
(2007) 04 CAL CK 0012
In the Calcutta High Court
Case No : BIFR No. 65 of 1988

In Re: Kumardhubi Fire Clay and Silica Works Ltd.

Date of Decision : 24-04-2007

Acts Referred:

Companies Act, 1956 — Section 529, 529A

Citation : AIR 2007 Cal 239

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : A.K. Dhandhaniala, M. Ghosh and M. Sen, S.C. Prasad, Soumen Sen, for the Appellant;

Judgement

Sanjib Banerjee, J.—In this letter for direction the Official Liquidator had sought directions for declaring and making payment of dividend to the 1572 workmen and for ancillary orders. Copies of the letter for directions were required to be served on the two secured creditors. Bihar State Financial Corporation and State Bank of India. The workers have also joined in and challenged the finding of the Official Liquidator that only a sum of Rs. 4.47 crore (approx) was payable to the workers after accepting the permissible claims of the secured creditors.

2. The Official Liquidator claimed that the total fund for distribution is a sum of Rs. 11.90 crore. After deducting expenses incurred and payments made, including to Bihar State Financial Corporation (BSFC), the closing balance in the hands of the Official Liquidator as at February 28, 2007 appears to be a sum of Rs. 10,97,28,622/-.

3. The workers submit that the workers have a right at par with BSFC and ahead of State Bank of India as regards the fixed assets of the company in liquidation.

4. Bihar State Financial Corporation claimed a much larger sum but the Official Liquidator settled the claim at Rs. 1,87,96,743.49. BSFC has not been aggrieved by such settlement made by the Official Liquidator.

5. The 1572 workers claimed a sum of Rs. 7,23,24,652.15, that is an average of Rs. 46,008/- per worker. The State Bank of India lodged a claim in excess of Rs.

10 crore. The Official Liquidator found that the total amount due to State Bank of India would be Rs. 5,54,23,558/-. After adding the settled claim of BSFC of Rs. 1,87,96,743/- to the money found as payable to the bank, a sum of Rs. 4,47,79,699/- would be left in the hands of the Official Liquidator out of the then total available funds of Rs. 11.90 crore. The Official Liquidator prayed for release of settled amounts to the State Bank of India and to the workmen.

6. It is submitted on behalf of the workers that BSFC had a first charge on the fixed assets of the company and despite State Bank of India's claim of mortgage of some of the fixed assets, there is no document in support of such claim nor any mortgage was created by the company, prior to its liquidation, in favour of the bank. The workers, thus, submit that State Bank of India can have no claim in respect of the sale proceeds relating to the fixed assets of the company and it would only be BSFC and the workers in terms of Section 529A and Section 529 of the Companies Act, 1956, who would be entitled thereto. It is conceded on behalf of the workers, upon relevant papers in that regard being produced by the Bank, that State Bank of India enjoys a charge on the current assets of the company and the sale proceeds therefrom could be divided between the workmen and State Bank of India in proportion to their settled claims.

7. The Bank's claim for Rs. 10 crore was sought to be settled for a sum in excess of Rs. 5 crore despite the submission made earlier before Court when the secured creditors of the company in liquidation were called upon to pay expenses for maintaining the security guards to protect the assets of the company in liquidation. Submissions made on behalf of the State Bank of India repeatedly at various stages of the proceedings, have been referred to by the workmen. It is evident that right upto the Supreme Court it was the stand of the State Bank of India that it had a nominal claim against the company in liquidation and that it should be required to pay such proportion of security expenses as would be relatable to its charge over the assets of the company in liquidation. It is on the basis of such submission made on behalf of the Bank that it was required to pay much less than what was originally required. It was suggested on behalf of the workers that the Bank was estopped making a large claim upon its stand having been accepted by Court earlier to reduce its share in the security expenses. The ultimate claim in excess of Rs. 10 crore made by the Bank was by far the largest claim made by any creditor.

8. However, the Bank's claim cannot be discredited because of submission made earlier in the proceedings. Indeed, if the Bank could establish its claim upon the papers that it relied on, at the highest, the Bank could have been found guilty of misleading Court and could have been subjected to the consequences therefor. The Official Liquidator could, naturally, not take such matter into consideration and rightly proceeded to deal with the Bank's claim with merits. However, the Official Liquidator fell into error in accepting the Bank's claim that it had a paramount charge over the fixed assets of the company when Bank could produce no documents in support of such claim. The Official Liquidator

recognised the Bank's right to a part of the sale proceeds relating to the fixed assets of the company and thus the workers' claim relating thereto got proportionately reduced.

9. As it is now evident that the Bank could not have been claimed a first charge over the fixed assets of the company, and the Bank does not dispute such position now, the Bank's claim in respect of the proceeds from the sale of the fixed assets of the company could not have been entertained. The Bank submits that the company in liquidation had intended to create a mortgage in its favour in respect of some or all of the fixed assets of the company in liquidation but no document to such effect was finally executed. The papers that it relied on before the Official Liquidator related to the creation of a second charge over the fixed assets, subject to the charge of BSFC.

10. It is urged on behalf of the workers that the protection guaranteed unto that workers u/s 529A, puts the claim of the workers at par with the rights of the secured creditors. It is submitted that such right of the workers is to be recognised to be on the same pedestal as the secured creditor enjoying first charge over the assets. It is urged that if the rights of the workers are equated with the rights of the last charge holder, the right created by the overriding provisions of Section 529A would be illusory. There is substance in such contention. It can be imagined that a company prior to its liquidation created security ten times over in respect of the same assets. If the workers were required to wait upon the tenth charge holder's right being exhausted upon the company going into liquidation, the protection given to the workers u/s 529A would be meaningless. A company would effectively be able to deny all benefits, and even legal rights to its workers, by creating multiple charges in respect of its most valuable assets.

11. Section 529A read with the applicability of the insolvency rules recognised in Section 529 would put the workers on the same footing as the highest charge holder in respect of any security. In this case, since BSFC had the first charge over the fixed assets of the company, the workers enjoyed a similar right in respect of the fixed assets. The rights of the State Bank of India, inarguably the second charge holder, would be subject to the rights of BSFC and the workers and the bank could fall in line to receive payment only after the dues of BSFC and workers as settled had been discharged.

12. The bank would, however, enjoy higher rights in respect of the current assets of the company in liquidation. It would have been necessary to go into the apportionment of the amounts held by the Official Liquidator on account of fixed assets and current assets had the sum available fallen short of the total claim of the secured creditors after the workers being elevated to such status by virtue of the provisions of Section 529A. The bank has submitted that it would be satisfied if a sum of Rs. 3 crore out of the funds held by the Official Liquidator were paid to it.

13. This brings us to the simple arithmetic. The sum of Rs. 1,87,96,743.49 found due to BSFC need not be considered as the funds now lying in the hands of the Official Liquidator are net upon such money having been paid to BSFC. If the workers' claim of Rs. 7,23,24, 652.15 is discharged from the sum of Rs. 10, 97,28,622/- held by the Official Liquidator as at the end of February 2007, a sum in excess of Rs. 3.64 crore would be left out of which the claim of Rs. 3 crore now sought by State Bank of India can be met and the Official Liquidator can thereafter retain a sum of Rs. 64 lakh out of which the liquidation expenses can be discharged before the other creditors of the company, in accordance with their rights, can be invited to partake of the leftover funds.

14. The Letter for Directions of September 6, 2006 is disposed of with the following directions:

i) The workers' claim is settled at Rs. 7,23,24,652.15 and disbursement in the form of dividend for such amount should be made by the Official Liquidator within a reasonable time. Such disbursement has to be made to the individual workers upon due verification and upon the Official Liquidator being satisfied that each recipient of the money is entitled thereto.

ii) State Bank of India will be paid, by way of dividend, a sum of Rs. 3 crore in full and final satisfaction of its claim as sought by the bank. Since the bank has reduced its claim, the additional amount that it was liable to pay on account of security expenses upon its earlier submission now having been found to be inaccurate, need not be deducted from the sum of Rs. 3 crore.

iii) The Official Liquidator will be entitled to seek further directions for liquidation expenses that may have been incurred on the basis of the actuals.

iv) The Official Liquidator will invite claims from other creditors in accordance with their rights and make disbursement without further leave in accordance with law.

v) BSFC will be entitled to stand in queue as an unsecured creditor in respect of the balance claim made which was not found to be payable by the Official Liquidator.

15. For the purpose of carrying out the above and ancillary directions, the Official liquidator has leave to encash the fixed deposits but only after April 30, 2007.

16. Urgent photostat certified copy of this order, if applied for, be supplied to the parties upon all requisite formalities.