
(2008) 07 P&H CK 0065
In the Punjab And Haryana At Chandigarh

IFCL Ltd.

APPELLANT

Vs

Punjab Wireless Systems Limited (In Liqn.) and Another

RESPONDENT

Date of Decision : 28-07-2008

Acts Referred:

COMPANIES ACT, 1956 — Section 457, 529, 529A, 530
Transfer of Property Act, 1882 — Section 100

Citation : (2009) 147 CompCas 303 : (2008) 152 PLR 238

Hon'ble Judges : Permod Kohli, J

Bench : Single Bench

Judgement

Permod Kohli, J.—The sole question involved in the present application is whether secured creditor can ask for interim disbursement of part of his claim pending adjudication of its claim alongwith other secured creditors and workmen in terms of Section 529-A and 530 of Companies Act read with Rules 147 to 179 of the Companies (Court) Rules, 1959.

2. Following are the admitted facts of the case:

M/s Punjab Wireless System Limited a Company registered under the Companies Act, was ordered to be wound by this Court vide order dated 1.2.2001 passed in C.P. No. 226 of 1999. Official Liquidator was appointed as Liquidator to take over the possession of the assets and property of the Company.

3. Sanction was granted in terms of Rule 272 of the Companies (Court) Rules, 1959 to the Official Liquidator to sell the assets and properties of the Company in Liquidation by inviting offers through advertisement in newspapers. On the receipt of tenders by the Official Liquidator and opening thereof inter-se bidding was conducted on 20.4.2006 and sale of 21 lots (fixed asset) was confirmed in favour of M/s Sun Group Enterprises Pvt. Ltd., M/s S.K. Disposers and M/s LOIL Continental Foods Ltd. For Rs. 3016 lac on 20.4.2006. Another amount of Rs. 860 lacs was received by the Official Liquidator in respect of sale of remaining 3 lots viz. lots Nos. 17, 19 & 20 in pursuance of order dated 8.8.2006 passed by Hon'ble Supreme Court in C.A. No. 3490 of 2006 arising out of SLP No.

24032-33 of 2005 titled as Punjab Wireless Systems Employee's Union v. Winsom Yarns Ltd. and Ors. An amount of Rs. 3876 lacs being the sale proceeds comprising fixed assets stands deposited with the Official Liquidator. The applicant (IFCL) filed CA No. 485 of 2005 seeking interim disbursement. This application was disposed of vide order dated 23.11.2006 on the basis of an order of the same date passed in C.A. No. 826 of 2006. This Court made following observations in order dated 23.11.2006:

The present applications by the auction purchaser who has purchased the assets of the company in liquidation in an auction conducted by this Court. The applicant has sought clarification that the assets of the company in liquidation has been sold to the applicant is not liable for any past dues of the company in liquidation. The applicant has relied upon para No. 7 of the advertisement to the effect that the liability of any tax, octroi and duty etc. which arise for sale, shall be of the purchaser and not of the company in liquidation. However, the previous liabilities of the company will not pass to purchaser of the assets/goods. The applicant has also sought direction to the Official Liquidator to apportion, invite and settle the claims of the creditors expeditiously.

After hearing learned Counsel for the applicant for some time, I do not find that any clarification is required in respect of the auction proceedings in respect of the assets of the company in liquidation. If any creditor including Regional Provident Fund Commissioner has raised any claim against the auction purchaser, it shall be open to the auction purchaser to dispute such claim or action in appropriate proceedings but the application to seek clarification is not maintainable after the sale is confirmed. No lis is pending in respect of sale of the property of the company in liquidation which may confer jurisdiction on the Company Court to entertain the present application. Therefore, no case for issuance of any clarification is made out.

However, Shri S.N. Mishra, Official Liquidator, who is present in the Court states that he shall take expeditious steps to apportion the sale proceedings derived from the sale of the assets of the Punjab Wireless Systems Limited (in liquidation) as well as he shall invite and settle the dues of the creditors of the company in liquidation expeditiously. In view of the said statement, I do not find any merit in the present application. The same is disposed of with a direction to the Official Liquidator to apportion the sale proceeds of the assets of the company in liquidation and to invite and settle the claims of the creditors at an early date, preferably within a period of six months from today.

The company application stands disposed of accordingly.

It is claimed that the IFCL has first charge over the fixed assets alongwith the Industrial Development Bank of India Ltd. whereas Canara Bank as lead Bank in consortium along with Indian Overseas Bank, State Bank of Patiala and Deutsche Bank have a second charge on the fixed assets. The workmen also have the charge over the sale proceeds in accordance with law. It is also admitted position

that IFCI has initiated separate proceedings before the Debt Recovery Tribunal at Chandigarh against the Company in liquidation and guarantors for recovery and the claim of the IFCI for an amount of Rs. 2745 lacs as on 29.9.2000 stands decreed vide judgment dated 31.8.2001 and execution proceedings are pending before the Recovery Officer.

4. The application, however, has been seriously resisted by the Official Liquidator in the written statement filed and during the course of the arguments. It is contended that interim disbursement is impermissible. The sale proceeds are to be distributed amongst the creditors, workmen etc. in accordance with the procedure prescribed under Rules 147 to 179 of the Companies (Court) Rules. It is further stated that the claims have to be adjudicated and the same have to be scrutinized by the Chartered Accountant to be appointed with the sanction of the Company Court and claims can only be disbursed on pro rata basis on final adjudication and not on piece meal basis.

5. The relevant extract of Sections 529A and 530 of the Companies Act, 1956 are reproduced here under:

529-A. Overriding preferential payments.:

(1) 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.

(2) The 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].

530. Preferential payments

(1) In a winding up [subject to the provisions of Section 529A, there shall be paid] in priority to all other debts:

(a) all revenues taxes, cesses and rates due from the company to the Central or a State Government or to a local authority at the relevant date as defined in Clause (c) of Sub-section (8), and having become due and payable within the twelve months next before that date;

(b) all wages or salary (including wages payable for time or piece work and salary earned wholly or in part by way of commission) of any employee, in respect of services rendered to the company and due for a period not exceeding four months within the twelve months next before the relevant date subject to the limit specified in Sub-section (2).

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(f) all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company; and

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(5) The foregoing debts shall:

(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(6) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them, and in the case of the debts to which priority is given by Clause (d) of Sub-section (1), formal proof thereof shall not be required except in so far as may be otherwise prescribed.

(7) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this Section shall be a first charge on the goods or effect so distrained on, or the proceeds of the sale thereof;

Provided that, in respect of any money paid under any such charge, the landlord or other person shall have the same rights of priority as the person to whom the payment is made....

6. Rules 147 to 179 provide the procedure for invitation, verification of the claims of various categories. Rules 161 and 162 deal with the proof of claims whereas Rule 163 provides for acceptance or rejection of the claims by the Official Liquidator. Rule 164 confers right of appeal with the creditor against the order of the Official Liquidator regarding rejection or the acceptance of the claims of any class of claimants. Rule 165 again prescribes the procedure for hearing creditors' appeal. Rules 172 to 178 deal with the settlement of claims of the creditors and also the manner of proof etc. whereas Rule 179 deals with the payment of subsequent interest.

7. Section 457 of the Companies Act, 1956 prescribes and identifies various powers of the Liquidator in a winding up matter. The extract of Section 457 relevant for the purposes of this petition is noticed here under:

457. Powers of Liquidator.:

1. The liquidator in a winding up by the [Tribunal] shall have power with the sanction of the [Tribunal]

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(c) to sell the immovable and movable property and actionable claims of the company by public auction or private contract, with power to transfer the whole thereof to any person or body corporate, or to sell the same in parcels;

[(ca) to sell whole to the undertaking of the company as a going concern]

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(e) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets....

8. A conjoint reading of the aforesaid provisions reveal that the liquidator once appointed shall have the power to deal with the assets and properties of the Company as he is the owner thereof, though he has to act as a prudent person while dealing the property. Such power includes power to sell the movable and immovable property and actionable claims of the Company by public auction and private contract to transfer the same to any person as a one lot or any separate unit and also to distribute its assets. These powers are, however, required to be exercised with the sanction of the Company court. Distribution of the assets of the Company is one of the important powers of the Liquidator. The object and purport for which the property is placed at the disposal and in custody and control of the Liquidator is to safeguard the interest of the creditors of the Company, particularly, the secured creditors like financial institutions. It has been experienced that due to various procedural wrangles and some time impediments created by the litigating parties, including official apathy, the sale and distribution of the assets of the Company, take longer time than is expected or should have been. The final distribution of the assets among the creditors and workmen as prescribed under Sections 529-A and 530 is made by the Official Liquidator after taking into consideration the claims of all the concerned and their entitlement as on the date of winding up and after deduction of the liquidation expenses. However, there does not seem to be any legal prohibition under the Act or any Rules which may prevent the court from making interim measures for distribution of the assets and properties of the Company which is of course subject to the final adjudication in settlement, in accordance with the procedure prescribed and the entitlement under law. It is in this context that the contention of the secured creditors is to be considered. The applicant in this case is a secured creditor who has first charge over the assets and properties of the Company. Assets and properties of the Company have been sold. Money is lying with the Liquidator. The applicants are only asking for interim disbursement, subject to the final determination of their claims. It is equally settled law that the Company Court, while dealing with the assets and properties of the Company in liquidation acts as an Executing Court. Rule 6 of the Companies (Court) Rules 1959 applies the provisions of the CPC in proceedings before the Company Court,

while dealing with liquidation matters which reads as under:

6. Practice and procedure of the Court and provisions of the Code to apply.:

Save as provided by the Act or by these Rules, the practice and procedure of the Court and the provisions of the Code so far as applicable, shall apply to all proceedings under the Act and these Rules. The Registrar may decline to accept any document which is presented otherwise than in accordance with these Rules or the practice and procedure of the Court.

9. By virtue of the aforesaid Rules read with Rule 9 of the Companies (Court) Rules, 1959, Company Court has the jurisdiction to issue necessary directions as an Executive Court and in absence of there being any specific provisions exercising inherent powers under Rule 9. Thus, this Court has the jurisdiction to issue necessary directions in respect to all matters relating to sale of assets and properties of the Company in liquidation and disposal of the sale proceeds thereof. Such powers include the power to take ad interim measures and by no stretch of imagination, the power to make interim disbursement can be excluded. High Court of Allahabad while dealing with the powers of the Company Court in the case of M/s U.P. State Cement Corporation Ltd. (in liquidation) decided on 12.10.2007 made following observations:

40. In this background having finalized almost the entire affairs, except few, which do not affect the disbursement, the Official Liquidator is directed to transfer the adjudicated, calculated and approved pari passu dividend to the secured creditors, workmen and the dues of UP Power Corporation within a period of 15 days from today. These amounts shall be paid by way of interim dividend retaining one per cent of the sale consideration for any future claims. The secured creditors shall be paid the amount after they give undertakings by way of affidavit of an officer not below the rank of General/Divisional Manager/Senior Manager of the banks and financial institutions duly authorized by their boards of directors....

10. The Allahabad High Court has expressed similar view in another case i.e. M/s Rajinder Steels Limited (in liquidation), (C.P. No. 44 of 1998) which reads as under:

5. Taking into account the fact that the final liquidation and declaration of final dividend may take a long time and to protect the interest of the financial institutions/secured creditors having first charge, the Court proposes to make an interim disbursement strictly in accordance with Sections 529, 529A and 530 of the Companies Act, 1956. The Official Liquidator will retain an amount of Rs. 5.4 crores-towards liquidation expenses. The remaining amount of Rs. 70 crores will be disbursed in ratio, in which two-third of the amount will be shared by the secured creditors and one-third of the amount will be shared by the workmen. Out of the two-third of Rs. 70-crores for secured creditors having first charge over the assets of the Company (in liquidation), the amount will be paid in the same ratio in which the secured creditors/first charge holder, advanced the

money as per the agreement between them. The Vijaya Bank having second charge under "hire purchase scheme" and "working capital loans" against stocks book debt etc. will not be entitled to share any amount at this stage. This arrangement will conform to the judgment of Supreme Court dated April 28th 2006 in Civil Appeal No. 2332 of 2006, ICICI Bank Ltd. v. Sidco Leathers Ltd. and Ors.

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7. Let the Official Liquidator make interim disbursement only to those secured creditors/first charge holder claimants, who have filed their "Affidavits of Proofs" of the two third of Rs. 70 crores in the same proportion in which their principal amount is mentioned in the agreement after taking an undertaking from them that in case at the time of declaration of final dividend they are held entitled to lesser amount, they will return the remaining amount to Official Liquidator without protest within a week from the declaration of final dividend. It will be open to other secured creditors/first charge holder namely ICICI, IRBI, New India Insurance, United India Insurance, UTI, GIC and National Insurance Co. to submit their claims with Affidavits of Proof, for availing similar benefits as have been provided to the IFCI, IDBI and ICICI in the same ratio after furnishing of similar undertaking. If it is possible, the Official Liquidator may make interim disbursement in pursuance of this order before 28th February, 2007 when the other matters in Rajinder Steel Ltd. (in liquidation) for sale of assets at Kanpur are coming up for hearing.

11. This Court also allowed therein disbursement in the case of IFCI v. Samsung Acrycot Ltd. (in liquidation) (C.A. No. 160 of 2007 in C.A. No. 530 of 2006 in C.P. No. 211 of 2002) decided on 8.3.2007 which reads as under:

Learned Counsel for the applicant has sought interim disbursement of the sale proceeds to the extent of 80% in the present application. It is pointed out that the balance 20% would be sufficient for settling the claims of the workmen....

In view of the above, learned Official Liquidator is permitted to disburse half of the amount of the sale proceeds to the secured creditors after getting an undertaking from the authorized representative to the effect that in the event of adjudication of the claims if the share of the secured creditors is less than the amount disbursed to them, the balance amount shall be refunded to the Official Liquidator forthwith.

12. A similar order regarding interim disbursement has been passed by this Court in the case of IFCI Ltd. v. Shree Bhawani Cotton Mills Limited (in liquidation) (C.A. No. 5 of 2007 in C.P. No. 121 of 1998) on 15.2.2007 which reads as under:

The Official Liquidator shall take steps for disbursement of the amount to the secured creditors within four weeks from today. The Official Liquidator is also permitted to appoint a Chartered Accountant to examine the records and to

furnish report to facilitate adjudication by him.

13. A similar interlocutory order has been passed in C.A. No. 806 of 2007 in C.P. No. 50 of 1999 on 11.1.2008, which is as follows:

Objections have been filed by the Official Liquidator. Admittedly, the assets of the Company were sold for an amount of Rs. 7.85 crore. SASF/IDBI is the only secured creditor which is the first charge holder of the property. Though Punjab and Sind Bank has the second charge but a separate suit has been filed by the Bank. The Bank has also not lodged any claim with the Official Liquidator. The amount of sale proceeds of the property of Company is lying with the Official Liquidator.

It is deemed proper that at this stage at least 60% of the amount be released in favour of SASF/IDBI by the Official Liquidator. In the event, the SASF/IDBI is required to contribute anything towards the expenses of liquidation of the Company, it will be liable to contribute for the said expenses, if so required.

14. Learned Counsel appearing for the Official Liquidator submits that the Official Liquidator is the representative of the workmen and is under an obligation to protect their rights. Reliance is placed upon observations made by the Hon'ble Supreme Court in the case of International Coach Builders Ltd. Vs. Karnataka State Financial Corpn., wherein it has been observed as under:

20. The Official Liquidator, as the representative of the workmen, to enforce such pari passu charge would have the right of representing the workmen equally with the rights of the secured creditors. Charge is defined u/s 100 of the Transfer of Properties Act thus....

14. In the case of Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another, , the Hon'ble Supreme Court again examined the powers of the Official Liquidator in respect of the distribution of the assets of the Company and observed as under:

19. ...The right to sell under the SFC Act or under the Recovery of Debts Act by a creditor coming within those Acts and standing outside the winding up, is different from the distribution of the proceeds of the sale of the security and the distribution in a case where the debtor is a company in the process of being wound up, can only be in terms of Section 529A read with Section 529 of the Companies Act. After all, the liquidator represents the entire body of creditors and also holds a right on behalf of the workers to have a distribution pari passu with the secured creditors and the duty for further distribution of the proceeds on the basis of the preferences contained in Section 530 of the Companies Act under the directions of the company court. In other words, the distribution of the sale proceeds under the direction of the company court is his responsibility....

15. Andhra Pradesh High Court in the case of IFCI Ltd. and Others Vs. A.P. Scooters Ltd. (In Liquidation), has made following observations:

6. The application is moved by the applicant under Sections 457 and 529-A of the Act. A careful perusal of these provisions would show no such power inheres either in the Court or in the Official Liquidator to make interim payment out of liquidation assets to the secured creditors even before claims of such secured creditors are adjudicated by the official liquidator in accordance with Rules 159, 163 and 169 of the Rules. Indeed no provision of law has been brought to the notice of this Court, which confers jurisdiction on the court to grant interim payment....

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8. In view of the above legal position, payment of moneys to secured creditors by way of interim disbursement ignoring Section 529-A of the Act does not arise. Furthermore, admittedly, the claims made by the secured creditors as well as the workers are under adjudication and in such a situation even if interim order is passed in exercise of inherent jurisdiction, the same would result in denying the right of workers to claim dues and also renders Section 529-A of the Act ineffective. Such an interpretation is neither permissible nor proper.

16. These observations have been made referring to the judgment of the Hon"ble Supreme Court in the case of Textile Labour Association and Another Vs. The Official Liquidator and Another, wherein the Hon"ble Supreme Court dealt with the rights of the workmen and the secured creditors under Sections 529, 529A vis-a-vis Section 530 of the Companies Act and made following observations:

7. ...

The effect of Sections 529 and 529A is that the workmen of the company become secured creditors by operation of law to the extent of the workmen's dues provided there exists secured creditor by contract. If there is no secured creditor then the workmen of the company become unsecured preferential creditors u/s 529A to the extent of the workmen dues. The purpose of Section 529A is to ensure that the workmen should not be deprived of their legitimate claims in the event of the liquidation of the company and the assets of the company would remain charged for the payment of the workers' dues and such charge will be pari passu with the charge of the secured creditors. There is no other statutory provision overriding the claim of the secured creditors except Section 529A. This section overrides preferential; claims u/s 530 also. u/s 529A the dues of the workers and debts due to the secured creditors are to be treated pari passu and have to be treated as prior to all other dues.

17. I have carefully perused the judgments in the case of IFCI Ltd. and Ors. (supra) and the Textile Labour Association (supra), I must say with utmost respect that the interpretation sought to be placed and the inference drawn from judgment of the Hon"ble Supreme Court does not suggest that there is any statutory embargo on the powers of the Official Liquidator to make interim disbursement or on the jurisdiction of this Court (Company Court) to order

interim disbursement. In the case of IFCL Ltd. and Ors. (supra) and the Textile Labour Association (supra), Hon"ble Supreme Court has only ruled that the claims of workmen u/s 529A is part passu i.e. at par with the secured creditors. These claims ought to be treated as preferential claims against all other dues payable by the Company (in liquidation). However, there is nothing to even prompt against the disbursement of the interim claims to the secured creditors. Inference, drawn is far fetched. I respectfully disagree with the observations of the Andhra Pradesh High Court in this regard. To the contrary, the power of the Official Liquidator u/s 457 of the Companies Act to disburse the assets/sale proceeds of the Company (in liquidation) are wide enough to confer the power to make interim disbursement. I, therefore, reject the contention of the Official Liquidator that this Court can not make interim disbursement within the reasonable limit out of the sale proceeds of the property and assets of the Company (in liquidation). It is, however, made clear that any interim disbursement is always and shall be subject to the final adjudication of the claims of the secured creditors, workmen and other persons entitled to receive the money from the sale proceeds of the property and assets of the Company (in liquidation) subject to the statutory provisions contained under Sections 529, 529A and 530 of the Companies Act This application is accordingly disposed of in the above manner.