
(2002) 09 KL CK 0051

In the High Court Of Kerala

Case No : M.F.A. No's. 1186 and 1232 of 1997 and connected cases

Federal Bank

APPELLANT

Vs

Official Liquidator

RESPONDENT

Date of Decision : 20-09-2002

Acts Referred:

Companies (Court) Rules, 1959 — Rule 179
Companies Act, 1956 — Section 446, 529A

Citation : (2003) 1 BC 209 : (2003) 113 CompCas 410 : (2003) 1 ILR (Ker) 572

Hon'ble Judges : K.S. Radhakrishnan, J;K.A. Mohamed Shafi, J

Bench : Division Bench

Advocate : Thomas V. Jacob, George Mathew and Sujith Mathew Jose, for the Appellant; K.P. Vijayan, K. Moni, V.B. Jinnah, M. Pathrose Mathai, Saji Varghese and Baby Mathew, P.S. Sreedharan Pillai, S.C.G.S.C. and K. Balachandran, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, J.—The question that is posed for consideration in this case is whether a decree obtained by a secured creditor standing outside the winding up proceedings could be satisfied fully along with the interest in the event of there being surplus after payment in full all the claims admitted to proof by the liquidator.

2. Travancore Ogale Glass Manufacturing Company Ltd. (hereinafter called "the Company") was sought to be wound up by a contributory by filing C.P. No. 3 of 1984 u/s 433 of the Companies Act on the ground that the Company was commercially insolvent. Provisional liquidator was appointed on 7.2.1984. Federal Bank Ltd., secured creditor was impleaded in the proceedings as per order dated 17.2.1984 in C.A. No. 37 of 1984. Employees Association representing the workers also got impleaded in C.A. No. 46 of 1984 on 1.3.1984. Federal Bank filed statement on 13.3.1984 informing the Company Court that the Bank would keep outside the winding up proceedings. On 7.6.1985 Bank filed another

statement stating that if the Company was ordered to be wound up, necessary direction might be given to safeguard the rights of the Bank to proceed against the assets of the Company for realisation of the amount due to the Bank. Bank also filed C.A. No. 291 of 1984 u/s 446 of the Companies Act, for sanction to institute a civil suit to enforce their security. The Company Court granted the prayer by order dated 11.2.1985.

3. The Company Court later ordered winding up of the Company by order dated 10.6.1985. Federal Bank after obtaining leave of the Court instituted O.S. No. 3 of 1986 before the Sub Court, Ernakulam against the Company. The Company as well as the Official Liquidator were arrayed as defendants in the suit. Suit was compromised and the Sub Court passed a decree in terms of the compromise on 30.1.1988 allowing the plaintiff Bank to realise a sum of Rs, 1,48,23,388.73 from the Company with* interest at 10% on the amount from the date of suit till realisation. Bank was allowed to realise the amount by sale of the properties mortgaged. Other incidental reliefs were also granted.

4. Bank later filed E.P. No, 275 of 1990 before the Sub Court for executing the decree and the properties were brought to sale. Dispute was raised with regard to the fixation of upset price and also the manner in which the sale was effected. Matter was brought before this Court and this Court set aside the sale and the Official Liquidator was directed to take steps to conduct fresh sale. This Court also fixed upset price at Rs.3.5 crores the details of which are available in the ruling reported in Penta Properties v. Official Liquidator 1995 (2) KLT 376 The sale was conducted at a price of Rs.6.75 crores which was more than sufficient to satisfy the decree obtained by the Bank and other secured creditors including workmen. Balance amount has to be utilised for return of capital to the contributories. The stand of the Official Liquidator is that even though the civil court had awarded 10% interest to the Bank they are entitled to get interest only at the rate of 4% similar to the claim of other secured creditors who agitated their claim in the winding up proceedings. Reference was made to Section 529A which was incorporated as per the amending Act 35 of 1985. Counsel for the Official Liquidator submitted that the workmen and other secured creditor, the Federal Bank be treated alike in the matter of awarding interest. Reference was made to Rule 179 of the Companies (Court) Rules which provides for payment of interest not exceeding 4 per cent per annum to secured creditor. Consequently in spite of the decree granting 10% interest to Federal Bank which also is a secured creditor just like workman the Bank is entitled to get 4% interest. This stand of the Official Liquidator was supported by the contributories.

5. Counsel for the Bank placed reliance on the ruling of the Delhi High Court in Haryana Financial Corporation Vs. Pnb Auto Ancillary (India) Ltd. (In Liquidation), and contended that the Court in that case held that future interest could be paid in terms of any decree held by the secured creditor in case any surplus is available for distribution after meeting the claims of the workers and those of other creditors. Counsel also referred to another ruling of the Madras High Court

in (Penumetsa) China Venkataraju and Another Vs. Pulavarthi Lakshmanaswami and Another, . It is a case arising under the Provincial Insolvency Act. Counsel submitted that the court permitted to realise interest at the contract rate. Counsel also made reference to the decision of the Karnataka High Court in State Bank of Mysore v. Official Liquidator, 58 CC 609.

6. Learned counsel appearing for the Liquidator submitted that the various decisions cited by the counsel appearing for Federal Bank were rendered prior to the introduction of Section 529A of the Companies Act which says that dues of the workmen and debts due to secured creditors are to be treated *pari passu* and have to be treated in priority to other dues.. We may in this connection examine the scope of the said Section as well. Section 529A relates to overriding preferential payments. Sub-s, (1) states that notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company - (a) workmen"s" dues; and (b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to Sub-section (1) of Section 529 *pari passu* with such dues; shall be paid in priority to all other debts Sub-s. (2) states that debts payable under clause (a) and clause (b) of Sub-section (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions. The object of the abovementioned provision is to ensure that the workmen should not be deprived of their legitimate claim in the event of liquidation of the company. This position is well settled by catena of decisions such as Giovanola Binny Brighton & Co. Inre.(1990) 67 CompCas 447 SC and Aryavarta Plywood v. Rajasthan State I & I Corporation (1991) 72 CompCas 5 KER It is evident from the abovememioned provision that secured creditors are to be treated On a par with the workmen and debts of the workmen have to be treated *pari passu*. All the same we have read Section 529A along with Rule 179 of the Companies (Court) Rules, as far as the claim of workers is concerned, which reads as follows:

"R. 179. Payment of subsequent interest - In the event of there being a surplus after payment in full of all the claims admitted to proof, creditors whose proofs have been admitted shall be paid interest from the date of the winding up order or of the resolution as the case may be up to the date of the declaration of, the final dividend, at a rate not exceeding 4 per cent per annum, on the admitted amount of the claim, after adjusting against the said amount the dividends declared as on the date of the declaration of each dividend".

Abovementioned rule would indicate that in the event of there being surplus after payment in full of all the claims admitted to proof, creditors whose proofs have been admitted shall be paid interest from the date of the winding up order at the rate not exceeding 4% per annum on the admitted amount of the claim. From a reading of Section 529A along with Rule 179 of the Companies (Court) Rules it is evident that debts of workmen and the debts due to secured creditors are treated as *pari passu* in priority to all other dues. It is therefore evident as far as persons who are covered by Section 529A read with Rule179 of the Companies

(Court) Rules they are entitled to get only 4% interest. This provision, Section 529A read with Rule 179 could not be applied to those secured creditors who stood outside the winding up proceedings envisaged u/s 446 of the Companies Act. In other words, as far as those workmen and other secured creditors who are covered by Section 529A they are legally obliged to get only 4% interest per annum in the event of there being surplus after adjudicating their claims.

7. The question to be examined is whether a secured creditor who was granted leave u/s 446 and obtained a civil court decree with interest, at the rate of 10% is still entitled to get only 4% just like secured creditors, workmen etc. whose claims were to be settled in the winding up proceeding. We are of the view, as far as persons who are covered by Section 529A, read with Rule 179 of the Companies (Court) Rules are concerned they are bound by those rules. Granting of interest at rate exceeding 4% as per a court decree does not mean tampering the claim of secured creditors covered by Section 529A who are not entitled to interest contrary to Rule 179 of the Companies (Court)" Rules. Secured creditors who had obtained a decree from a civil court with interest can claim the amount as per the decree with interest without prejudice to the rights of those secured creditors and workmen covered by Section 529A read with Rule 179. In other words, right of those secured creditors covered by Section 529A read with Rule 179 is also to be respected vis-a-vis decree obtained by secured creditors outside the winding up proceedings, but only to the extent of limitation prescribed with regard to interest under Rule 179. Decree obtained by secured creditor who stood outside the winding up of the company shall not defeat the rights of secured creditors covered by Section 529A read with Rule 179, to that extent rights of those persons covered by Section 529A with Rule 179 are protected.

8. We may in this connection refer to certain decisions which would lend support to our reasoning. An almost identical question came up for consideration before the Madras High Court in *A Shanmugham v. Official Liquidator* (1992) 75 CompCas 181. That was a case where the court was dealing with the scope of Rule 179 of the Rules. The Court held that Rule 179 would not apply to secured creditors who have elected to rely on the security in view of the provisions contained in the Presidency Towns Insolvency Act read with Section 529 of the Companies Act, 1956. Andhra Pradesh High Court in *K.V. Lakshminarayan a Sastry v. Vijaya Commercial Bank Ltd.* (1963) 33 Comp Cas 49 AP, dealt with claim of interest under the Provincial Insolvency Act read with Section 529 of the Companies Act. After examining the matter, the court held that as far as secured creditor is concerned he stands outside the Act so long as the security is sufficient to pay the debt secured thereon in full and he would be entitled to interest till date of payment at the contract rate. Delhi High Court in *Haryana Financial Corporation v. PNB Auto Ancillary (India) Ltd.* (1994) 88 CompCas 588 DELHI also examined the scope of Section 529A of the Companies Act read with Rule 156 of the Companies (Court) Rules and Section 28(6) of the Provincial Insolvency Act, 1920. The Court held that it is clear from the provisions of Sub-

section (6) of Section 28 of the Provincial Insolvency Act, 1920 that what is left unimpaired is only the power of the secured creditor to realise or otherwise deal with his security and not the effect of insolvency on the chargeability of interest, which is governed by the provisions of Section 48 of the 1920 Act and in the case of a company in liquidation by Rules 156 and 179 of the Companies (Court) Rules, 1959. It was further held that the wages of workmen as on the date of winding up shall rank *par passu* with the claims of secured creditors, as their claims stand on the date of winding up and future interest could be paid in terms of any decree held by the secured creditor in case any surplus is available for distribution after meeting the claims of workers for their wages and those of other creditors. The Court held that it would be the only just and equitable way of dealing with the issue which is in consonance with the legislative intent. In this connection it is also profitable to refer to the decision of the Apex Court in *Indian Bank Vs. The Official Liquidator, Chemmeens Exports (P) Ltd. and Others*, wherein the Apex Court was dealing with the provisions of the Companies Act. The Court held as follows:

"From this what follows is when a suit is instituted in the court of competent jurisdiction with the leave of the court under Sub-section (1) and a decree is passed by that court whether on the basis of mortgage or otherwise, it would be binding on the official liquidator and no plea inconsistent with the decree passed against the official liquidator can be raised while deciding the questions of priorities under Clause (d) of Sub-section (2). We wish to make it clear that u/s 446, no power is conferred on the company court to declare a decree of the competent court void -a prayer which is made by the official liquidator in the application out of which this appeal arises so to that extent the application filed by the liquidator in the company court is not maintainable."

From the above discussion, the following principles would emerge.

- (i) A secured creditor could obtain leave of the court for standing outside the winding up jurisdiction of the Company Court so as to proceed against the security and could enforce the decree as against the Official Liquidator.
- (ii) The Company Court while granting leave u/s 446 has got the power to incorporate such terms if it so finds necessary to safeguard the interest of the creditors, contributors, workmen affected by the liquidation proceedings.
- (iii) A secured creditor who obtained leave without any conditions u/s 446 could enforce the decree fully as against the liquidator subject to Section 529A of the Companies Act read with Rule 179 of the Companies (Court) Rules.
- (iv) The Official Liquidator is bound by the decree obtained by a secured creditor from a court of competent jurisdiction with leave of the Company Court u/s 446 of the Companies Act and no plea inconsistent with the decree passed against the Official Liquidator could be raised while discharging the priorities under Sub-section (d) of Section 446. However, this could be subject to the rights of the secured creditors covered u/s 529A of the Companies Act read with Rule 179 of

the Companies (Court) Rules.

(v) Dues of workmen and debts due to secured creditors u/s 529A are to be treated pari passu and shall be paid in priority to all other debts. However, under Rule 179 in the event of there being a surplus after payment in full of all the claims admitted to proof, creditors whose proofs have been admitted would be entitled to only interest at the rate of 4% per annum on the admitted amount of claim and cannot get interest in excess of Rule 179 even though secured creditor who stood outside the winding up proceedings had obtained decree in excess of 4% interest per annum.

(vi) Secured creditor who stood outside the winding up proceedings and obtained decree can enforce the decree as against the assets and the ceiling with regard to payment of interest under Rule 179 would not apply in the case of those secured creditors and they are entitled to get interest as decreed by the Civil Court. In a case where there is no surplus after payment in full of all the claims admitted of proof, the creditors who stood outside the winding up proceedings as well as the secured creditors who fall u/s 529A would be treated alike to the extent of granting interest at the rate of 4% under Rule 179 of the Companies (Court) Rules. In a case where there is surplus amount after satisfying the decree of secured creditors, including secured creditors who stood outside the winding up as well as those who covered u/s 529A read with Rule 179, secured creditors who obtained decree with interest at a rate more than 4% would be entitled to realise the said interest from the surplus amount. In such an event, even though there is surplus amount secured creditors covered u/s 529A are not entitled to demand in excess of 4%.

9. If we apply the aforementioned principle we may indicate leave was granted without any condition imposed u/s 446 of the Companies Act. Further, if there being surplus amount after paying off all the claims admitted to proof and that the secured creditors covered by Section 529A could be satisfied fully with interest at the rate of 4%, the Official Liquidator is bound to honour the decree of the civil court. Contributories and other shareholders would be entitled to only rest of the amount after the decree is being satisfied fully.

10. In the aforementioned circumstances, we are inclined to set aside the judgment of the learned Single Judge restricting interest at 6% instead of 10% as ordered by the civil court in O.S. No. 3 of 1986 of the Sub Court, Ernakulam. We are of the view fixation of rate of interest, rates and taxes is a legislative function wisdom of which cannot be challenged in these proceedings. In the absence of any materials to satisfy that such statutory interest is in any way arbitrary or violative of Art. 14 of the Constitution of India, we do not find any merit in the Writ Petition and the same will stand dismissed.