**(1990) 04 MAD CK 0026**

**In the Madras High Court**

Canara Bank APPELLANT

Vs

Official Liquidator RESPONDENT

**Date of Decision :** 05-04-1990

**Acts Referred:**

Companies Act, 1956 — Section 446, 446(1), 520, 529, 529A
Provincial Insolvency Act, 1920 — Section 28, 47, 48, 61

**Citation :** (1991) 70 CompCas 295

**Hon'ble Judges :** Janarthanam, J

**Bench :** Single Bench

# Judgement

Janarthanam, J.—Ratna Packaging Complex (P.) Ltd. is a private limited company registered under the Companies Act, 1956 (for short

the Act, 1956""), having its registered office at Rural Industrial Estate, Kattukuppam, Pondicherry. It carried on business in the manufacture of

pacing materialls like corrugated boxes, rolls-boards and heavy duty shipping containers, etc. The Canara Bank offered certain finanical facilities as

a secured creditor to the said company, which availed of the same on execution of necessary documents. Similarly, the Pondicherry INdustrial

Promotion Devlopment and Investment Corporation Ltd. advanced certain amounts to the company and they also stood as guarantors to the bank

for repayment of the amount by the company. The company on its inability to pay its debts was wound up on a petition by a crditor in Company

Petition No. 56 of 1984 by an order of this court dated November 25, 1985, and the property of the company came to be vested with the official

liquidator attached to this court.

2. Prior to the initiation of the winding up proceedings, the bank instiruted a suit, Original Suit No. 427 og 1984, on the file of the Principal

 

Subordinate Judge, Pondicherry, on August 1, 1984, for realisation of the debt due to them against the company and others. The bank has now

come forward with the present application u/s 446 of the Act of 1956 praying for grant of leave to continue the proceedings in Original Suit No.

427 of 1984, on the file of the Principal Subordinate Judge, Pondicherry, impleading as respondents, the company now represented by the official

liquiator besides the five directors and the Pondicherry Industrial Promotion Development Corporation Ltd. represented by its managing director.

3. The official liquidator has filed his report stating that he has no objection to grant of leave subject to the terms (a) to (e) enumerated thereon.

Besides, the learned official liquidator on the premise of section 529 of the Act of 1956 making the law of insovency applicable to liquidation

proceedings, would raise a question of some importance, which, according to him makes it obligatory on the person coming forward with an

application u/s 446 to make an election as to whether such a person is standing within or outside the liqudation proceedings in view of the fact that

legal consequences to flow widely very depending upon the election so made.

4. The two points that arise for consideration in such circumstances are as follows :

(1) Whether it is obligatory for the applicant coming with an application u/s 446 of the Act of 1956 to make an election for his standing inside or

outside liquidation proceedings ; and

(2) Whether it is legally permissible to incorporate terms as suggested by the official liquidator whilst granting leave ?

5. Point NO. 1 : A consideration of the salient provisions adumbrated in sections 28, 47, 48 and 61 of the Provincial Insolvency Act, 1920 (for

short, ""the Act of 1920""), will be necessay for determination of the question involved on this point. Section 28 deals with the effect of an order of

adjudication. Sub-section (2) of section 28 prescribes that on the making of an order of adjudication, the whole of the property of the insolvent

shall vest in the court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter except as provided by

this Act, no creditor to whom the insolvent is indebted in respect of any debt proable under this Act shall during the pendency of the insovency

proceedings have any remedy against the property of the insolvent in respect of the debt or commence any suit or ohter legal proceeding except

with the leave of the court and on such terms as the court may impose. it is but necessary to note in this context the provisions of sub-section (6) of

the same section which provides that nohting in the section shall affect the power of any secured creditot to realise or oterwise deal with his

security, in the same manner as he would have been entitled to relise or dea with it if this section creditor to realise his security or to otherwise deal

with it and authorises him to do so in the same manner as he would have done had the section not been passsed. The power of a secured creditor

is to realise his money by the sale of the mortgaged property. The manner in which that right can be exercised is to file a suit, obtain a decree, get it

executed and get the property sold in execution of that decree. While proceeding against the property of the insolvent for the realisation of his

mortgage debt, he must in the court or the revier, because the equity of redemption vests in the court or the receiver, in view of the order of

adjudication and in their absence the secuirty cannot be realised.

6. Section 47 deals with various ways of satisfaction of debts by realisation of the secuirty. The section gives him three options. The first one is that

he can realise his secuirty and if there is something left due to him, then to come and prove for the balance. THe second option is that he has to

give up his secuirty and to come into liquidation ranking with other creditors and take his share in teh distribution of the dividends. The third option

is to value his secuirty and to come into liquidation and prove for any dues, that according to him, remain outstanding in respect of his debt on the

valuation of his security.

7. Section 48 deals with payment of interest. The section deals with two types of cases, namely, (1) where ther is no provision for payment of

interest in the agreement between the parties ; and (2) where there is an agreement to pay interest. In both the cases, the section provides for

payment of interest not exceeding six per cent. Per annum only up to the date of adjudication.

8. Section 61 dealing with priority of debts provides that where there is any surplus after payment of the debts, it shall be applied in payment of

interest from the date on which the debtor is adjudged an insolvent at the rate of six per cent. per annum on all debts entered in the schedule. This means that the proceedings after the date of adjudication should be deemed to have affected all the creditors in the same way and there is no

reason why a difference should be made between one set of creditors and another set of creditors. This provision applies to all debts entered in the

schedule whether there was or was not a stipulation between the creditors and the debtors as refards some of the debts about payment of interest.

Therefore, interest after the date of adjudication is payable not only on debts which carried interest but also on debts entered in the schedule and

which carried no interest.

9. It is to be noted here that under insolvency, the ordinary rule is that all interest ceases once there is an incolvency and no interest is ordinarily

pemissible to be granted after the presentation of a petition. It is only under sections 48 and 61 of the Act of 1920 read together that the insolvency

court has the jurisdiction to grand interest under certain circumstances as indicated above.

10. From a conspectus of various provisions of the Act of 1920, referred to above, it is crystal clear that it is not standing inside or outside the

liquildation at the time of making an application u/s 446 of the Act of 1956, and it is open to him to prove the balance ddue to him aftertaking the

net amount realised by him from the secuirty by the institution of propceeding in a court of law and for the balance die he will be recovering as an

ordinary creditors in the insolvency proceedings for the proof of the balance of his debt before the insolvent is discharged. The synonym of the

word balance used in section 47(1) of the Provincial Insolvancy Act, is of pramount impotance which calls for determination, so as to aviod any

confusion regarding the amount provable in liquidation proceedings before the offical liqudator by a secured credito, after realisation of the amount

due to him by exhausting the security offered to him. The learned official liquidator would submit that when the company goes into liquidation, a

secured creditor may realise his security and prove for any balance outstanding and in that case, the remaining assets of the company would alone

be liable for such principal and interest as was due on the date of the order ofwinding up. This argument is repelled by learned counsel on the other

side by stating that the interest due after the date of liquidation is not to be excluded from the balance which is allowed to be proved u/s 47(1), as section 48 has no application at all to secured creditors. In support of his submission, the learned official liquidator would place reliance upon the

definition of ""secured creditor"" u/s 2(e) which is as follows:

''secured creditor'' means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt

due to him from the debtor ;

11. He also placed reliance on the decisions in Ram Chand v. Bank of Upper India Ltd., Delhi, ILR 1922 Lah 59 ; AIR 1922 Lah 281 and H.

Oppenheimer v. M. E. Moolla and Sons Ltd., ILR 1929 Rang 514 ; AIR 1930 Rang 47. Learned counsel for the other side placed implicit

reliance on the decision in Sharfuzzaman v. H. Hunter, AIR 1930 Oudh 2020. The learned official liquidator, placing reliance on the definition of

secured creditor"", extracted above, would submit with all force and vehemence that the moment the secuirty gets exchausted, in realisation of the

amount due to the secured creditor, by sale, and if there is any balance due, there is no meaning is stating that for such balance due, the status of

the secured creditor would remain unaffected. The sordid fact in the context of such a situation is that he has to be construed as an ordinary

unsecured creditors in the insolvency proceedings. This submission of his gets reinforced and strengthened by the ratio laid down in the two

decisions relied upon by him, cited above,. In Ram Chand v. Bank of Upper India Ltd., Delhi, ILR 1922 Lah 59; AIR 1922 Lah 281, it was held

as follows (at page 285 of AIR 1922 Lah) :

As far as possible therules of bankruptcy are appliable to liquidation matters. When a company goes into liquidation, a secured creditor may

realise his security and prove for any balance there may be outstanding. The remaining assets of the company would in thaqt case only be liable for

sluch principal and interest as was due on the date case only be liable for such principal and interest as was due on the date of the winding up

order. A secured creditor in the case of a liquidation is on the same footing as in that of insovency proceedings. The property hypothecated is thus

liable for the whole claim, principal and interest up to the date of realisation, and it is only the liabilty of the remaining assets that could be affected

by the winding up order.

12. IN H. Oppenheimer v. M. E. Moolla and Sons Ltd., ILR 1929 Rang 514 ; AIR

 

1930 Rang 47, the following was the view taken(p.48) : ""In

the liquidation proceedings of an insolvent company a secured creditor, after having exhausted his security cannot in proving as regards the balance

of his debt unsatisfied include interest after the date of the winding up order ... So far as the unsecured portion of their debts is concerned the

provisions of the Insolvency Act, generally, do not suggest any intention of putting secured creditors on a more favourable footing than unsecured.

13. In AIR 1930 20 (Oudh) the view taken was as follows (headnote) :

A secured creditor who has advantages of security may remain outside the Act. He can realise upon his secuirty. The extent to which he realises

on his security will reduce the estate in insolvency. But he obtains at first no part in the dividend and is unaffected by the proceedings. Should,

however, the amount of realisation be less than the amount due to him he is given the special privilege of proving for the balanc. This balance is the

difference between the decretal amount and the amount realised. When he has proved he will not obtain any more than his proportionate share in

the estate. He will be put then on the footing of an unsecured crditor.

14. Considering the contentions of either side and the decisions cited by learned counsel on both sides I am affixing my seal of approval to the

submission of the learned official liquidator, getting solid support in the decisions, Ram Chand v. Bank of Upper India Ltd., Delhi, ILR 1922 Lah

59 ; AIR 1922 Lah 281 and H. Oppenheimer v. M. E. Moolla and Sons Ltd., ILR 1929 Rang 514 ; AIR 1930 Rang 47. The decision cited by

the other side, viz., AIR 1930 20 (Oudh) is of no hlep, for the simple reason that that decision had not taken into account the signigicant change in

the position of an unsecured creditor, for the balance due to himafter the realisation of his amount exhausting the security by way of sale. To put it

otherwose, that decision proceeded on the basis that the postion of the secured creditor remains unaltered in any eventuality. The further

elucidation therein was that the secured creditor had been given the special privilege of proving for the balance representing the difference between

the decretal amount and thr amount realised by the sale of the security. This positon is rather inconeivable when especially the learned juge in that

case proceeded on the footing that the secured credditor is on the same footing of an unsecured creditor respecting the balance due to him. As already submitted by the learned official liquidator, the position of a secured creditor cannot at all be stated to be in abetter postion than that of the

ohter unsecured creditors, the moment the secured creditor comes before the insolvency proceedings for the proof of the balance due to him, after

realsiation of his security and in such a contingency the remaining assets of the company would be liable for principal and interest as was due on the

date of the winding up order. If this position is not made clear, while granting leave to continue the prceedings initiated u/s 446(1) of the Act, a

chaotic and confounding situation would be created when he appears before the official liquidator for the proof of the balance due to him. The

official liquidator would be placed in a delicate position and it will be embarassing for him to decide whether to honour the decree of a civil court,

in the sense of allowing the creditor to make a claim before him in respect of the entirety of the balance due to him, which is inslusive of interest up

to the date of realisation, or to restrict the claim of the secured creditor only to principal and interest up to the date of the winding up order. In this

view of the matter, the balance due to the secured creditor coming before the insolvency or liquidation proceedings, must be made specicially

clear, beyong the pale of controversy. In these circumstances, I agree with the contention of teh learned official liquidator and I answer the point

accordingly.

15. Point No. 2 : The incorporation of various terms, as suggested by the learned oficial liquidator in his report, in the order granting leave falls for

consideration in this point. It is not as if the court and id bereft of power to incorporate any terms while granting such leave and it is explicitly made

cleart by the phraseology, namely, ""except by leave of the court and subject to such terms as th ecourt may impose"" incorporated in sub-section

(1) of section 446 of the Act , 1956. The incorporation of Such terms is perhaps contemplated to safeguard the interest of the general body of

creditros, contributories and workman affected by liqudation proceedings. The incorporation of the terms (a) to (e) as suggested by the official

liquidator in his report can by no stretch of imagination be constued to be in any way affecting the interest of the applicant, in the sense of the same

causing prejudice to his cause and that apart, the learned official liquidatro acting as an officer of the court, had simply done his duty in requesting the court to incorporate all those terms in the interests of all persons affected by liqudation and, therfore, it is that all those terms deserve to be

incorporated in the order granding leave. The point is ansered accordingly.

16. In the result, the petition is allowed granting leave to the applicant as prayed for, subject to the following conditions :

(a) In the event of the applicant-bank obtaining a decree, it shall not execute it against the assets and effects of the company in liquidation not

foming part of the suit property ;

(b) In the event of the applicant-bank obtaining a decree and realising the security, the applicant-bank is precluded from proving before the learned

official liquidator for any deficiency arising out of the sale of the security, except and to the extent provided in section 529 of the Act of 1956 ;

(c) In view of the provisions contained in sections 520 and 529A of the Act, 1956 in the event of the applicant-bank realising the secuirty purant to

the deree in the suit in O. S. No. 427 of 1984 on the file of the Principal subordinate judge, Pondicherry, the applicant-bank can appropriate the

sale proceeds of the security subject to and without prejudice to the rights and claims of the workmen of the company in liquidation over the said

sale proceeds ;

(d) The grant of leave in this application to the applicant-bank will not be consturced as grant of leave to the Pondicherry Industrial Promotion

Development and Investemnt Corporation Limited (seventh defendent) which has not moved this court for leave to continue the suit in O. S. No.

427 of 1984 ;

(e) The grant of leave on terms as above to the applicant-bank does not amount to grant of leave to the Pondicherry Industrial promotion

Devlopment and Investment Corporation Limited (seventh defendant) to work out its rights, if any, as a purported secured creditor of the company

in liquidation through a court of law ;

(f) The applicant bank secured creditor can prove only for the deficiency of the balance amount repreenting the principal and interest calculated up

to the date of the order of winding up.

 