(2001) 07 P&H CK 0173

In the Punjab And Haryana At Chandigarh

Case No : Company Petition No''s. 226 of 1999 and 174 of 2000

H.S. Oberoi and Associate APPELLANT

Vs

Punjab Wireless Systems Ltd. RESPONDENT

Date of Decision : 11-07-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 54, Order 21 Rule 58, Order 21 Rule 59, Order 38 Rule 11, Order 38 Rule 11A
Companies Act, 1956 — Section 433, 439, 450

Citation : (2001) 07 P&H CK 0173

Hon'ble Judges : J.S. Khehar, J

Bench : Single Bench

Advocate : L.M. Suri, T.P. Singh and Amit Sethi, for the Appellant; Puneet Kansal, for the Respondent

Judgement

1. Company Petition No. 226 of 1999 titled as H.S. Oberoi & Associates v. Punjab Wireless Systems Ltd. was filed under Sections 433 and 439 of the Companies Act, 1956 (''the Act'') for the winding up of Punjab Wirless Systems Ltd. ''s case (supra) (Punwire). The aforesaid petition was filed on 23-9-1999. During the pendency of the aforesaid winding-up petition, C.A. No. 705 of 1999 was filed by the petitioner H.S. Oberoi & Associates praying for the appointment of a provisional liquidator u/s 450 of the Act. This Court vide its order dated 27-7-2000 accepted the prayer of the petitioner and appointed the official liquidator as the provisional liquidator. On 1-2-2001, this court disposed of C.P. No. 226 of 1999 by passing an order of winding-up against the respondent-company.

2. The Punjab Scheduled Caste Land Development & Finance Corpn. (''the Corpn.'') has filed the instant petition with a prayer that it should be permitted to execute recovery proceedings initiated by it, consequent upon the judgment and decree passed by the Civil Judge (Junior Division), Chandigarh dated 9-9-1999 vide which the Corporation has been found entitled to a sum of Rs. 7,42,27,312 from Punwire. Alternatively, it is prayed that this Court should transfer the

execution proceedings to itself and to execute the judgment and decree passed by the Civil Judge (Junior Division), Chandigarh on 9-9-1999 in favour of the Corporation.

3. Before dealing with the claim of the Corporation, it would be necessary to narrate the facts on the basis of which the Corporation is making the instant claim. In this behalf, it would be pertinent to point out that the Corporation filed a civil suit on 31-7-1999 at Chandigarh for the recovery of Rs. 7,42,27,312 along with future interest. During the pendency of the aforesaid suit, the Corporation filed an application under Order XXXVIII rule 5 of the CPC attachment of movable and immovable properties of the respondent-company, i.e. Punwire. The Civil Judge (Junior Division) Chandigarh on 17-8-1999 accepted the application filed by the Corporation. A perusal of the order dated 17-8-1999 reveals that the respondent-company, i.e., Punwire, was directed to furnish a Bank Guarantee in the sum of Rs. 7.50 crores, failing which two of the properties of the respondent-company were ordered to be attached. The properties of the respondent-company, which were ordered to be attached were as under :--

"1. Premises No. B-76-77, Industrial Area Ph. VII SAS Nagar (Mohali), i.e., entire land, building, machinery, etc. in the said property.

2. Property No. B-53 situated opposite Verka Plant Phase VI, SAS Nagar (Mohali), i.e., building, land, machinery, furniture and other fixtures etc."

4. The narration of facts disclosed in the pleadings of the instant case reveal that an application under order XXIII rule 3 read with Section 151 of the CPC was moved on behalf of the parties, i.e., the Corporation and Punwire for passing a compromise decree. The Civil Judge (Junior Division), Chandigarh, after recording the statement of Jagjit Singh, IAS, Executive Director, Punjab Scheduled Caste and Development and Finance Corporation on behalf of the plaintiff and Ved Parkash, Executive Director, Punjab Wireless Systems Limited on behalf of the defendants disposed of the suit in terms of the compromise entered into between the parties. Accordingly, the suit filed by the Corporation for the recovery of Rs. 7,42,27,312 was decreed with costs along with interest at the rate of 17.5 per cent per annum from the date of filing the suit till its realization. The Corporation was permitted to recover the decretal amount in accordance with the compromise, failing which the Corporation was allowed to recover the decretal amount in accordance with law. Punwire failed to make any payment to the Corporation, whereupon, the Corpn. initiated execution proceedings by filing Execution case No. 25 of 1999. In furtherance of the execution case filed by the Corpn. the Executing Court on 6-12-1999 ordered the attachment of the properties of the respondent-company, i.e., Punwire, already described hereinabove. After the attachment of the properties of the respondent-company by the aforesaid order, Punwire filed objections under order 21 rules 58 and 59 read with Section 151 of the Code of Civil Procedure. The objections filed by the respondent-company, Le., Punwire were dismissed by the Executing Court on 29-1-2000.

5. The necessity for filing the instant petition by the Corporation has arisen as a consequence of the provision of Section 446 of the Act, which, inter alia, postulates that after a winding-up order has been passed or after the official liquidator has been appointed as the provisional liquidator; no suit or legal proceedings pending shall be proceeded with (against the Company in respect of which either of the aforesaid orders have been passed) except with the leave of the Court. It is in these peculiar circumstances that the instant petition has been filed with a prayer that the execution proceedings initiated by the Corporation before the Executing Court be allowed to be proceeded with or alternatively to transfer the execution proceedings to this Court for its disposal.

6. According to the learned counsel for the Corporation, the mandate of Section 125 of the Companies Act, 1956 does not obstruct the continuation of the proceedings initiated by the Corporation before the Executing Court. According to the learned counsel for the Corporation, the claim made by the Corporation is not based on a charge created by the company, but is based on the judgment and decree passed by the Civi! Judge (Junior Division), Chandigarh. It is the case set up by the learned counsel that that a charge must be deemed to have been created over the properties in question vide the orders dated 17-8-1999 and 6-12-1999. The Corporation was, thus, a secured creditor for the recovery of a sum of Rs. 7,42,27,312, and that it had a legitimate right to recover the aforesaid amount by continuing the execution proceedings initiated by the Corporation by filing Execution case No. 25 of 1999.

7. The buttress his claim, the learned counsel for the Corporation has relied on Praga Toots Ltd. v. Official Liquidator of Bengal Engineering Co. (P.) Ltd. 1984 56 Comp. Cas. 214 . In the aforesaid case, a decree for repayment of money was passed in favour of Praga Tools Ltd. requiring Bengal Engineering Company (P.) Ltd., i.e., the judgment debtor in the aforesaid case, to pay the decretal amount due as per the determined mode. In the event of execution of the decree, a sum of Rs. 50,000 already furnished as security by Bengal Engineering Co. (P.) Ltd. under an earlier order of the Court was required to be retained as a security for the decree. It would be pertinent to mention that the decree for repayment of money referred to above was passed with the consent of the parties. Bengal Engineering Co. (P.) Ltd. went into the liquidation and its entire assets were sold and the proceeds were held by the Liquidator. The case set up by the Praga Tools Ltd.''s case (supra) was that it was a secured creditor to the extent Rs. 50,000, which was required to be retained as security for the execution of the decree by the order of the Court itself. In the background of the aforesaid facts, it was held by the Calcutta High Court that security of Rs. 50,000 was the creation of the order of the Court, it was not a charge created by the company and, therefore, it did not require registration under the provisions of Section 125 of the Act. Praga Tools Ltd.''s case (supra) was held to be a secured creditor to the extent of Rs. 50,000 and was, accordingly, held to be entitled to recover the aforesaid amount from the official liquidator.

8. Reliance has also been placed by the learned counsel for the petitioner on In re Overseas Aviation Engg. (G.B.) Ltd. 1963 33 Comp. Cas. 315 . In the aforesaid case J. Jarvis & Sons Ltd. were held to be entitled to recover a sum of Pounds 8,300 besides Pounds 19 as costs. J, Jarvis & Sons Ltd. obtained a charge in respect of certain lease-hold lands owned by Overseas Aviation Engineering (G,B.) Ltd. ''s case (supra) in respect of the amount of Pounds 8,319. After notice, the aforesaid charge was made absolute. The order of the Court was not registered with the registrar of companies in accordance with the provisions of Section 95 of the Act (Section 125 of the Companies Act, 1956). By virtue of an extraordinary resolution passed by the board of directors of Overseas Aviation Engineering (G.B.) Ltd., it went into creditors voluntary liquidation. The liquidators opposed the claim of J. Jarvis & Sons Ltd. The question to be determined was (i) whether, the charge order was (a) valid and enforceable against the judgment debtors i.e., Overseas Aviation Engineering (G.B.) Ltd. ''s case (supra) and/or the liquidators or (b) was void by reasons of non-registration pursuant to the provisions of Section 95 of the Companies Act, 1948 and (ii) whether J. Jarvis and Sons Ltd. were not entitled to recover as secured creditors in terms of the charge order which was made absolute. By majority, it was held that registration u/s 95 of the Companies Act, 1948 was not necessary to bestow validity upon the charge order as the charge order having been created by an order of the Court did not require registration under the Companies Act. The dissenting view, however, was that a judgment creditor was not entitled to retain the benefit of a judgment charge unless he had completed execution before the commencement of winding-up and, therefore, since execution had not been completed merely by the order, by which the charge was made absolute, J. Jarvis & Sons Ltd. were not entitled to recover as secured creditors.

9. In Suryakant Natvarlal Surati v. Kamani Bros. (P.) Ltd. 1984 2 C L J 182, the Bombay High Court held as under :

"The only point which requires consideration in the present case is whether Section 125 of the Companies Act, will prevent the decree holder from executing a decree for sale obtained in a mortgage suit against a company prior to the order of winding up, if the decree is in respect of a mortgage unregistered under the Companies Act. Section 125 deals with a charge created by the Company. Such a charge must be registered as provided in Section 125. Otherwise, it will not bind the liquidator. Now a decree is not a charge created by the company. It is, therefore, not covered by the company. It is, therefore, not covered by Section 125. Secondly, the rights of a decree holder flow from the decree itself. Hence, a decree enforcing a mortgage or a charge is distinct from the mortgage or charge which it enforces. Under Sub-section (4) of Section 125 of the Companies Act various unregistered charges which became void under that section are enumerated. These includes a charge on any immovable property, wherever situate or any interest therein. These words do not cover a mortgage decree. This becomes even more apparent if these words are read with the main provisions in Section 125(1) which deals only a charge created by a company. A decree or a mortgage, especially one obtained prior to winding up of the company, is, therefore, not governed by Section 125."

10. On the basis of the judgment referred to above, it is sought to be concluded that if a charge is created by the Court, the same does not require registration under the provisions of Section 125 of the Act, and, therefore, a charge created by the court is enforceable in law by treating the concerned party as a secured creditor vis-a-vis the charge.

11. On behalf of the company in Liquidation, two submissions have been addressed to counter the claim of the Corporation. Firstly, it is contended that attachment proceedings were not initiated validly as they had been initiated after the commencement of winding-up. In this behalf, the attachment proceedings being invalid, no rights can be claimed by the Corporation on the basis thereof. Secondly, it is contended that the order of attachment does not create a charge and since no charge is created, the Corporation cannot be considered to be a secured creditor for the recovery of the decretal amount.

12. So far as the first contention is concerned, the same is based upon a collective reading of Sections 441(2) and 537(1) of the Act. The aforesaid provisions are being extracted hereunder :--

"441. Commencement of winding up by Court:--

(1) ** ** ** (2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up."

"537. Avoidance of certain attachments, executions, etc., in winding up by or subject to supervision of court.

(1) Where any company is being wound up by or subject to the supervision of the court-

(a) any attachment, distress or execution put in force, without leave of the court, against the estate or effects of the company, after the commencement of the winding up; or

(b) any sale held, without leave of the court, of any of the properties or effects of the company after such commencement;

shall be void."

13. On the basis of Section 441(2) it is contended that the winding-up proceedings must be deemed to be initiated with effect from the date on which the winding-up petition is presented. It is not disputed that the winding-up petition, i.e., company petition No. 226 of 1999, was presented by the petitioner H.S. Oberoi & Associates against the respondent-company, i.e., Punwire on 23-9-1999. On the basis of Section 537(1) as extracted above, it is contended that an order of attachment against the estates and assets of the company after

the commencement of winding-up proceedings is deemed to be void. On a collective perusal of the aforesaid provisions, there can be no doubt that any order of attachment passed against the respondent-company, i.e., Punwire, after the presentation of the winding-up petition on 23-9-1999 would be void. In this behalf, the learned counsel for the respondents have submitted that the order of attachment in furtherance of Execution Case No. 25 of 1999 was passed on 6-12-1999. Since the aforesaid order had not been passed with the leave of this Court, the same was void under the mandate of the provisions extracted above.

14. One cannot lose sight of the fact that on an application filed by the Corporation under order XXXVIII rule 5 of Code of Civil Procedure, the Civil Judge (Junior Division), Chandigarh on 17-8-1999 directed the respondent-company, i.e., Punwire, to furnish a bank guarantee in the sum of Rs. 7.50 crores, failing which two of the properties of the respondent-company were ordered to be attached. The properties of the respondent-company which were ordered to be attached by the order dated 17-8-1999, have already been described above. Subsequently, in furtherance of the Execution Case No. 25 of 1999, a formal order of attachment was passed on 6-12-1999 attaching the same properties. The question to be considered is whether the properties in question came to be attached vide the order dated 17-8-1999 or vide order dated 6-12-1999. In case, the former order is the effective order of attachment, then the submission advanced by the learned counsel for the respondent-company based on the presentation of the winding-up petition by H.S. Oberoi & Associates on 23-9-1999 would be of no consequence as the order of attachment was passed on 17-8-1999, i.e., prior to the initiation of winding-up proceedings against Punwire. On the contrary, the argument would have some force if the order of attachment is considered to have been passed on 6-12-1999. In my view, the answer to the aforesaid question lies in rules 11 and 11A of order XXXVIII of the Code of Civil Procedure. The aforesaid rules are being extracted hereunder :--

11. Property attached before judgment not to be re-attached in execution of decree - Where property is under attachment by virtue of the provisions of this order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.

11 A. Provisions applicable to attachment- (1) The provisions of this Code applicable to an attachment made in execution of a decree shall, so far as may be, apply to an attachment made before judgment which continues after the judgment by virtue of the provisions of rule 11.

(2) An attachment made before judgment in a suit which is dismissed for default shall not become revived merely by reason of the fact that the order of the dismissal of the suit for default has been set aside and the suit has been restored.

15. A bare perusal of the aforesaid provisions reveal that if an order of

attachment has been passed in respect of certain properties before the passing of any final judgment and decree, no further order of attachment under Order XXI of the CPC is required to be passed for execution of the decree subsequently passed in favour of the plaintiff. In the instant case, an order of attachment was passed on 17-8-1999, whereas, the final judgment and decree was passed on 9-9-1999. In the final judgment and decree, the suit filed by the Corporation for the recovery of Rs. 7,24,27,312 was decreed with costs along with the interest at the rate of 17.5 per cent per annum from the date of the filing of the suit till its realization. It is, therefore, evident that in the instant case, the order of attachment must be deemed to be the order passed on 17-8-1999. The subsequent order dated 6-12-1999 was wholly unessential and must be deemed to be a mere surplusage in view of the rules extracted hereinabove. In the aforesaid view of the matter. I find no merit in the first submission advanced on behalf of the learned counsel for the respondent.

16. The second contention of the learned counsel for the respondent company, i.e., Punwire, is that an order of attachment does not create a charge. In this behalf, reliance has been placed on Buta Singh & Sons Ltd. v. Peoples ''Bank of Northern India Ltd. AIR 1931 Lah 589, wherein, this Court observed as under :--

"... It is urged that before the company went into liquidation, the property had been attached in execution of the respondent''s decree. But it is admitted that under the CPC attachment creates no charge or lien upon the attached property in favour of the attaching creditor. It does not make him a secured creditor, nor does it confer any title on him. Until the property is actually sold the position of the attaching creditor is not higher than that of one, who has a more money claim against the judgment-debtor. At the crucial date, therefore, the respondent-bank has no preferential right in law or in equity to realize his decretal money from the attached house, and it seems to me that it would be going against the statutory provisions of Section 207 to allow the execution to proceed. I hold therefore, that there are no special circumstances to justify a departure from the ordinary rule, which governs the exercise of discretion in such cases." (p. 590)

17. To the same effect is the decision rendered by the Gujarat High Court in Ananta Mills Ltd. (In Liquidation) v. City Dy. Collector1972 42 C C. 476. Therein, it was held as under :--

"What effect can then be given to an attachment levied by a creditor who, but for the attachment, would stand in company with all other creditors similarly situated. In my opinion, the short answer to the question would be to ignore the attachment or, as a winding-up court, raise the attachment with a view to remove an impediment in the collection or realization of the assets of the company which is being wound up, for its just and equitable distribution. If attachment is held subsisting giving some right to the attaching creditor, it would strike at the root of the principle whereby all unsecured creditors are to be paid pari passu. As soon as a winding up order is made directors'' authority to deal with the property including the authority to alienate property comes to an end. If the purpose of attachment is to prohibit alienation, it is achieved against the company by the winding-up order. The attachment has by that time outlived its utility and at any rate it cannot be binding on the liquidator." (p. 484)

18. The question to be determined, therefore, is does the order of attachment create a charge whereby the Corporation in the instant case can raise its status from an unsecured creditor to a secured creditor. In my view, the answer to the aforesaid question emerges from rule 54 of order XXI of the Code of Civil Procedure. The aforesaid rule is being extracted hereunder :--

"54. Attachment of immovable property - (1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(1A) The order shall also require the judgment-debtor to attend Court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also where the property is land-paying revenue to the Government, in the office of the Collector of the district in which the land is situated and, where the property is land situate in a village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village; Where the property is land situated in cantonment, copies of the order shall also be forwarded to the Cantonment Board and to the Military Estate Officer in whose area Cantonment is situated.

(3) The order shall take effect as against persons claiming under a gratuitions transfer from the judgment-debtor, from the date of the order of attachment, and as against others from the time they had knowledge of the passing of the order of attachment or from the date of Proclamation, whichever is earlier".

19. After the perusal of the aforesaid rule, it clearly emerges that the only effect of the order of attachment is that the property attached cannot be transferred nor a third party right can be created therein, in other words, no right, whatsoever, is created in the decree-holder vis-a-vis the property attached. It is, therefore, natural to conclude that an order of attachment creates no interest in favour of the decree-holder. Therefore, the attachment of property of the respondent-company, i.e., Punwire, vide orders dated 17-8-1999 and 6-12-1999 does not have the effect of creating any charge in favour of the Corporation in respect of the attached property. Mulla in the Code of Civil Procedure, 13th edition, at page 318 has observed as under :--

"Attachment creates no charge on lien upon the attached property. It only confers a right on the decree-holder to have the attached property kept in custodia legis for being dealt with by the court in accordance with law. It merely prevents and avoids private alienations; It does not confer any title on the attaching-creditors."

20. On the basis of the provisions of rule 54 of order XXI CPC coupled with the decision rendered by this Court in Buta Singh & Sons Ltd. (supra) and by the Gujarat High Court Ananta Mills Ltd. (supra) in my view, no charge is created merely on order of attachment passed by a Court. Thus, viewed, it is concluded that no preferential rights can be deemed to have been created in favour of the Corporation on the basis of the orders by the Civil Judge (Junior Division), Chandigarh, dated 17-8-1999 and 6-12-1999.

21. In the judgments relied upon by the learned counsel for the Corporation, i.e., Praga Tools Ltd.''s case (supra), Overseas Aviation Engineering (G.B.) Ltd. ''s case (supra) and, Suryakant Natwarlal Surati''s case (supra), charge on the property of the companies in question had been created by the judgment/decree respectively passed by the courts in each of the aforesaid cases. In the case in hand, no charge was created on the property of the respondent company by the judgment/decree passed by the Civil Judge (Junior Division), Chandigarh on 9-9-1999. The aforesaid judgments relied upon on behalf of the Corporation are, therefore, wholly inapplicable to the controversy in hand.

22. On the basis of the conclusion drawn above that no charge stands created in favour of the Corporation vis-a-vis the property of the respondent company, i.e., Punwire attached vide orders dated 17-8-1999 and 6-12-1999, it is not possible, for this Court to accept the prayer of the Corporation to allow it to execute the judgment and decree dated 9-9-1999 against the respondent-company, i,e., Punwire, for the recovery of a sum of Rs. 7,42,27,312 besides costs and interest from the attached properties as a secured creditor. Thus viewed, I find no merit in the claim of the petitioner-Corporation for being permitted to continue the execution proceedings initiated by it by filing execution proceedings in this Court to enforce the judgment and decree dated 9-9-1999. The Corporation may, if be so advised, make an appropriate claim in this behalf before the liquidator in view of the fact that a winding-up order has already been passed in furtherance of company petition No. 226 of 1999 on 1-2-2001.

