
(2009) 02 SC CK 0166

In the Supreme Court Of India

Case No : Civil Appeal No. 1118 of 2009 (Arising out of SLP (C) No. 15285 of 2008)

AI Champdany Industries Limited

APPELLANT

Vs

The Official Liquidator and Another

RESPONDENT

Date of Decision : 19-02-2009

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 141
Companies Act, 1956 — Section 456, 457, 528, 529, 529A
Constitution of India, 1950 — Article 13, 372
Provincial Insolvency Act, 1920 — Sec

Citation : (2009) 148 CompCas 641 : (2009) 3 CTC 881 : (2009) 3 LW 143 : (2009) 3 SCALE 772 : (2009) 4 SCC 486 : (2009) 90 SCL 271 : (2009) 2 SCR 705 : (2009) 3 UC 1950

Hon'ble Judges : S. B. Sinha, J;Asok Kumar Ganguly, J

Bench : Division Bench

Advocate : Sunil Kumar, Abhijeet Guha Roy, Abhay Prakash Sahay, Awanish Sinha and Himanshu Shekhar, for the Appellant; Sanjay K. Ghosh, Rupali S. Ghosh, Avijit Bhattacharjee, Sibajit Sen, Shiv Shankar Banerjee, Rauf Rahim, Y. Bansal and Brijesh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—Leave granted.

2. Wool-Combers of India Limited (the company) went in liquidation. Appellant purchased assets of the company in liquidation in a court sale for a consolidated sum of Rs. 7,03,00,000/-. Sale was confirmed by the learned Company Judge by an Order dated 15th September, 2006.

3. Appellant was served with a notice dated 15-02-2007 by Bhatpara Municipality claiming payment of arrears of property tax amounting to Rs. 47,59,597.19/- for the period from 1991-1992 and 2006-2007, stating:

that before adopting the said stringent measure for realizing the arrear property

tax once again give you an opportunity to pay all arrear property tax in respect of the said holdings being 1/, West Ghoshpara Road, Ward No. 12, amounting to Rs. 47,59,597.19/- plus statutory interest within seven days from the receipt thereof.

4. Appellant contends that it has no liability to pay the said dues and the same has to be adjusted from the sale proceeds. It is furthermore stated that on and from the date of purchase it had paid all municipal rates and taxes subsequent to the date of sale. Appellant on receipt of the said notice took out a Chamber Summons praying, *inter alia*, for the following reliefs:

(a) Necessary clarification be made that Sale confirmed in favour of applicant by order dated 15th September, 2006 would make the applicant liable for payment of property tax only on and from the date of confirmation of sale i.e. 15th September, 2006 and not for any period prior thereto;

(b) Order dated 15th September, 2006 be suitably modified and/or clarified in terms of prayers above;

(c) Injunction restraining the respondent No. 2 from claiming any alleged arrear property tax for period prior to 15th September, 2006;

(d) Direction be given to the respondent No. 2 lodge its claim before the Official Liquidator for any alleged claim on account of property tax for period prior to 15th September, 2006.

(e) Injunction restraining the respondent No. 2 from giving any effect and/or further effect to the notice dated 15th February, 2007 and 6th March, 2007 being Annexures "E" and "G" respectively to the affidavit in support of this summons;

(f) Ad-interim orders in terms of prayers above;

(g) Costs of and/or incidental to this application be paid by the respondent No. 2;

(h) Such further and/or other order or orders as this Hon'ble Court may deem fit and proper.

5. By reason of an order dated 7th February, 2008, the said application has been dismissed, stating:

Having considered the submissions of the parties the terms "as is where is basis and whatever there is basis" signifies, the condition, quality and the quantity in which the assets sold, exists. It does not take into account the liabilities attached to the assets sold. The terms and conditions of sale, however, called upon the bidders to satisfy themselves regarding title and encumbrance attached to the said asset. Encumbrance would include the liability attached to the asset including the tax payable. therefore, it was incumbent upon the purchaser to make enquiry regarding liabilities (to be read as encumbrance) attached to the asset before making the offer, The tax payable to the municipality is one such encumbrance and for not making enquiry the petitioner cannot avoid payment.

6. An intra court appeal preferred thereagainst has been dismissed by a Division Bench of the said court.

7. Mr. Sunil Kumar, learned senior counsel, in support of this appeal, would contend that a purchaser is not liable to pay the property tax prior to the date of purchase and remedy of the respondent municipality, if any, was to have its claim satisfied from the sale proceeds in terms of Sections 529 and 529A of the Companies Act, 1956.

8. Mr. Sibaji Sen, learned senior counsel appearing on behalf of the respondent-Municipal Corporation, on the other hand, would draw our attention to the advertisement for sale to contend that the appellant had a duty to make an enquiry in regard to the Company's encumbrance as also in terms of the provisions of Sections 55(1) and 55(2)(g) of the Transfer of Property Act. The learned Counsel appearing on behalf of the official liquidator would support the said contention.

9. The company went in liquidation. It was directed to be wound up. The official liquidator indisputably took charge of both movable and immovable assets of the company. The fact that the company went in liquidation was given due publicity. Respondent-Municipality did not file its claim before the official liquidator. It did not stand in queue to get the same recovered and/or adjusted from the sale proceeds. Indisputably the manner in which the claim of a creditor in respect of the dues of the company in liquidation is to be realized has been laid down in Sections 529 and 529A of the Companies Act, 1956.

10. Dues in relation to the Municipal Tax in terms of the provisions of the said Act do not create any encumbrance on the property. It does not create any charge. It is considered to be a personal liability. On the aforementioned premise, we have to construe the terms and conditions of sale. It reads as under:

1. The sale will be held as per inventory made by the Valuer on "As is Where is And Whatever There is" basis and subject to confirmation by the Hon'ble High Court at Calcutta. The Official Liquidator shall not provide any guarantee and/or warranty as to the quality, quantity or specification of the assets sold. The Offerers/Bidders are to satisfy themselves in this regard after physical inspection of the assets/properties as to the title, encumbrance, area, boundary, measurement, description etc. of the Company (in Liquidation) and the purchasers will be deemed to offer with full knowledge as to the defects, if any in the descriptions, quality or quantity of the assets sold. The Official Liquidator shall not entertain any complaint in this regard after the sale is over. Any mistake in the notice inviting tender shall not vitiate the sale.

11. Both the learned Single Judge as also the Division Bench of the High Court held that having regard to the fact that an inventory was made on "as is where is and whatever there is" basis and furthermore in view of the fact that a duty was cast upon the offerer to satisfy themselves in regard to the physical inspection of the assets/properties as to the title, encumbrance, area, boundary,

measurement, description etc. of the assets of the company in liquidation and the purchaser would be deemed to be offering his prices therefore with full knowledge as to the defects containing the descriptions, quality or quantity of the assets sold, the appellant was bound to make an investigation in regard to the liabilities of the company in liquidation.

12. The terms and conditions of the sale must be read as a whole. It must be given a purposive meaning.

The word 'encumbrance' in relation to the word 'immovable property' carries a distinct meaning. It ordinarily cannot be assigned a general and/or dictionary meaning. We may however notice some dictionary meanings of the said word as reliance thereupon has been placed by Mr. Sibaji Sen.

In Stroud's Judicial Dictionary of Words and Phrases 5th Edition Encumbrance is defined as "being, 'a claim, lien, or liability, attached to property'; and this definition is wide enough to cover the plaintiff's claim," which was, as assignee for value of a reversionary interest, against a person coming in under a subsequent title."

In Supreme Court on Words and Phrases it is stated that "the word 'encumbrance' means a burden or charge upon property or a claim or lien upon an estate or on the land."

In Advanced Law Lexicon Encumbrance is defined as "an infringement of another's right or intrusion on another's property."

In Black's Law Dictionary Encumbrance is defined as "any right to, or interest in, land which may subsist in another to diminution of its value, but consistent with the passing of the fee."

13. Encumbrance, therefore, must be capable of being found out either on inspection of the land or the office of Registrar or a statutory authority. A charge, burden or any other thing which impairs the use of the land or depreciates in its value may be a mortgage or a deed of trust or a lien or an easement. Encumbrance thus must be a charge on the property. It must run with the property. If by a reason of the statute no such burden on the title which diminishes the value of the land is created, it shall not constitute any encumbrance.

14. If the property tax was merely a statutory dues without creating any encumbrance on the property which had cast a duty upon all the auction purchasers to make an investigation, it would mean that he must try to find out all the liabilities of the company in liquidation in their entirety. Respondent-Municipality was an unsecured creditor. In that capacity it cannot stand on a higher footing than an ordinary unsecured creditor who is required to stand in queue with all others similarly situated for the purpose of realization of their dues from the sale proceeds.

15. Companies Act or any other law does not impose any additional obligation upon the purchaser to make an enquiry with regard to the liabilities of the companies other than those which would impede its value. Reliance has been placed by Mr. Sen on a decision reported in *The Ahmedabad Municipal Corporation of the City of Ahmedabad Vs. Haji Abdulgafur Haji Hussenhbai*, wherein it was held:

The plaintiff purchased the property in November, 1954 and in our opinion it could not have reasonably been expected by him that the receivers would not have paid to the municipal corporation, since 1949 the taxes and other dues which were charged on this property by statute. According to Section 61 of the Provincial Insolvency Act, 1920 the debts due to a local authority are given priority, being bracketed along with the debts due to the State.

We may notice that Section 141 of the Bombay Provincial Municipal Corporation Act provides that the property taxes to be a first charge on the premise for which they are assessed. It is in that view of the matter Section 100 of the Transfer of Property Act was found to be capable of being invoked therein, which reads as under:

100.Charges - Where Immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge. Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.

16. There cannot, thus, be any doubt or dispute that a provision of law must expressly provide for an enforcement of a charge against the property in the hands of the transferee for value without notice to the charge and not merely create a charge.

17. In Ahmedabad Municipality itself it was held:

According to the submission it is not necessary for the saving provision to expressly provide for the enforceability of the charge against the property in the hands of a transferee for consideration without notice of the charge. This submission is unacceptable because, as already observed, what is enacted in the second half of Section 100 of Transfer of Property Act is the general prohibition that no charge shall be enforced against any property in the hands of a transferee for consideration without notice of the charge and the exception to this general rule must be expressly provided by law. The real core of the saving provision of law must be not mere enforceability of the charge against the property charged but enforceability of the charge against the said property in the

hands of a transferee for consideration without notice of the charge. Section 141 of the Bombay Municipal Act is clearly not such a provision. The second contention accordingly fails and is repelled.

It was further more held:

Reliance was next placed on a Full Bench decision of the Allahabad High Court in *Lala Nawal Kishore Vs. Municipal Board*, . According to this decision the question of constructive notice is a question of fact which falls to be determined on the evidence and circumstances of each case. But that Court felt that there was a principle on which question of constructive notice could rest, that principle being that all intending purchasers of the property in municipal areas where the property is subject to a municipal tax which has been made a charge on the property by statute have a constructive knowledge of the tax and of the possibility of some arrears being due with the result that it becomes their duty before acquiring the property to make enquiries as to the amount of tax which is due or which may be due and if they fail to make this enquiry such failure amounts to a wilful abstention or gross negligence within the meaning of Section 3 of the Transfer of Property Act and notice must be imputed to them.

18. Clause (g) of Sub-section (1) of Section 55 of the Transfer of Property Act whereupon reliance has been placed by Mr. Sen reads as under:

In the absence of a contract to the contrary, the buyer and the seller of Immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:

(1) The seller is bound -

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all encumbrances on such property due on such date, and, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing.

19. In terms of the aforementioned provisions, therefore, the seller is bound to pay all public charges due in respect of the property upto the date of sale, when a property is sold in auction. Section 55 refers to a contract only. Unless there is a contract to the contrary, the rights and obligations of the parties to a sale would be as indicated in Section 55. Such a contract to the contrary must be express and not implied, as a result whereof the meaning of term encumbrance would be expanded. The advertisement did not specify that all public charges have to be paid. Municipal Corporation indisputably is not a preferential creditor. Companies Act in relation to winding up of proceeding is otherwise a special law. While distributing the assets between the creditors and unsecured creditors, the provisions of Sections 529 and 530 must be complied with.

20. All claims against the companies were required to be filed before the liquidator until the property was sold as provided for u/s 457 of the Companies

Act. In terms of Section 456 thereof once an order for winding up is made the liquidator has to take into custody the properties, effects and actionable claims to which the company is or appears to be entitled. Section 528 provides that all debts payable on a contingency and all claims against the company, present or future are admissible to proof against the company. Section 529 provides for the same rule as in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent. Section 530 provides for certain priorities to secured creditors and other unsecured creditors. Once the property is sold, the assets of the company are required to be distributed to the creditors in order of preference. As the respondent- Municipality was not a secured creditor, the impugned Judgment cannot be sustained.

21. Almost a similar question in regard to the dues of the electrical charges came up for consideration before this Court in *Isha Marbles Vs. Bihar State Electricity Board and Another*, . In that case sale of the assets of industrial undertaking took place in terms of the provisions of the State Financial Corporation Act, 1951. Having regard to the provisions of the Indian Electricity Act, 1910 a three Judge Bench of this Court held that a liability on the purchaser cannot be imposed which was not incurred by them stating:

63. We are clearly of the opinion that there is great reason and justice in holding as above. Electricity is public property. Law, in its majesty, benignly protects public property and behoves everyone to respect public property. Hence, the courts must be zealous in this regard. But, the law, as it stands, is inadequate to enforce the liability of the previous contracting party against the auction-purchaser who is a third party and is in no way connected with the previous owner/occupier. It may not be correct to state, if we hold as we have done above, it would permit dishonest consumers transferring their units from one hand to another, from time to time, infinitum without the payment of the dues to the extent of lakhs and lakhs of rupees and each one of them can easily say that he is not liable for the liability of the predecessor in interest. No doubt, dishonest consumers cannot be allowed to play truant with the public property but inadequacy of the law can hardly be a substitute for overzealousness.

22. Dues of the Municipality would also not even otherwise come within the purview of the crown debt. Even a crown debt could be discharged only after the secured creditors stand discharged.

23. In *Union of India (UOI) and Others Vs. SICOM Ltd. and Another*, , it is stated:

11. Generally, the rights of the crown to recover the debt would prevail over the right of a subject. Crown debt means the debts due to the State or the king; debts which a prerogative entitles the Crown to claim priority for before all other creditors. [See *Advanced Law Lexicon* by P. Ramanatha Aiyer (3rd Edn.) p. 1147]. Such creditors, however, must be held to mean unsecured creditors. Principle of Crown debt as such pertains to the common law principle. A common law which is a law within the meaning of Article 13 of the Constitution is saved in

terms of Article 372 thereof. Those principles of common law, thus, which were existing at the time of coming into force of the Constitution of India are saved by reason of the aforementioned provision. A debt which is secured or which by reason of the provisions of a statute becomes the first charge over the property having regard to the plain meaning of Article 372 of the Constitution of India must be held to prevail over the Crown debt which is an unsecured one. It is trite that when a Parliament or State Legislature makes an enactment, the same would prevail over the common law.

12. Thus, the common law principle which was existing on the date of coming into force of the Constitution of India must yield to a statutory provision.

13. To achieve the same purpose, the Parliament as also the State Legislatures inserted provisions in various statutes, some of which have been referred to hereinbefore providing that the statutory dues shall be the first charge over the properties of the tax-payer. This aspect of the matter has been considered by this Court in a series of judgments.

24. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed with costs. Counsel's fee assessed at Rs. 10,000/-