(1953) 01 CAL CK 0002

In the Calcutta High Court

In Re: Parjoary Hosiery Mills Ltd.

Date of Decision : 30-01-1953

Acts Referred:
Income Tax Act, 1961 — Section 46, 46(2)

Citation : 57 CWN 590

Hon'ble Judges : S.R. Das Gupta, J

Bench : Single Bench

Advocate : Ranadeb Chaudhuri and D.C. Sethia, for the Appellant;Sankar Banerjee for Union of India and R.K. Ghose for Official Liquidators, for the Respondent

Final Decision : Allowed

Judgement

S.R. Das Gupta, J.

1.This is an application on behalf of Messrs. Jewanram Gangaram, inter alia, for an order that the rights of the petitioner as secured creditor be declared and determined by this Court and that the Joint Official Liquidators appointed herein be directed to pay to the petitioner out of the sale-proceeds in their hands the sums mentioned in the notice of motion and leave be given to the petitioner to prove for the balance of its claim in the liquidation proceedings. The matter arises in this way. By a deed of mortgage and hypothecation dated the 17th March, 1949, the company, that is, the Parjoary Hosiery Mills, created a first charge in favour of the petitioner M/s. Jewanram Gangaram for a sum of Rs. 1,00,000 upon all plants, machinery, structure, etc., as well as the leasehold interest of the company in the lands whereupon the factory of the company was situate. The petitioner''s case is that the said sum was advanced by the petitioner to the company. The said charge was not registered with the Registrar of Joint Stock Companies, West Bengal, as required u/s 109 of the Indian Companies Act, till 14th December, 1950. In the meantime, on the 29th May, 1949, a certificate u/s 46(2) of the income tax Act, was issued by the Certificate Officer for Rs. 59,901-4 due by the company for excess profits tax for the accounting period ending 31st March, 1945. On the 14th March, 1950, another certificate u/s 46(2) of the income tax Act was issued by the Certificate Officer for Rs. 46,185-8 being the amount due for excess profits tax plus compulsory deposit for the accounting period ending 31st March. 1946. Thereafter on the 21st March, 1950, a notice u/s 7 of the Public Demands Recovery Act was issued by the Certificate Officer for the said sum of Rs. 46,185-8 and a Warrant of attachment of movables belonging to the company was also issued by the Certificate Officer in respect of the said sum. On 25th March, 1950, the said notice u/s 7 of the Public Demands Recovery Act was served on the company and on the same date certain machineries and other articles belonging to the company were attached. The said articles were however kept in the custody of a surety on the latter executing a bond to produce the same when required to do so. On 4th December, 1950, an order was made u/s 120 of the Indian Companies Act extending the time for registering the charge created in favour of the petitioner Messrs. Jewanram Gangaram. On the 14th December, 1950, the said charge was registered. Thereafter on the 29th December, 1950, a notice on behalf of the petitioner u/s 162 of the Indian Companies Act was served on the company. On February 5, 1951, a petition was presented by the said Messrs. Jewanram Gangaram for winding up without abandoning its rights as secured creditor. The said petition was admitted by this Court. There after, on the 29th March, 1951, a second hypothecation was created in favour of Jewanram Gangaram to secure a further sum of Rs. 42,600. It appears that after the petition for winding up was made, certain arrangements were arrived at between the petitioner and the company and on the 2nd April, 1951, the said petition was withdrawn. Subsequently, on 20th April, 1951, an application was made by the petitioner for vacating the order, dated 2nd April, 1951, allowing the petition for winding up to be withdrawn. On 7th May, 1951, an order was made on the agreed minutes put in by the parties to the said application the said order provided that if no order for continuation and/or revival of the quota of yarn was obtained by the company within six weeks from the 7th May, 1951, the order dated 2nd April, 1951 would stand vacated and the petitioner would be entitled to proceed with the application for winding up. The company failed to obtain the said quota of yarn within the period mentioned and on 8th August, 1950 the company was ordered to be wound up and Mr. A. P. Chowdhury and Mr. K. K. Marar were appointed Joint Official Liquidators. On 15th January, 1951, an order was made giving leave to the Liquidators to sell the hosiery mills by public auction to the highest bidder. Thereafter on the 8th February, 1952, summons was taken out by the petitioner for leave to bid at the sale and to set off the moneys due under the mortgage. On 13th February, 1952, an order was made directing sale by the Official Liquidators in such lots as they may decide On 1st March, 1952, the factory was sold by the Official Liquidators in four different lots; the properties mortgaged to the petitioner M/s. Jewanram Gangaram being sold in one lot for Rs. 1,59,000. On 1st April, 1952, the said sale was confirmed. There after on the 23rd June, summons was taken out by the petitioner inter alia, for a direction upon the Liquidators to pay the applicant as secured creditors Rs. 1,50,000 out of the sale-proceeds of the lot mortgaged to him. On the nth

August, 1952, the said application was adjourned by Banerjee, J.

2. The petitioner''s case is that Banerjee, J., adjourned the said application to enable the petitioner to take out a fresh summons and on that date, Banerjee, J., also ordered: "The Liquidators not to spend money." On 13th August, 1952, summons for the present application was taken out by the petitioners. As I have already said, the relief''s asked for in the application are that the rights of the petitioner as secured creditor be declared and determined by this Court and the Joint Official Liquidators appointed herein be directed to pay the petitioners out of the sale-proceeds in their hands, Rs. 1,21,713-11 due and the mortgage, dated 17th March, 1949, Rs. 50,188-12 due to the petitioner under deed of hypothecation, dated 29th March, 1951, and the security created by the said deeds be valued and leave be given to the petitioner to prove for the balance of its claim in the liquidation proceedings.

3. There is an alternative prayer that it necessary, leave be given to the petitioner to bring and proceed with an action against the Official Liquidators.

4. The application is opposed mainly the Union of India. The Union of India is interested in opposing the application because of the dues of the income tax Authorities as aforesaid. There are some other creditors, who also opposed the application, but the learned Standing Counsel appearing for the Union of India led all the opposition to this application.

5. Mr. Chaudhuri, who appeared on behalf of the petitioner, based his application on rule 18 of Schedule 2 of the Presidency Towns Insolvency Act. In the alternative, Mr. Chaudhuri contended that the application is maintainable even apart from rule 18 and on principles of the English Law.

6. It would be convenient at this stage to set out rule 18 of Schedule 2 of the Presidency Towns Insolvency Act. The said rule reads as follows:

Upon application by any person claiming to be a mortgagee of any part of the Insolvent''s real or leasehold estate and whether such mortgage is by deed or otherwise, and whether the same is of a legal or equitable nature, or upon application by the official assignee with the consent of such person claiming to be a mortgagee as aforesaid, the Court shall proceed to inquire whether such person is such mortgagee, and for what consideration and under what circumstances; and if it is found that such person is such mortgagee, and if no sufficient objection appears to the title of such person to the sum claimed by him under such mortgage, the Court shall direct such accounts and enquiries to be taken as may be necessary for ascertaining the principal, interest and costs due upon such mortgage, and all the rents and profits or dividends, interest or other proceeds received by such person or by any other person by his order or for his use in case he has been in possession of the property over which the mortgage extends or any part thereof and the Court, if satisfied that there ought to be a sale, shall direct notice to be given in such newspapers as the Court thinks fit, when and where, and by whom and in what way the said premises or property or the interest therein so mortgaged, are to be sold, and that such sale be made accordingly, and that the official assignee (unless it is otherwise ordered) shall have the conduct of such sale; but it shall not be imperative on any such mortgagee to make such application. At any such sale the mortgagee may bid and purchase.

7. Mr. Banerjee raised a preliminary objection and he contended that this application is not maintainable under rule 18 of the said schedule. He contended before me that at this stage, an application under rule 18 of the said schedule is not maintainable, the property having been already sold in the winding-up proceedings. Mr. Banerji urged that on insolvency the secured creditor of the insolvent has one of the three options open to him, namely, (i) he can stand upon his security and bring a suit upon his mortgage ignoring the bankruptcy proceedings, (2) he can give up the security and prove his debt and take part in the insolvency proceedings and (3) in stead of bringing a regular suit, he can avail himself of the summary proceedings under rule 18 of Schedule 2 of the Presidency Towns Insolvency Act.

8. Mr. Banerji contended before me that, the last alternative remedy mentioned above, although a summary proceeding, is also a mode of enforcing his rights as a secured creditor and must be resorted to before the security is sold. Mr. Banerji drew my attention to the fact that the rule inter alia provides for sale of the property mortgaged. In this case, the property mortgaged having been already sold in the winding-up proceedings, there can be no question of enforcing the summary remedy.

9. I am unable to accept this contention. In the first place, under the said rule 18, the Court will direct sale of the mortgaged property "if satisfied that there ought to be a sale". But if, as in this case, the property mortgaged has already been sold and the mortgagee accepts the sale as valid and binding upon him and is prepared to get his dues out of the sale-proceeds, then I do not see why it should be necessary to order a fresh sale and why in that case the mortgagee cannot, provided the other conditions of rule 18 are satisfied and his mortgage is established, have his claim satisfied out of the sale-proceeds. Some support for the view which I am taking in this matter may be had from the observation of Rankin, J., in the case of Hajee Tyeb Ali Mullick v. Purna Chandra Pal and another (1) (43 C. L. J. 219), where his Lordship inter alia observed as follows :

The first order which under rule 18, Schedule II of the Presidency Towns Insolvency Act, may be made is an order appointing a certain time in the future as the date upon which the Court will enquire into the existence and validity of the mortgage. Nothing further should be ordered at that stage. When the time comes to hold an enquiry, if the mortgage has been substantiated, then the Officer has it open to him to make another order, namely, declaring the existence of the mortgage and directing that certain accounts shall be taken; if necessary, also by that order having declared the existence of the mortgage, he may direct a sale.

10. These observations show that it is not incumbent upon the Court whenever an application under rule 18 is made to order a sale of the mortgaged property. Such an order may be made if it is necessary to do so. In my opinion, there is no such necessity in the present case, the applicant Laving accepted the said sale. The only thing to be decided is the validity of the mortgage and the question of accounts.

11. Mr. Chaudhuri contended before me that in this case the sale took place with the concurrence of the mortgagee and when a sale takes place with the concurrence of the mortgagee, the sale-proceeds can be followed. He drew my attention to a passage from Palmer''s Company Precedent, 16th Edition, page 416, Vol. II. In the premises as aforesaid, I am unable to accept Mr. Banerjee''s contention on this point.

12. As for other contention of Mr. Chaudhuri, namely, that the application is maintainable even apart from rule 18, I an unable to accept the same. Mr. Chaudhuri cited before me a passage from Halsbury''s Laws of England, Volume 5, page 760, Art. 1241 in support of his contention, but it seems to me that there being a specific statutory provision in the Indian Law, the principles of the English Law have no application.

13. I shall now deal with Mr. Chaudhuri''s contentions on their merits. As I have already indicated, the properties comprised in the mortgage dated 17th March, 1949, consist of machineries and leasehold interest. As for the immovable properties comprised in the said mortgage, it cannot be disputed that a statutory charge has already been created in favour of the Government u/s 8 of the Public Demands Recovery Act. Section 8 of the said Act reads as follows :

From and after the service of notice of any certificate u/s 7 upon a certificate debtor, -

(a) any private transfer or delivery of any of immoveable property situated in the district in which the certificate is filed, or of any interest in any such property shall be void against any claim enforceable in execution of the certificate and

(b) the amount due from time to time in respect of the certificate shall be a charge upon immoveable property of the certificate debtor, wherever situated, to which every other charge created subsequently to the service of the said notice shall be postponed.

14. In this case a notice u/s 7 of the said Act had been served on the company on the 21st March, 1950, and section 8 of the said Act provides that from and after the service of the notice the amount due in respect of the certificate (for which such notice is given) shall be a charge on the immoveable properties of the debtor wherever situated to which every other charge created subsequently to the service of the said notice shall be postponed.

15. The mortgage In favour of the petitioner was registered on the 14th December, 1950. Therefore the said mortgage, although executed on the 17th

March, 1950, having regard to the provisions of section 8 of the Public Demands Recovery Act and section 109 and section 120 of the Indian Companies Act, must be held to be postponed to the charge created in favour of the Government as aforesaid Mr. Chaudhuri has not disputed this proposition but his contentions are two fold, firstly, he contended that his client is entitled to relief in respect of the moveables comprised in the mortgage. Secondly, in any event, his client is prepared to take after the claim of the income tax authorities for Rs. 46,165-8 in respect of which notice u/s 7 of the Public Demands Recovery Act was issued is satisfied.

16. In support of his first contention Mt Chaudhuri urged before me that the attachment of the movables purported to have been effected on 25th March, 1950 was invalid for non-compliance of rule 15 of the Public Demands Recovery Act. He contended that the said rule makes it obligatory upon the attaching officer to keep the property in his own custody and unless that is done, there is no valid attachment. In any event, he contended, the attachment stood released as the properties in question were made over to J. C. Dutt on his executing a bond as mentioned before. It would be convenient at this stage to set out rule 15 of the Public Demands Recovery Act. The said rule reads as follows:

Where the property to be attached is moveable property (other than the agricultural produce) in the possession of certificate debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates and shall be responsible for the due custody thereof; provided that, when'' the property seized is subject to speedy and natural decay or when the expense of keeping it in custody is likely to extend its value, the attaching officer may sell it at once.

17. I am unable to accept Mr. Chaudhuri''s said contention. I am unable to hold that because the attaching officer has made over the custody of the attached goods to a surety on his executing a bond to produce and keep in his safe custody, the attachment is invalid or that the attachment has been released. The attachment, in my opinion, becomes complete the moment the goods are actually seized, that is, seized from the custody of the judgment debtor. The subsequent provision in rule 15 only imposes an obligation on the attaching officer to keep the property in his own custody and it is he who shall be responsible for the due custody thereof. If then the attaching officer leaves the goods in the custody of a custodian, the latter undertaking to be responsible for due custody thereof and to produce the same whenever called upon to do so, whatever may be the other consequences of such an action on the part of the attaching officer, the attachment does not, in my opinion, become invalid, nor is the attachment released. In the case of Gurmukh Rai Ghanasyamdas, Firm Vs. E.F. Lawson, Manager, Morongibagan Tea Estate and Others, , it was held by a Division Bench of this Court that where an officer of the court seizes the goods under Order 21, rule 43, the attachment is complete, and at once an obligation on that officer is imposed by law. The provisions of Order 21, rule 43 are similar

to those of rule 15 of the Public Demands Recovery Act.

18. In that case also movables were attached by an officer of this Court, but they were not removed to the Court-house, out eventually left with one Mr. E. F. Lawson, the latter executing a security bond by which he undertook to produce them in Court when required. R. C. Mitter, J., delivering judgment in that case observed as follows:

The goods have to be actually seized by the officer of the Court to whom the writ has been given. As soon as he seizes the goods, the attachment is complete, and at once an obligation on that officer is imposed by law. He must keep the same in his custody or in the custody of his subordinate. This obligation means that he must keep it safe and produce it in Court for being made available for sale, for on sale of such property the Court has to deliver the same physically to the purchaser (Order 21, rule 43, Order 21-A, rule 4 and Order 21, rule 79). Order 21-A, rule 3, which has been enacted into law in 1933, gives the discretion to the attaching officer to leave the attached property in the custody of another person on taking security from him for its production in Court. When the attaching officer exercises his discretion under rule 3 of Order 21-A, and leaves the property in the custody of a custodian the latter undertakes to perform the duty (i.e., to produce the attached goods in Court), which the law had cast upon the Court''s Officer who had attached the goods. The obligation of the custodian is accordingly in such a case not an original, but an accessory one. This obligation has to be enforced in the execution proceedings.

19. I am not unmindful of the fact that in that case Mitter, J., took into consideration Order 21-A, rule 3, which gives a direction to the attaching officer to leave to the custody of some other person but His Lordship considered the said provision in order to determine the nature of the obligation of the custodian and His Lordship held that it was not an original but an accessory one. But on the question as to when the attachment would be complete, His Lordship clearly expressed himself by saying that "as soon as he seizes the goods the attachment is complete, and at once an obligation on that officer is imposed by law". This contention of Mr. Chaudhuri, in my opinion, fails.

20. Mr. Chaudhuri then urged before me that the order for winding up operated as release of the attachment. He drew my attention to section 230 of the Indian Companies Act and contended that priority of the debts of the State in winding up is limited to those specifically mentioned in the said section. The material portion of section 230of the Indian Companies Act reads as follows :

In a winding up there shall be paid in priority to all other debts-

(a) all revenue, taxes, cesses and rates, whether payable to the Crown or to a local authority from the Company at the date hereinafter mentioned and having become due and payable within the twelve months next before that date.

21. In support of his contention Mr. Chaudhuri relied on the case of In the matter

of In Re: matter of the Northern Bengal Co., Ltd, (In Liquidation) . In that case Lort-Williams, J., observed as follows :

Applying this principle, I have no doubt that the intention of the legislature was to limit the priority of Crown debts in winding-up proceedings to those specifically mentioned in section 230 and that is the combined effect of the sections in question. Apart from the exceptions contained in section 230 the assets of a company must be applied in satisfaction of its liabilities pari passu in accordance with the provisions of section 207. That is the result of the decision in the case of the Secretary of State v. The Punjab Industrial Bank Ltd. (In Liquidation) with which I agree.

22. Mr. Banerjee contended before me that having regard to the fact that the seizure has already taken place under the Public Demands Recovery Act, the provision of section 230 would no longer be applicable; in other words, Mr. Banerjee''s contention is that section 230 applies to a case where there has been no seizure under a statute. He contended that seizure gives the right to sell, because the custody remains with the Government. That right, according to Mr. Banerjee, is not taken away by section 230 of the Companies Act. He further contended that it is not an attachment under the CPC but seizure under the statute.

23. I have given careful consideration to the contention raised by Mr. Banerjee but I am unable to accept the same. I hold, as held by Lort-Williams, J., and with which view I respectfully agree, that priority of debts due to the State is limited to those specifically mentioned in section 230 of the Indian Companies Act; all other debts falling outside those limits must, in winding up of a company, rank equally and the assets of the company must be applied in satisfaction of its liabilities pari passu in accordance with section 207 of the Companies Act. If, then, this is a debt which stands outside the limits mentioned in section 230, then the company having gone into liquidation it must rank equally with all ordinary unsecured debts. Such a debt cannot have priority even though movables belonging to the Company have been attached by means of seizure under rule 15 of the Public Demands Recovery Act. Attachment under rule 15 for a debt due to the State is nothing more than a mode of enforcing the debt, but if the debt itself cannot have any priority and must rank equally with all ordinary debts of the company in liquidation, then the attachment, even though by seizure, would not in my opinion give it a priority. Attachment under rule 15 does not create any security in the goods attached. Mr. Banerjee laid considerable emphasis upon the fact of seizure of the goods, but again seizure is nothing but a mode prescribed for effecting attachment of movables; in other words, attachment of movables is to be effected by seizing the goods. The same mode is prescribed in the CPC for effecting attachment on movables, but it is an attachment all the same and no interest or security in my opinion is created in the goods in respect of the said debt. In this connection, I would also refer to the decision of the Federal Court given in the case of the Governor-General in Council

v. Shiromani Sugar Mills Ltd. (In Liquidation) (4) [50 C. W. N. (F.R.) 10]. In that case also the dispute was between the liquidator and the income tax authorities, the latter trying to enforce their claim through the machinery provided in section 46 of the income tax Act. Their Lordships in their judgment, inter alia, observed as follows:

In section 230 of that Act a modified priority is expressly provided for a certain limited class of Crown debts

These include debts in respect of revenue, taxes, cesses and rates payable to the Crown, but the provision is limited to those due from the Company at a prescribed date and having become due and payable within the twelve months next before that date, the prescribed date being the date of the commencement of the winding up, or in the case of a Company ordered to be wound up compulsorily, which has not previously commenced to be wound up voluntarily, the date of the winding-up order. Moreover, the priority expressly so given to Crown debts is not confined solely to Crown debts. They have to rank pan passu for payment with certain debts due to local authorities, certain debts in respect of salary or wages due to clerks, servants, labourers or workmen, compensation payable under the Workmen''s Compensation Act, 1923, and other classes of debts and expenses, and all have to abate equally if the assets are insufficient to meet them in full.

24. Their Lordships further observed as follows:

It is difficult to believe that where so much consideration has been given to rights of priority and the respective rights and position of secured and unsecured creditors, and the order and manner in which their debts are to be discharged, the Crown was to remain outside the scheme and unaffected by the provisions of the Act, except to the extent to which Crown rights have been expressly dealt with. It is difficult to think of any reason for qualifying the priority in respect of the Crown debts specified in section 230(1)(a),if it was intended that other debts due to the Crown should enjoy unqualified priority. This provision is in marked contrast to the provisions contained in the Indian Insolvency Acts allowing priority in respect of ''all debts due to the Crown or to any local authority''.

25. I, therefore, hold that this is a debt which stands outside the limits mentioned in section 230 of the Indian Companies Act and ranks equally with all us secured debts and cannot have any priority even though movables belonging to the company have been attached under rule 15 of the Public Demands Recovery Act.

26. In any event, I do not understand how on the facts of this case the learned Standing Counsel can at ail raise these objections. The sale of the movables in question has already been held by the liquidators and it is out of the said sale-proceeds that the applicant claims to be paid on the footing that he is a secured creditor. Mr. Banerjee is resisting that claim and his contention, if I have understood him correctly, is that all the dues of the income tax authorities should

be paid in the first instance out of the said sale-proceeds. The effect of Mr. Banerjee''s contention is that the income tax authorities are not insisting on their rights to proceed under the provisions of the Public Demands Recovery Act, but have accepted the present sale. Otherwise, there would be no point in their resisting the present application. The income tax authorities, in that event, might and should have ignored the present proceedings and proceeded with the sale of the attached goods. I am unable to uphold Mr. Banerjee''s contention.

27. As for the leasehold interest Mr. Chaudhuri, as I have already indicated, did not seriously dispute the contention of Mr. Banerjee, namely, that by virtue of section 8 of the Public Demands Recovery Act, a charge has been created in favour of the income tax authorities on the said leasehold interest. What he contends, is that the said charge is in respect of a sum of Rs. 46,185-8 for which a demand notice u/s 7 of the Public Demands Recovery Act was served on the company. He admits that the mortgage created in his client''s favour should be postponed to the said charge and his client''s dues under the said mortgage, if the same is established, should be paid after the said sum of Rs. 46,185-8 is paid to the income tax authorities. In my opinion, that must be the position. The mortgage in favour of Mr. Chaudhuri''s client is said to have been executed on March 17, 1949, but the same was not registered under the provisions of the Indian Companies Act till December 14. 1950. In the meantime, demand notice u/s 7 of the Public Demands Recovery Act was served on the company for Rs. 46,185-8 and a charge was created in respect thereof u/s 8 of the said Act and under sub-section (2) of section120of the Indian Companies Act the right created in favour of Mr. Banerjee''s client u/s 8 of the Public Demands Recovery Act will not be prejudiced by the subsequent registration of the mortgage in favour of the petitioner. The result therefore is that the said mortgage would be postponed to the charge created in favour of the income tax authorities for Rs. 46,185-8, if of course the mortgage in favour of the petitioner is established. As for the second mortgage, dated March 29, 1951, the contention of the petitioner cannot be given effect to. The said mortgage was created after the petition for winding up was presented to this Court on February 5, 1951, and on the said petition on August 8, 1951, the winding-up order was made. A winding-up order relates back to the date of the presentation of the petition and the mortgage having been created after presentation of the petition, is void and inoperative.

28. The result, therefore, is that there will be an order directing an enquiry to be held as to the existence and validity of the alleged mortgage, dated March 17, 1949. and the consideration for which the same was executed in favour of the petitioner. The said enquiry is to be held by me three weeks hence. In the meantime, there will be cross-order for discovery by letter within a week, inspection forthwith there after and the suit to appear in the list three weeks hence. The rest of the prayer in the petition stands adjourned till after the above mentioned questions are determined. Cost of this application is also reserved. [Pursuant to the directions contained in the judgment the petitioning creditor was allowed to prove his mortgage in Court in the Liquidation proceedings and

order was made on the Liquidator to pay the petitioning creditor''s dues out of as sets in the hands of the Liquidator.-Ed.]

