

(1999) 10 AP CK 0006

In the Andhra Pradesh High Court

Case No : CA No's. 295 of 1999 and 127 of 1999

APSFC, Hyd.

APPELLANT

Vs

Emgee Rubber (P) Limited, A.P.

RESPONDENT

Date of Decision : 05-10-1999

Acts Referred:

Companies Act, 1956 — Section 446, 457, 529(2)
Provincial Insolvency Act, 1920 — Section 28
State Financial Corporations Act, 1951 — Section 29, 30, 32

Citation : (1999) 6 ALD 807

Hon'ble Judges : Krishan Saran Shrivastav, J

Bench : Single Bench

Advocate : Mr. Y.N. Lohita, for the Appellant; Mr. M. Anil Kumar, Official Liquidator, for the Respondent

Judgement

1. This judgment shall also dispose of CA No.127 of 1999 because the questions in controversy are interconnected.

2. The undisputed facts of the case, in short, are that M/s. Emgee Rubbers Private Limited has been ordered to be wound up in CP No.58 of 1998 on 19-8-1998. M/s. Andhra Pradesh State Financial Corporation (for short, "APSFC") is a secured creditor of the company in liquidation. It has to recover an amount of Rs.91,39,263/-plus interest. The second secured creditor of the company in liquidation is State Bank of India, Hyderabad. On 5-11-1998 and on 6-11-1998, the Official Liquidator had taken possession of the properties of the company in liquidation. On 10-11-1998 APSFC has filed an application in CA No.590 of 1998 for permission to stay outside liquidation. The application was resisted by the Official Liquidator, but on 10-12-1998 the application was allowed and APSFC was granted permission to stay outside liquidation on the following terms and conditions:-

(1) That the petitioner shall inform the Liquidator about the stage of the proceedings,

(2) That the petitioner should not dispose of the assets of the company or realise the amounts in pursuance of any decree which might be passed, without prior permission of the Court, and

(3) That the petitioner should undertake to discharge the liability u/s 529-A of the Companies Act.

3. The Official Liquidator has filed an application in CA No.127 of 1999 on 16-3-1999 for directing the APSFC to pay Rs.4,800/- being the salary and other incidental charges payable to the existing watchman for the period from 6-11-1998 to 31-3-1999 and for further direction that the secured creditor-APSFC should also deposit with the Official Liquidator a sum of Rs.2,300/- per month with effect from 1-4-1999 to meet the salaries of two watchmen and other incidental expenses. On 15-6-1999, APSFC has filed an application CA No.295 of 1999 for directing the Official Liquidator to deliver the assets of the company in liquidation which assets have been mortgaged/hypothecated in its favour. The Official Liquidator has filed his report opposing delivery of possession of the assets of the company in liquidation which have since been vested in it.

4. Relying on the cases of M.K. Ranganathan and Another Vs. Government of Madras and Others, , Gujarat State Financial Corporation v. Official Liquidator and others, (1996) 87 CC 658. and Sitani Textiles and Fabrics (P) Ltd Vs. Asst. Collector of Customs and Central Excise, Hyderabad and Another, , it has been argued by the learned Counsel appearing for the APSFC that the APSFC being the secured creditor of the company in liquidation is entitled to stay outside liquidation and is entitled to obtain possession of the property though the possession of the same has been taken over by the Official Liquidator. Section 46-B of the State Financial Corporation Act, 1951 (for short, "SFC Act") prevails over Section 446 of the Indian Companies Act. Reliance has also been placed on an unreported case of The Official Liquidator v. The Andhra Pradesh State Financial Corporation, in CA No.46/80, 27/ 80 and 58/79 in CP No.4/78 decided on 14-11-1988.

5. On the other hand, learned Counsel of the Official Liquidator has argued that the APSFC stands in que pari passu with the secured creditors and the claim of the workmen. The Official Liquidator must be associated with the secured creditors at the time of finalisation of the sale of the properties of the company in liquidation. Once the Official Liquidator takes possession of the properties of the company in liquidation, the secured creditors are left with no remedy except to submit their claim before the Official Liquidator to be approved and paid proportionately with the other secured creditors and workmen. He has placed reliance on the case of APS Financial Corporation v. Electrothermic Private Limited 1996 (2) ALD 213 It has also been contended by the learned Counsel of the Official Liquidator that if a secured creditor does not relinquish his security, then he is bound to share the expenses with other secured creditors in preserving the securities of the company in liquidation. He has further contended that the provisions of the Companies Act are applicable to the SFC Act Section

32-E of the SFC Act is subject to Section 46-B of the said Act and Section 28 of the Provincial Insolvency Act is subject to Section 529(2) of the Indian Companies Act. Therefore, APSFC is bound to pay the requisite amounts to the Official Liquidator for payment of salaries of watch and ward which have been appointed to preserve the properties of the company in liquidation.

6. In the case of APS Financial Corporation v. Electrothermic Private Limited (supra), a Division Bench of this Court, relying on the cases of M.K. Ranganathan (supra), Central Bank of India v. Elmot Engineering Company, (1994) 81 CC 13, and Andhra Pradesh State Financial Corporation Vs. Official Liquidator, , has held that:

"..... u/s 29 of the SFC Act, a statutory right to sell the property has to be exercised with the rights of pari passu charge holder in whose favour the statutory charge is created by the proviso to Section 529(1) of the Companies Act, 1956. Section 529-A of the Companies Act has put workmen's dues as well as debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to subsection (1) of Section 529 pari passu with such dues, on the same priority and in the case of an insolvent company, when assets are going to be subjected to the claim of the creditors, it is indeed necessary to reckon that a secured creditor who does not have the advantage of a provision like Section 29 of the Act cannot be thrown out and all assets, subject, of course, to the charge of the workmen, will be left for the benefit of the Financial Corporation. Once it comes to the notice that the workmen's claims are unpaid, the liquidator has a duty to realise from the assets which are under a debt charge of the financial corporation, their claims. The same, on principle, being pari passu with the dues of the financial corporation, has to be applied to the claims of any other secured creditor provided, of course, when the assets of the company are insufficient to meet all pari passu claims.

.....the financial corporation shall stand in the queue of the secured creditors pari passu with the claim of the State Bank of Hyderabad. As the case appears to us fully covered by Section 529(1)(c) of the Companies Act, 1956, the liquidator has a duty to bring this fact to the notice of the Court and to ensure that the two secured creditors apportion, if their debts in full are not likely to be discharged by the assets of the company, in such a manner that they get their claims discharged in proportion to their claims strictly pari passu."

7. In the case of APS Financial Corporation v. Electrothermic (supra), the Division Bench of this Court has held that the claim of State Bank of Hyderabad, which was also a secured creditor, cannot be ignored simply because the APSFC has chosen to remain outside liquidation and has the advantage of executing its claim only by a notice as contemplated u/s 29 of the SFC Act.

8. In the case of BIER Vs. Chairman and M.D. Adivasi Paper Mills Ltd. and others, , a learned single Judge of this Court, relying on the case of Andhra Pradesh State Financial Corporation v. Electrothermic (supra), was pleased to

reject the contention of the learned Counsel appearing for the APSFC that as the Financial Corporation has opted to stay outside the winding up proceedings, with the permission of the Court, the Corporation can realise its debt u/s 29 of the SFC Act independently of the provisions of the Companies Act. And again relying on the *Andhra Pradesh State Financial Corporation v. Official Liquidator* (supra) and *Business Machines (I) Private Limited v. Bank of India*, (1998) 91 CC 434, it has been held that the secured creditors standing outside the winding up proceedings are liable to pay his share of expenses incurred by the Official Liquidator for the preservation of the security before its realisation by the secured creditor. It has also been held that by virtue of Section 32(E)(2) of the SFC Act, the provisions of the Companies Act, 1956 are made applicable to the management of any industrial concern when it is taken over by the Financial Corporation. From this, it follows that the power of the Corporation to realise its debts under Sections 29 and 30 of the SFC Act would be subject to the provisions of the Companies Act. This conclusion is irresistible, because Section 46 of the SFC Act specifically provides that save as provided in this Act. The provisions of this Act shall be in addition to and not in derogation of any other law for the time being applicable to the industrial concerns. There is no provision in the SFC Act similar to Section 529-A of the Companies Act, therefore, Section 529-A of the Companies Act would be applicable in addition to whatever that is provided in the SFC Act. Thus, Section 32(E) of the SFC Act would be subject to Section 46(B) of the SFC Act. It has been further held in this case that Section 28 of the Provincial Insolvency Act though made applicable u/s 529 of the Companies Act, but it is made subject to pari passu charge of the workers under proviso to Section 529(1) of the Companies Act. Therefore, notwithstanding Section 28(6) of the Provincial Insolvency Act, rights of the Financial Corporation as secured creditor are subject to pari passu charge in favour of the workmen and the Corporation shall be liable to pay all its portion of the expenses for the preservation of the security as long as it does not relinquish its security.

9. The unreported case of *The Official Liquidator v. The Andhra Pradesh State Financial Corporation* (supra) decided on 54-11-1998, is of no help to the Andhra Pradesh State Financial Corporation because the provisions of Section 529-A of the Companies Act have been incorporated by the Amending Act of 35 of 1985 as also on account of the law laid down by the two Division Benches of this Court and referred to above.

10. In the case of *M/s. Guardian Papers Limited v. IDBI and others*, OSA No. 16 of 1993, dated 19-11-1998, a Division Bench of this Court has held that Section 456 of the Companies Act makes it clear that the custody and control of the property, effects and actionable claims of the company will be vested in the Official Liquidator soon after winding up order is passed. Section 457 of the Companies Act confers various powers on the Official Liquidator which he can exercise with the sanction of the Court. One such power is to sell immovable and movable properties and actionable claims of the Company by public auction or private contract with power to transfer the whole thereof to any person or body

corporate or to sell in parcels. It is subject to the control of the Court. In the face of these provisions, it could not be open to the creditors to take independent decision without reference to the Liquidator to sell the properties of the company under liquidation to a purchaser of their choice and then apply to the Court to issue appropriate directions to the Official Liquidator to give effect to such deal. The Official Liquidator has to be taken into confidence and the proposal should be placed before the Official Liquidator for his consideration and concurrence.

11. In view of the aforementioned principles of law laid down by the three Division Benches of this Court, which have followed the law laid down by the Apex Court, which is binding on this Court, as also of the opinion of the learned single Judge, with which I am in complete agreement, it is not at all possible to accept the contention of the learned Counsel appearing for the Andhra Pradesh State Financial Corporation that Section 46-B of the State Financial Corporation Act has got overriding effect on the provisions of the Indian Companies Act, and the contrary view taken by the Division Bench of the Gujarat High Court in the case of Gujarat State Financial Corporation v. Official Liquidator (supra) is of no help to the Andhra Pradesh State Financial Corporation, particularly when, relying on the case of Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another, it has been held in the case of Sitani Textiles (supra) that, when both the Acts are special Acts, each having different objectives, the provisions of the latter Act would ordinarily prevail and govern over the former Act.

12. As noted above, permission to stay outside liquidation has been granted to the Andhra Pradesh State Financial Corporation on conditions set out in Para 2 above. The claim of the workmen to be quantified has been secured. It has also been ordered that, before the sale is finalised, permission of this Court should be obtained. The Official Liquidator has sought the relief of direction to the Andhra Pradesh State Financial Corporation to pay the aforementioned amounts for preservation of the properties of the company in liquidation. Under these circumstances, if possession of the properties of the company in liquidation mortgaged with the Andhra Pradesh State Financial Corporation is ordered to be delivered to the Andhra Pradesh State Financial Corporation, the Official Liquidator would not require to request for payment of the amounts from Andhra Pradesh State Financial Corporation. Except State Bank of India, there appears to be no other secured creditor. The integrity of this secured creditor is also to be preserved. Under these peculiar circumstances of the case, ends of justice would be met if the Official Liquidator is directed to handover the mortgaged property to the Andhra Pradesh State Financial Corporation on the condition of payment of the upto date expenses incurred and to be incurred on preservation of the properties of the company in liquidation as also the safeguarding the interests of the other secured creditor and involving the Liquidator in finalising the sale of the properties of the company in liquidation.

13. In the result, the Andhra Pradesh State Financial Corporation is directed to

pay to the Official Liquidator, Rs.4,800/-(Rupees four thousand eight hundred only) for payment of the salaries and to meet other charges payable to the watchmen for the period from 6-11-1998 to 31-3-1999, and, Rs.2,300/-(Rupees two thousand three hundred only) per month from 1-4-1999 till possession of the mortgaged property is delivered to the Andhra Pradesh State Financial Corporation, to meet the salaries of two watchmen and other incidental expenses. On receiving the aforesaid amounts in full, the Official Liquidator shall handover the possession of the mortgaged property of the company in liquidation to the Andhra Pradesh State Financial Corporation. After obtaining the possession of the mortgaged property, the Andhra Pradesh State Financial Corporation shall obtain and file the valuer's report in this Court, shall conduct the sale proceedings after wide publicity in consultation with the Official Liquidator who would be informed each date of proceedings and shall give an undertaking to deposit and shall deposit the workmen dues with the Official Liquidator as and when quantified by him as also the debts of the other secured creditor that is State Bank of India in full or in proportion to their claims strictly in pari passu if their debts cannot be discharged fully by the sale of the assets as per the provisions of Section 529-A of the Companies Act, and whatever surplus remains after the sale and realisation of the dues of the secured creditors and workmen as per law, the balance sale proceeds shall be made available to the Official Liquidator for being dealt with in accordance with the Companies Act and Rules.

14, Both the applications are thus disposed of.