(2006) 05 DEL CK 0014

In the Delhi High Court

Case No : Company Jurisdiction Report No. 314 of 2005

In Re : Bokiyu Tanneries Ltd.

Date of Decision : 22-05-2006

Acts Referred:
Companies Act, 1956 — Section 528, 529, 529(1), 529(3), 529A
Transfer of Property Act, 1882 — Section 48

Citation : (2006) 89 DRJ 513

Hon'ble Judges : Sanjiv Khanna, J

Bench : Single Bench

Advocate : Rajiv Shakdar, for the Appellant; Rajiv Shakdar and Rajiv R. Raj, for Indian Bank, S.K. Luthra and Manisha Tyagi for Official Liquidator, for the Respondent

Judgement

Sanjiv Khanna, J.—M/s. Bokiyu Tanneries Ltd. was ordered to be wound up vide Order dated 17th August, 1999 on the recommendation of BIFR.

2. By another Order dated 17th February, 2005, this Court appointed a Committee to scrutinise the claims of the secured creditors and the workers. After verifying the claims, the Committee has accepted the following claims:

(a) Workmen : Rs. 1,07,01,546/-.

(b) Secured creditors:

IFCI - Rs. 22,83,000/-

Indian Bank (first charge) - Rs. 1,74,84,486/-

Indian Bank (Second charge) - Rs. 7,17,88,954/-.

3. The total amount available for disbursement is Rs. 4,42,53,718/-. This is after deducting of expenses and after keeping aside Rs. 10 lacs for meeting liability of 52 workers who have not yet filed their claims.

4. The committee has recommended full payment of Rs. 1,07,01,546/- to the workmen and Rs. 22,83,000/- to IFCI (including Rs. 7,50,000/- already paid).

5. The Committee held that the payment of Rs. 2,92,50,000/- has already been made to Indian Bank against the total claim of Rs. 8,96,21,880/- (Rs.1,74,84,486 first charge and Rs. 7,17,88,954/- second charge) and Therefore no further amount is payable to Indian Bank against the first charge.

6. inspire of recommending full payment of Rs. 1,07,01,546/- to workmen, on the question whether only first charge or both first charge and second charge in favor of Indian Bank should be taken into consideration while calculating amount payable to workmen under Sections 529 and 529A of the Companies Act,1956 (hereinafter referred to as the Act), the committee opined that the matter be placed before the court for appropriate orders.

7. Indian bank has filed objections to the report stating that the Committee has misconstrued and misinterpreted Section 529A of the Act and has erred in holding that Indian Bank though a secured creditor is not entitled to pro rata share of the money available for distribution as it has second charge on Rs. 1,95,00,000/-. Indian Bank has further stated that the second charge, should be taken into consideration for payment of dividend/distribution between the secured creditors and the workmen.

8. In order to decide the controversy and issue involved, we have to examine the provisions of Sections 529 and 529A as well as provisions of Chapter V of the Act.

9. Section 528 of the Act states that in every case of winding up, an estimate of value of debt or any other claim against the company shall be made. For this purpose debts of all description are admitted to proof. Section 529 of the Act, makes the rules of insolvency applicable to the winding up proceedings. The rules in force under the law of insolvency apply with equal force to debts provable, valuation of annuities and future and contingent liabilities and respective rights of secured and unsecured creditors.

10. In 1985, Section 529 of the Act was amended and new Section 529A was enacted. This brought about a substantive change in the manner in which payment to secured creditors is to be made, when workmen also have claims. Section 529(1) of the Act reads as under:

Section 529. Application of insolvency rules in winding up of insolvent companies. (1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to :

(a) debts provable.

(b) the valuation of annuities and future and contingent liabilities; and

(c) 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:

Provided that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favor of the workmen to the extent of the workmen''s portion therein, and, where a secured creditor, instead of relinquishing his security and proving is debt, opts to realise his security,-

(a) the liquidator shall be entitled to represent the workmen and enforce such charge;

(b) any amount realised by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen''s dues; and

(c)so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso on the amount of the workmen''s portion in his security, whichever is less, shall rank pari passu with the workmen''s dues for the purposes of Section 529-A.

11. The aforesaid provision Therefore provides that the insolvency rules shall equally apply when a company is being wound up in respect of Clauses (a), (b) and (c) of Sub-section (1). Under the proviso, a secured creditor has been given liberty to realize his security but the amount so realized is subject to pari passu charge to the extent of ''workmen''s portion'' and has to be proportionately applied for payment of the ''workmen''s portion''. This charge in favor of the ''workmen portion'' is created by the operation of the law from the date of the winding up order. The liquidator is entitled to represent the workmen and enforce the charge and amount realized has to be applied rateably for discharge of the workmen''s dues.

12. The expression ''workmen''s portion'' has been defined in Section 529(3) of the Act. The said provision is as under:

(3) For the purposes of this Section, Section 529-A and Section 530,''

(a)-(b) * * *

(c) ''workmen''s portion'', in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the amount of the workmen''s dues bears to the aggregate of''

(i) the amount of workmen''s dues; and

(ii) the amounts of the debts due to the secured creditors.

Illustration. : The value of the security of a secured creditor of a company is Rs. 1,00,000. The total amount of the workmen''s dues is Rs''1,00,000. The amount of the debts due from the company to its secured creditors is Rs. 3,00,000. The aggregate of the amount of workmen''s dues and of the amounts of debts due to secured creditors is Rs. 4,00,000. The workmen''s portion of the security is, Therefore, one-fourth of the value of the security, that is Rs. 25,000.

12. Section 529(3)(c) of the Act provides and states how ''workmen''s portion'' has to be calculated. For this purpose we have to calculate aggregate amount of workmen''s dues and aggregate debt due to all the secured creditors. The

legislature has deliberately used the word ''creditors'' in plural. On proportionate basis (i.e. the aggregate of debt of secured creditors in proportion to the aggregate of workmen''s claims) the ''workmen portion'' has to be computed. This cannot be done without aggregating dues of the secured creditors. If we leave out debt of one or more secured creditor, the ratio or the proportionate amount of ''workmen''s portion'' shall get enhanced. Similarly if claim/dues of any workman is left out the pari passu charge created u/s 529 of the Act will be reduced. The illustration given makes the position clear beyond doubt.

13. Section 529A of the Act, provides for over-riding preferential payment and reads as under:

Section 529A. 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

(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.

14. Section 529 A of the Act, Therefore, deals with two different types of creditors: (i) the workmen and (ii) debt due to the secured creditors, which is subject matter of pari passu charge in favor of the workmen also. Pari passu'' means with equal steps, equally, without preference'' (Jowitt''s Dictionary, volume II, 1959 edition 1294). Black''s Law Dictionary, sixth edition, page 115 defines it as `by an equal progress ... used especially of creditors who, in marshalling assets, are entitled to receive out of the same fund without any precedence over each other''. It is also defined as `with equal steps, that is to say, proceeding side by side at the same place'' (Prem''s Judicial Dictionary, volume III, 1964 edition, page 1217).

15. The rights of the pari passu charge in favor of the workmen would run equally, temporally and potently, with the rights of the secured creditors. The official liquidator, as the representative of the workmen, to enforce such pari passu charge has the right of representing the workmen equally with the rights of the secured creditors. Where the secured creditor, instead of relinquishing his mortgage and proving his debt, opts to stand outside the winding up proceedings and realise his security, the official liquidator is entitled to represent the workmen and enforce such charge and any amount realised by enforcement of such charge is to be applied rateably by the official liquidator for the discharge of workman''s dues. It is true that even the amended provisions do not give the liquidator an independent right of enforcing the charge by selling the security

against which such charge is created. None the less, it creates a "pari passu" charge in favor of the workmen to the extent of their dues and makes the liquidator the representative of the workmen to enforce such a charge. By reason of Clause (c) of the proviso to Section 529 of the Act, so much of the debt due to the secured creditor opting to realise security as could not be realised because of the specially created rights in favor of the workmen, or the amount of the workman''s portion in the security, whichever is less, shall rank pari passu with the workman''s dues u/s 529A. Both the dues of the secured creditors and the workmen u/s 529A(2) abate in equal proportion. Thus the endeavor is to ensure that the workmen and the secured creditors are treated at par and equally in proportion to their respective dues. The security of every secured creditor is deemed to be subject to a "pari passu" charge in favor of the workmen to the extent of the workman''s dues (called workman''s portion, as defined in Section 529(3)(c) of the Act). Section 529A provides for overriding preferential payments of workman''s dues and unrealised portion of the secured creditors dues, as provided in Clause (c) of the proviso to 529.

16. Sections 529 and 529A of the Act Therefore create two different classes of creditors who have been treated as ''priority preferential creditors'' having over-riding rights, namely, workmen and secondly, the secured creditors. The said sections however do not make any distinction between secured creditors having the first charge or the second charge. All the secured creditors have been treated as a separate class and have been clubbed together under Sections 529 and 529A of the Act without any distinction. Similarly u/s 529(3)(c) also aggregate of debts of all secured creditors whether having first charge or second charge have to be taken into account. Section 529A does not make any difference between the secured creditors having the first charge or the second charge. A secured creditor having a second charge does not cease to be a secured creditor within the meaning of Sections 529(3) and 529A of the Act because dues of the secured creditors having first charge have to be paid before payment is made to a secured creditor having a second charge. Secured creditors are treated as one group and the amount payable to the workmen u/s 529(3)(c) of the Act i.e. workmen''s portion is accordingly ascertained.

17. Section 529A does not provide for and specify how payment is to be made between the secured creditors having the first charge and/or the second charge. For that one has to refer to Section 48 of the Transfer of Property Act, 1882. The said Section determines the priority between the secured creditors, as this aspect is not determined by Section 529A. Section 529A does not at all deal with how the amount is to be apportioned between the secured creditors having the first charge and the second charge. The said distribution takes place in accordance with the principles of general law i.e. Section 48 of the Transfer of Property Act. The workers dues along with the dues of the secured creditors have to be paid in priority to other debts. The workers dues rank pari passu with secured creditors. Merely because Indian Bank also has second charge in respect of one loan, the amount payable under the said loan cannot be ignored and has to be taken into

consideration while applying Sections 529 and 529A of the Act. In Section 529(3)(c) and the Illustration given in the said Section, again no distinction is made between a secured creditor who has a first charge and a secured creditor has a second charge. Reference in this regard may be made to the recent judgment of the Supreme Court in the case of ICICI Bank Ltd. v. Sidco Leathers Ltd. and Anr. (Civil Appeal No. 2332/2006). In the said judgment it has been held as under:

The non-obstante nature of a provision although may be of wide amplitude the interpretative process thereof must be kept confined to the legislative policy. Only because the dues of the workmen and the debt due to the secured creditors are treated pari passu with each other, the same by itself, in our considered view, would not lead to the conclusion that the concept of inter se priorities amongst the secured creditors had thereby been intended to be given a total go-by.

A non-obstante clause must be given effect to, to the extent the Parliament intended and not beyond the same.

Section 529-A of the Companies Act does not ex facie contain a provision (on the aspect of priority) amongst the secured creditors and, hence, it would not be proper to read there into things, which the Parliament did not comprehend. The subject of mortgage, apart from having been dealt with under the common law, is governed by the provisions of the Transfer of Property Act. It is also governed by the terms of the contract.

x x x

Section 529(1)(c) of the Companies Act speaks about the respective rights of the secured creditors which would mean the respective rights of secured creditors vis-a-vis unsecured creditors. It does not envisage respective rights amongst the secured creditors. Merely because Section 529 does not specifically provide for the rights of priorities over the mortgaged assets, that, in our opinion, would not mean that the provisions of Section 48 of the Transfer of Property Act in relation to a company, which has undergone liquidation, shall stand obliterated.

18. In the case of Andhra Bank Vs. Official Liquidator and Another, , the Supreme Court while examining Section 529 and 529A of the Act, has held as under:

22. ... The ''workmen''s portion'' as contained in proviso to (c) of Sub-section (3) of Section 529 in relation to the security of any secured creditor means the amount which bears to the value of the security the same proportion as the amount of the workmen''s dues bears to the aggregate of (a) workmen''s due, and (b) the amount of the debts due to all the (six secured) creditors. The submission of Mr. Gupta is that in a situation of this nature, what was necessary to be considered by the learned Single Judge was to find out the amount in relation whereto the appellant was raising its claim as a secured creditor, namely, Rs. 135 lakhs vis-a-vis the aggregate of the amount of the workmen''s dues of Rs. 19 crores and the claim of any other secured creditor was not required to be taken into consideration. We cannot accept the said contention. The Illustration

appended to Clause (c) of Sub-section (3) of Section 529 is a clear pointer to the effect that the amount of debts due to the secured creditors should be taken into consideration for the purpose of ascertaining the workmen''s portion of security.

19. In the case of UCO Bank Vs. Official Liquidator, High Court, Bombay and Another, , it has been held that the legislative intent in enacting Section 529A and 529 was not that the workers claims should rank higher in priority to secured creditors.

20. In view of the above, it has to be held that while making payment or distributing dividend after passing of the winding up order, the dues payable to the secured creditors have to be verified and calculated. For the purpose of Section 529 and 529A of the Act, all the secured creditors including those having second charge are treated equally and their claims cannot be differentiated. Similarly, the claims of all the workmen have to be calculated and accordingly in terms of Sections 529(3) and 529A of the Act, payment is to be made in the ratio and proportion specified therein.

21. Accordingly, it is held that the Committee while recommending payment/ distribution of dividend has incorrectly not taken into consideration the dues payable to Indian Bank as a secured creditor holding a second charge. The Committee shall accordingly calculate the proportion and ratio in which the payment is to be made in the light of the observations given above. The report and the objections are accordingly disposed of.