

(2001) 07 KL CK 0028

In the High Court Of Kerala

Case No : C.P. No"s. 26, 48 etc. of 1999

In the matter of M/s Remanika Silks (P) Ltd. (In Liquidation)

Date of Decision : 23-07-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 73
Companies (Court) Rules, 1959 — Rule 130
Companies Act, 1956 — Section 19(19), 391, 446, 457, 457(2)
Constitution of India, 1950 — Article 226, 227
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 18, 19(19), 22, 34

Citation : (2001) 107 CompCas 296

Hon'ble Judges : M.R. Hariharan Nair, J

Bench : Single Bench

Advocate : Antony Dominic, Mohan Pulickal, Augustine Joseph, C.N. Ramachandran Nair, Kurien George Kannanthanam, A.B. Xavier, P.K. Joseph and Shaji Thomas Porkkattil, for the Appellant; N.P. Samuel, for the Respondent

Judgement

M.R. Hariharan Nair, J.—The important question that is posed before this Court is whether the constitution of the Debts Recovery Tribunal under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short "the RDB Act") and the proceedings initiated by the Tribunal for recovering certain due to the Federal Bank Ltd. from M/s. Remanika Silks Pvt. Ltd., which company is under liquidation proceedings before this Court stands in the way of the Official Liquidator continuing with sale proceedings; and also whether during the pendency of the proceedings by the Official Liquidator, the sale proceedings initiated by the Debts Recovery Tribunal has to be stayed.

2. The Provisional Liquidator appointed by this Court vide order dated 23.1.2001 has filed a report that pursuant to the orders of this Court he issued notice under R.130 of the Companies (Court) Rules, 1959 and thereafter held a meeting on 13.2.2001 in which Ex-Directors, representatives of the creditors and secured creditors and Ex-Managing Director of the Company participated and that in the meeting the representative of the Federal Bank appraisal the said Liquidator that pursuant to the orders of the Debts Recovery Tribunal, the two sets of keys of

the building in which the assets of the company are kept have been taken over by the Debts Recovery Tribunal and that the said keys cannot be surrendered to the Official Liquidator unless there is specific orders of the Debts Recovery Tribunal. The Official Liquidator therefore approached this Court with the following prayers:

"(i) To direct the Federal Bank Ltd., Secured creditor of the company to hand over the two sets of keys of the Business Centre at M.G. Road, Ernakulam to the Official Liquidator;

(ii) ratify the action of the Official Liquidator in serving a copy of this report on the Counsel for Federal Bank Ltd.; and

(iii) pass such other order or orders as may be deemed fit and proper in the premises of the case."

3. The Federal Bank Ltd. has filed an objection to the report stating that the entire goods kept in the business premises of the company M/s. Remanika Silks Pvt. Ltd., at Cochin & Tellicherry were hypothecated to the Bank on 6.10.1993 as security for the cash credit account which the company was operating; that the Bank has first charge over the hypotheca; that as the company failed to repay the loan amounts due to the Bank, O.S. No. 751 of 1995 was filed before the Sub Court, Ernakulam, which was transferred to the Debts Recovery Tribunal (for short DRT) on its constitution; that an Advocate - Commissioner deputed by the DRT has prepared an inventory of the articles available in the business premises of the company at Cochin and Tellicherry and that the sale proceeding initiated by the DRT is presently pending. he also alleged that inspite of objections raised, the Liquidator appointed by this Court opened the godown of the company at Tellicherry and took possession of the entire stock and that this is irregular.

4. One of the defendants in the suit also approached the DRT for a direction to direct the Bank to hand over the keys of the godown and business premises at M.G. Road, Ernakulam to the Official Liquidator and the said petition, after hearing was dismissed by the DRT. It is the very same prayer that is now contained in the report filed by the Official Liquidator and hence according to the Bank, it is not maintainable. Case Law is also relied on to show that in such a situation it is the DRT alone which has jurisdiction to proceed with the matter in preference to the Company Court.

5. The points that arise for decision therefore are:

(1) Whether the Debts Recovery Tribunal is entitled to proceed with the sale proceeding during the pendency of the proceedings for liquidation thereof before the Company Court?

(2) In case of finding on the above point in the affirmative what are the directions to be issued so that the interests of the shareholders, creditors and workmen of the company can be protected?

6. Point No. 1:- The Company Court, *inter alia*, looks after the interests of the creditors including the workmen to whom amounts are due from the company under liquidation. It is well settled that the workmen's dues rank *pari passu* with debts due to secured creditors. The winding up proceedings are performed by the Company Court through a Liquidator who is given wide power under S. 457 of the Companies Act. As far as the proceedings already initiated by the civil courts against the company for recovery of debts are concerned, the position is that a Receiver appointed by a civil court on being approached by the secured creditor would basically look after the interest of that creditor. His interests may, in many cases, be in conflict with that of the Liquidator, and in case of conflict, the interest of the Liquidator has to receive precedence over that of the Receiver inasmuch as the former looks after the interest of large segment of creditors along with that of the workmen, whereas the latter confines his concern to the interest of the secured creditor alone.

7. S. 446 of the Companies Act provides as follows:

"S.446. Suits stayed on winding up order.-

(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of winding up order shall be proceeded with, against the company, except by leave of the court and subject to such terms as the Court may impose.

(2) The Court which is winding up the company shall, notwithstanding anything contained in any order law for the time being in force, have jurisdiction to entertain, or dispose of-

(a) any suit or proceeding by or against the company;

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made under S. 391 by or in respect of the company;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in 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 order for the winding up for the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

(3) Any suit or proceeding by or against the company which is pending in any court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court.

(4) Nothing in sub-s. (1) or sub-s. (3) shall apply to any proceeding pending in

appeal before the Supreme Court or a High Court."

The aim of S. 446 is to safeguard the assets of the company against wasteful or expensive litigation and to conduct the proceedings expeditiously and cheaply by the Company Court.

8. S. 457 of the Companies Act confers power on the Liquidator to sell the properties of the company and to realise the assets. To avoid the Liquidator from approaching the civil court with a number of suits to realise the dues to the company and to keep all incidental proceedings in winding up before the company court, its jurisdiction had to be enlarged to entertain petitions, amongst others, for recovering the claims of the company. It was to give effect to this objective that S. 457(2) was suitably amended through Companies (Amendment) Act, 1960 which obviated the need for filing of suits by the Liquidator which could be prolix and expensive. The amendment enables the Company Court to order realisation or recovery of subsisting debts owing to the company.

9. The enactment of "The Recovery of Debts Due to Bank & Financial Institutions Act, 1993" (for short "the RDB Act") is later in origin when compared to the amendment to S. 457 aforementioned. The enactment was made taking into account the difficulty experienced by the financial institutions in recovering the loans and for enforcement securities charged with them. The provision in the said Act provides for a suitable mechanism through which debts due to these institutions could be realised without delay and in a less expensive manner. To achieve this purpose, the Act visualises establishment of the "Debts Recovery Tribunal" with its own procedure which is expeditious in nature. S. 18 of the Act has barred jurisdiction of other Court except the writ court in relation to the matter specified in S. 17; that being recovery of debts due to such institutions. There is some conflict between the scheme envisaged in the DRB Act and in the Companies Act for recovery of debts and for distribution of the assets of the company to the various creditors and workmen. Emphasis available in the proceedings before the DRT is for realisation of debt due to the secured creditor-financial institutions. But this cannot be done at the cost of other secured creditors. To preserve the interests of one secured creditor the interests of another secured creditor cannot be sacrificed and it may so happen that secured creditor who has approached the Tribunal is only one amongst very many similar creditors and it is the Company Court which has to take care of the interests of other secured creditors. It has necessarily to consider whether the dues of the workmen are outstanding, if so, the extent of the same too. It has also to be seen whether the assets of the company can be allowed to be used to satisfy the debt of the secured creditor. There is hence some inherent conflict between the provision in S. 457(2) of the Companies Act and those in the RDB Act.

10. During hearing the learned counsel for the Federal Bank placed reliance on the decision in Allahabad Bank Vs. Canara Bank and Another, which is a judgment delivered on 10.4.2000, whereas the Official Liquidator relied on the decision in A.P. State Financial Corporation Vs. Official Liquidator, . What was

considered in the latter decision which is also later in point of time was the impact of the provisions in the State Financial Corporation Act, 1951 on the company Court jurisdiction. While doing so the Court took into accounts S. 529-A of the Companies Act which provides as follows:

"529-A. (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-s. (1) of S. 529 *pari passu* with such dues,

shall be paid in priority to all other debts".

S. 29(1) of the State Financial Corporations Act, 1951, on the other hand, provides the following:

"29(1). Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligations in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the right to take over the management or possession or both of the industrial concerns, as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation".

Under S. 29 aforementioned, the Financial Corporation has thus the right to take over the management or possession or both of the industrial concern as well as the right to transfer by way of lease or sale and realise the property pledged to the Corporation, whereas under the non obstante clause in S. 529-A of the companies Act aforementioned in the winding up of a company, workmen's dues, and the debts due to secured creditors, to the extent such debts rank under clause (c) of the proviso to S. 529(1) *pari passu* with such dues i.e., (a) debts provable; (b) the valuation of annuities and future and contingent liabilities (c) the respective right of secured and unsecured creditors have to be paid in priority to all other debts.

11. In A.P. State Financial Corporation case cited *supra*, the conflict between the two provisions (Ss. 29 & 529-A) was settled by the Apex Court. It took note of the fact that under the proviso to S. 529(1) the security of every secured creditor has to be deemed to be subject to a *pari passu* charge in favour of the workmen to the extent of the workmen's portion therein and also the fact that where a secured creditor, instead of relinquishing his security and proving his debt opts to realise his security the Liquidator who represents the workmen should enforce such charge and apply the proceeds for rateable distribution for the discharge of workmen's dues and that so much of the debt due to such secured creditors as could not be realised by him shall rank *pari passu* with the workmen's due for

the purpose of S. 529-A.

12. Considering the said provision along with S. 29 of the SFC Act of 1951 it was held that being a subsequent enactment the non obstante clause in S. 529-A prevails over S. 29 of the Act, 1951 in view of the settled position of law. It was also held that the right available with the Corporation under S. 29 to sell the property of the Company has to be exercised with the rights of the pari passu charge to the workmen created under the proviso to S. 529 of the Companies Act. Since under the proviso to S. 529(1) the Liquidator is entitled to represent the workman to ensure enforcement of workmen's charge, it was held that the Company Court would be fully justified in imposing the conditions to enable the Official Liquidator to discharge his function properly under the supervision of the Company Court. This is so because S. 529-A of the Companies Act confers upon the Company Court the duty to ensure that the workmen's dues are paid in priority to all other debts in accordance with the above section. It was also held that the power of the Corporation under S. 29 of the State Financial Corporation Act has to be exercised only subject to the provisions in the Companies Act. The main reason for arriving at the said conclusion, as evident from the judgment, was the fact that S. 529-A was introduced by the Parliament later in point of time vis-a-vis S. 29 of the State Financial Corporation Act. It is to be mentioned here that S. 529-A of the Companies Act was introduced through an amendment as per Act 35 of 1985 whereas the SFS Act was enacted in 1951.

13. What was considered in Allahabad Bank Vs. Canara Bank and Another, was the impact of a still later enactment, namely, Recovery of Debts Due to Banks & Financial Institutions Act, 1993 on S. 529-A of the Companies Act. If we go by the principle in the A.P. State Financial Corporations" case aforementioned, the provisions in the RDB Act being later in point of time vis-a-vis S. 529-A has to prevail over S. 529-A if it comes into conflict with that provision. Under S. 17 of the RDB Act the Debts Recovery Tribunal is to decide the applications of the Banks and Financial Institutions for recovery of debts due to them and the jurisdiction of the Tribunal in regard to adjudication of claims is exclusive. Under S. 18 the jurisdiction of any other Court or authority which would otherwise have had jurisdiction but for the provisions of the Act is ousted and the power to adjudicate upon the liability is exclusively vested in the Tribunal, though the exclusion is subject to the jurisdiction of the Supreme Court or of the High Court exercising power under Art. 226 or 227 of the Constitution of India. Even with regard to execution of decrees already obtained from other civil courts which are pending before the Tribunal the jurisdiction of the Recovery Officer is exclusive and the Company Court cannot decide the claims of the Banks and Financial Institutions. Considering the above aspects it was held in the Allahabad Bank case cited supra, that for deciding such claims or to proceed with execution proceedings the Recovery Officer or the DRT does not need the leave of the Company Court. Noting the fact that there is no provision for transfer of the case from the Tribunal to the Company Court and also that when there are two special laws, the provision in the latter special Act has to prevail, and in view of the

provision in S. 34 of the RDB Act, it was held that the provision in the RDB Act would override the corresponding provisions in the Companies Act to the extent there is inconsistency between the two Acts. In respect of monies realised under the RDB Act, the question of priorities among the banks and financial institutions and other creditors can be decided only by the Tribunal under the RDB Act and in accordance with S. 19(19) read with S. 529-A of the Companies Act and in no other manner. In view of this position, the Apex Court also held in categorical terms that the provisions of the RDB Act on the above aspects being inconsistent with the provisions of the Companies Act, to prevail over the provisions of the Companies Act during the pendency of the winding up petition against the debtor company and also after a winding up order is passed. No leave of the Company Court, it was held, is necessary for initiating or continuing the proceedings under the RDB Act, 1993.

14. The question of distribution of the amounts recovered by the Tribunal in such event was also considered in the Allahabad Bank case aforementioned. It was held that where against the defendant company no winding up order has been passed, the company is like any other defendant and if in such a situation a question of priority arises before the Tribunal, in respect of any monies realised under the RDB Act, as between the bank or financial institutions on the one hand and the other creditors on the other, it would be necessary for the Tribunal to decide such question of priority bearing in mind the principles underlying S. 73 CPC and that S. 22 of the RDB Act gives sufficiently wide powers to the Tribunal to decide such question of priorities subject to the principles of natural justice. It was also held that under S. 73 of the CPC sharing in the sale proceeds realised through the Tribunal is permissible only if a person seeking such share has obtained a decree or an order of adjudication from the Tribunal and has also complied with other condition laid down under S. 73 S. 19(19) of the RDB Act, it was held, does not give priority to all secured creditors and priority will have to be given only to those secured creditors coming under S. 529-A of the Companies Act. As regards secured creditors who go before the Companies Court for dividend by relinquishing their security in accordance with the insolvency rules mentioned in S. 529 they will rank with the unsecured creditors and have to take their dividend as provided in S. 529(2). As regard other secured creditors under S. 529-A(1)(b) read with proviso (c) to S. 529(1) the priority of the secured creditor is confined to the "workmen's portion" as defined in S. 529(3) (c) of the Companies Act. Under clause (c) of the proviso to S. 529(1) what is to be rateably distributed is the amount taken away from the private realisation of the second creditor by the Liquidator by way of enforcing the charge for workmen's dues and the distribution is against each secured creditor. To that extent, the secured creditor who has stood outside the winding up and who has lost a part of the monies otherwise covered by security can come before the Tribunal to reimburse himself from out of other monies available in the Tribunal claiming priority over all creditors by virtue of S. 529-A(1)(b) of the Act. At the same time, his position not improve from what it was originally and his priorities

would not extend to his entire unrealised sums which might be in excess of his security.

15. The question whether the amount realised by a Bank through the Tribunal can be straightaway released in its favour was also considered in the aforesaid decision. It was found that even if S. 19(19) read with S. 529-A of the Companies Act does not help a secured creditor who has not approached the Tribunal or Court for realisation of its money, those provisions can still have an impact in the matter. The workmen's dues have priority over all other creditors, secured or unsecured in view of S. 529-A(1)(a). The said priority will have to be protected. No secured or unsecured creditor including banks or financial institutions will have a right to be paid before the workmen's dues are paid.

16. In the instant case the position therefore would be that even if the Debts Recovery Tribunal brings to sale the assets of the Company under liquidation it cannot straightaway pay the proceeds to the Federal Bank; but will have to give priority to the dues of the workmen and then only to decide on the question as to how the proceeds should be distributed among the various creditors including the Federal Bank.

17. In view of the legal position aforementioned, the sale proceedings with regard to the assets of M/s. Remanika Silks Pvt. Ltd., will have to be continued by the Debts Recovery Tribunal and not by the Official Liquidator. The prayer in the report that the Federal Bank should be directed to surrender the keys relating to the business centre of the company at M.G. Road, Ernakulam, to the Official Liquidator is hence inadmissible and rejected. The action taken by the official Liquidator in serving a copy of the report on the counsel for the Federal Bank is ratified. It will be open to the Official Liquidator to get himself impleaded in the proceedings before the Debts Recovery Tribunal concerned in case this has not yet been done and in case such application is made, it will be allowed by the Tribunal considering the fact that he is necessary party to the case. There will be further directions to the Debts Recovery Tribunal on the following lines:

(1) The mode of sale of the assets belonging to the company should be decided after hearing all the parties including the Official Liquidator.

(2) A copy of the inventory prepared by the Commissioner deputed by the Tribunal with regard to the assets of the Company under liquidation will be served on the Official Liquidator forthwith.

(3) Creditors of the company secured and unsecured will have the right to approach the Tribunal seeking impleadment in view of the fact that the jurisdiction available with this Court under S. 529-A of the Companies Act cannot be exercised by this Court and the matters mentioned therein will also have to be dealt with by the Tribunal as far as distribution of assets are concerned.

(4) The sale of the assets in question will be conducted only after fixing an upset price which will be decided after hearing all parties including the Official

Liquidator.

(5) The sale proceeds will be deposited with the Tribunal itself until the manner of distribution is finally decided by the Tribunal in accordance with the principles mentioned in this order and bearing in mind the legal principles involved.

(6) There will also be a direction to the Official Liquidator to give a public notification through advertisement in the leading newspapers to the effect that creditors and workmen of the company might approach the Debts Recovery Tribunal seeking impleadment in T.A. No. 1112/97 so that their claims can be got adjudicated through the Tribunal and that the distribution of the sale proceeds would be possibly only through the said Tribunal.