside? OPD.

ii. Relief.

4. During pendency of the application under section 12(2), C.P.C., petitioner moved another application for appropriate orders wherein he sought recalling of the impugned Judgment and Decree in terms of section 447 of the Companies Ordinance, 1984 as purportedly the suit could not have been proceeded without obtaining permission of Company Judge, Sindh High Court. The application was contested by respondent No.1 and the learned Trial Court dismissed the same vide order dated 18.04.2011 aggrieved there from he filed revision petition which met the same fate vide order dated 18.10.2014.

5. Learned counsel for petitioner argued that the suit house was purchased by utilizing the funds collected from public in order to avoid accountability, respondent No.2 alienated it to respondent No.1 who obtained ex parte Decree without permission of the Company Judge, Sindh High Court in terms of section 447 of the Ordinance, *ibid*.

6. It is further asserted that respondent No.1-Ms. Fauzia Tariq had already lodged her claim before the petitioner as well as in the Sindh High Court Karachi, therefore, further proceedings in the suit would be nullity in the eyes of law. According to the learned counsel, all the issues are to be agitated before the Company Judge and the Civil Court is not competent to adjudicate upon the issues sub-judice before the Sindh High Court.

7. It is next added that limited company incorporated by respondent No.2 on 12.01.1988 has no concern and relevance with the proposition in present case because winding up of an un-registered firm/entity had been ordered by the Sindh High Court on 27.11.1990. Lastly, it is maintained that separate procedure for liquidation/winding-up of registered companies is provided under section 309 of the Companies Ordinance and the fact that proceedings were carried under part 'X' of the Ordinance shows the un-registered firm was subject matter of the said proceedings before the Sindh High Court.

8. Conversely, learned counsel for respondent No.1/deGREE holder repelled the above submissions. It is argued that the application is an afterthought, moved after availing opportunity to produce evidence, thus, rightly turned down by the two learned Courts. He added that the suit house has no concern with the proceedings pending before the Sindh High Court, because the property in question was sold to respondent No.1 prior to incorporation of the company and passing of winding-up order for that matter. It is asserted that the respondent has no claim against contributory of the company in respect of any debt of the company, therefore, section 447 *ibid* was not attracted in the case and no permission was required.

9. Learned counsel also submitted that the spirit of section 12(2), C.P.C. is limited in the scope and applies in cases where decree has been obtained by fraud, mis-representation or there is jurisdictional error.

10. Heard and record perused.

11. In order to ascertain import of winding-up proceedings before the Sindh High Court, it would be imperative to determine their nature. The order passed by the learned Sindh High Court

in the present matter has been reported as "1991 CLC 1148 Karachi", concluding para whereof reads as under-

"The petition has been published in the newspaper and other formalities have been complied with. It is apparent that the respondent company is not in a position to pay its dues. The private respondents namely, the partners, of the unregistered company have also absconded. A case is made out under section 444 of the Companies Ordinance, 1984 for winding up of the respondent-company.

J.M No.9/90 is accordingly allowed and respondent No.1 M/s. Shahid Akhtar and Co. an unregistered company, is ordered to be wound-up. The official assignee is appointed as Official Liquidator of the respondent-company."

In para 5 of the application for appropriate order moved by petitioner on 19.03.2011 the nature of proceedings before the Sindh High Court were mentioned as follows,-

"Hon'ble High Court of Sindh Karachi, vide Judgment dated 27.11.1990 passed the winding-up order of the Firm under section 444 of the Companies Ordinance, 1984. Initially, Official Assignee, Moulana Abdul Sattar Edhi and Mr. Naseemuddin Qamar were appointed Provisional Liquidators and finally at the time of winding-up order, Official Assignee, was appointed as Official Liquidator of the Firm."

12. In reply to application ibid respondent No.1 asserted that "Para 5 needs no comments", which amounts to admission that the winding-up was ordered under section 444 of the Companies Ordinance, 1984 and connotes that the winding-up was ordered regarding un-registered partnership, existed prior to incorporation of company because separate procedure has been laid down for winding up of registered companies.

13. Once the nature of winding up proceedings becomes conclusive, the argument regarding applicability of section 447 Companies Ordinance requires consideration. The relevant section reads as under;-

"Where an order has been made for winding up an unregistered company, no suit or other legal proceedings shall be proceeded with or commenced against any contributory of the company in respect of any debt of the company, except by leave of the Court and subject to such terms as the Court may impose."

14. Perusal of above provision reveals that necessity of obtaining permission from the Court would become necessary in following cases;-

- (i) There should be an order existing regarding winding up of an un-registered company.
- (ii) The suit or other legal proceedings should be against or by any contributory of such company.
- (iii) The proceedings or suit should be in respect of any debt of the company.

15. When the test mentioned above is applied in the present case, the position verifies that the winding-up proceedings were directed against an un-registered company in which respondent No.2-Shahid Akhtar was contributory. Moreover, the winding up order was passed on 27.11.1990 prior to issuance of ex parte Judgment and Decree dated 19.10.1994. The last required element is that the proceedings should be regarding debt of company. In this regard, it is settled principle of law that "Partners of an un-registered firm are personally liable towards the creditors and in that manner the suit house, prima facie, forms part of the debt.

16. The discussion above leads to the conclusion that ex parte Judgment and Decree was obtained without fulfilment of legal requirement contained in section 447 of Companies Ordinance, 1984 as such the same deserves to be set aside.

17. Order accordingly. This writ petition is allowed as a consequence impugned orders are set aside and by allowing application for appropriate orders filed by the petitioner/applicant ex parte judgment and Decree dated 19.10.1994 is set aside. The plaintiff/respondent No. 1 shall fulfil requirement of section 447 ibid and the suit shall thereafter be proceeded in accordance with law. No order as to costs.

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