
(1991) 10 P&H CK 0024
In the Punjab And Haryana At Chandigarh
Case No : Company Appeal No. 5 of 1989

Hindustan Forest Co. (Private) Ltd. and Others	APPELLANT
Vs	
United Commercial Bank	RESPONDENT

Date of Decision : 29-10-1991

Acts Referred:

Companies Act, 1956 — Section 125, 446, 446(3), 537

Citation : (1994) 79 CompCas 669 : (1992) 102 PLR 588

Hon'ble Judges : H.S. Bedi, J;A.L. Bahri, J

Bench : Division Bench

Advocate : Munishwar Puri and Deepali Puri, for the Appellant; J.S. Narang and P.D. Mehta, for the Respondent

Judgement

A.L. Bahri, J.—This appeal has been filed by Hindustan Forest Company (P) Ltd. (in Liquidation) (hereinafter called "the company") through the liquidator, Shri B.K. Kapur, and Smt. Lalita Kapur, against order dated March 3, 1989, passed by the company judge in C.P. No. 33 of 1986, whereby leave was granted to the United Commercial Bank, a decree-holder, to continue with the execution proceedings pending in the Court of the Subordinate Judge I Class, Pathankot, and declining the request of the bank for transfer of the execution file to this court. The bank filed a petition u/s 446(3) of the Companies Act. A decree was passed in favour of the bank on July 31, 1974, by the Senior Sub-Judge, Jalandhar. The judgment-debtor, the company, was represented but no written statement was filed in spite of three opportunities having been obtained subject to payment of costs. An execution application was filed in the court at Jalandhar which was subsequently transferred to the Court of the Sub-Judge I Class, Pathankot. Company Petition No. 31 of 1975 was filed by the bank for recovery of the decretal amount by way of sale/auction of the property of the judgment-debtor. On April 4, 1975, the company judge passed an order stating that execution could proceed and that the bank was to keep the money in a separate account. The executing court passed an order of attachment. Smt. Lalita Kapur, one of the guarantors, filed Company Petition No. 36 of 1975, on which the

company judge passed an order on May 17, 1975, observing that the order dated April 4, 1975, was not called for and further staying execution of the decree. The attachment was to continue. The executing court, in view of the aforesaid order, directed the property to remain under attachment. The details of such properties are given in the petition. Apprehending that such property would be damaged due to the vagaries of nature, the present petition was filed for transfer of the execution application from Pathankot to this court and for any other order which the court may deem fit to pass. A written statement was filed to this petition on behalf of the company, inter alia, alleging that the ex parte decree obtained by the bank was held to be void by the liquidator under Sections 528 and 529 of the Companies Act. The execution of the aforesaid decree had become time-barred u/s 136 of the Limitation Act. The application for leave to execute the decree was filed on October 24, 1986, which is barred by time. On merits also, certain pleas were raised which are not considered necessary to repeat for disposal of this appeal.

2. Shri Munishwar Puri, advocate for the appellants, has argued that no specific prayer was made in the petition filed by the bank for grant of leave to proceed with the execution of the ex parte decree which was pending in the court at Pathankot and the learned single judge thus erred in granting this relief. Reliance has been placed on the decision of the Privy Council in AIR 1930 57 (Privy Council) , wherein it was observed that, where a claim was never made in the defence presented, no amount of evidence could be looked into upon a plea which was never put forward. The ratio of the decision aforesaid cannot be applied to the case in hand. There is no defect in the pleadings of the parties. The pendency of the execution of the decree at Pathankot was not at all in dispute. A prayer made was for transfer of the execution to the High Court in view of the fact that the company (judgment-debtor) had gone into liquidation. u/s 446 of the Companies Act, either the execution was to be transferred to the High Court or, if the same was to continue, leave of the court was necessary. This is a case where, on the facts alleged and admitted to be so, necessary relief was to be allowed. Such a question was considered by this court in Karam Dass and Others Vs. Som Parkash, . In para 7 of the judgment it was observed as under (at page 91) :

"No doubt, as a general rule, no plaintiff is entitled to a relief for which there is no foundation in the plaint but when on the pleadings and the issues and the evidence adduced the relief is clear, this general rule does not apply because it is the duty of the court to grant relief as the circumstances of the case would warrant even though it may not be asked for."

Leave of the court was required to proceed with the execution of the decree which is pending in the executing court at Pathankot in view of the provisions of Sections 446(1) and 537 of the Act.

3. It has further been argued that the liquidator having declared the ex parte decree to be void, the execution cannot proceed. It has been held in Company

Appeal No. 2 of 1988, decided today between the parties (since reported as Hindustan Forests Co. P. Ltd. v. United Commercial Bank [1994] 79 Comp Cas 498) that an ex parte decree could not be declared as void by the liquidator and the bank's name could not be deleted from the list of creditors. The bank is held to be a secured creditor on the basis of ex parte decree. Learned counsel for the appellant has further argued that, by attaching the property of the judgment-debtor, the bank has ceased to be a secured creditor and the execution cannot proceed on that score also. In support of these contentions, reliance has been placed on two decisions of the Bombay High Court : Goverdhandas Vallabhdas v. Official Liquidator, Electro-Metal Refining Co. Ltd. AIR 1930 Bom 16 ; Ovation International (India) P. Ltd., In re : Grey Steel Casting and Finishing Co. P. Ltd. v. Adverts (Private) Ltd. [1969] 39 Comp Cas 595.

4. The decisions aforesaid are distinguishable. In these cases, attachment orders were passed before the decrees were passed. By merely getting orders of attachment of properties of the companies, the decree-holders could not be held to be secured creditors. The position in the present case is different. On the passing of the ex parte decree with a direction to recover the decretal amount by sale of the mortgaged property and the hypothecated property and the hypothecated goods, the bank is in the position of a secured creditor. When any charge is created by a company on its property, it has got to be registered as required u/s 125 of the Companies Act. A register of such charge is maintained in Form 8. No such register has been produced to show that the claim of the bank is not so registered. If the bank has attached property/goods other than those mortgaged or hopothecated, the bank would cease to be a secured creditor, the other amount of sale proceeds of such property or goods would be available to the liquidator or the court for distribution proportionately according to law among the creditors after meeting the other necessary obligations.

5. The position of a secured creditor has been fully discussed by the Supreme Court in M.K. Ranganathan and Another Vs. Government of Madras and Others, . The secured creditor can choose to recover the amount by selling the property mortgaged or goods hypothecated and remain outside the winding up proceedings. In case such a creditor wants to recover the decretal amount by taking the assistance of the court by filing an execution and attaching other properties of the company, he would cease to be a secured creditor and would rank with other creditors of the company.

6. In view of what has been stated above, the directions of the single judge in the impugned order for disposal of the objections to the execution on the merits by the executing court are appropriate. This appeal is dismissed. There will be no order as to costs. The parties are directed to appear in the executing court on November 25, 1991.