

(1979) 02 DEL CK 0010

In the Delhi High Court

Case No : Company Application No. 269 of 1973

**In Re: Tanwar Finance P. Ltd. (In Liquidation)
 Tanwar Finance P. Ltd.**

Date of Decision : 28-02-1979

Acts Referred:

Citation : (1979) 49 CompCas 827

Hon'ble Judges : D.K. Kapur, J

Bench : Single Bench

Advocate : S.K. Mehra, for the Appellant; N.K. Jaggi, for respondent Nos. 1, 2 and 4, D.R. Dhamija, for respondent Nos. 3, 5 and 7, M.S. Mathur, for the Respondent

Judgement

D.K. Kapur, J.—The present petition has been brought under Sections 446, 518, 523 and 526 of the Companies Act, 1956, and is concerned with an order passed in Execution Case No. 197/72 in Civil Suit No, 761/67, which is entitled Shri K. Ram Chander v. Tanwar Finance. The application also seeks a direction of this court regarding the order dated 23rd March, 1973, passed by Shri S.P. Sabharwal, Sub-Judge, First Class, Delhi, in the case, The matter is quite an intricate one and has been dealt with by myself on several occasions. There were many attempts to compromise this case and in fact a compromise was reached which was about to be acted upon when due to the intervention of some other parties who got a declaratory decree against the auction-purchaser the compromise was frustrated. Hence, the matter has to be decided on the merits.

2. M/s. Tanwar Finance is a company in voluntary liquidation. By an order of this court passed several years ago, this winding up became subject to the supervision of the court u/s 522 of the Companies Act, 1936. There were several decree-holders who had taken out execution proceedings in the Subordinate Judge's Court for the sale of 22 bighas and 8 bids was of land belonging to the company in liquidation for the purpose of Realizing the amount due from the company in liquidation. An application being C.P. No. 1/69, was decided on 15th April, 1969, by S.K. Kapur J. That application was also u/s 518 of the Act. The

certified copy of the order is on the record of this case and the judgment is as follows :

" The learned counsel agree that :

(1) in view of the provisions of Sections 526 and 527 of the Companies Act 1956, the execution of decrees obtained by respondents Nos. 1 to 7 against Tanwar Finance Private Limited (in voluntary liquidation) be stayed ;

(2) the decree-holders will not sell the properties in execution of the said decrees without obtaining leave of the court u/s 537 or other relevant provision in this behalf ; and

(3) the question whether leave should be granted to the respondents for realisation of their amounts by sale of properties or whether it will result in undue preference to the respondents will be considered if and when the said respondents make an application in this behalf.

In view of the agreement of the learned counsel I direct that the execution of the decrees obtained by the respondents against Tanwar Finance Private Limited (in voluntary liquidation) be stayed and other questions will be decided as and when an application is made by the decree-holders for a permission to realise the amount.

There will be no order as to costs,

(Sd.) S.K. Kapur,

Judge."

April 15, 1969.

3. This order which was passed by agreement between the applicant who is the voluntary liquidator and the decree-holders was to the effect that the execution would be stayed and the execution will only be permitted after obtaining the leave of the court u/s 537 of the Act.

4. The next stage in the proceedings was the filing of C.P. No. 190/69, which was decided, on 19th January, 1970. The certified copy of this order is also on record, the same having been decided by S.N. Shanker J. (as he then was). The copy of the order shows that it was passed on a petition under Sections 526 and 537 of the Companies Act, 1956. Apparently, the decree-holders had applied for permission to put the property to sale in execution. It was also prayed that preference should be given to the petitioners over other creditors in the matter of payment of their amounts. The relevant part of the order reads :

"The learned counsel for the petitioners are now agreed that the land sought to be attached is covered by the notifications issued under Sections 4 and 6 of the Land Acquisition Act, 1894. They, however, state that they are still entitled to attach the land in question with a view to leave no room for doubt in regard to their locus standi for taking appropriate proceedings in case compensation of

land is assessed and it is found to be necessary that application for enhancement of compensation is to be made. Mr. Mehra has no objection to this being done subject to the law of the land, but he says that this will not give any preference to these petitioner's as far as their right to realise their debt from the company is concerned.

I have heard the learned counsel for the parties. The contention of the petitioners subject to the provisions of the Land Acquisition. Act seems to be justified, Petitioners Nos. 2 to 7 may be allowed to take out execution and to have attachment of the land in question subject to the law in force. This attachment, will not give them any special, priority except to the extent permissible in law..... "

5. This order reveals that although there were seven petitioners, six of them were permitted to take out execution and get attachment of the land.

6. It so happens that, in furtherance of this order, the first petitioner, Kanwar Ram Chander, took out execution and got the property sold. It also appears that the decree-holders had also applied for execution and Shri Shamsheer Singh, Sub-Judge, ordered the sale of the land which was sold by auction on 20th April, 1971.

7. The voluntary liquidator moved the executing court, which was then Shri S.P. Sabharwal, Sub-Judge, to challenge the order as well as the sale. A certified copy of the order is also on record. It was contended on behalf of the company in liquidation that the sale was void and fraudulent. The objection of the judgment-debtor was overruled. As I have to deal with more or less the same question, though in a slightly different form, I would like to summarise the conclusion of the subordinate judge. He held, firstly, that the application moved by the judgment-debtor was barred by limitation, because the auction was held on 20th April, 1971, and the application under Order 21, Rule 90, of the Code of Civil Procedure, had been filed on 28th May, 1971. He then proceeded to deal with the merits of the contentions.

8. The subordinate judge came to the conclusion that the original order passed by S.K. Kapur J. staying the sale had been superseded by the order by S.N. Shankar J. The conclusion, of the court was that the second order permitted execution to be taken out and as well as sale could be ordered. There were some other contentions also which are not relevant and are concerned with the procedure adopted by the executing court.

9. The only other relevant point discussed in that judgment was that the judgment-debtor contended that the auction could not take place without the permission of the High Court. On this point, the court held :

" I am unable to accept this contention of the judgment-debtor because the position has been clarified in the latest order of the High Court passed by Hon"ble Mr. Justice S.N. Shankar and no condition was imposed on the decree-

holder to take such permission. The order of the Hon"ble High Court is clear to the effect that the decree-holders could take out execution in respect of the land. As such, this contention has no basis and is Therefore rejected."

10. The voluntary liquidator filed an appeal and appears to have moved this court at the same time with the present petition. It is stated in the petition that on the dismissal of the objections, the executing court is about to issue a sale certificate and as this is being done contrary to the High Court's order, this should be restrained. On 24th April, 1973, this court passed a stay order which has resulted in the same being unconfirmed up to to-day.

11. In the present petition, it is contended on behalf of the company in liquidation that the order concerning sale of the property, etc., should be set aside and all the proceedings in execution should be declared to be wrong and illegal and relief should be granted by this court. Replies have been filed by the various respondents. During the proceedings some of the original respondents have died and their legal representatives have been imp leaded. It is the case of the respondents that the application is misconceived as the permission to sell the property had already been granted by this court. Secondly, it is contended that the proceedings are barred by res judicata as the matter has already been decided by the executing court. It has also been brought to my notice that the appeal filed by the liquidator was filed in the wrong court and was dismissed for this reason and, Therefore, it is contended that the order of the executing court passed tinder Order 21, Rule 90 of the Code has become final and this court has no jurisdiction to interfere with the same proceedings.

12. There are, Therefore, two questions for consideration. Firstly, whether this court has jurisdiction, or, whether the proceedings are barred either by res judicata or lor lack of jurisdiction and, secondly, whether the sale is in fact invalid. Taking up the first question first, I may here say that Section 526(2) of the Companies Act, 1956, provides that if a winding-up is being carried on subject to the supervision of the court, then the court has all the powers of the court when it is compulsorily winding up a company. The effect of this section is to make the voluntary liquidation in this case equal in all respects to a winding-up which has been ordered by the court. Section 446 of the Act states that no legal proceedings shall be commenced or proceeded with against a company except by leave of the court and subject to such terms as the court may impose. Sub-section (2) of this section gives the court jurisdiction to entertain any claim or any suit or proceedings by or against the company and any question of priority or any other question whatsoever " whether of law or fact, which may relate to or arise in the course of the winding up of the company, whether such suit or proceeding has been instituted or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the winding up of the company..." Thus, the jurisdiction of the court in these matters is extremely wide. Then Sections 518 and 523 are also relevant because Section 518 enables an application to be made to the court to determine any

question which has arisen in the winding up of the company and Section 523 enables the court to have jurisdiction over suits and legal proceedings relating to the company being wound up subject to the supervision of the court just as in the case of a company which is compulsorily being wound up. All these provisions are extraordinary provisions of a statutory nature. What may be the normal position in regard to res judicata or in relation to other question does not strictly speaking apply to a company which is in winding up. I will come back to this question shortly.

13. I first refer to some decisions which have been cited on the question of res judicata. Reference has been made to Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, , wherein it was held that a question of jurisdiction cannot be deemed to be finally determined by an erroneous decision of the court. This authority has been cited with a view to submit that merely because the executing court has held that it has got jurisdiction, when it has not got jurisdiction to execute the decree, would not render that order final and conclusive. Then, reference has been made to Merla Ramanna Vs. Nallaparaju and Others, , wherein it was held that Order 21, Rules 89, 90 and 91 of the Code relating to applications for setting aside sales and Article 166 of the Limitation Act, 1908, have no application when a sale is declared to be void.

14. Reference has been made to In re Ovation International (India) P. Ltd. : Gray Steel Casting & Finishing Co. P. Ltd. v. Adverts (P,) Ltd. [1969] 39 Com Cas 595 , and Rajratna Naranbhai Mills Co. Ltd. v. New Quality Bobbin Works [1973] 43 Com Cas 131 , to show that declarations have been made in those cases concerning matters which took place in execution. For instance, in the last case, certain shares had been attached and a sale had also taken place. The official liquidator made an application to the company court to get a declaration that the sale of 186 shares which had been attached and sold in execution was void. The said declaration was granted and it was held that the sale of the shares in execution was void and the amount of Rs. 16,740 received as sale proceeds was directed to be re-deposited. This case is somewhat similar to the one I am dealing with.

15. I think the mere fact that the voluntary liquidator also raised the same contention before the executing court and failed does not make the slightest difference to this court's jurisdiction.

16. In S. Krishnamachariar v. V. Hanuman Bank Ltd. (In liquidation) [1963] 33 Com Cas 543, it was held by the Madras High Court that though leave was required before a sale took place, this requirement could be waived by the official liquidator. This case further makes it clear that the sale is only valid if either leave has been obtained from the court or the liquidator has validly waived the requirement for such leave.

17. A number of other cases have been cited at the bar, but I think a reference to the same is not necessary in the special circumstances of this case.

18. The provisions of the Companies Act, are perfectly plain. If a company is being wound up by the court, then no legal proceedings can be brought against the company except with the leave of the court. When such leave has been obtained, the proceedings can be instituted. The same position holds true when a company is being wound up voluntarily under the supervision of the court. This is clear from the provisions mentioned earlier. Assuming that permission has been given to institute certain proceedings, then the Companies Act requires a further permission for purposes of attachment and sale of the property. This is so stated in Section 537 of the Act. So, leave from the, court has to be sought also under those provisions. I am now going to assume before actually dealing with the second question, that no leave was granted for selling the property. If the executing court proceeds to sell the property in spite of the absence of leave, then the liquidator has the right to move that court to say " the order is void and please recall it", if he does so and the executing court says that it has jurisdiction, it does not preclude the official liquidator from moving the company court to obtain an order regarding the validity of the proceedings. There is no question of lack of jurisdiction and no question of res judicata involved. The statute, namely, the Companies Act, has reposed a special jurisdiction in the company court which happens to be this court in the present case. That jurisdiction cannot be altered or taken away by a decision of the executing court. Therefore, notwithstanding the decision of the executing court to the effect that the sale is valid, this court is entitled to decide whether it is in fact valid, because the entire jurisdiction for this matter has been granted to the company court and to no other court. This is the effect of the decisions I have just referred to and also seems otherwise to directly flow from the provisions of Sections 446 and 537 read with other sections of the Companies Act.

19. It is, Therefore, inescapable that I should now deal with the question whether the sale is valid or not. For this purpose, I have to refer to Section 537 of the Companies Act, which reads :

" 537. Avoidance of certain attachments, executions, etc., in winding up by or subject to supervision of court.--(1) Where any company is being wound up by or subject to the supervision of the court--

(a) any attachment, distress or execution put in force, without leave of the court, against the estate or effects of the company, after the commencement of the winding up; or

(b) any sale held without leave of the court, of any of the properties or effects of the company after such commencement;

shall be void.

(2) Nothing in this section applies to any proceedings for the recovery of any tax or impost or any dues payable to the Government."

20. This section shows that when a company is being wound up by the court or

subject to the supervision of the court, then no execution can be put into force without leave of the court, and, secondly, any sale held without the leave of the court shall be void. The problem in the present case is what is the meaning of the order passed by Shankar J. on 19th January, 1971 ? Did that order allow the sale of the property or did it merely allow the attachment ? In a nut-shell, this is the controversy between the parties, and that is why I have reproduced all the orders and their effect. The operative part of the order passed by Shankar J. is :

" Petitioners Nos. 2 to 7 may be allowed to take out execution and to have attachment of the land in question subject to the law in force. This attachment will not give them any special priority except to the extent permissible in law."

21. One reading of this order leads to the conclusion that the property may be attached but the attachment will not give priority ; another reading can mean that the parties can take out execution and proceed also to bring that execution to a conclusion by sale. The respondents contend that this is the meaning of the order, i.e., the property can be proceeded against and not only attached but also sold. I do not agree that this is so, because of the earlier part of the order. I think, the first meaning to the effect that the property may be attached, but not sold, has to be the real meaning of this order and I give my reasons for the same.

22. The first order passed by S. K. Kapur J. in this case was that the execution is stayed and that question will be decided as and when an application is made for permission to realise the amount. This order was made because when a company is in winding up, then the sale proceeds have to come to the official liquidator and have to be distributed *pari passu* among the various creditors of the company. No creditor can have the priority in the matter of distribution of the assets of the company. That is the scheme of winding up. As a company which is being wound up under the supervision of the court is to be treated exactly like a company which is compulsorily being wound up by the court, it follows that the assets of the company have to be realised by the court and distributed among the creditors on an equitable basis which is provided for by Sections 528, 529 and 530 of the Companies Act. These provisions show that preferential payments are those mentioned in Section 530 and regarding other creditors the insolvency rules have to apply, which are to the effect that in the case of an insolvent company, the assets have to be sold and the realisations distributed *pari passu* among the creditors. This is so obvious a point that it hardly needs any stress. The position of the decree-holders in the present case was that they had attached the property and were about to sell the same. The company judge at that time, S.K. Kapur J., thought that the sale should not take place and execution was stayed.

23. When the company judge was moved by the second application, the petitioners wanted the property to be sold and. wanted to be given preference over other creditors. This is so stated in the prayer reproduced in the certified copy. The court did not grant this prayer. The court merely stated that as the property had been notified under the Land Acquisition Act, the execution could

be allowed to the extent of permitting attachment so that the attaching creditors could take proceedings for getting enhancement of compensation. This is stated in the opening words of the order which I reproduce again :

" They, however, state that they are still entitled to attach the land in question with a view to leave no room for doubt in regard to their locus standi for talking appropriate proceedings in case compensation of land is assessed and it is found necessary that application for enhancement of compensation is to be made."

24. These words clearly imply that the applicant wanted to move the land acquisition court for enhancement of compensation. Such an application could only be moved if the property was attached and remained attached. If the property had been sold by the court, the question of attachment would not be relevant because in such a case the auction-purchaser would be the party entitled to apply for enhancement of compensation. In my view, it was apparently represented to the court that the attaching creditors wanted to get an order of attachment and only attachment and nothing more, so that they could apply for enhancement of compensation. In my view, the court must have ordered attachment only and nothing more. I say so again keeping in view the wording of the order which is that "petitioners Nos. 2 to 7 may be allowed to take out execution and to have attachment of the land in question subject to the law in force. This attachment will not give them any special priority except to the extent permissible in law". Obviously, if sale had to be permitted, these words would be quite redundant because after a sale the attaching creditors could withdraw the decretal amount. I am quite sure that the company court could not have intended that the sale proceeds should be divided among the decree-holders and an illegal and invalid preference given to them in the matter of the company's assets. The order is quite plain on an analysis and I am, Therefore, of the view that the court never gave permission for the property to be sold.

25. Turning now to Section 537 of the Companies Act, the wording indicates that an attachment, distress or execution can be put in force and the second portion shows that a sale which is without the leave of the court is void. Therefore, before the executing court could have sold the property, the leave of the court was necessary. As I have said just now, no leave of the court was given for selling this property and hence the sale is invalid.

26. In the circumstances, I give a declaration that the sale in execution is invalid and void because it has been brought about without the leave of the court. However, I also hold that the attachment of the property which was permitted by the court is not invalid and that is the maximum extent to which the execution has been permitted by orders of this court. In view of the difficulties of the questions involved, I leave the parties to bear their own costs.