
(2002) 05 AHC CK 0155
In the Allahabad High Court
Case No : Special Appeal No. 698 of 2002

ICICI Bank Ltd. and Others	Vs	APPELLANT
SIDCO Leathers Ltd. and Another		RESPONDENT

Date of Decision : 24-05-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 6, Order 35 Rule 2
Companies (Court) Rules, 1959 — Rule 148
Companies Act, 1956 — Section 124, 125, 528, 529, 529(1)(C)
Judicature Act, 1875 — Section 10
Provincial Insolvency Act, 1920 — Section 45, 46, 47, 48, 49
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19(19), 22
Transfer of Property Act, 1882 — Section 48, 69(4)

Citation : (2006) CriLJ 502

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Advocate : Om Prakash Misra, for the Appellant; K.L. Grover and Ramesh Singh, for Punjab National Bank, for the Respondent

Judgement

Sunil Ambwani, J.—Heard Sri Om Prakash Misra, Advocate for IFCI and IDBI and Shri K.L. Grover, Senior Advocate, assisted by Sri Ramesh Singh for Punjab National Bank.

2. The company (in liquidation) was wound up by order of this court dated 16 December 1993, and the Official Liquidator has been appointed as its liquidator. The assets of the company (in liquidation) were sold by the Official Liquidator vide order of the court dated 9 October 1998, and the sale was confirmed on 24 February 1999. By an order dated 9 April 2001, the Official Liquidator was directed to invite claims under Rule 148 of the Companies (Court) Rules, 1959, from the creditors and ex-workmen after issuing advertisement in the newspapers. The Official Liquidator in his Report No. 13 of 2002 has stated that he received claims from IFCI, IDBI as well as other secured creditors, namely, ICICI, Punjab National Bank and other seven ex-workers. The first prayer in the

application dated 12 December 2001, under consideration, for taking claim of ICICI Ltd., that of Rs. 4,56,06,736 as on 16 December 1993, on pro rata basis has been considered after hearing counsel for ICICI Ltd. and upheld on 9 January 2002.

3. The question with regard to the exclusion of claim of the Punjab National Bank was heard on 9 January 2002 and 16 January 2002. Applicants submitted that Punjab National Bank was not liable to be paid dividend as it has second charge over the movable and immovable current assets. The first charge holder has priority u/s 48 of the Transfer of Property Act over the assets of company, either before or its winding up; which provides that where a person purports to create by transfer at different times rights in or over the same immovable property, and as such, right cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding on the earlier transferees, be subject to the rights previously created

4. Section 528 of the Companies Act, 1956, provides that in every winding up all debts payable on a contingency and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency, or may sound only in damages, or for some other reason may not bear a certain value. The question of priority between the creditors can be decided by the Company Court. Sections 529 and 529A provide for application of insolvency rules in winding up of insolvent companies and for overriding preferential payments; Section 530 provides for preferential payments. A secured creditor, as applied to the companies, means a person who holds a mortgage, charge, or lien on the company's property or any part of it, as security or any debt due to him from the company. The lien may be of any kind, but if it is founded on a contract, it must be registered u/s 125 of the Act.

5. According to the applicant, Section 529(1)(C) provides that same rules will prevail, and be observed, with regard to the respective rights of secured and unsecured creditors, as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent. Section 47 of the Provincial Insolvency Act, 1920, relevant to the present case, is quoted as below:

47. Secured creditors.-(1) Where a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised.

(2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt.

(3) Where a secured creditor does not either realise or relinquish his security, he shall, before being entitled to have his debt entered in the Schedule, state in his proof the particulars of his security, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him

after deducting the value so assessed.

(4) Where a security is so valued, the court may at any time before realisation redeem it on payment to the creditor of the assessed value.

(5) Where a creditor, after having valued his security, subsequently realises it, the net amount realised shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor.

(6) Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all share in any dividend.

6. Sri K.L. Grover, Senior Advocate, on the other hand, submits on behalf of Punjab National Bank that under Sections 529, 529A of the Companies Act, 1956 read with Section 47 of the Provincial Insolvency Act, 1920, all secured creditors are entitled to pro rata distribution of dividend. Both the securities are registered u/s 124 of the Companies Act. The total amount of Rs. 71,00,351 has been realised from the sale of company (in liquidation) and that the secured creditors are entitled to rank equal for pro rata distribution of their dues along with workmen as provided u/s 529A of the Act. The ICICI has claimed Rs. 4,56,06,736; IFCI Rs. 8,90,17,177; IDBI Rs. 7,96,46,226 and Punjab National Bank, having the second charge over the assets, have claimed Rs. 1,32,22,539 whereas the ex-workers have claimed Rs. 42,000. In *M.K. Ranganathan and Another Vs. Government of Madras and Others*, *Bank of Rajasthan Ltd. v. Jai Mata Plywood Co. Ltd.* (1991) 2 Comp LJ 35 (All) and *Gujarat State Financial Corporation Vs. Official Liquidator and Others*, a settled law, with regard to secured creditors joining the winding up proceedings, has been explained in holding that it is not necessary for a secured creditor to prove his debt in the winding up, and he can stand wholly outside the winding up proceedings. He may rely on his security and proceed to realise his debt in the ordinary course of law, provided he proceeds with the leave of the winding up court in the case of a winding up by the court or under supervision. If after exhausting the security, anything more remains due to him, he may prove for the deficiency in the winding up, or he may value the security without instituting a suit, and prove for the balance of the debt after giving credit to the assessed value. But then the liquidator may redeem the security and tender proof of his whole debt. A secured creditor can be required to set off the company's claim against him. After the secured creditor realised such amounts, as may be possible by proceeding against the security, it is open to him to prove for the balance due as an ordinary creditor in the winding up proceedings. He is entitled to payment of interest, only if there is a surplus available after all the creditors have been paid off.

7. In case a suit for recovery of the amount due from mortgaged property by the secured creditor, provisions of Section 48 of the Transfer of Property Act gives precedence to the first charge holders and, in such a case, if a suit is filed, the final decree in foreclosure of the suit under Order 35, Rule 2(iii), of the Code of

Civil Procedure, the mortgages or persons deriving title from, or subrogated to the rights of any such mortgagees are joined as parties, preliminary decree is provided for adjudication of respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, or Appendix B with variance, as the case may, require. These Forms 9 and 10 are provided in para 2 and 1, respectively, the entitlement of plaintiff in priority to defendant No. 2 of if there axe several subsequent mortgagees in the order of payment of sums due to them, para 4 of Forms 9 and 10 provide that money realized by sale of mortgaged property shall be paid in court and it will apply after deducting there from the expenses of sale first in payment of the amount paid by defendant No. 2, the sale proceed of mortgaged property deposited in court, after deducting there from the expense of sale, shall be paid in payment of the amount payable to the plaintiff under the decree of the court and the balance, if any, shall be applied in the amount payable to defendant No. 2 and that, if any further balance be left, it shall be paid to defendant No. 2 or other persons entitled to receive the same. Paras 5 and 6 of the form provide that if defendant No. 2 pays into the court, the amount adjudged due to the plaintiff but defendant No. 1 makes default in payment of the said amount, defendant No. 2 shall be entitled to keep the plaintiff alone for his benefit and he shall be entitled to the benefit similar to those conferred upon the plaintiff; in that case, if defendant No. 1 fails to pay, the mortgaged property shall be sold and the proceeding, after deducting the expenses of sale, shall be paid to defendant No. 2 in respect of the plaintiff and thereafter his own mortgage.

8. Section 47 of the Provincial Insolvency Act, 1920, quoted as above, does not derogate or reduce the official receiver's right in the property invested in him. It, however, recognised the powers of creditors to insist on a procedure where he is given a right to realise his security, and thereafter, he may prove for the balance due to him after deducting the net amount realised. However, where he relinquishes his security for the general benefit of the creditors, he may prove for his whole debt. The right of a secured creditor under the insolvency proceeding, is a contingent one and until that contingency happens, he is outside the provisions of the Provincial Insolvency Act, 1920. His debt is not provable until he has realised his security or has abandoned or valued in accordance with Section 47. In such a case, the secured creditor is only entitled to a final decree against the insolvent under Order 34, Rule 6 of the Civil Procedure Code.

9. The aforesaid provisions of the Companies Act, 1956, Provincial Insolvency Act, 1920 and the CPC and all of these provide that a secured creditor remains outside in the insolvency proceedings and can proceed to realise his debt from the assets secured for realisation of his debt. After realising his credit from the said assets, if any amount is left, he may prove for the balance due to him before Official Receiver or Official Liquidator, as the case may be. In case, however, he does not choose to realise his security and joins winding up proceedings, he loses his priority and ranks equal to all other secured creditors to be paid out of the sale proceeds on pro rata basis subject to overriding the preferential claim u/

s 529A of the Companies Act, 1956.

10. Coming to the decision cited by Shri O.P. Misra for the applicants, he has relied upon an order passed by this court in Company Application No. 17 of 1995, directing the Official Liquidator to submit a report apportioning the dividend in this way that the first charge on current assets be taken that of State Bank of India and on the fixed assets of the financial institutions. While apportioning the dividend, the Official Liquidator be directed to have due regard to the provision of Section 529A of the Companies Act with regard to the workmen's dues. This order does not lay down any propositions of law and has directed the Official Liquidator to comply with the provisions of Section 529A of the Companies Act, 1956.

11. The judgment dated 30 March 1973, of the Calcutta High Court in the matter of Asian Refractories Ltd. (in liquidation) relates to the apportionment amongst various secured creditors where the security was substituted by an amount of compensation for acquisition of entire assets paid by the Government. The court extended the doctrine of substituted securities where the mortgage security is converted into any other form or shape--it was held that, in such cases, mortgagees' interest will not be extinguished. The Official Liquidator was directed to value and apportion the said compensation money in respect of the respective rights of the parties in their securities under the relative deeds.

12. In re Yetlamma Cotton, Woollen and Silk Mills Co. Ltd.: Bank of Maharashtra Ltd. v. Official Liquidator Mysore High Court (1970) 40 Comp Cas 466 (Mys), the company was wound up on 5 October 1967. The Official Liquidator while taking possession of the assets of the company, found that possession had already been taken by Bank of Maharashtra in apparent exercise of its powers as a mortgagee and charge holder of the immovable and movable properties of the company. Counsel for the bank gave a statement that his clients, who are secured creditors, would prefer to stand outside the winding up proceedings and realise or recover the amounts due to them by exercising the right of private sale without the intervention of court both in regard to movables as well as the immovables charged and mortgaged in their favour. After examining the provisions of the Companies Act, 1956, applicable to the winding up proceedings, it was held that, in the case of hypothecated or pledged goods, the creditor has the right to retain possession and to sell the goods directly without intervention of the court for the purpose of recovering his dues. Regarding immovable properties, covered by English mortgage, the Mysore High Court held that the bank has power to sell the property without the intervention of the court for recovering the money due to it in accordance with and by complying with the provisions of the Transfer of Property Act, and the Contract Act, governing the exercise of such power. The bank is, however, accountable to the company for the moneys realised by sale in accordance with or in terms of Sub-section (4) of Section 69 of the Transfer of Property Act.

13. Sri K.L. Grover, Senior Advocate, appearing for Punjab National Bank, has

relied upon a judgment of the Kerala High Court in the case of *In Re: Kerala Water Transport Corporation Ltd.*, The Kerala High Court dismissed the application of the State Government to claim priority for its debt in winding up proceedings on the basis of Section 64(1) of the Kerala Insolvency Act, 1956, and held that rules of priority of debts laid down in Section 64(1) of the Kerala Insolvency Act, 1956, are inconsistent with those in Section 530 of the Companies Act and that it could not have been the intention of the Companies Act that Section 529(1) thereof should attract the provisions of section of the Insolvency Act. The State Government pleaded that Section 64(1)(a) of the Kerala Insolvency Act gives priority to all debts due to the Government whereas Section 530(1)(a) of the Companies Act gives priority only to their limited cases of such debts and that, even if the debts are included in the Kerala Insolvency Act, [and] are not so included in Section 530 of the Act, this should be given priority. A paragraph of the said judgment, relevant to the present case with regard to the question whether there is any priority between secured creditors inter se under the Insolvency Act, is quoted as below:

Clause (c) of Sub-section (1) of Section 529 is likewise capable of a narrower and a wider meaning. The words "the respective rights of secured and unsecured creditors" can mean merely the rights of the class of secured creditors, on the one hand, as against the class of unsecured creditors, on the other or it can include also the rights of secured creditors inter se and of unsecured creditors inter se. The former, narrower, meaning would not attract the rule of priorities, as between creditors, while the latter, wider, meaning would. I am unaware of any provision of the insolvency law which regulates the rights of secured creditors inter se. I asked counsel whether there was any such provision--they were unable to bring any to my notice. There are provisions in the insolvency law regulating the rights as between the class of secured creditors on the one hand, and the class of unsecured creditors on the other, and, therefore, I should think that the meaning to be assigned to Clause (c) of Sub-section (1) of Section 529 is the narrower meaning that I have assigned to it. This narrower meaning was the meaning assigned to the words "the respective rights of secured and unsecured creditors" by Fry J. in *In re Maggi: Winehouse v. Wine house* (1882) 20 Ch D 545 when construing Section 10 of the Judicature Act of 1875, and, although the words were given the wider meaning by Vaughan Williams, LJ., in *Whitaker, In re: Whitaker v. Palmer* (1901) 1 Ch 9 there can be little doubt that they are capable of both the narrower and the wider meaning.

14. In *Allahabad Bank v. Cnnara Bank* (2000) 2 Comp LJ 170 (SC): AIR 2000 SC 1535 the Supreme Court has given an exhaustive decision with regard to the jurisdiction of Debts Recover)'' Tribunal and Recovery Officer under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, and the powers of the Company Court under the Companies Act, 1956, to grant permission to continue a claim filed before the Tribunal and to stay proceedings under the RDB Act to transfer the suits or proceedings. After holding that a Tribunal established under the RDB Act has exclusive jurisdiction to adjudicate, execute and distribute

sale proceed and to work out priority between banks and financial institutions as well as other creditors, the question as to the manner of distribution of these monies between banks or financial institutions, on one hand, the other creditors, secured or unsecured of the company, under winding up, [on the other], was decided under points 4 and 5 in paragraphs 50 to 73 of the judgment. It was held that in the cases where the defendant company has not been wound up, Section 22 of the RDB Act gives sufficiently wide powers to the Tribunal and the Appellate Tribunal to decide such questions of priorities, subject only to the principles of natural justice. These are wider powers than those of Civil Court. Where, however, winding up proceedings are pending in the Company Court against the defendant; company, the Supreme Court has classified secured creditors into two categories, i.e., those who desire to go before the Company Court and those who like to stand outside the winding up. The first category of secured creditors are those, who go before the Company Court for dividend by relinquishing their security in accordance with the insolvency rules mentioned in Section 529 of the Companies Act. The insolvency rules are contained in Sections 45 to 50 of the Provincial Insolvency Act. Section 47(2) of the Act states that a secured creditor who wishes to come before the Official Liquidator has to prove his debt and he can prove his debt only if he relinquishes his security for the benefit of the general body of creditors. In that event, he will rank with the unsecured creditors and has to take his dividend as provided in Section 529(2). The second class of secured creditors are those who come u/s 529A(1)(b) read with proviso (c) to section 529(1). These are those who opt to stand outside the winding up to realise their security. Section 19(19) of the RDB Act permits distribution to secured creditors only in accordance with Section 529A of the Companies Act, 1956, and the said category is the one consisting of creditors who stand outside the winding up. These secured creditors in certain circumstances, can come before the Company Court and claim priority over all other creditors for release of amounts out of the other monies lying in the Company Court. This limited priority is declared in Section 529A(1) but it is restricted only to the extent specified in Clause (b) of Section 529A(1). Canara Bank in the said case laid claims against realisations by other creditors. It had not exercised its option to remain outside the winding up proceedings and thus it was held that the question of such claim can be raised--only if Canara Bank had stood outside the winding up and had realised the amounts, and if it shows that out of the amounts privately realised by it, some portion has been rateably taken away by the liquidator under Sub-clauses (a) and (b) of the proviso to Section 529(1). It is only then that it can claim that it is to be reimbursed at the same level as a secured creditor with priority over the realisations of other creditors lying in the Tribunal. The Canara Bank's claim was thus rejected.

15. The test in law, as emerges from the aforesaid discussion, is that where the secured creditor even if it has first charge over mortgaged assets, in preference to other secured creditors, having second charge over the same assets, opts to prove his debts before the Official Liquidator and claims dividend by joining

winding up proceedings, relinquishes his claim over the assets and ranks equal to other secured creditors, including those who have second charge over the assets and shall be entitled to pro rata share out of the sale proceeds subject to the claim of workmen to be determined as provided u/s 529A of the Companies Act, 1956.

16. I may add here that IFCI, IDBI and ICICI had given foreign currency loan and term loans to the company (in liquidation) by connotation, the rate of interest and liquidated damages were claimed. The Punjab National Bank had second charge over the fixed assets of the company for working capital of Rs. 134 lakhs by deposit of title deeds created by the company in favour of the Punjab National Bank on 21 November 1989, at IFCI office. The second charge in favour of the Punjab National Bank was subject to the first charge of IFCI, IDBI and ICICI. It is admitted to the applicant that the Punjab National Bank might have first charge on the current assets of the company; but that claim of the Punjab National Bank as second charge holder for Rs. 1,32,22,539 has to be excluded and that the Punjab National Bank may get its share out of the sale proceeds of current assets. Since the applicants--IFCI and IDBI have joined the winding up proceedings and have submitted proof of their debts before the Official Liquidator, as held above, they shall be taken to have given up their securities and thus they cannot claim any priority over the assets of the Punjab National Bank on the fixed assets.

17. The application is accordingly rejected. The Official Liquidator is directed to declare dividends in accordance with the order passed as above, and to submit a report to the court.