(2010) 07 P&H CK 0046

In the Punjab And Haryana At Chandigarh

Case No : C.P. NO. 40 of 1998 and C.A. NO. 774 of 2009

Canara Bank APPELLANT

Vs

Northland Sugar Complex Ltd. (In Liquidation) RESPONDENT

Date of Decision : 30-07-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 73
Companies Act, 1956 — Section 125, 441(2), 442, 446, 529
Contract Act, 1872 — Section 171
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 18, 19(19), 22, 25
State Financial Corporations Act, 1951 — Section 29

Citation : (2011) 165 CompCas 32 : (2011) 109 SCL 104

Hon'ble Judges : Hemant Gupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. This order shall dispose of C.A. No. 774 of 2009 filed by Canara Bank, to direct respondent No. 2-PSIDC, to release the amount payable to

the applicant as adjudicated upon by the learned Debts Recovery Appellate Tribunal, New Delhi and to dispense with the requirement to seek

permission for execution of the recovery certificate as imposed vide order dated 18-9-1998, passed by this court. In the alternative, the prayer is

to grant permission to the applicant to execute the recovery certificate through the Debts Recovery Tribunal, Chandigarh in view of the permission

granted by this court to file its recovery suit with a rider that for execution of the recovery certificate it shall obtain permission of this court.

2. Respondent No. 1 was ordered to be wound up by this court vide order dated 9-10-1997. The applicant had granted a term loan of Rs. 1

crore to the company (in liquidation) against the security of plant and machinery.

Vide order dated 18-9-1998, passed by this court in C. P. No.

40 of 1998, the applicant was granted permission to continue with the suit. However, it was directed that the Tribunal may pass decree, but such

decree shall not be executed against the assets of the company without the leave of this court. O.A. No. 145 of 2001 filed by the applicant was

allowed by the Debts Recovery Tribunal (for short ""the DRT"") on 27-6-2002. The applicant was found entitled to recover an amount of Rs.

1,41,83,391.53 against the defendants therein jointly and severally along with interest at 19.5 per cent per annum with quarterly rests from the date

of filing of the suit till its realisation. A finding was returned that respondent No. 2 has sold the entire unit including the assets, such as, plant and

machinery though not entitled to do so. The appeals against the aforesaid orders passed by the DRT were dismissed on 18-8-2009, but the

appeals filed by the guarantor were allowed partly. The Debts Recovery Appellate Tribunal (for short ""the DRAT"") has maintained the decree for

recovery of the amount of Rs. 1,41,83,391.33 with pendente lite and future interest at 9 per cent per annum, till actual recovery from PSIDC with

costs reckoned on the aforesaid amount.

3. It is also pleaded that in similar circumstances, the other secured creditors, i.e., State Bank of India and State Bank of Patiala, were also granted

permission to execute the recovery certificates vide order dated 30-1-2004, passed by this court, a copy of which has been appended as

annexure P4, with the following directions:

(i) by virtue of the provisions of section 171 of the Indian Contract Act, 1872, the applicant-banks have lien over the amount lying deposited under

the order of this court in respect of its dues irrespective of the fact that the sale proceeds represents the sale of goods secured by the banks under

the cash credit accounts;

(ii) the applicant-banks are entitled to interest in terms of the orders passed by the Debts Recovery Tribunal up to the date of realisation; and

(iii) the applicant-banks shall furnish undertaking to reimburse the official liquidator to the extent of the workmen''s claims found due and payable

without any demur and objection.

4. It is also pleaded that the applicant has sought permission of this court prior to enunciation of law in respect of the powers of the company court

vis-a-vis right of the secured creditors to recover the amount in terms of the provisions of the Recovery of Debts Due to Banks and Financial

Institutions Act, 1993 (for short ""the RDB Act""). But it is pleaded that after the enunciation of law by the Hon''ble Supreme Court in Allahabad

Bank v. Canara Bank (2000) 101 Comp. Cas. 64 the applicant is not required to seek permission of the company court to seek its remedy under

the Act, but in view of the order passed by this court on 18-9-1998, the permission of this court is now sought to recover the amount due as a

secured creditor.

5. The official liquidator in his reply has stated that the amount realised from the sale of the assets of the company has to be adjudicated and

disbursed as per sections 529 and 529A of the Companies Act, 1956 and certificate of the Debts Recovery Tribunal does not oust the

applicability of the provisions of the Companies Act and does not entitle the holders to recover the full amount so adjudged. The applicant is

required to lodge its claim with the official liquidator, which shall be adjudicated as per the provisions of the Companies Act, as and when the

amount is ordered to be disbursed by this court.

6. Respondent No. 2 in its reply has stated that it has taken over the plant and machinery u/s 29 of the State Financial Corporation Act, 1951 and

that the representatives of the bank were present and signed the proceedings. No objection was raised by the bank at that time nor at the time

when the plant and machinery were sold. It is also pointed out that respondent No. 2 has filed a Writ petition before this court challenging the

order of the Debts Recovery Appellate Tribunal. It is not disputed that PSIDC has surplus of Rs. 21,26,15,094.78.

7. Respondent Nos. 5 to 8 in their reply have referred to a communication made by the consortium of banks including the applicant on 2-8-1997,

in view of the advertisement brought out by the PSIDC for sale of factory, land, building, plant and machinery, to the effect that consortium banks

are secured creditors inasmuch as their charge on the company''s fixed assets is fully registered with the Registrar of Companies u/s 125 of the

Companies Act and that consortium banks have prior charge on the sale proceeds/lease money. It is also pointed out that PSIDC has sold the

property on 26-9-1997, i.e., 14 days prior to the winding up order passed on

9-10-1997 and that the official liquidator has filed C. P. No. 89 of

2002 seeking direction to the PSIDC to return the entire sale consideration of Rs. 45 crores along with interest with effect from 9-10-1997, till the

date of payment. It is also pointed out that a communication dated 11-11-1997, was written by the banks to the official liquidator to the effect that

the consortium of banks be kept out of the winding up proceedings after sale of assets. It is, thus, sought to be asserted that on the date of the

winding up, the status of the bank qua the company (in liquidation) is that of an unsecured creditor. Since there was no security against which the

banks could proceed by standing out in the winding up. It is pleaded that the applicant-bank has to lodge its claim before the official liquidator,

which shall be considered in accordance with the provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959, as an

unsecured creditor.

8. Learned counsel for the applicant has vehemently argued that the applicant has sought permission of this court to institute the proceedings under

the RDB Act, before the DRT in terms of the law as it then understood. But after the judgment of the Hon''ble Supreme Court in Allahabad

Bank''s case (supra) the applicant who is a secured creditor and has a right to execute the recovery certificate and recover the amount due and

found payable by the Debts Recovery Tribunal as modified by the Debts Recovery Appellate Tribunal (for short ""the DRAT"" subject to the rights

of the workmen as may be adjudicated upon by the official liquidator u/s 529A of the Companies Act. It is contended that similar directions have

already been issued in respect of the other secured creditors, namely, State Bank of India and State Bank of Patiala. Therefore, the present

application should be allowed in the same terms as the applications of the other two banks vide order dated 30-1-2004.

9. Shri Puneet Kansal, learned counsel appearing for respondent Nos. 5 to 8, has vehemently argued that the applicant is an unsecured creditor

and its claim is required to be adjudicated upon by the official liquidator. The recovery certificate issued by the DRT under the RDB Act does not

confer any priority of rights to recover the amount from the sale of the assets including the plant and machinery. It is contended that the RDB Act

has no application as the secured assets were put to sale before the order of winding up was passed by this court. It is also contended that the

applicant is not entitled to recover any amount over and above the amount due to the applicant on the date of winding up of the company.

10. A few other facts which are relevant are that the petition for winding up was filed before this court on 9-5-1996 and that in the public interest

litigation, this court issued certain directions on 27-9-1996, in respect of payment of dues to the growers of sugarcane and utilisation of nearly 22

lakhs quintals of sugar cane standing in the fields. This court constituted a Committee for sale of sugar molasses (bagasse) with a direction that the

expenses to be borne by the concerned bank-PSIDC and the company subject to further directions as may be issued. Subsequently, an order of

winding up was passed on 9-10-1997, allowing the petition for winding up with the following observations:

Mr. J.S. Narang, senior advocate and P.D. Mehta, advocate, have appeared on behalf of the consortium of State Bank of India, State Bank of

Patiala and Canara Bank. The only objection raised by Mr. Narang to the winding up of the respondent-company is that consortium of banks

being the secured creditors of the company, the securities charged to the said banks cannot be sold or disposed of in any manner, interfered with

by the official liquidator if the company is ordered to be wound up and the official liquidator is appointed by this court.

After hearing counsel and going through the record, prayer made in this petition is allowed and the respondent-company is ordered to be wound

up. Order of winding up of the respondent-company be published in one issue each of the daily Tribune Punjabi and Punjab Government Gazette.

The official liquidator attached to this court is directed to take forthwith in his custody or under his control all properties, books of account and

papers, etc., of the company. It would be the duty of the company to deliver possession of the properties of the company to the official liquidator.

As regards the objection raised by Shri Narang, it is directed that the consortium of banks shall give details to the official liquidator of the assets

and securities charged to the consortium of banks and on verifying and having been satisfied, the official liquidator shall keep the assets and

securities charged to the consortium of bank being secured creditors, out of winding up proceedings.

11. On 29-8-1997, an order was passed in other proceedings that the sale proceeds in pursuance of the order shall be deposited with the State

Bank of Patiala, High Court Branch, Chandigarh and disbursement of the amount so deposited will only be in furtherance of the orders passed by

the court of competent jurisdiction.

12. Still further, it is not disputed that PSIDC has taken over the entire assets of the company (in liquidation) in exercise of the powers conferred

u/s 29 of the State Financial Corporation Act, 1951, including the assets not secured with it.

13. In my opinion, the following questions need to be examined in the present application:

(1) Whether the applicant is an unsecured creditor and thus, it is required to lodge its claim before the official liquidator for adjudication ?

(2) Whether the DRT under the RDB Act, will have the jurisdiction in respect of the proceedings initiated by the applicant, though secured assets

were put to sale by PSIDC prior to the order of the winding up ?

(3) Whether the proceedings before the DRT are in respect of the money realised by the secured creditors ?

(4) Whether the claim of the applicant being a secured creditor, is subject to the rights of the other secured creditors including the claim of the

workmen u/s 529A of the Companies Act, 1956 ?

Question No. 1

14. It has been held by the DRT in its order annexure P2 that the applicant is a secured creditor. The Tribunal held to the following effect:

Thus, their contention is also rejected. In case, any separate amount is lying deposited with the Hon''ble High Court, the applicant-bank shall be at

liberty to take steps in accordance with law to lay hands on the same too. It is also held that the bank is a secured creditor as its charge has been

duly registered with the Registrar of Companies, as is evident from exhibit A5, the charge certificate.

Such finding has been affirmed in appeal by the DRAT, when it was held by the Debts Recovery Appellate Tribunal, to the following effect:

... the inventory/seizure memo prepared by PSIDC at the time of takeover was even signed by the officials of the three banks. The presence of the

three banks at the time of takeover of the fixed assets including plant and machinery of the borrower company by PSIDC on July 17, 1996, is also

an undeniable fact. Plant and machinery and accessories were hypothecated as first charge in favour of three banks, viz, Canara Bank, State Bank

of India, State Bank of Patiala, whereas stocks of finished goods, raw material, by-products and allied products were pledged/ hypothecated in

favour of State Bank of Patiala and State Bank of India. Obviously, the three banks consented and acquiesced for an illegal act by PSIDC in

taking over of those assets also which were under the first charge of the said three banks. They never took any steps to protect their interest.

15. As a consequence of the said finding, the DRAT, held that the liability of the surety got discharged because of the negligence of the lending

banks. It was further found that the applicant is entitled to recover an amount of Rs. 1,41,83,391.33 with pendente lite and future interest at 9 per

cent per annum, till actual recovery from PSIDC with costs reckoned on the aforesaid amount.

16. The argument of Shri Kansal that the applicant is an unsecured creditor in view of the sale of assets by PSIDC, before the winding up, is

misconceived. Firstly, the winding up order relates back to the date of filing of the winding up petition, i.e., on 9-5-1996, in terms of section

441(2) of the Companies Act. Secondly, the act of sale of the assets once secured in favour of the applicant, will not make the applicant an

unsecured creditor on account of sale by the PSIDC. After sale the money realised by the sale of the secured assets would continue to be security

against which a secured creditor can proceed and realise its dues. The sale proceeds is the cash worth of the security of the assets. Therefore, the

act of sale of the secured assets will not render a secured creditor as an unsecured creditor. Question No. 2

17. In Allahabad Bank''s case (supra) the unsecured creditor has sold the assets of the company on the strength of money decree obtained by it

from the DRT. The secured creditor has initiated proceedings under the RDB Act, but has not been granted any certificate of recovery. It was held

that sections 17 and 18 of the RDB Act, are exclusive in respect of the question of adjudication of the liability. It was also held that the leave of the

company court is not necessary as the jurisdiction of the Tribunal is exclusive. It was also held that section 19(19) of the RDB Act is inconsistent with section 446 and other provisions of the Companies Act, 1956 and only section 529A is attracted to the proceedings before the Tribunal and

thus, on the question of execution and working out priorities, the special provisions made in the RDB Act, have to be applied. It was held to the

following effect (page 88):

For the aforesaid reasons, we hold that at the stage of adjudication u/s 17 and execution of the certificate u/s 25 etc., the provisions of the RDB

Act, 1993, confer exclusive jurisdiction in the Tribunal and the Recovery Officer in respect of debts payable to banks and financial institutions and

there can be no interference by the company court u/s 442 read with section 537 or u/s 446 of the Companies Act, 1956. In respect of the monies

realised under the RDB Act, the question of priorities among the banks and financial institutions and other creditors can be decided only by the

Tribunal under the RDB Act and in accordance with section 19(19) read with section 529A of the Companies Act and in no other manner. The

provisions of the RDB Act, 1993, are to the above extent inconsistent with the provisions of the Companies Act, 1956, and the latter Act has to

yield to the provisions of the former. This position holds good during the pendency of the winding up petition against the debtor company and also

after a winding up order is passed. No leave of the company court is necessary for initiating or continuing the proceedings under the RDB Act,

1993. Point Nos. 2 and 3 are decided accordingly in favour of the appellant and against the respondents.

18. The Hon''ble Supreme Court has also considered the priorities amongst the secured creditors in respect of a defaulter against whom no

winding up order has been passed. It was held to the following effect (page 89 Comp. Cas. 101) :

Where the defendant-company is a company against which no winding up order is passed, the company, in our view, is like any other defendant

and if in such a situation a question of priority arises before the Tribunal, in respect of any monies realised under the RDB Act, as between the

bank or financial institutions on the one hand and the other creditors on the other, it will, in our opinion, be necessary for the Tribunal to decide

such questions of priority bearing in mind the principles underlying section 73 of the Civil Procedure Code. Section 22 of the RDB Act, in our view, gives sufficiently wide powers to the Tribunal and the Appellate Tribunal to decide such questions of priorities, subject only to the principles

of natural justice. This court has explained that the powers u/s 22 are wider than those of civil courts and the only restriction on its powers is that

the principles of natural justice have to be followed.

19. It has been held that it shall be necessary for the Tribunal to decide the question of priority by keeping in mind the principles underlying section

73 of the Code of Civil Procedure. It has been further held that u/s 73 of the Code of Civil Procedure, sharing of the sale proceeds is permissible

only if the person seeking such share has obtained a decree or an order of adjudication from the Tribunal and also complied with other conditions

laid down u/s 73 of the Code of Civil Procedure. It was, thus, concluded that Canara Bank in the aforesaid case, is not in a position to invoke the

provisions underlying section 73 of the Code of Civil Procedure, 1908, because it has not obtained any decree or adjudication from the Tribunal.

Thus, in view of the judgment of the Hon''ble Supreme Court in Allahabad Bank''s case (supra) it is the Tribunal and the Tribunal alone, which

would have jurisdiction to entertain the question of priorities in terms of section 22 of the RDB Act.

Question No. 3

20. hri Kansal has vehemently argued that the Debts Recovery Tribunal has the jurisdiction only in respect of money realised from the sale of the

assets of the defaulters. Reference was made to paragraphs 54 and 56 of the judgment.

21. However, I find that the contention of Shri Kansal is wholly misconceived. The discussion in the aforesaid paras is in respect of the facts of the

case. Allahabad Bank, as an unsecured creditor, has sold property of the company on the strength of a money decree obtained from the DRT. The

question of appropriation raised was in respect of the said sale consideration. Therefore, the contention that the Tribunal has jurisdiction only in

respect of the money realised, is untenable.

Question No. 4

22. The Hon''ble Supreme Court in Allahabad Bank''s case (supra), has also examined that the secured creditors fall under two categories: (i)

those who go before the company court, and (ii) those who opt to stand outside the winding up to realise their security. In respect of such secured

creditor, the following findings are relevant (page 92):

The second class of secured creditors referred to above are those who come u/s 529A(1)(b) read with proviso (c) to section 529(1). These are

those who opt to stand outside the winding up to realise their security. Inasmuch as section 19(19) permits distribution to secured creditors only in

accordance with section 529A, the said category is the one consisting of creditors who stand outside the winding up. These secured creditors in

certain circumstances can come before the company court (here the Tribunal) and claim priority over all other creditors for release of amounts out

of the other monies lying in the company court (here, the Tribunal). This limited priority is declared in section 529A(1) but it is restricted only to the

extent specified in clause (b) of section 529A(1). The said provision refers to subclause (c) of the proviso to section 529(1) and it is necessary to

understand the scope of the said provision. 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.

23. In view of the above, the applicant is a secured creditor, who has opted to stand outside the winding up. The secured assets have been put to

sale by the PSIDC including the assets secured in favour of the applicant. Therefore, the applicant is entitled to recover the amount of Rs.

1,41,83,391.33 with pendente lite and future interest at 9 per cent per annum till actual recovery, as found by the DRT and modified by the

DRAT, from the sale proceeds lying in deposit with PSIDC. However, such entitlement is subject to the right of the claim of the Workmen u/s

529A of the Companies Act, 1956, as and when adjudicated upon by the official liquidator.

24. In view of the above, the present application is allowed and the applicant-bank is found entitled to recover the amount of Rs. 1,41,83,391.33

with pendente lite and future interest at 9 per cent per annum till recovery, in terms of the order passed by the DRT. The applicant shall furnish undertaking to reimburse the official liquidator to the extent of workmen''s claim found due and payable without any demur and objection.

