(2010) 01 MP CK 0092

In the Madhya Pradesh High Court

Case No : Company Petition No. 38 of 2001

Dhar Spinner (P) Ltd., Indore — APPELLANT

Vs

Board for Industrial and Financial Reconstruction, New Delhi and others — RESPONDENT

Date of Decision : 06-01-2010

Acts Referred:
Transfer of Property Act, 1882 — Section 48

Citation : (2010) 2 MPLJ 354

Hon'ble Judges : S.S. Kemkar, J

Bench : Single Bench

Advocate : Romesh Dave, for the Appellant; H.Y. Mehta Official Liquidator is also present in person and None for the state Bank of indore, Ujjain Branch, for the Respondent

Judgement

Shantanu Kemkar, J.

This order shall govern disposal of OLR No. 52/2008 and Company Appeal No. 1/2006.

Feeling aggrieved by the issuance of form No. 70 dated 19-1-2006 under Rule 163 of the Companies (Court) Rules, 1959 (for short the Rules) for part acceptance of the claim of the Madhya Pradesh Financial Corporation (for short M.P.F.C.) by the Official Liquidator to the extent of Rs. 59.25 lakhs as against the claim of the M.P.F.C. of Rs. 265.23 lakhs for principal and interest and Rs. 0.43 lakhs for security expenses the M.P.F.C. has filed Company Appeal No. 1/2006.

According to the M.P.F.C. it is the only first charge holder on the fixed assets of the Company in liquidation comprising of Land, Building, Plant and Machinery, in the circumstances is entitled for priority in payment on sale proceeds over all other secured creditors. It has been stated that all other secured creditors have got either subsequent or second charge and they cannot claim priority or ranking with the petitioner. The grievance of the M.P.F.C. is that the Official Liquidator has arbitrarily rejected its claim to the extent of Rs. 265.23 lakhs for principal and interest and Rs. 0.43 lakhs for security expenses and has committed grave error in allowing the claim only to the extent of Rs. 59.25 lakhs.

Through OLR No. 52/2008 the Official Liquidator has clarified its stand supporting the claim of the M.P.F.C. In spite of repeated opportunities being given to the State Bank of Indore to submit its objection to the OLR No. 52/2008 submitted by the Official Liquidator no reply/objection has been filed and at the time of hearing none appeared for the State Bank of Indore, Branch Ujjain.

According to Official Liquidator the Company in liquidation M/s Dhar Spinners has been wound up vide order dated 13-2-2004 passed by this Court. On inviting the claims in pursuance to the order of this Court passed on 11-2-2005 while deciding the OLR No. 1/2005 the Official Liquidator invited claims from creditors of the Company by issuing advertisement under Rule 148 of the Rules. Total 18 claims were received out of which two claims are of secured creditors namely M.P.F.C. and State Bank of Indore, Ujjain Branch. Nine claims are of unsecured creditors, seven are of from the shareholders which were not entertained by the Official Liquidator as they were not invited.

Against adjudication of the claim of M.P.F.C. the M.P.F.C. has filed Appeal No. 1/2006 seeking quashment of form No. 70. The Official Liquidator has stated that initially the Official Liquidator has admitted the claim of M.P.F.C. only for Rs. 59.2 lakhs considering that was the amount outstanding on account of principal as on the date of winding up order. However it has now been realized by the Official Liquidator that u/s 529-A of the Act it is the debt due to the secured creditor which is payable along with workmen''s dues in priority to all other debts. Thus, interest etc. due under an agreement registered as charge with Registrar of Companies, also falls within the ambit of debt due to the secured creditors. It has been stated in this OLR that the claim of M.P.F.C. is eligible for admission as secured debt to the extent of Rs. 265.23 lakhs (Rs. 59.25) lakhs on account of principal and Rs. 205.98 lakhs on account of interest outstanding as on 13-2-2004 i.e. the date of winding up of company). The Official Liquidator has also stated that the loan of M.P.F.C. is secured over Land, Building, Plant and Machinery installed at factory of the company in liquidation. The M.P.F.C. has exclusive first charge over the assets and has not ceded first charge to any Bank/ Financial Institutions.

It has also been made clear by the Official Liquidator that the State Bank of Indore is another secured creditor and it has first charge on goods for Rs. 116.45 lakhs and second charge on Fixed Assets for Rs. 117.45 lakhs. While adjudicating the claim of State Bank of Indore the claim has been admitted for Rs. 116.45 lakhs secured as first charge on goods and stocks and for Rs. 117.45 lakhs secured as second charge on Fixed Assets (emphasis supplied).

It has been made clear by the Official Liquidator that the Land and Building, Plaint and Machinery, Furnitures and Fixtures of the company were sold for a sum of Rs. 69 lakhs only and the sale was confirmed by this Court vide order dated 24-11-2004 passed in OLR No. 31/2004.

As regards the claim of M.P.F.C. towards security expenses to the extent of Rs. 43,225/- for protecting the assets of the company in liquidation from the date of taking possession of assets till disposal of the same the Official Liquidator has stated that the said amount can be permitted to be paid to M.P.F.C. towards reimbursement of security charges.

The Official Liquidator has also stated that after meeting all the liquidation expenses he has balance of a sum of Rs. 67,65,588/- as per books of Accounts. After making the payment of security expenses to the extent of Rs. 43,225/- to the M.P.F.C. approximately Rs. 67,22,363/- would remain.

It has been stated that only Land and Building, Plant and Machinery has been sold and the amount has been realised as would be evident from the sale notice (Annexure B) and no current assets were sold. Considering the availability of the funds, Official Liquidator has stated that the M.P.F.C. can be paid dividend of Rs. 67 lakhs being first charge over immovable assets of the Company (emphasis supplied).

Taking note of the aforesaid facts and circumstances of the case and the stand taken by the Official Liquidator in OLR No. 52/2008 which also finds support from the law laid down by the Supreme Court in the case of ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others, in which the Supreme Court has held that the provisions of Transfer of Property Act provides for different types of charges. In terms of section 48 of the Transfer of Property Act claim of the first charge holder shall prevail over the claim of the second charge holder and in a given case where the debts due to both, the first charge holder and the second charge holder, are to be realized from the property belonging to the mortgagor, the first charge holder will have to be repaid first and there is no dispute as regards the said legal position.

In view of the aforesaid law laid down by the Supreme Court and the stand taken by the Official Liquidator I am inclined to allow the Company Appeal No. 1/2006 filed by the M.P.F.C. and dispose of this OLR No. 52/2008 permitting the Official Liquidator to make payment of Rs. 43,225/- to the M.P.F.C. towards reimbursement of security expenses and permission is accorded to the Official Liquidator to make payment of Rs. 67 lakhs to the M.P.F.C. being secured creditor and first charge holder in respect to Fixed Assets (Land and Building, Plant and Machinery, Furniture and Fixtures) of the Company. The payment be made through Bank Draft by the Official Liquidator to the M.P.F.C.

List this matter after eight weeks.

C. C. within three days.

