(2003) 07 AP CK 0043

In the Andhra Pradesh High Court

Case No : Company Petition No. 48 of 1989 and Company Application No. 584 of 2002

Canara Bank APPELLANT

Vs

Mopeds India Ltd. RESPONDENT

Date of Decision : 25-07-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 11
Companies (Court) Rules, 1959 — Rule 147, 148, 154, 156, 166
Companies Act, 1956 — Section 529A, 530

Citation : (2005) 124 CompCas 824 : (2004) 50 SCL 105

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : S. Mohan Ranganath and Deepak Bhattacharjee, for the Appellant; M. Anil Kumar and P. Prabhakar Reddy, for the Respondent

Final Decision : Dismissed

Judgement

V.V.S. Rao, J.—In this application (appeal) filed under Rule 164 of the Companies (Court) Rules, 1959 by Canara Bank (appellant) assails by the Notice of Rejection of Proof of Debt in Form No. 66 dated 17-6-2002 (hereafter called ''the impugned order'') issued by the Official Liquidator of the High Court of A.P.

2. M/s. Mopeds India Ltd. was ordered to be wound up by this Court on 17-10-1990. After the Official Liquidator issued notice under Rule 148 of the Companies (Court) Rules, 1959 inviting claims, the appellant Canara Bank filed an application claiming an amount of Rs. 19,97,80,404.18p. The claim was not totally admitted. The bank filed an application being C.A. No. 54 of 2002 in C.P. No. 48 of 1989. This Court set aside the order of the Official Liquidator and directed him to pass orders on merits giving detailed reasons for acceptance or rejection of the claim of the bank. Accordingly, the Official Liquidator directed the bank to file any proof of their claim for about Rs. 19.98 lakhs. In response thereto, the bank filed documents enclosing charge/modified charge registered

with the Registrar of Companies and recovery certificate issued by the Debts Recovery Tribunal (DRT) in O A No. 972 of 1999 on the file of the DRT, Hyderabad. After appreciating evidence and also considering the oral submissions made on behalf of the bank, by Notice of Rejection dated 17-6-2002 the Official Liquidator, while recording that Canara Bank is secured creditor, allowed/ admitted the claim of the bank to a tune of Rs. 6,74,06,344.45p. and the claim for the balance amount of Rs. 12,80,62,545.40p. was rejected. The Official Liquidator also did not allow any claim which allegedly arose after the date of winding up i.e., 17-10-1990 and also did not allow any interest subsequent to the date of winding up.

3. In this appeal, learned counsel for the appellant bank Sri Deepak Bhattacharjee submits that the bank is entitled to claim interest as per the contract rate of interest till the claim is finally settled and not till the date of winding up. He also submits that after filing a suit for recovery of bank''s debt being O.S. No. 139 of 1989 on 25-4-1990 on the file of the Court of the Subordinate Judge, Tirupati (which was later transferred to DRT), the bank obtained leave of the company Court u/s 446(1) of the Companies Act and therefore, the total claim determined by the DRT under Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDB Act) has to be admitted by the Official Liquidator. He placed strong reliance on the judgment of the Supreme Court in Allahabad Bank v. Canara Bank AIR 2000 SC 1535. He also disputes the contention of the Official Liquidator that the bank is not entitled to any interest beyond the date of winding up order. Rejection of the claim of loans given to workmen of the company is illegal.

4. The Official Liquidator appeared in person. He placed reliance on various provisions of the Companies (Court) Rules and also the judgment of the Madras High Court in A. Shanmugham v. Official Liquidator [1992] 75 Comp. Cas. 181 in support of the contention that the claims of the creditors whether they are secured creditors or unsecured creditors are determined as on the date of winding up order and not beyond that. He also contends that every creditor is entitled to claim interest only from the date, the debt becomes payable till the date of winding up order and thereafter interest cannot be claimed as a matter of right. He submits that the recovery certificate issued by the DRT is only piece of evidence and the same cannot confer any right on the bank to claim that the entire amount covered by the recovery certificate be admitted by the Official Liquidator.

5. Three questions would fall for consideration in the background of facts and the contentions raised. The first question is whether the recovery certificate issued by the DRT is conclusive proof of debt binding on the Official Liquidator in relation to the company in winding up ? It is not denied that Canara Bank is a secured creditor which from time to time sanctioned loans to the company. It is also not disputed that in the plaint filed before the Court of the Subordinate Judge, Tirupati in O.S, No. 139 of 1990 (subsequently transferred to DRT,

Hyderabad), the bank claimed an amount of Rs. 6,20,20,545.02p. as on 25-5-1990. The bank did not claim any interest from 25-11-1990, because admittedly the bank accounts were not operated by the company. The suit was filed on 25-9-1990 and this Court ordered winding up of the company on 17-10-1990. By reason of Section 34 of the Code of Civil Procedure, 1908 (CPC) as well as order 34, Rule 11, it is within their discretion to the civil court as well as DRT to award interest during the pendency of the suit and also for post-decree periods-- Central Bank of India Vs. Ravindra and Others, . Therefore, it is permissible for the DRT to award interest subsequent to filing of the suit as well as post-decree period till the payment is made. Indeed, a reading of Sections 124 and 125 of the Companies Act would show that though a charge, in a given case, is not registered with the Registrar of Companies, such non-registration shall not prejudice any contract or application for repayment of loan secured by the charge. If the security for the loan is continuing security covering interest also, the same is a good ground for the civil Court to award interest either under order 34, Rule 11 or u/s 34 CPC. The same is, however, not the case in the matter of winding up.

6. After the company is ordered to be wound up by the company Court, the procedure for determining the debt and claims against the company in winding up is provided by Rules 147 to 179 of the Companies (Court) Rules. After issuing notice of 14 days under Rule 149 by the Official Liquidator, every creditor has to file a claim in Form No. 66 under Rule 151, which required an affidavit proving the debt contained in a statement of account showing the particulars of debt and vouchers by which the debt can be substantiated. In the case of a suit or proceedings for recovery of debt from the company which were continued with the leave of the Court u/s 446(1) of the company Court, the decree or a recovery certificate by the DRT does not give any special status to the holder of recovery certificate or a decree.

7, u/s 447 of the Companies Act, an order of winding up of a company shall operate in favour of all the creditors and all the contributors to the company as if it had been made at the joint instance of all creditors. Therefore, a creditor who obtains a decree in a suit or proceeding after obtaining leave of the Court will stand on the same footing with other creditors who have not obtained a decree or recovery certificate. Be it noted, when an winding up order is made or Official Liquidator is appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or, is pending at the date of winding up, no such suit shall be proceeded with against the company. Canara Bank proceeds with its O.A. before the DRT only with the leave of the Court. While granting leave this Court did not pass any orders that by reason of any decree or recovery certificate in favour of Canara Bank, the total claim should be admitted. Indeed, such power inheres in the company Court by reason of Rule 149 of the Companies (Court) Rules, which lays down that in a winding up by the Court, every creditor shall prove his debt unless the Judge in any particular case directs that any creditor or class of creditors shall be admitted without proof. That is not the case here. After realising the sale proceeds of the assets of the company, the Official Liquidator has to distribute the assets on equal proportionate basis to the workmen, secured creditors, other secured creditors, unsecured creditors and others. If the contention of the learned counsel is accepted, in a given case, one secured creditor, who with the leave of the Court obtains a decree in a suit or proceeding, would knock away the entire sale proceeds realized by selling the assets of the company in winding up. That is not the intention of the Companies Act or the Companies Rules. The amounts realized have to be distributed in accordance with the provisions of Section 530 of the Companies Act and Rules 166 to 196 of the Companies (Court) Rules. Therefore, the submission that the recovery certificate issued by DRT is conclusively binding on the OL cannot be accepted.

8. In Allahabad Bank''s case (supra), the Supreme Court, inter alia, considered the question whether for initiation of various proceedings by the banks and financial institutions under the RDB Act, leave of the company Court is necessary u/s 446(1) or 537 of the Companies Act before a winding up order is passed against the company or before a provisional liquidator is appointed; and the question whether in respect of proceedings under the RDB Act, at the stage of adjudication u/s 19 of the RDB Act and at the stage of execution of recovery certificate, the Tribunal or Recovery Officer are conferred exclusive jurisdiction ? The Supreme Court ruled that at the stage of adjudication or execution, the provisions of RDB Act, 1993 confer exclusive jurisdiction on the Tribunal and the Recovery Officer in respect of the debts payable to the banks and financial institutions and that there can be no interference by the company Court u/s 442 read with Section 537 or u/s 446(1) of the Companies Act. It was also held that even in regard to execution, the jurisdiction of the Recovery Officer is exclusive.

9. Learned counsel for the appellant has placed reliance on paragraph 37 of the above judgment which read :

"37. Even in regard to ''priorities'' among creditors, the said Committee stated in Annexure I as follows :

The Adjudication Officer will have such power to distribute the sale proceeds to the Banks and Financial Institutions being secured creditors, in accordance with inter se agreement/arrangement between them and to the other persons entitled thereto in accordance with the priorities in the law.''

The above recommendations as to working out ''priorities'' have now been brought into the Act with greater clarity u/s 19(19) of Ordinance 1 /2000. Priorities, so far as the amounts realised under the RDB Act are concerned, are to be worked out only by the Tribunal under the RDB Act. Section 19(19) of the RDB Act reads as follows :

''Where a certificate of recovery is issued against a company registered under the Companies Act, 1956, the Tribunal may, order the sale proceeds of such company to be distributed among its secured creditors in accordance with the provisions of Section 529A of the Companies Act, 1956 and to pay the surplus, if any, to the Company.''

Section 19(19) is clearly inconsistent with Section 446(1) and other provisions of the Companies Act. Only Section 529A is attracted to proceedings before the Tribunal. Thus, on questions of adjudication, execution and working out priorities, the special provisions made in the RDB Act have to be applied."

10. In case the DRT issues a recovery certificate, the sale proceeds must be distributed only by the Tribunal under the RDB Act. That is not the situation in this case. Canara Bank itself filed claim petition which is admitted for part of the claim. Since Section 529A of the Companies Act is attracted to this case, special provisions made in the RDB have to be applied. In paragraphs 60 to 76, the Supreme Court considered the right of secured creditors to a share in the sale proceeds before the DRT and the company Court. Insofar as the secured creditors who move the company Court it was held that secured creditor who wishes to come before the OL has to prove his debt and he can prove his debt only if he relinquishes his security for the benefit of the general body of creditors. Insofar as the second class of secured creditors who like to stand outside the winding up, it was held as under ;

"64, Under Sub-clause (c) of the proviso to Section 529(1), the priority of the secured creditor who stands outside the winding up is confined to the ''workmen''s portion'' as defined in Section 529(3)(c). ''Workmen''s portion'' means the amount which bears to the value of the security, the same proportion which the amount of the workmen''s dues bears to the aggregate of (a) workmen''s dues and (b) the amounts of the debts due to all the creditors. This is explained in the illustration under the said provision. If the workmen''s dues in all are (say) Rs. 1 lakh and the debt due to all secured creditors is Rs. 3 lakhs, the total amount due to all of them comes to Rs. 4 lakhs. Therefore, the workmen''s share comes to 25% (Rs. 1 lakh out of Rs. 4 lakhs). Now if the value of the security of a secured creditor (like Canara Bank) is Rs. 1 lakh, the ''workmen''s portion'' will be Rs. 25,000.00 which is the pro rata amount to be shared by the said secured creditor. By virtue of Section 529A(1)(b) his priority over all others out of other monies available in the Tribunal is restricted to Rs. 25,000.00 only."

11. The Supreme Court also considered the ratable distribution of sale proceeds among secured creditors and observed as under :

"67. In our opinion, the words ''so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of the proviso'' obviously mean the amount taken away from the private realisation of the secured creditor by the liquidator by way of enforcing the charge for workmen''s dues under Clause (c) of the proviso to Section 529(1) ''rateably'' against each secured creditor. To that extent, the secured creditor who has stood outside the winding up and who has lost a part of the monies otherwise covered by security can come before the Tribunal to reimburse himself from out of other monies available in the Tribunal, claiming priority over all creditors, by virtue of Section 529A(1)(b)."

In view of the above, the order passed by the Official Liquidator restricting the claim of Canara Bank to Rs. 6,74,06,244.45p. is unexceptionable.

12. The next question is whether Canara Bank can claim post-liquidation interest after winding up ? Dealing with this question whether a secured creditor is entitled to claim interest after the date of winding up order, after referring to Rules 154 and 156 of the Companies (Court) Rules, I have held as under in the order in C.A. Nos. 535 and 536 of 2002 delivered by me today.

".. .The liabilities of the company have to be determined as on the date of winding up and not subsequent thereto. This is made clear by Rule 154 of the Companies (Court) Rules, which is to the effect that the value of debts and claims against the company shall be estimated according the value thereof at the date of the order of winding up of the company or where before the presentation of the petition for winding up, a resolution has to be passed by the company for voluntary winding up, at the date of passing of such resolution. Nonetheless, as per Rule 156, it is competent for the Official Liquidator to allow interest at the rate not exceeding 4 per cent per annum from the date when the debt becomes payable if such debt is payable by virtue of written agreement."

13. In Rajasthan Financial Corpn. v. Official Liquidator, Jaipur Spg. & Wvg. Mills Ltd. [1997] 88 Comp. Cas. 192, the Rajasthan High Court considered the question as to how much interest could be allowed and

observed thus :

"In respect of the claim of the appellant for expenses and interest from the order passed by the Official Liquidator, I find that the said order is neither speaking nor the provisions of law have been considered. With regard to expenditure incurred the estimate has to be made in accordance with Rule 154 of the Companies (Court) Rules, 1959, and for the purpose of interest provisions exist under Rule 156 of the said rules. The responsibility remains of the creditor for providing the debt. In the order of the Official Liquidator though it is mentioned that entries in respect of expenditure are not existing in the books of the company in liquidation, it has to be seen as to whether the creditor has been able to establish the claim and the same is the position in respect of interest as to under law how much interest could be allowed. The order of the Official Liquidator in this regard cannot be sustained."

14. As seen from the order of the Official Liquidator, the claim of SFC was admitted to the extent of Rs. 23.12 lakhs as unsecured claim ignoring subsequent interest of Rs. 46.89 lakhs, which was not proved as secured loan. The Official Liquidator has thoroughly analysed the statement of account and came to a conclusion that after giving credit to the various amounts paid by the company in repayment of the loan, balance outstanding as on the date of

passing of winding up order, is only about Rs. 23,11,670 rounded off to Rs. 23.12 lakhs. This is not seriously disputed. What is disputed is that the amount-payable by the company should be determined as on the date of confirmation of sale which cannot be accepted in view of Rule 154 of the Companies (Court) Rules. In A. Shanmugham ''s case (supra), Hon''ble Sri Justice AR. Lakshrnanan (as His Lordship then was) considered the question whether the cut off date for allowing the ratio at which sale proceeds divided on a pari passu basis as per Section 529 of the Companies Act should be the date of winding up order. His Lordship, after referring to the relevant ease law, ruled as follows :

"Thus, I hold that (i) the workmen become secured creditors by operation of law from the date of winding up order, (ii) the workmen have a part passu charge over the security which is held by the secured creditor under the contract, and (iii) the cut off date for arriving at the ratio at which the sale proceeds should be divided on a pari passu basis as per Section 529 of the Companies Act, 1956, should be the date of the winding up order and not the date of sale. The workmen are entitled to claim interest from the date of the winding up order till the date of realisation of security."

For the above reasons, I do not see any infirmity or illegality in the impugned notice rejecting part of the claim of the appellant.

The appeal (application) is, therefore, dismissed.

