**(2005) 05 GUJ CK 0016**

**In the Gujarat High Court**

**Case No :** Company Application No. 529 of 2003 in Company Petition No. 8 of 1998 with Official Liqudator Report No. 93 of 2003

Gujarat State Financial Corpn. APPELLANT

Vs

O.L. of ABC (Plant Protection) Ltd. RESPONDENT

**Date of Decision :** 06-05-2005

**Acts Referred:**
Companies Act, 1956 — Section 529(A)
State Financial Corporations Act, 1951 — Section 29, 3

**Citation :** (2005) 05 GUJ CK 0016

**Hon'ble Judges :** K.A. Puj, J

**Bench :** Single Bench

**Advocate :** Mitul K Shelat, in Company application No. 529 of 2003 and Official Liquidator in Official Liqudator Report No. 93 of 2003, for the Appellant; Official Liquidator for Respondent No. 1 and Nalini S Lodha for Respondent No. 2 in Company Application No. 529 of 2003 and Nalini S Lodha For Respondent No. 1 in Official Liqudator Report No. 93 Of 2003, for the Respondent

**Final Decision :** Dismissed

## Judgement

K.A. Puj, J.—The applicant viz. Gujarat State Financial Corporation has taken out this Judges Summons seeking direction to the Official Liquidator to return the charge and possession of the movable properties of the Company as indicated in Schedule-1 to the Judges Summon of the applicant Corporation for the purpose of enforcement of its charge as secured creditor under the provisions of the State Financial Corporation Act, 1951, subject to the provisions of Section 529(A) of the Companies Act, 1956. The applicant has also prayed for the direction to the Official Liquidator to return the charge and possession of the property bearing Flat No. 702/B, Ashoka Chamber, Ahmedabad to the applicant Corporation for the purpose of enforcement of its charge as secured creditor under the provisions of the State Financial Corporation Act, 1951.

2. As far as second prayer is concerned, this Court has passed an order on 28.12.2004 recording that in view of an order dated 28.12.2004 passed in

Company Application No. 312/2003, learned advocate Shri Mitul Shelat did not press prayer (C), as by virtue of the said order, possession of the office referred to in the prayer clause has been given to the applicant. This leaves only one prayer to be decided by this Court in the present application and that is Prayer-A of the Judges Summons.

3. An affidavit in support of Judges Summon is filed by the Manager of the applicant Corporation. Mr.Mitul Shelat learned advocate appearing for the applicant Corporation has submitted that the Company in liquidation has taken loan of Rs. 45,80,000/- from the applicant Corporation on 20.1.1995. The Company defaulted in payment of dues and hence final notice u/s 29 of the State Financial Corporation Act was served upon the Company on 18.11.1997. The applicant took over charge and physical possession of the hypothecated properties of the Company in liquidation on 10.12.1997 in exercise of power u/s 29 of the State Financial Corporation Act. Mr.Shelat has further pointed out that this Court has passed an order on 27.11.2002 in Company Petition No. 8/1998 whereby the Company was ordered to be wound up and the Official Liquidator was appointed as a liquidator of the Company and he was directed to take charge of the movable and immovable properties of the Company. The Official Liquidator has taken over the charge and possession of the movable properties of the Company in liquidation on 2.6.2003. He has further submitted that no notice was served upon the Corporation informing it about such action by the Official Liquidator. He has further submitted that the applicant Corporation is established u/s 3 of State Financial Corporation Act. Section 29 of the Act deals with the right of the Corporation in case of default in payment of loans or advances or installments thereof by any industrial concern. The said section empowers the Corporation to take charge of the overall management or possession or both of the defaulting concern. It also has right to transfer by way of lease or sale and realise the property pledged, mortgaged or hypothecated or assigned to the Corporation as security for loan. Mr.Shelat further submitted that Section-29 provides to the Corporation a remedy to realise its dues. The said provision provides for both the rights and remedies as also the procedure for enforcement of the rights and is therefore in itself a complete Code. He has further submitted that it is open to the Corporation to act u/s 29 of the Act to realise the dues from the defaulting concern by following the procedure prescribed u/s 29 of the Act.

4. Mr.Shelat further submitted that the Corporation is a secured creditor and wants to remain outside the winding up proceedings, and enforce the charge over the properties of the Company as a secured creditor. The applicant Corporation was already in possession of the movable properties of the Company and the procedure to recover its dues was already in progress. He has further submitted that the right of the Corporation as a secured creditor to deal with its security and realise the same without intervention of the Court remains unaffected notwithstanding vesting of the property in the Court by statutory provision or the property coming in the custody of the Court. Such right of the Corporation is only subject to the provisions of Section 529(A) of the Companies

 

Act, 1956. In support of his submission he relied on the decision of the Hon''ble Supreme Court in the case of M.K. Rangnathan and Anr. vs. Government of Madras and Ors. (1955) 25 Comp Cas 344 as also in the case of Gujarat State Financial Corporation vs. Official Liquidator and Ors. (1996) 87 Comp Cas 658 and in the case of A.P. State Financial Corporation Vs. Official Liquidator, In view of the settled legal position, Mr.Shelat has submitted that the applicant Corporation is entitled to the possession and charge of the immovable properties of the Company for the purpose of enforcement of its charge under the provisions of the State Financial Corporation Act, 1951 and subject to the provisions of Section 529(A) of the Companies Act, 1956.

5. The Official Liquidator has filed his report on 4.3.2004, wherein he has referred to and relied on the judgment of Andhra Pradesh High Court in the case of Pennar Paterson Ltd., vs. State Bank of Hyderabad and others 106 Comp Cas 338. The Official Liquidator has further referred to the decision of the Hon''ble Supreme Court in Civil Appeal No. 4702/1994 in the matter of International Coach Builders Ltd., Vs. Karnataka State Financial Corporation, wherein it is held that the right unilaterally exercisable u/s 29 of the State Financial Corporation Act is available against a debtor, if a Company, only so long as there is no order of winding up and that the State Financial Corporation cannot unilaterally act to realise the mortgaged properties without the consent of the Official Liquidator representing workmen for the parri passu charge in their favour under the proviso to Section 529 of the Companies Act, 1956, and that if the Official Liquidator does not consent, the State Financial Corporation will have to move the Company Court for appropriate directions to the Official Liquidator who is the parri passu charge holder on behalf of the workmen. In any event, the Official Liquidator cannot act without seeking directions from the Company Court and under its supervision.

6. An affidavit-in-reply is filed by the respondent No. 2 i.e. Bank of Baroda. Ms.Nalini S. Lodha learned advocate appears on behalf of Bank of Baroda. She has submitted that the Company in liquidation has hypothecated and charged all the movable plant and machinery both present and future to the Bank under an Instrument of Hypothecation of Machinery dated 17.1.1995 for the aggregate credit facilities of Rs. 85,00,000/-. The said charge on the movable plant and machinery was extended under an Instrument of Extension of charge dated 29.5.1995 executed in favour of the Bank to secure the enhanced cash credit limit of Rs. 50 lacs aggregating to Rs. 135 lacs. The charges created by the Company in liquidation in favour of the Bank on the movable plant and machinery have been registered with the Registrar of Companies, Gujarat, Ahmedabad. She has therefore submitted that the Bank is having hypothecation charge over the movable plant and machinery of the Company in liquidation which is prior in point of time in so far as the charge claimed by the applicant Corporation on the movable plant and machinery is concerned.

7. Ms. Lodha further submitted that the Company in liquidation has committed

 

default in repayment of its dues to the Bank and hence the Bank had filed Application being O.A. No. 218/1998 for recovery of a sum of Rs. 1,15,82,051.85 from the Company in liquidation and others together with interest at the rate stated therein from the date of application till realization and costs before the Debts Recovery Tribunal. She has further submitted that the movable properties, for which the relief has been claimed by the applicant Corporation are not exclusive securities of the applicant Corporation inasmuch as the existing movable plant and machinery as per the list annexed to the sanction letter of applicant Corporation are the securities of the Bank over which the Bank has first and foremost charge as the charges created thereon are prior to the charges created in favour of the applicant Corporation. In view of this factual position, while granting the prayer of the applicant Corporation seeking direction to the Official Liquidator to return the charge and possession of the movable properties of the Company in liquidation, it is necessary to ensure that the rights of the Bank as secured creditor with regard to the existing movable plant and machinery remains unaffected. She has further submitted that the Bank has no objection to the sale of the entire movable plant and machinery of the Company in liquidation with the joint efforts of the applicant Corporation and Bank subject to the condition that the sale proceeds will be distributed between the applicant Corporation and the Bank pro rata to the value of the machinery shown in the sanction letter of applicant Corporation subject however to the provisions of Section 529(A) of the Companies Act, 1956.

8. Ms. Lodha has further invited Court''s attention to the additional affidavit filed on behalf of respondent No. 2 on 20.4.2005. On the basis of this additional affidavit she has submitted that the Bank, in order to ascertain correct position of the existing charges on the assets of the Company in liquidation obtained the Search Report from the practicing Company Secretary on 11.2.2005. The said Search Report reveals that the charges created by the Company in liquidation on the entire movable plant and machinery, existing and to be purchased of the Company in liquidation in favour of the Bank are prior in point of time in terms of creation as well as registration thereof whereas the charges created in favour of the applicant Corporation on the movable plant and machinery of the Company is subsequent to the creation and registration of the charge of the Bank. She has further submitted that in this view of the matter, the application filed by the applicant Corporation is not maintainable and deserves to be rejected. She has further submitted that the movable and immovable assets of the Company in liquidation be permitted to be sold through the Recovery Officer of the Debt Recovery Tribunal at Ahmedabad, for recovery of outstanding dues of the Bank.

9. In response to the additional affidavit filed on behalf of the respondent No. 2 Bank, the applicant Corporation has filed affidavit in rejoinder on 25.4.2005. Based on this affidavit in rejoinder Mr.Shelat has submitted that the respondent No. 2 Bank is relying on its agreement for hypothecation of machinery executed on 17.1.1995 to contend that the charge of the Bank is first charge in respect of the Machinery which may be acquired by the Company in liquidation at any point

 

of time. In this connection Mr.Shelat has submitted that bare reading of the agreement does not in any manner suggest that the Company has hypothecated and charged to the Bank machinery which it would have acquired in the future. Even otherwise, such a clause is itself void ab initio being contrary to the provisions of the Indian Contract Act. She has further submitted that the machinery referred to in the Schedule to the Deed of Hypothecation executed between the applicant Corporation and Company in liquidation on 31.3.1995, is hypothecated to the applicant Corporation and in view thereof, the Corporation is entitled to initiate proceedings u/s 29 of the State Financial Corporation Act, for the purpose of recovering its dues. The said machinery is not charged with the respondent Bank as is evident from the Deed of Hypothecation of machinery. In this view of the matter, the respondent Bank has no right, title or interest in the machinery and therefore cannot claim any such right nor oppose the legitimate right of the applicant Corporation. In support of this submission Mr.Shelat has invited the Court''s attention to Clause-2 of the Deed of Hypothecation of machinery executed by the Company in liquidation in favour of respondent No. 2 Bank on 17.1.1995, wherein it is stated that the borrower hereby hypothecates and charges to the Bank all moveable machinery of the company including all stocks and spare parts both present and future belonging to the Company.... He has further submitted that the words "present and future" will go to the words of stocks and spare parts and these words would not apply to all moveable machinery of the Company. He has therefore submitted that the respondent No. 2 Bank was having the charge only on the existing machinery as on 17.1.1995 and the machineries which were subsequently acquired by the Company in liquidation are not subject to any charge of respondent No. 2 Bank. He has further submitted that the machineries which were subsequently purchased by the Company in liquidation were specifically hypothecated to the applicant Corporation and the detailed list thereof was attached to the sanction letter dated 19.1.1995, under which term loan facility of Rs. 45,50,000/- was granted by the applicant Corporation to the Company in liquidation. He has therefore submitted that this Court should grant prayer made in the present Judges Summon and over rule objection raised by the respondent No. 2 Bank.

10. He has further submitted that even the respondent No. 2 Bank has admitted before this Court in Annexure-A to the affidavit in reply filed in OLR No. 93/2003 on 7.7.2004 that "as GSFC is claiming machinery we do not mind if the machinery is given to them, as in my opinion it is not worth to claim charge on existing item of machinery (i. e. those not financed by the GSFC also"). Once having admitted the claim of the applicant Corporation it is not open for the respondent No. 2 Bank to back out from the said admission and make any claim on such machinery.

11. Ms. Lodha learned advocate appearing for the respondent No. 2 Bank has disputed the proposition canvassed by Mr.Shelat on the basis of interpretation of Clause-2 of Deed of Hypothecation of machinery. She has submitted that the words "present and future" would not only apply to stocks and spare parts but

 

these words would equally apply to movables and machinery. In support of her submission she invited attention of the Court to the other relevant clauses of the said Deed of Hypothecation and they are Clause Nos.14, 15 and 16. Clause-14 says that the borrower shall not remove or dismantle any of the moveable machinery including all stores and parts thereof or other hypothecated premises now in use in the Company''s premises without the consent in writing of the Bank. Clause-15 says that the borrower will keep all the plant, machinery and other hypothecated premises in a good state of repair and in perfect working order and condition and further of that all such moveable machinery including all stores and parts thereof and other hypothecated premises at present or for the time being not in use. Clause-16 says that this agreement is made on the faith (a) of the declaration which the borrower hereby makes that the hypothecated premises now and from time to time hereafter comprised in the security hereby created are and will at all times be the absolute property of the borrower ( except for and subject to the security hereby created) and free from other trust, pledge lien, claim or encumbrances and (b) on the undertaking given by the borrower hereby given by the borrower, that the borrower will not create a further mortgage or lien or any charge upon the hypothecated premises during the currency of the said Cash Credit/ Loan Account. She has further submitted that the composite reading of all these clauses in the agreement clearly reveals that the entire movable machinery including all stores and spare parts either in present or in future are hypothecated to the respondent No. 2 Bank and the applicant cannot claim any charge over such subsequently acquired machinery. She has further submitted that the Search Report taken out by the Company Secretary clearly reveals that the instrument of Hypothecation of Machinery dated 17.1.1995 was registered with the Registrar of Company on 24.4.1995 and charge was created over all existing plant and machinery and to be purchased machinery for an amount of Rs. 85 lacs being the amount sanctioned by the respondent No. 2 Bank. She has further submitted that the modifying instrument of Hypothecation of Machinery dated 29.5.1995 was registered with the Registrar of Company on 12.7.1995 and the charge was modified and enhanced to cover cash credit (hypothecation) limit of Rs. 50 lacs. As against this, the charge was created by the applicant Corporation by virtue of Deed of Hypothecation dated 31.3.1995 and the same was registered with Registrar of Companies on 23.5.1995. The said charge was registered for all plant and machinery lying at Nandesari Plant. She has therefore submitted that the applicant Corporation has created its charge and same was registered at later point of time and hence the respondent No. 2 Bank being the first charge holder is entitled to claim the possession of the plant and machinery of the Company in liquidation.

12. With regard to the alleged admission made on behalf of respondent No. 2 Bank Ms. Lodha has submitted that the same was a mistake and said statement was made without verifying the record and the real position has come to knowledge only after the Search Report is taken out. She has therefore submitted that on the basis of such mistaken statement the applicant

 

Corporation cannot be granted any benefit which is otherwise not available to the applicant Corporation. 11. After having heard the learned advocates Mr.Mitul Shelat and Ms.Nalini Lodha for the respective parties and the Official Liquidator and after having perused their affidavits and counter affidavits and the reports of the Official Liquidator as well as the documents produced before the Court and after having given considerable thoughts to the relevant statutory provisions and the authorities referred to and relied upon by the parties, the Court is of the view that the relief prayed for by the applicant in prayer Clause (A) of the Judges Summons, deserves to be granted. It is true that Bank of Baroda, the respondent No. 2 herein is having prior charge in respect of the plant and machinery of the Company in liquidation by virtue of Deed of Hypothecation of machineries dated 15.1.1995 which was Registrar of Companies on 24.4.1995. However, no list of plant and machinery is attached with the said document. The normal presumption which one would derive therefrom is that the said charge is only in respect of plants and machineries which are in existence on that day. The application of that charge cannot and should not be extended to the plants and machineries which may be acquired by the company in future unless by executing a separate deed the same is brought within its ambit. As against this, the applicant Corporation has attached a separate list of machineries alongwith its sanction letter dated 19.1.1995 and Deed of Hypothecation dated 31.3.1995 which was registered with Registrar of Companies on 23.5.1995. The Court, therefore, found substance in the submission of Mr.Shelat that the words "present and future" used in Clause-2 of the Deed of Hypothecation dated 17.1.1995 will go to the words of stocks ( or stores) and spare parts and these words would not apply to all movable machineries of the Company. The Bank is having the first prior charge only on the existing machinery as on 17.1.1995 and the machineries which were acquired subsequently by the Company in liquidation are not subject to any charge of the Bank. These subsequently acquired machineries were specifically hypothecated to the applicant Corporation and detailed list thereof was attached to the letter dated 19.1.1995 under which term loan facility of Rs. 45,50,000/- was granted by the applicant Corporation.

13. Even otherwise, the Court cannot ignore the fact that the Manager of the Bank has admitted in his report marked at Annexure-A to the affidavit filed on 7.7.2004 before this Court in OLR No. 93/2003 that "as GSFC is claiming machinery we do not mind if the machinery is given to them, as in my opinion, it is not worth to claim charge on existing item of machinery, (i.e. not financed by GSFC also "). It is therefore, not open for the Bank to take complete U turn subsequently and claim the first charge even on the machineries financed by the applicant Corporation as an when the same were acquired by the Company in liquidation.

14. In the above view of the matter, the Court hereby allow this application to the above extent and grants the relief prayed for in prayer Clause (A) of the Judges Summons. The Official Liquidator is hereby directed to return the charge and possession of the movable properties of the Company as indicated in

 

Schedule-1 to the Judges Summons and as observed hereinabove to the applicant Corporation for the purpose of enforcement of its charge as secured creditor under the provisions of the State Financial Corporation Act, 1951, subject to the provisions of Section 529(A) of the Companies Act, 1956. At the time of handing over the charge and possession of the machineries as stated above, the Official Liquidator shall intimate to the respondent No. 2 Bank to depute its representative and to remain present if the Bank so desires. It is further made clear that before confirmation of sale of these machineries and/or disbursement of sale proceeds, the applicant Corporation shall take prior permission of this Court.

15. Subject to the aforesaid directions and observations, this application is accordingly disposed off.

16. As soon as order is passed by this Court, Ms.Nalini Lodha learned advocate appearing for the Bank has asked for stay against the implementation of order. However, looking to the facts and circumstances of the case and considering the view taken by this Court in the present application, the request for stay is rejected.