

(1980) 04 DEL CK 0008

In the Delhi High Court

Case No : Company Appeal No. 13 of 1979

Faqir Chand Gupta

APPELLANT

Vs

Tanwar Finance Private Ltd. and Others

RESPONDENT

Date of Decision : 30-04-1980

Acts Referred:

Citation : (1981) 51 CompCas 60 : (1980) 18 DLT 482

Hon'ble Judges : Sultan Singh, J;Prakash Narain, J

Bench : Division Bench

Advocate : M.S. Mathur, K.K. Mehra, N.K. Jaggi and Santosh Jain, for the Appellant;

Judgement

Sultan Singh, J.

(1) This appeal u/s 483 of the Companies Act, 1956 is by the Auction Purchaser against the Judgment and order dated February 28, 1979 of the Company Judge declaring auction sale of the property in execution of money decree as invalid and void because it was held without leave of the Court.

(2) M/S. Tanwar Finance Private Limited a company registered under the Companies Act, 1956 (hereinafter called "the Act) in a meeting held on 16th November, a special resolution that the company be wound up voluntarily and appointed Ch. Ram Singh son of Ch. Bhanwar Singh as liquidator. Prior to the passing of this resolution Kanwar Ram Chander had filed a suit against the said company for recovery of Rs. 13.000.00 which was decreed on 6th November, 1967, and on 15th July, 1968 he got attached the land belonging to the company, measuring 22 Bighas, 8 bids was bearing Khasra No. 31 and 410/28 situated at Azadpur, Delhi. The executing court by order dated 6th September, 1968 directed sale of the said land but auction did not take place. On 3rd January, 1969 the liquidator filed a petition u/s 518 of the Act alleging that Kanwar Ram Ghandar and six others had obtained seven money decrees against the company, that Kanwar Ram Chander, decree-holder got attached the said

land, that the land had been acquired by the Union of India and notifications under Sections 4, 6 and 9 of the Land Acquisition Act had been issued and prayed that the attachment and order for sale of the land passed by the court of Sh. Shamsher Singh, Sub Judge, 1st Class, Delhi in Suit No. 761 of 1977 and Execution case No. 77 of 1963 be set aside and the land be ordered to be released and that further proceedings in execution be stayed. The seven decree-holders filed application C.A. No. 115 of 1969 before the Company Judge for the removal of the liquidator Ch. Ram Singh and for the appointment of the Official Liquidator as liquidator of the company. The Company Judge by order dated April 1, 1969, on the agreement of the parties, ordered that the voluntarily winding up would continue subject to supervision of the court and Gh. Ram Singh continued as liquidator of the Company. The Company Judge (S.K. Kapur, J.) on April 15, 1969 on the agreement of the parties passed the following orders :

" THE learned counsel agree that : (1) in view of the provisions of sections 526 and 527 of the Companies Act, 1956, the execution of decrees obtained by respondents I to 7 against Tanwar Finance Private Limited (in voluntary liquidation) be stayed; (2) the decree-holders will not sell the properties in execution of the said decrees without obtaining leave of the court u/s 537 or other relevant provision in this behalf; and (3) the question whether leave should be granted to the respondents for realisation of their amounts by sale of properties or whether it will result in undue preference to the respondents will be considered if and when the said respondents make an application in this behalf. In view of the agreement of the learned counsel, I direct that the execution of the decrees obtained by the respondents against Tanwar Finance Private Limited (in voluntary liquidation) be stayed and other question will be decided as and when an application is made by the decree holders for a permission to realise the amount. There will be no order as to costs".

(3) Accordingly seven execution cases pending before the Sub Judge, Delhi were stayed. The decree-holders then filed application C.A. No. 190 of 1969 before the Company Judge under Sections 526 and 537 of the Act on 21st May, 1969 seeking leave for the sale of the land attached in execution of the decree of Kanwar Ram Ghander and also for the sale of the said land in execution of the other six decrees. They further prayed that after the sale in execution, preference may be given to them over other creditors in the matter of payment of the amounts due to them. On 19th January, 1970 the Company Judge (S. N. Shanker, J.) passed the following orders :

" THE learned counsel for the petitioners are now agreed that the land sought to be attached is covered by the notifications issued under Sections 4 and 6 of the Land Acquisition Act, 1894. They, however, state that they are still entitled to attach the land in question with a view to leave no room for doubt in regard to their locus-standi for taking appropriate proceedings in case compensation of land is assessed and it is found to be necessary that application for enhancement of compensation is to be made. Mr. Mehra has no objection to this being done

subject to the law of the land, but he says that this will not give any preference to these petitioners as far as their right to realise their debt from the company is concerned. I have heard the learned counsel for the parties. The contention of the petitioners subject to the provisions of the Land Acquisition Act seems to be justified. Petitioner Nos. 2 to 7 may be allowed to take out execution and to have attachment of the land in question subject to the law in force. This attachment will not give them any special priority except to the extent permissible in law. The learned counsel for the parties are agreed that no further order is called for in C.A. No. 190 of 1959. This application is, Therefore, disposed of in terms of this order. No costs".

According to this order the remaining six decree-holders who were petitioners Nos. 2 to 7 in C.A. No. 190 of 1969 were allowed to take out execution and to get the land attached. It however appears that Kanwar Ram Chander, decree-holder made an application to the executing court and got the attached land sold in execution of his decree on 20th April, 1971. The liquidator filed objections under Order 21 rule 90 of the CPC before the executive court but the objections were dismissed on March 23, 1973 and the sale was confirmed. The liquidator filed an appeal before the District Judge, Delhi against the said order but his appeal was ordered to be returned on August 16, 1973 for presentation to the court having jurisdiction in the matter. It may be mentioned that the decree was for Rs. 13,000.00 and prima facie the appeal was not maintainable before the District Judge. But in fact the liquidator did not pursue the appeal after its return by the Additional District Judge. The liquidator in the meantime however filed application C.A. No. 269 of 1973 in this Court before the Company Judge under Sections 446, 513, 523 and 526 of the Act, for setting aside the sale held by the executing court in execution of the decrees in the suit, Kanwar Ram Ghander vs. Tanwar Finance Ltd. He further prayed that the sale certificate be not issued to Faquir Ghand Gupta, the auction purchaser, who had given the bid for Rs. 90,000.00 for the purchase of the said land. The liquidator also prayed that all proceedings before the executing court were null and void and be declared as such. The appellant-auction purchaser contested the claim of the liquidator. He submitted that the company court has no jurisdiction to set aside the sale held by the executing court, that the petition was barred by principles of res judicata and that the auction sale was valid. The Company Judge by the impugned order dated February 28, 1979 held that he had jurisdiction in the matter, that proceedings were not barred by principles of res judicata and that the sale was without leave and Therefore void. The auction purchaser-appellant raises the following points :

1. That order dated 19th January, 1970 passed by S.N. Shanker, J. in C.A. No. 190 of 1969 is an order granting leave to the decree-holders to take out execution and get the property attached and sold.
2. The Company Judge has no jurisdiction to entertain the application C.A. No. 269 of 1973 of the liquidator on the ground that the liquidator having failed to file an appeal against the order of the executing court dismissing his objections against the auction sale, is

debarred from moving the Company Judge to get the sale declared as null and void. 3. The Liquidator in voluntary winding up proceedings is authorised to act u/s 526 of the Companies Act without any order from the Company Judge and that he waived his right, if any, when he allowed the executing court to conduct the auction sale.

(4) Point No. 1: The Company M/s. Tanwar Finance Private Ltd. is being wound up voluntarily under the supervision of the court. The attachment of the land belonging to the company had taken place on July 15, 1968 while the special resolution for voluntary winding up was passed on November 16, 1968. The Company Judge by order dated April 15, 1969 on the agreement of the liquidator and the seven decree-holders stayed execution proceedings in their decrees and directed them not to get the property sold in execution without leave of the Court u/s 537 of the Act. He further directed that the question whether leave should be granted to them for realisation of their decretal amount by the sale of the properties or whether it would result in undue preference would be considered if and when an application is made by them. The decree-holders again approached for leave and the Company Judge in terms of the compromise between the parties passed an order dated January 19, 1970. It was brought to the notice of the Company Judge that the land is covered by notifications under Sections 4 and 9 of the Land Acquisition Act, 1894, that they were entitled to attach the land so that they might appropriate proceedings for enhancement of compensation, if necessary. The counsel for the liquidator did not object to this prayer of the decree-holders. The said land had already been attached on July 15, 1968 in execution of the decree in favor of Kanwar Ram Chander while the other six decree-holders had not got the land attached in execution of their decrees. The company Judge Therefore, only allowed the six decree-holders to take out execution and to get the land attached. The Company Judge further ordered that the attachment would not give any special priority to them. From the order it does not appear that he ever permitted the sale of the land in question. All that he said is that the six decree-holders other than Kanwar Ram Ghander may take out execution and get the land attached. He never permitted them to get the land sold. Kanwar Ram Ghander who got the land attached on July 15, 1968 had also prayed for leave to sell the land but no leave was ever granted. The effect of order dated January 19, 1970 is that the land in question was allowed to be attached in execution of the decrees of the various decree-holders but no permission was given to any of them to get the same auctioned in execution of their decrees. The decree-holders were keen to protect their rights by getting the land attached. They were under the impression that by getting the land attached, they would be in a position to take proceedings for enhancement of compensation under the Land Acquisition Act. When the idea of the decree-holders was to take proceedings for enhancement of compensation it must be presumed that they felt satisfied by getting the land attached. If the land had been allowed to be sold they would cease to have any right to move for enhancement of compensation because in case of sale it is only the auction

purchaser who might have the right in the land purchased to move for enhancement of compensation. As preference to the decree-holders was disallowed it is also obvious that the permission for sale was also refused to them. All these observations are based on the ground that there is no specific order granting leave to any of the decree-holders to get the land sold in execution of any decree. Reading the order dated January 19, 1970 as a whole the conclusion is that the six decree holders other than Kanwar Ram Chander were allowed to take out execution and attach the land in question. Counsel for the appellant-auction purchaser on the other hand contends that Kanwar Ram Chander had already got the land attached and Therefore this order be deemed to have permitted him to get the land sold. There is no force in this argument. Kanwar Ram Chander got the property attached prior to winding up. He prayed for leave to get the property sold but no order was passed granting him such leave. The decree- holders i.e. petitioner Nos. 2 to 7 in C.A. No. 190 of 1969 were keen to get some benefit by getting the land attached and Therefore they only obtained- leave for attachment of the land.

(5) We, Therefore, hold that no leave was granted to get the land sold in execution of any of the seven decrees against the company.

(6) Point No. 2: The executing court auctioned the property on April 20, 1971. The liquidator filed objections under Order 21 rule 90 of the Code of Civil Procedure, which were dismissed on March 23, 1973. The decree was for Rs. 13,000/-. The appeal against this order, being of the value of more than Rs. 10,000.00 lies to this court and not to the District Court but the liquidator filed the same before the District Judge on April 20, 1973 and the same was returned to him vide order dated August 6, 1973 for presentation to the court having jurisdiction in the matter. It appears that the liquidator did not pursue the appeal further and it is admitted that no appeal is pending. The argument of the appellant's counsel is that the liquidator having failed to challenge the order of the executing court is debarred from approaching the Company Judge and Therefore the Company Judge has no jurisdiction in the matter. When any property is auctioned, it is conducted according to the procedure prescribed under Order 21 of the Code of Civil Procedure. The aggrieved party has a right to file objections under Order 21 rule 90 of the Code of Civil Procedure. The liquidator accordingly filed objections but the objections were dismissed. The executing court interpreted the order dated January 19, 1970 of the Company Judge as an order granting leave to the decree-holder to get the property sold in execution of the decree. The ex-ecuting court further held that the order dated April 15, 1969 passed by S. K. Kapur, J. stood superseded by the order dated January 19, 1970 of S.N. Shanker, J. and held that as there was no stay for the auction of the land, the sale held by the court was not wrong. All other objections raised by the liquidator were also rejected by the executing court. The question however remains whether the proceedings under the Companies Act are in any way barred by the proceedings before the executing court. Execution proceedings are entirely different from the proceedings under the Companies Act by the

Company Judge u/s 446(2)(d) read with Section 518 of the Act. No proceedings can be taken against the property of the company except by leave of the court. As a matter of fact no proceedings can be initiated after the winding up order and if any proceedings are pending at the date of the winding up order the same cannot be continued except by the leave of the Court. Further the Company Court has been given absolute powers to entertain or dispose of any suit pending before any court against the company. The Company Court has also power to transfer a case pending in any court to its own file and to dispose it of. Section 518 of the Act reads :

" POWER to apply to Court to have questions determined or powers exercised. 518(1) The liquidator or any contributory or creditor may apply to the court- (a) to determine any question arising in the winding up of a company; or (b) to exercise, as respects the enforcing of calls, the staying of proceedings or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court. (2) The liquidator or any creditor or contributory may apply to the Court specified in sub-section (3) for an order setting aside any attachment, distress or execution put into force against the estate or effects of the company after the commencement of the winding up. (3) An application under sub-section (2) shall be made- (a) if the attachment, distress or execution is levied or put into force by a High Court, to such High Court ;and (b) if the attachment, distress or execution is levied or put into force by any other Court, to the Court having jurisdiction to wind up the company. (4) The Court, if satisfied on an application under sub-section (1) or (2) that the determination of the question or the required exercise of power or the order applied for will be just and beneficial, may accede wholly or partially to the application on such terms . and conditions as it thinks fit, or may make such other order on the application as it thinks just. (5) A copy of an order staying the proceedings in the winding up, made by virtue of this section, shall forthwith be forwarded by the Company, or otherwise as may be prescribed, to the Registrar, who shall make a minute of the order in his books relating to the company." Section 446(2) of the Act reads : Suits stayed on winding up order : 446(1) x x x x (2) The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, jurisdiction to entertain, or dispose of-- (a) any suit or proceeding by or against the company ; (b) any claim made by or against the company (including claims by or against any of its branches in India) ; (e) any application made u/s 391 by or in respect of the company; (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company ; whether such suit or proceeding has been instituted or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960."

Under clause (d) of sub-section 2 of Section 446 read with clause (b) of sub-

section (1) of Section 518 of the Act the Company Judge on the application of the liquidator has wide and. extraordinary powers on any matter arising in the course of winding up. An application for setting aside attachment, distress or execution conducted by court other than High Court, is to be made to the court having jurisdiction to wind up the company. The Company Judge Therefore is the only competent Court to set aside the auction sale conducted without leave. u/s 537 of the Act sale of any property of the Company held after the winding up order of the court without its leave is void. Thus it will be seen that proceedings u/s 446 read with section 518 of the Act are independent of the proceedings under the CPC before the executing Court. If the Company court comes to the conclusion by interpreting its own order that no leave was granted for the sale of the property the sale shall be deemed to be void within the meaning of Section 537 of the Act. The question for decision is what is the effect of the order dated 23rd March, 1973 passed by the executing court confirming the auction sale. The order of the executing court in view of Section 537 read with Sections 446 and 518 of the Act must be held to be non est because the sale was void having been held without leave of the Company Court. The order of the executing court thus cannot be said to be binding upon the Company Court. On the other hand the order passed by the Company Judge would be binding upon the parties and the executing court because the Company Judge has power to decide such question notwithstanding any other provision contained in any other law. Thus it must be held that the Company court has jurisdiction to determine whether the sale of the property belonging to a company after the commencement of the winding up is in accordance with the provisions of the Companies Act or not and if the court finds that the same is contrary to the provisions of the Companies Act, it has power to declare the same as null and void. In fact the various provisions of the Companies Act relating to winding up under the supervision of the court are extraordinary provisions and are meant to protect the property of the company under voluntary liquidation.

(7) The next argument of the learned counsel, for the appellant is that the judgment of the executing court operates as res judicata. There is no question of res judicata involved in the facts and circumstances of the present case. The jurisdiction of the executing court is different from the jurisdiction of the company court. The executing court has no jurisdiction to determine matters arising out of Section 518 or Section 446 of the Act. It is only the company court which has jurisdiction to determine whether leave is to be granted by it for the sale of the property belonging to the company.

(8) We, Therefore, hold that the Company Judge had jurisdiction to entertain the application of the liquidator to determine whether the sale held by the executing court is void. The Company Judge by the order under appeal rightly held the sale to be void.

(9) Point No. 3; Section 526 of the Companies Act reads as under : Effect of supervision order.

"526(1)Where an order is made for a winding up subject to supervision, the liquidator may, subject to any restrictions imposed by the Court, exercise all his powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily. (2) Except as provided in sub-section (1), any order made by the Court for a winding up subject to the supervision of the Court, shall for all purposes, including the staying of suits and other proceedings, be deemed to be an order of the Court for winding up the company by the Court, and shall confer full authority on the Court to make calls or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court. (3) In the construction of the provisions whereby the - Court is empowered to direct any act or thing to be done to or in favor, of the liquidator, the expression "liquidator" shall be deemed to mean the liquidator conducting the winding up, subject to the supervision of the Court".

(10) It is contended by the learned counsel for the appellant that the liquidator in voluntarily winding up of the company subject to the supervision of the court has wide powers within the meaning of sub-section (1). His contention is that no restrictions were imposed upon the liquidator by the Court and Therefore when the liquidator contested the auction proceedings before executing court he is deemed to have power to consent to the sale either expressly or by implication. By "implication" he means that the liquidator contested the auction sale by filing objections against the sale and when his objections were dismissed and no appeal was pursued, he is deemed to have consented to the sale by the executing court. In other words the liquidator waived his right to object to the sale. There is no force in this argument. The liquidator has not sold the land in question. The land was sold by the executing court and Therefore there is no question of application of Section 526(1) of the Companies Act to the facts of the present case. The . liquidator after the sale by the executing court filed objections but the same were dismissed. The liquidator being under the supervision of the court and thus accountable to it could move the court u/s 518 of the Act and pray that sale of the property belonging to the company conducted without leave be held to be void. It is not necessary in this case to further comment upon, what are the powers of a liquidator, in voluntary winding up under the supervision of the court, relating to sale of property belonging to the company.

(11) We, Therefore, hold that there is no force in the appeal. We agree with the order of the Company Judge and dismiss the appeal with no order as to costs.