

(2005) 11 AHC CK 0132

In the Allahabad High Court

Case No : Company Miscellaneous Application No. 8 Of 1996

**In Re: Himalayan Magnesite Limited (In Liquidation)
KHSL
Industries Ltd.**

Date of Decision : 21-11-2005

Acts Referred:

Companies Act, 1956 — Section 449, 529, 529A, 530
State Financial Corporations Act, 1951 — Section 29, 31

Citation : (2005) 11 AHC CK 0132

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Advocate : A.K. Misra and S.K. Saxena, for the Appellant; Anurag Khanna, R.P. Agarwal and Vivek Chaudhary, for the Respondent

Final Decision : Disposed Of

Judgement

Sunil Ambwani, J.—Heard Sri A.K. Misra for Official Liquidator.

2. M/s Himalayan Magnesite Ltd. (In Liq.) was ordered to be wound up by this Court on 22.9.1999, on the recommendation of BIFR and the Official Liquidator was appointed as Liquidator by virtue of Section 449 of the Companies Act 1956. The possession of the assets of the Company (In Liq.) situate at Pithoragarh were taken over by the Official Liquidator on 18.9.2002 in the presence of, among others, and the Deputy Manager, State Bank of India, Rudrapur, one of the secured creditor. The Official Liquidator reports in application No. 219961 of 2005 that at the time of taking over the possession, it was found that all the movable assets including plant and machinery was removed and nothing was found in the factory except scrap. The company has leases of land, mines and some scrap material was found on the spot. Sri Dayaloo Ram was appointed to take care of the security. It is now reported that the State Bank of India having full knowledge of the liquidation proceedings and the possession of the Official Liquidator initiated proceedings under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 and obtained a decree in execution vide DRT No. 41 of 2003 State Bank of India versus M/s Himalayan Magnesite Ltd and others.

The Recovery Officer, Debts Recovery Tribunal, Lucknow ordered for the auction sale which was conducted on 13.10.2005 with reserved price of Rs. 12 lakhs and the properties were sold on 13.10.2005. It is reported that all this took place with full knowledge that the assets of the Company are in possession of the High Court and that the Official Liquidator was appointed and is functioning as the Liquidator of the Company.

3. In *Allahabad Bank v. Canara Bank and Anr.* (2000) 2 Comp. L.J. 170 (SC) Supreme Court held that in view of the Recovery of Debts Act being a subsequent legislation and being a special law would prevail over general law i.e., the Company Act, 1956. In subsequent decision in *Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another*, dated 5.10.2005, the Supreme Court field us follows:

17. Thus, on the authorities what emerges is that once a winding up proceeding has commenced and the liquidator is put in charge of the assets of the company being wound up, the distribution of the proceeds of the sale of the assets held at the instance of the financial institutions coming under the Recovery of Debts Act or of financial corporations coming under the SFC Act, can only be with the association of the Official Liquidator and under the supervision of the Company Court. The right of a financial institution or of the Recovery Tribunal or that of a financial corporation of the Court which has been approached u/s 31 of the SFC Act to sell the assets may not be taken away but the same stands restricted by the requirement of the Official Liquidator being associated with it, giving the Company Court the right to ensure that the distribution of the assets in terms of Section 529A of the Companies Act taken place. In the case on hand, admittedly, the appellants have not set in motion, any proceeding under the SFG Act. What we have is only a liquidation proceeding pending and the secured creditors, the financial corporations approaching the Company Court for permission to stand outside the winding up and to sell the properties of the company in liquidation. The Company Court has rightly directed that the sale be held in association with the Official Liquidator representing the workmen and that the proceeds will be held by the Official Liquidator until they are distributed in terms of Section 529A of the companies Act under its supervision. The directions thus, made, clearly are consistent with the provisions of the relevant Acts and the view expressed by this Court in the decisions referred to above. In this situation, we find no reason to interfere with the decision of the High Court. We clarify that there is no inconsistency between the decisions in *Allahabad Bank v. Canara Bank and Anr.* (2000) 2 Comp. LJ 170 (SC), *supra*, and in *International Coach Builders Ltd. Vs. Karnataka State Financial Corpn.,* , in respect of the applicability of Sections 529 and 529A of the Companies Act in the matter of distribution among the creditors. 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 529 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. To ensure the proper working out of the scheme of distribution, it is necessary to associate the Official Liquidator with the process of sale so that he can ensure, in the light of the directions of the Company Court, that a proper price is fetched for the assets of the company in liquidation. It was in that context that the rights of the Official liquidator were discussed in *International Coach Builders Limited >(2003) 2 Comp LJ 166 (SC), supra*. The Debt Recovery Tribunal and the District Court entertaining an application u/s 31 of the SFC Act should issue notice to the liquidator and hear him before ordering a sale, as the representative of the creditors in general.

18. In the light of the discussion as above, we think it proper to sum up the legal position thus:

(i) A Debt Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company in liquidation, through its Recovery Officer but only after notice to the Official Liquidator or the liquidator appointed by the Company Court and after hearing him.

(ii) A District Court entertaining an application u/s 31 of the SFC Act will have the power to order sale of the assets of a borrower company in liquidation, but only after notice to the official Liquidator or the liquidator appointed by the Company Court and after hearing him.

(iii) If a financial corporation acting u/s 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company in liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the Company Court and acting in terms of the directions issued by that Court as regards associating the official Liquidator with the sale, the fixing of the up set price of the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of Section 529A and Section 529 of the Companies Act.

(iv) In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the SFC Act are not set in motion, the concerned creditor is to approach the Company Court for appropriate directions regarding the realisation of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the company in liquidation.

4. The Official Liquidator as such represents the entire body of the creditors and also holds a right on behalf of the workers to have a distribution *pari passu* with

the secured creditors and to discharge the duty for further distribution of the proceeds on the basis of preferences contained in Section 530 of the Company Act and the directions by the Company Court. To ensure the proper sale and distribution of the sale proceeds, it is necessary to associate the Official Liquidator with the process of sale after issuing notice and hearing him, so that he can ensure, in the light of the directions of the Company Court, that a proper price is fetched for the asset of the company (In Liq.)

5. The up shot of aforesaid decision is that when the company has been wound up and the assets are in possession of the Court through the Official Liquidator, the creditors of the company the Debt Recovery Tribunal or the recovery officer cannot, without informing the Court and associating the Official Liquidator proceed with the sale or disposal of the assets of the company or to distribute or appropriate the sale proceed, where the assets have been disposed of without assent of the Official Liquidator. There is likelihood of it being appropriated, without taking into account the rights of the workmen government dues and the dues of other creditors. Further it is also a question of propriety and fairness in sale of the assets. I, therefore, prima facie find that the State Bank of India as well as Recovery Officer, Debt Recovery Tribunal, Lucknow exceeded their authority to sell the assets of the company and that the sale made by them cannot be sustained. Sri A.K. Misra states that the Official Liquidator has not been informed about the details of the sale and the price fetched by the Recovery Officer.

6. Having regard to the facts and circumstances, let notices be issued to the State Bank of India, Rudrapur Branch, Rudrapur, and the Recovery Officer. Debts Recovery Tribunal, Lucknow, to disclose full facts giving details of the sale and further to show cause as to why the sale be not cancelled and they be not proceeded lor violating the provisions of the Company Act 1956 and the Company (Courts) Rules 1959. The notices shall be annexed a copy of this order and shall returnable by 19.12.2005. List on 19.12.2005.

7. Until further orders the parties and the purchasers shall maintain status quo with regard to assets of M/s Himalayan Magnesite Ltd. (In Liq.) including those assets which have been sold by the Recovery Officer, Debt Recovery Tribunal, Lucknow.