

(2002) 10 MAD CK 0206

In the Madras High Court

Case No : C.P. No. 526 of 2000 and Company Application No's. 403 and 404 of 2002

Escorts Finance Ltd.

APPELLANT

Vs

Fidelity Industries Ltd. and Another
First Leasing Co. of
India Ltd. Vs Escorts Finance Ltd. and Others

RESPONDENT

Date of Decision : 11-10-2002

Acts Referred:

Companies Act, 1956 — Section 125, 125(1), 536, 536(2)

Citation : (2003) 117 CompCas 282

Hon'ble Judges : P. Sathasivam, J

Bench : Single Bench

Advocate : Arvind P. Datar, for R. Senthil Kumar, J. Nithyanandam, for the Appellant; P.L. Narayanan, for the Respondent

Judgement

P. Sathasivam, J.—In Company Application No. 403 of 2002, the applicant First Leasing Company of India Ltd., has prayed for an order to declare that the charge created by the second respondent-company (Fidelity Industries Ltd.--in liquidation) in favour of the applicant herein and registered with the Registrar of Companies on August 16, 2000, is the only valid and exclusive charge in respect of the immovable properties of the second respondent-company measuring to an extent of 42 acres and 50 cents located at Ulandai and Kilai villages in Sriperumbudur Taluk, Chengalpattu District, further, the charge in favour of the applicant has priority and will prevail over the unregistered charge in favour of the third respondent herein (IDBI), which is effectually void against the liquidator and any creditor of the second respondent-company and consequently direct the third respondent to hand over the title deeds of the said property to the applicant.

2. In Company Application No. 404 of 2002, the very same applicant has prayed for leave to institute an appropriate suit against the official liquidator for the company in liquidation in respect of the security by way of a charge created in favour of the applicant herein over the immovable properties of the second

respondent-company measuring to an extent of 42 acres and 50 cents located at Ulandai and Kilai villages in Sriperumbudur Taluk, Chengalpattu District.

3. The case of the appellant is briefly stated hereunder :

According to them, the applicant is a secured creditor of the second respondent-company and the second respondent-company had executed two hire-purchase agreements on July 29, 1997, and March 2, 1998, respectively in favour of the applicant herein. In terms of the agreements, various items of plant and machinery were given to the second respondent's company on hire basis. The second respondent herein had been irregular in payment of instalments of hire/penal charges and a sum of Rs. 1,98,56,640 was due to the applicant as on August 4, 2000, the second respondent had created a second charge in respect of 4,204.50 cents of vacant freehold land located in Ulandai and Kilai villages in Sriperumbudur Taluk in favour of the applicant herein. It is also evidenced by the letters of the second respondent dated August 4, 2000. The said charge has also been registered with the Registrar of Companies pursuant to Section 125 of the Companies Act, 1956, on August 16, 2000, after due compliance with all statutory requirements.

4. It is further stated that the second respondent herein had deposited the title deeds of the aforementioned immovable property with the third respondent--IDBI on August 2, 1999, as security for credit facilities availed of from them. Therefore, the applicant was given copies of the title deeds instead of the originals. However, no charge has been registered in favour of the third respondent with regard to the said property. Verification shows that a charge has been created and registered over the movable assets of the second respondent, which are valued at Rs. 26.50 crores in favour of the third respondent. Thus, the only valid and registered charge on the immovable property of the second respondent is that one created in favour of the applicant herein. In view of the non-registration of the first charge in favour of the third respondent IDBI with the Registrar of Companies, the said charge is void against the liquidator and any creditor of the second respondent-company. Hence, the IDBI is precluded from enforcing its claim as a secured creditor as regards the immovable property of the second respondent.

5. The third respondent IDBI has filed a counter affidavit, wherein it is stated that it has granted various financial assistance aggregating to 710 million to the second respondent for meeting its working capital requirements. They entered into loan agreements with the third respondent on April 7, 1998, November 4, 1998, and July 15, 1999. In terms of the said loan agreements, the loans were required to be secured, inter alia, by a first charge and a mortgage on the movable and immovable properties of the second respondent. The second respondent deposited the title deeds in respect of the immovable properties situate at Kilai and Ulandai. Meanwhile, it came to the notice that a winding up petition is pending against the company before this court, and the second respondent failed to obtain permission from this court to complete the mortgage

formalities in favour of this respondent to file a charge with Registrar of Companies. The original title deeds were deposited with them as surety for financial assistance and the third respondent has lien over the said title deeds of the immovable property in question until the third respondent's dues are cleared. Further, the declaration sought for is to be rejected for the reason that the applicant's charge over the immovable property created by the second respondent is subsequent to presentation of the winding up petition and therefore, it cannot be treated as a validly created charge. In the circumstances, the relief sought for by the applicant and the connected reliefs have to be rejected.

6. Heard the learned senior counsel for the applicant as well as the respondents.

7. The only point for consideration is,

"Whether the charge created by the second respondent in favour of the applicant and registered with the Registrar of Companies on August 16, 2000, is the only valid and exclusive charge in respect of the immovable properties of the second respondent ?"

8. There is no dispute that the above application is filed u/s 446(2)(b) of the Companies Act, 1956 (in short "the Act, 1956"). It is also not disputed that a winding up petition was filed before this court on June 27, 2000, and a winding up order was passed in April 2001. It is also not disputed that as per Section 441(2) of the Companies Act, 1956, once the company is ordered to be wound up, it dates back to the filing of the company petition, i.e., on June 27, 2000. It is the case of the applicant that pursuant to the hire-purchase agreements dated July 29, 1997, and March 2, 1998, various items of plant and machinery were given to the second respondent on hire. In respect of payment of instalments/interest/penal charges, the second respondent had created a second charge in respect of 4,204.50 cents of vacant land located at Ulandai and Kilai villages, Sriperumbudur Taluk. It is to be noted that it is a second charge which is evidenced by the letter of the second respondent dated August 4, 2000. It is vehemently contended by the learned senior counsel for the applicant that inasmuch as the said charge has been registered with the Registrar of Companies pursuant to Section 125 of the Act, 1956, on August 16, 2000, after due compliance with all statutory requirements, the said charge may be declared as valid and exclusive charge in respect of immovable properties of the second respondent.

9. On the other hand, the third respondent IDBI has claimed that pursuant to the loan agreements dated April 7, 1998, November 4, 1998, and July 15, 1999, with the second respondent, the second respondent deposited the title deeds in respect of the very same immovable properties situate at Ulandai and Kilai villages. Though it is prior to the filing of the winding up petition, admittedly, the said charge has not been registered with the Registrar of Companies in terms of Section 125 of the Companies Act, 1956. In this regard, it is relevant to refer

Sub-section (1) of Section 125 of the Companies Act, 1956.

"125. Certain charges to be void against liquidator or creditors unless registered.--(1) Subject to the provisions of this Part, every charge created on or after the 1st day of April, 1914, by a company and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidence, or a copy thereof verified in the prescribed manner, are filed with the Registrar for registration in the manner required by this Act within (thirty) days after the date of its creation."

10. It is clear that unless the charge together with instrument by which the charge is created is verified in the prescribed manner and filed with the Registrar for registration in the manner required within 30 days after the date of its creation, the charge is to be void against the liquidator and the creditors of the company in liquidation. I have already referred to the admitted factual position, that the second respondent had created a second charge in respect of the immovable properties at Ulandai and Kilai villages in Sriperumbudur Taluk, but subsequent to the first charge with the third respondent IDBI and after filing of the winding up petition, the said charge has been registered with the Registrar of Companies in accordance with the statutory provisions that too, after compliance with all requirements.

11. Mr. Arvind P. Datar, learned senior counsel has also brought to my notice regarding fulfilment of other statutory requirements by the second respondent and the applicant herein. The copies of those documents are annexed at pages 11, 13, 23, 25 and 27 of the typed set of papers. It is also to be noted that a charge has been created and registered over the movable assets of the second respondent which are valued at Rs. 26.50 crores in favour of the third respondent herein. The verification of all the documents from the typed set of papers clearly shows that the only valid and registered charge on the immovable property, namely 4,204.50 cents of vacant land located at Ulandai and Kilai villages, Sriperumbudur Taluk of the second respondent is in favour of the applicant herein.

12. No doubt, Mr. P. L. Narayanan, learned counsel for the third respondent by drawing my attention to the letter dated August 4, 2000, of the second respondent addressed to the general manager, IDBI, would contend that inasmuch as original documents of title in respect of property at Sriperumbudur have been mortgaged with the third respondent for creating a charge for the credit facility of Rs. 26.50 crores and in the light of the specific statement that "after all payments under the aforesaid facility are fully discharged" would contend that even in the absence of proper registration with the Registrar of Companies, the first unregistered charge with the IDBI gets priority over that of the second charge with the applicant herein. By pointing out the proviso to Sub-

section (1) of Section 125 of the Companies Act, 1956, he would contend that even now it would be open to the IDBI to move the Registrar of Companies for registration of their charge by filing appropriate application. In this regard, it is relevant to refer to the Commentaries by Ramaiya on Companies Act.

"In re Resinoid and Mica Products Ltd. [1982] 3 All ER 677 (CA) ; [1983] Ch. 132, Lord Denning M. R. held that time should not be extended for registering a charge after the company had gone into liquidation as such a step would prejudicially affect the rights of all parties which are determined on the commencement of winding up. The court also held following the dicta In re, Charles (LH) and Co., Ltd. [1935] WN 15 that an extension of time was properly refused when the application was not made for 20 months and then moved when liquidation was imminent. Followed in Victoria Housing Estates Ltd. v. Ashpurton Estates Ltd. [1982] 3 All ER 665 (CA) where the court further observed that when a chargee discovers that, by mistake, he is unregistered, he should apply without delay for an extension of time if he desires to register; and the court, when asked to exercise its discretion, should look askance at a chargee who deliberately defers his application in order to see which course would be to his best advantage. See also Krishna Silicate and Glass Works Ltd., In re [1975] Tax LR 1253 (Cal), Victoria Housing Estates Ltd. v. Ashpurton Estates Ltd. [1982] 3 All ER 665 (CA) ; [1983] Ch 110, In re Resinoid and Mica Products Ltd. [1982] 3 All ER 677 (CA) ; [1983] Ch. 132.

A very exceptional case will have to be made out to justify the court in making an order for rectification, after a company has gone into liquidation and the rights of unsecured creditor in the liquidation had crystallised. Mechanisations (Eaglescliffe) Ltd., In re [1965] 35 Comp Cas 478 (Ch D) ; [1966] Ch. 20."

13. Before considering the above aspect, it is to be noted that Section 531(1) of the Companies Act, 1956, applies with reference to transactions prior to the order of winding up and Section 536(2) applies transfers and transactions after the commencement of winding up proceedings. It is true that by virtue of these provisions the second charge created by the second respondent with the applicant on August 16, 2000, cannot be sustained. On the other hand, I have already referred to the fact that it had duly been registered with the Registrar of Companies in terms of Section 125(1) of the Companies Act, 1956. Though the charge created by the second respondent with the third respondent IDBI is earlier to the winding up proceedings and first charge, in view of the fact that it had not been registered with the Registrar of Companies in terms of Section 125(1) of the Companies Act, 1956, the same is void against the liquidator and the creditors of the company. The materials furnished by the applicant show that the agreements between the second respondent and the applicant is a bona fide contract and there is no mala fide intention. Sections 130, 131, 143(1) of the Companies Act, 1956, clearly refer to the salient features that registered charges are to be kept by the Registrar and the same shall be maintained in chronological index in the prescribed form with prescribed particulars and it shall be the duty

of the company to file it with the Registrar for registration of particulars of every charge created by the company. I have already referred to the fact that both those conditions have been fully complied by the second respondent and applicant in so far as the charge created in respect of the immovable property at Sriperumbudur. Even though similar charge has been created and registered with the Registrar of Companies in respect of movable properties by respondents Nos. 2 and 3, the same procedure has not been followed by the third respondent in respect of the immovable property at Sriperumbudur.

14. Now, I shall consider various decisions referred to on the above aspects, Mr. Arvind P. Datar, learned senior counsel for the applicant relied on the following English decisions :

"1. In re Park Ward and Company Ltd. [1926] Ch 828 ;

2. In re Steane's (Bournemouth) Ltd. [1950] 1 All ER 21 (Ch D) ;

3. In re Clifton Place Garage Ltd, [1969] 3 All ER 892 (Ch D)."

In re Park Ward and Company Ltd. [1926] Ch 828, between the date of presentation of a petition for the winding up of a company and the date of the order for its compulsory winding up a debenture was issued by the company to secure to the debenture holder the repayment of 1200 ? advanced to enable the company to pay wages due to the staff. A summons was taken out by the debenture holder for an order validating his debenture, notwithstanding the provisions of Section 205(2) of the Companies (Consolidation) Act, 1908. The debenture holder was, at the time of issue of the debenture, aware that the petition for the winding up of the company had been presented. It was held that notwithstanding his knowledge of the presentation of the petition, he was entitled to a declaration that the debenture was valid. It is not disputed that Section 205 is similar to Section 536 of the Indian Companies Act A similar conclusion has been arrived at in In re Steane's (Bournemouth) Ltd. [1950] 1 All ER 21 (Ch D).

15. In re Clifton Place Garage Ltd. [1969] 3 All ER 892 (Ch D), it is held that where a disposition of a company's property is made after the commencement of the winding up of that company, the court should make an order u/s 227 of the Companies Act, 1948, validating the disposition only if the applicant proves that the act was done reasonably and in good faith for the benefit of the company. In our case there is no material to show that the second respondent created a second charge with the applicant in respect of the immovable property at Sriperumbudur with intention to cheat anyone. On the other hand, the act was done in good faith for the benefit of the company. Though it is argued that the English decisions cannot be relied upon by the Indian courts in view of the corresponding provisions in the English Act and in the Indian Companies Act, I am of the view that the views expressed by the English courts can be considered and followed.

16. Before considering the Indian decisions, it is necessary to refer Sub-section (2) of the Section 536 of the Companies Act, 1956.

"536. Avoidance of transfers, etc., after commencement of winding up.--...

(2) In the case of a winding up by or subject to the supervision of the court, any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall, unless the courts otherwise orders, be void."

17. The very same section has been considered by the Kerala High Court in the case of Travancore Rayons Ltd. v. Registrar of Companies [1988] 64 Comp Cas 819 ; [1989] 1 CLJ 77. The hon"ble judge while considering Section 536(2) :

"The animus of Section 536(2) is to forbid malapropos and objectionable disposition or dissipation of property which would ultimately fall to a low ebb or tail-off the assets otherwise available for distribution among the creditors of the company in the event of winding up. But the section leaves a reserve power of discretion to justify and uphold all genuine and proper transactions, exercising a sound discretion normally validating transactions which are benign and honest; transactions which have been done in the best interest of the company and in the ordinary course of the company"s business. The legislative intent is plainly manifested by the use of the select express "unless the court otherwise orders" which mandates silently but eloquently, a duty on the judge to examine each case on its peculiarities, facts and circumstances, special bearing being given to the question of good faith and honest intention aimed at the best interest of the company. The omission to indicate any special guiding principles in the matter of discretion to be exercised by the court, makes it clear that it is not left entirely at large, but controlled only by general principles which apply to every kind of judicial discretion."

18. In the case of Sidhpur Mills Co. Ltd., In re [1987] 1 CLJ 71, the Gujarat High Court has held that, the court has an absolute discretion so as to validate the transaction after presentation of the winding up petition. It is further held that the discretion is to be exercised on recognised principles which guide the exercise of judicial discretion generally with particular attention to the interest of the company. The court can validate such impugned transaction in those bona fide cases which demand protection of equitable considerations.

19. In the case of J. Sen Gupta (Pvt.) Ltd., In re [1962] 32 Comp Cas 876, the Calcutta High Court has held that, u/s 536 of the Companies Act the court has an absolute discretion to validate a transfer of the company"s assets made after the commencement of the winding up and in its discretion the court can validate even transactions which are not entered into in the ordinary course of the current business of the company. It is further held that, it is found that the transaction was for the benefit of and in the interests of the company, or for keeping the company going generally, a transfer may be confirmed by the court

even if it was not made in the ordinary course of the business of the company.

20. Coming to the fact of non-registration of the charges before the Registrar of Companies u/s 125 of the Companies Act, 1956, in the case of Rajasthan Financial Corporation Vs. Official Liquidator, Jaipur Spinning and Weaving Mills Ltd. (In Liquidation), , the appellant, the Rajasthan Financial Corporation, filed a claim with the official liquidator in the liquidation of a company, as a secured creditor of the company, for recovery of the loan advanced to the company with interest up to February 28, 1991, and expenses incurred in connection with the loan. The official liquidator treated the appellant as an ordinary creditor, admitted the claim to principal, but allowed interest only up to December 1, 1983, and rejected the claim to expenses. On appeal to the company court of Jaipur Bench has held (headnote) :

"(i) that in the absence of any registration of the appellant's charge u/s 125 of the Companies Act, 1956, as on the date of the winding up order the official liquidator was justified in treating the appellant's claim as an ordinary one and not a secured one. The charge was filed with the Registrar in 1990, when the assets of the company had already been taken into custody by the official liquidator.

(ii) That, however the order of the official liquidator as to interest and expenses was not a speaking order, although it stated that entries therefore did not exist in the company's books. It had to be seen whether the creditor was able to establish the claim in terms of Rules 154 and 156 of the Companies (Court) Rules, 1959."

21. In the case of Industrial Finance Corporation of India v. Century Metals Ltd. [1992] 73 Comp Cas 630, the Delhi High Court, while considering Section 125 of the Act has held that the company going into liquidation must establish before the company court that it has a secured creditor.

22. Though it is contended that the second respondent had deposited the original title deeds relating to the immovable property at Sriperumbudur with third respondent, in the absence of registration of charge before the Registrar of Companies in terms of Section 125 of the Companies Act, 1956, I am of the view that deposit of deeds and documents was merely ancillary. In this regard, it is relevant to refer the case of Molton Finance Ltd., In re [1968] 38 Comp Cas 833 (CA) : [1968] Ch 325. In that case, a firm of stockbrokers lent ? 15,000 to a company. In order to secure repayment the company gave to the stockbrokers sub-charges on the properties and deposited deeds and documents with them "to the intent that the same may be equitably charged with the repayment" of the ? 15,000. The charges created were not registered u/s 95(1) of the Companies Act, 1948. The company went into liquidation. On a summons by the liquidator claiming, inter alia, that the deposits of the deeds and documents were void as against him for want of registration u/s 95 of the Act of 1948, and their delivery up by the stockbrokers, it was contended for the latter that they had a valid

common law lien on the documents. On an appeal by the stockbrokers from Pennycuick, who upheld the liquidators claim held, dismissing the appeal, that the deposit of the deeds and documents was merely ancillary to the equitable charge created and that the contractual right to their retention was lost when the charge was avoided for non-registration u/s 95(1) of the Companies Act, 1948. (Section 95(1) of the Companies Act, 1948, corresponds to Section 125(1) of the Companies Act, 1956).

23. In the light of what is stated above, I am satisfied that though the second charge created by the second respondent with the applicant is subsequent to the winding up proceedings, in view of the fact that it satisfies the statutory compliance with Section 125(1) of the Companies Act, 1956, and of the fact that the contract being bona fide, fair, just and reasonable and in view of the power conferred on this court under Sub-section (2) of Section 536 of the Companies Act, 1956, it is clear that the charge created by the second respondent in favour of the applicant and registered with the Registrar of Companies on August 16, 2000, is valid and a exclusive charge in respect of immovable properties of the second respondent measuring to an extent of 42 acres and 50 cents located at Kilai and Ulandai village, Sriperumbudur Taluk, Chengal-pattu District and gets priority and prevails over the unregistered charge in favour of the third respondent. Company Application No. 403 of 2002 is ordered accordingly. In view of the said conclusion, Company Application No. 404 of 2002 is also ordered.