

**NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, CHENNAI**

TCP/39/2016
(Old CP No.79/2008)

Under Sections 235, 237, 397, 398, 399, 402, 403 and 406 read with
Schedule XI of the Companies Act, 1956

In the matter of
M/s.SRI SELVANARAYANA PACKAGING PRIVATE LIMITED

In the matter of

K.Kannan

.... *Petitioner*

Vs.

M/s.Sri Selvanarayana Packaging Private Limited & 8 others

....*Respondents*

Order delivered on: 23.08.2018

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K. ANANTHA PADMANABHA SWAMY, MEMBER (JUDICIAL)
S. VIJAYARAGHAVAN, MEMBER (TECHNICAL)

For the Petitioner : Shri.Sandeep Kumar, Advocate.

Shri. Cibi Vishnu, Advocate.

For the Respondents 1, 2,3 & 5 : Shri.R.Sivakumar, Advocate.

For the Respondents 7 : Shri.J.Sathyanarayana Prasad, Advocate.

ORDER

Per: S. VIJAYARAGHAVAN, MEMBER (TECHNICAL)

The 1st Respondent Company is **M/s.Sri Selvanarayana Packaging Private Limited**, (hereinafter referred to as “the Company”) limited by shares incorporated under the provisions of the Companies Act, 1956 (hereinafter

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referred to as the "Act") on 23.11.1995 having its registered office at No.528, Periyar Nagar, Sattur-626203, Kamarajar District.

The authorized share capital of the Company is Rs.25,00,000/- divided into 25,000 equity shares of Rs.10/- each. The issued, subscribed and paid-up capital of the Company is Rs.5,000/- divided into 500 equity shares of Rs.10/- each.

The Petitioner has stated that he holds 20% of the total equity shareholding in the Company and thus in terms of Section 399 as well as under section 235 of the Companies Act, 1956, the petitioner is entitled to present a petition under Section 397 and 398 of the Companies Act, 1956.

Particulars of the Petitioners:

The 1st Petitioner is a shareholder and member of the Company and holds 100 equity shares of Rs.10/- each, the Petitioner is also a Director of the Company.

Particulars of the Respondents:

Respondent No.2 is the Managing Director of the 1st Respondent Company since 09.02.2001. The 3rd respondent is the father of the 2nd Respondent and the director of the 1st Respondent Company. Both the 2nd and 3rd respondents reside at No. 528, Periyar Nagar, Sattur-626203, Kamarajar District.

The Respondent No. 4 is a Director of the 1st Respondent Company since 09.02.2001 and is the widow of Mr.G.Alagarasamy who was a subscriber to the Memorandum of Association.

The Respondent No. 5 is an entity which is controlled by the 2nd and 3rd Respondents having its office at Kanmoi Soorangudi Village Sattur Taluk, Kamarajar District.

The 6th respondent is a creditor of the 1st Respondent Company. The 7th Respondent is the EPFO. The 8th and 9th respondents are state and central revenue/tax authorities.

Facts of the case:

- 1) The 1st Respondent Company was incorporated on 23.11.1995 and has a manufacturing facility at Survey No. 813/3, Sivakasi Co-operative Industrial Estate, Plot No.4, Thiruthangal Village, Thevarkulam Panchayat. The manufacturing facility of the Company is lying closed and is not operational since November, 2008. The 2nd Respondent was appointed as the Managing Director of the Company from 09.02.2001. It is alleged by the petitioner that the 2nd and the 3rd respondent are illegally siphoning money from the 1st respondent Company for their personal

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gains and has denied access to books of accounts of the 1st respondent company.

- 2) The petitioner has stated that the 4th Respondent who is also a Director of the 1st respondent Company and the widow of Late.Mr.G.Alagarsamy who was a subscriber to the Memorandum of Association of the 1st Respondent has not attended any board meeting and that the petitioner is unable to trace her whereabouts.
- 3) The petitioner has stated that the he was served with a show cause notice from the Employee's Provident Fund Organization dated 25.08.2008 for failure to remit provident fund dues totaling a sum of Rs.72,855/-, the notice requires that cause be shown why prosecution should not be initiated against the petitioner. Further, the petitioner has received a demand notice dated 18.08.2008 from the Tamil Nadu General Sales Tax department demanding the outstanding sum of Rs.10,35,595/- which has not been paid by the 1st respondent Company, failing which prosecution would be initiated against the Petitioner.
- 4) The petitioner has submitted that he came to know in November, 2008 that the 2nd and 3rd respondents were planning to dispose of the land, factory building and machinery of the Company and

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siphon off the sale proceeds for their personal gains to the detriment of the other shareholders and creditors of the Company and that the petitioner to safeguard the property of the Company from being illegally sold was constrained to institute a suit in O.S. No. 90 of 2008 before the Hon'ble Subordinate Judge, Sivakasi seeking an injunction restraining the Respondents 1 to 3 herein from disposing of the 1st respondent's properties.

- 5) Further, the 6th respondent has issued a demand notice dated 20.11.2008 under section 13(2) of the SARFAESI Act, 2002 for recovery of credit facilities availed by the Company which has been declared as NPA.
- 6) The respondent contends that the first respondent company started facing financial problems from 2003 because of the following reasons.

(a) The rate of interest @ 18.75% charged by TIIC at that point of time was very high and the first respondent company had to pay sizeable amounts towards principal and interest.

(b) Being a small scale unit the first respondent company was the 8th unit in Sivakasi to manufacture corrugated boxes but from 2002 competition in this business became intense

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with more than 27 new Units were set up to produce corrugated boxes. This cut throat competition adversely affected the 1st respondent Company in view of squeezing of margins. Since the entire board of the first respondent company was seized of the above problems and was struggling for its survival, it could not file the Statutory returns and pay off its statutory dues which is neither willful nor intentional. More over The problem was further compounded by the petitioner. It is false to say that the respondents refused to divulge any Information regarding the affairs of the first respondent company. The actual fact is the Account Books and Registers of the first respondent company were forcibly taken by the Petitioner with the help of Police belonging to Sivakasi East Police station in the name of the investigation in a criminal case, later numbered as C.C. 88 of 2008 on the file of Judicial Magistrate, Sivakasi, allegedly filed by him in the month of December ,2007

- 7) It has been stated that the 1st respondent company availed working capital to the tune of Rs.12 Lakhs from the 6th respondent, Indian Overseas Bank. The interest portion was paid till 2007 middle. The

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first respondent company has become sick and 2nd and 3rd respondents have not done anything to jeopardize the interests of the first respondent company and its shareholders. Thereafter the 6th respondent Bank from whom the first respondent company has availed financial assistance to the extent of Rs. 12 Lakhs issued Notice under SARFASI Act 2002 on 20.11.2008 giving 60 days notice to file objections if any from the 1st respondent company. Before issuing the said notice the bank officials instructed these respondents and the petitioner to dispose the property in a fair and transparent manner, for that purpose they have assured to help the respondents and the petitioner to solve the dispute. But the petitioner did not agree for that. To avoid further action is being taken against the first respondent

- 8) These respondents further submit that first respondent Company was supplying Corrugated Boxes to its customers in and around Sivakasi apart from its associate concerns namely Sree Renga Fireworks which was run by the petitioner Director and Sri Harish Pyrotechs owned by the second respondent. There was misunderstanding between the petitioner and the second respondent in their Fireworks business and in respect of certain matters concerning some charitable trusts it surfaced in the running of the

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affairs of the first respondent company. In fact the Petitioner refused to settle the amount owed by him to the first respondent company in connection with supply of Corrugated boxes to his company. The first respondent company almost became sick from 2006 because of the petitioner.

9) These respondents state that when the first respondent company was in trouble to settle all the above issues, the petitioner has filed this petition in the year 2008.

10) After filing this petition, the 2nd respondent has filed a memo before this Tribunal to allow him to sell the machinery to settle the dues to the 6th respondent bank. But the petitioner did not agree for the same.

11) The undertaking mentioned in the counter is

"In light of above the respondents wish to bring to kind attention of the Board if the Petitioner is interested to run the Company the 2nd and 3rd Respondent Directors who hold the majority stake are ready to divest the same in his favour at a reasonable price. Moreover the respondents are also ready to resolve all the issues with the petitioner as per his wish. The need for appointment of Special officer or Committee involving third party intervention is not warranted at this juncture."

12) Pending the above petition, the sole property of the 1st respondent company i.e the factory of the company was listed for auction sale by the 6th respondent Bank on 25-08-2009 for



Rs.13,66,994/- . the petitioner has not agreed for the same. In the meantime the 6th respondent has sold the 1st respondent company's assets for a sum of Rs. 44,00,000/- . At that time the total due to the bank was Rs.17,08,472.80.

13) After the sale of the company assets by the 6th respondent, the petitioner has filed an interim application in C.A.160 of 2010, for the following reliefs.

A). Direct the 6th respondent to produce details, including amount realized, of the auction conducted in pursuance of notice dated 29-10-2009.

B) Appoint an independent chartered accountant to verify the true financial position of the 1st respondent and determine whether there has been any diversion or siphoning off of funds of the 1st respondent, and the loss caused to the 1st respondent by the respondents 2 to 5 and consequently surcharge respondents 2 to 5 for the loss caused by them to the 1st respondent and direct the respondents 2 to 5 to make good the loss suffered by the 1st respondent.

C) pass such relief as prayed for in paragraph VIII (a) to VIII (i) of the petition.

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14) These respondents have stated no objection to allow only the prayer A and this Tribunal has directed the 6th respondent to produce details, including amount realized, of the auction conducted in pursuance of notice dated 29-10-2009 and closed the application on 12-10-2010. The petitioner did not press for the prayer B to appoint independent chartered accountant to verify the true financial position of the 1st respondent and determine whether there has been any diversion or siphoning off of funds of the 1st respondent, and the loss caused to the 1st respondent by the respondents 2 to 5 and consequently surcharge respondents 2 to 5 for the loss caused by them to the 1st respondent and direct the respondents 2 to 5 to make good the loss suffered by the 1st respondent.

15) The petitioner did not press for appointment of independent chartered accountant in this Tribunal. Therefore the petitioner now cannot press this petition which reflects the same prayer in the interim application

16) After the sale of the first respondent's assets the 6th respondent did not pay the balance amount of the sale proceedings to these respondents. So the 2nd respondent has filed a Writ petition before the Madurai Bench of the Hon'ble High Court of Madras. The Hon'ble High Court has directed the 5th respondent bank to pay the

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balance amount with interest to the second respondent on 14-07-2015. To comply with the order of the Hon'ble High court the 5th respondent has issued a Demand Draft in the name of the first respondent company a sum of Rs. 20,07,977/- on 27-08-2015. The 1st respondent company has stopped the production in the year 2008, but the liabilities of the sundry debtors and other suppliers of the company has not been settled so far. To settle their liabilities the second respondent has utilized the amount received from the bank. The 2nd respondent has already filed the accounts details with the relevant documents. The petitioner did not take any steps to take over the management but raised a question that what happened to the amount received from the Bank.

17)The Respondent 2 and 3 are ready to resolve all the issues with respect to the 1st respondent company by mutual discussion with Petitioner. For the above reasons the first respondent company could not pay the provident fund dues and the sales tax dues. Since the entire board of the first respondent company was seized of the above problems and was struggling for its survival It could not file the Statutory returns and pay off its statutory dues which is neither willful nor intentional.



18) The 7th respondent in his counter has stated that the petitioner as well as the 2nd, 3rd and 4th respondents being the Directors of the 1st respondent establishment, are the employers within the definition of Section 2(e) of the provisions of EPF & MP Act' 1952 and therefore are the persons responsible for the compliance under the provisions of the said Act including the payment of PF dues under the Act and the statutory returns prescribed under the Schemes framed thereunder.

19) Further the 7th respondent has stated that they received a letter dated 07.07.2009 from the 1st respondent establishment that, the factory has been closed permanently with effect from 27.10.2008 and that all operations have been stopped. The 7th respondent herein being responsible for settling the eligible PF and Pensionary benefits to the employees engaged in the 1st respondent establishment has the statutory right under Section 7A, 7C of the Act to detain any dues payable or any escaped amount payable by the 1st respondent establishment, including the petitioner as well as the 2nd, 3rd and 4th respondent Directors thereof, at a future date for the period the establishment was actually functioning.

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ORDER

In this case, it is observed that the 1st respondent Company is not in operation since 2008 and that the steps to settle the statutory liabilities and duties are being made by the Respondents and the few efforts have even fructified. The 6th Respondent bank was paid the amount due to them and the balance amount was directed by this Tribunal to be paid to the 1st respondent Company. It is seen from the averments made by the parties that the 1st respondent company was not in good shape even before going dormant.

The Tribunal is of the view that the 2nd and the 3rd respondent has taken reasonable efforts to settle the dues payable by the 1st respondent company. It is further observed that the petitioner being the director has denied the offer made by the 2nd and the 3rd respondent to take over the 1st respondent company and has also not accepted any settlement offers made by the respondents.

The 4th respondent has not made any representation from the date of filing of this petition.

The 9th respondent was set exparte by this Tribunal vide order dated 29.11.2016 and it is further observed that no application has been made for setting aside the same.

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In view of the above, the Tribunal observes that the petitioner who is the Director of the 1st respondent company has invested shares worth Rs.1000/- and as per the written arguments filed by the 1st, 2nd, 3rd and 5th respondents the petitioner is claiming Rs.11,00,000/- which is not accepted by the respondents.

The Tribunal observes that the being the Director the petitioner did not take part in any activities of the 1st respondent company until the company has sustained loss and stopped the operation in 2008 and all the offers and settlement efforts made by the respondents were denied and rejected. He has not shown any interest in the revival of the 1st respondent Company and has not availed the opportunity to take over the management of the 1st respondent Company.

Directors as individual have a duty to attend board meeting and contribute to the deliberations of the board and ultimately to the decision making.

The petitioner being the Director of the Company ought have taken due care and effort to know the activities of the 1st respondent Company. When the Director does not take due diligence in the activities of the company it is not proper on him to accuse the other directors of "siphoning off" of funds.

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Reduction in profits or incurring of losses may create a suspicion but it is not the same thing as a proof of financial mismanagement or even a presumption of it. (**Jagjit Singh Chawla Vs Tirath Ram Ahuja Ltd., (2002) 2 Comp LJ 72**)

In view of this, the Tribunal is of the opinion that the petitioner is not entitled for any relief under Section 397 & 398 of the Companies Act, 1956 and the **TCP/39/2016 (Old CP No.79/2008) stands dismissed.**

There will no order as to costs.



(S.VIJAYARAGHAVAN)
MEMBER (TECHNICAL)



(K.ANANTHA PADMANABHA SWAMY)
MEMBER (JUDICIAL)

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