(2008) 09 MAD CK 0076

In the Madras High Court

Case No : O.S.A. No''s. 201, 210 and 211 of 2005 and C.M.P. No''s. 14739, 14740, 15216, 15217, 15218 and 15219 of 2005

Indian Bank, Paridi Plastronics and Classic Marketing — APPELLANT

Vs

V.G.P. Finance Ltd. and Another — RESPONDENT

Date of Decision : 09-09-2008

Acts Referred:
Companies Act, 1913 — Section 227(2), 230
Companies Act, 1956 — Section 529A, 529A(1), 536(2)
English Companies Act, 1948 — Section 227

Citation : (2008) 145 CompCas 802 : (2008) 8 MLJ 468

Hon'ble Judges : M. Venugopal, J;M. Chocklingam, J

Bench : Division Bench

Advocate : Babu, Jayesh B. Dolia, for Aiyar and Dolia, in O.S.A. No. 201 of 2005, M. Murali, in O.S.A. No. 210 of 2005 and P. Rathinamani in O.S.A. No. 211 of 2005, for the Appellant; R. Krishnamoorthy, for Shivakumar, for the Respondent

Final Decision : Dismissed

Judgement

M. Chocklingam, J.—This appeal has arisen from an order of the learned single judge of this Court made in C.A. No. 1275 of 1999 in C.P.

No. 201 of 1996 (V.G.P. Finances Ltd. v. Official Liquidator [2005] 127 Comp Cas 1.

The case of the first respondent/applicant is as follows:

The applicant is a secured creditor of Neptune Inflatables Ltd., which was wound up as per the order of the court dated March 10, 1999. When

the said company approached the applicant for loan facilities, the applicant had extended the same to the tune of Rs. 65.20 lakhs. The company in

liquidation had mortgaged the schedule mentioned property. The charge created was duly informed to the Registrar of Companies, and the same was registered also. At that juncture, the company in liquidation wanted to sell the property in order to discharge the portion of the credit facilities

out of commercial compulsion. Accordingly, the company had conveyed the property to the applicant by way of two sale deeds dated February

11, 1999 and February 16, 1999 and put them in absolute possession of the property. In the meanwhile, the applicant received a letter from the

official liquidator about the winding up of the company and also about taking possession of the schedule property. The applicant raised objection.

Despite the same, the official liquidator over locked the premises. Hence, the applicant filed C. A. No. 1275 of 1999 (ICICI Venture Funds

Management Limited Vs. Neptune Inflatables Limited, , for directing the official liquidator to deliver possession of the property. The said

application was dismissed for default on August 14, 2002. The applicant came to know that the application was not the proper remedy and

necessary application to validate the disposition of the property by the court has to be filed. Accordingly, the applicant filed an application. The

applicant is having financial problems and has to pay the dues to the depositors. Under the circumstances, the transaction made by the company in

liquidation in favour of the applicant has got to be validated and the official liquidator be directed to deliver vacant possession of the property.

2. The official liquidator opposed the application by stating that the sale deeds are not bona fide; that all the transactions are void in terms of

Section 536(2) of the Companies Act, 1956 and hence the application was to be dismissed.

3. The learned single judge on enquiry, has allowed the application directing the official liquidator to deliver possession of the property in question

to the applicant. Hence this appeal.

4. Arguing for the appellants, learned Counsel would submit that besides the first respondent herein, the company in liquidation had other secured

and unsecured creditors to whom the company owed certain amounts; that the appellant Indian Bank had got first charge over the plant and

machinery and other movables belonging to it; that the learned single judge arrived at a decision without any evidence being let in by the parties;

that in this case, notice should have been issued to the secured and unsecured creditors ; that the provisions of Section 536(2) of the Companies

Act, 1956, should have been considered ; that while allowing the company, the secured creditors like the appellants and the workmen of the

company in liquidation have been denied their legitimate dues ; that while deciding the issue as to the declaration of transfer during the pendency of

the company petition, namely, whether it is void or not, the parties should be given opportunity to let in evidence, but not done so ; that in the

absence thereof, the transfer of the property shall be held to be invalid and void ab initio, and under the circumstances, the order of the learned

single judge has got to be set aside.

5. Learned senior counsel appearing for the first respondent would submit that the entire transaction of the first respondent is bona fide; that the

appellant Indian Bank admittedly not having any charge over the said immovable property cannot question the validation of the bona fide

transaction as found by the learned single judge; that the rights of any secured creditor has to be individually safeguarded ; that the Companies Act

does not envisage that the exclusive security of a secured creditor has to be shared among all the creditors, since the individual secured creditor

has the option of standing outside the winding up, even post winding up to realise its security; that the only statutory exception is the fictional

statutory pari passu charge u/s 529A; that the Indian Bank does not belong to the class of secured creditors covered u/s 529A(1)(b) ; that its

position would not improve more than security created in its favour; that its priority would not extend to its entire unrealised sums, which might be

in excess of its security; that the appellants have been keeping quiet for all these years; that the appeals have been filed with ulterior motives ; that it

is well known that the equity favours the vigilant and not the indolent; that under the circumstances, the learned single judge was perfectly correct in

allowing the application, and hence that order has got to be sustained and all the appeals be dismissed.

The court also heard the official liquidator.

6. The admitted facts are as follows:

The company in liquidation which was wound up as per the order dated March 10, 1999, in C. P. No. 201 of 1996, approached the applicant,

the first respondent herein, for certain loan facilities in order to extend its business activities. Accordingly, the applicant gave loan facilities to the company to the tune of Rs. 65,20,000 consisting of Rs. 10 lakhs, Rs. 25 lakhs, Rs. 25 lakhs and Rs. 5.20 lakhs and also other bill discount and

lease facilities. In order to secure the same, the company in liquidation mortgaged the property situated in door No. 135, Mottaikaran Chavadi,

Okkiyam-Thoraipakkam village, Tambaram taluk, which is described in the schedule. The charge created was duly intimated to the Registrar of

Companies on February 5, 1997 and the same was accordingly registered. Since the company could not make repayment proper, it came forward

to sell the schedule property in order to discharge a part of the said credit facilities. Accordingly, the company executed two sale deeds dated

February 11, 1999 and February 16, 1999, whereby the schedule property was conveyed to the applicant. Thus, the applicant took absolute

possession of the property. Pursuant to the order of winding up dated March 10, 1999, the official liquidator by a communication dated June 1,

1999, informed the applicant about the same and also about the taking possession of the property. Accordingly, the official liquidator visited the

schedule property on June 8, 1999, when the applicant put forth its objection from taking possession. Thereafter, the official liquidator took

possession of the property and recorded the minutes. The applicant filed C. A. No. 1275 of 1999 in ICICI Venture Funds Management Limited

Vs. Neptune Inflatables Limited, , for directing the official liquidator to deliver possession of the property. That application was dismissed for

default on August 14, 2002. The above application was not filed seeking proper remedy and hence necessary application to validate the above

conveyance of the property was to be filed. Accordingly, application was filed for the said relief. C A. No. 1275 of 1999 was dismissed on

November 29, 2004, against which the applicant filed O.S.A. No. 13 of 2005. The said appeal was allowed by a Division Bench of this Court

remitting the matter back for fresh consideration and observing that the learned single judge should consider the question whether the transaction

would be valid or not on the basis of the evidence that might be let in by the parties. Accordingly, C. A. No. 1275 of 1999 was taken up for

consideration by the learned single judge and as a result, the application was allowed directing the official liquidator to deliver vacant possession of

the property to the applicant. This order dated August 9, 2005, is the subject-matter of challenge in this appeal.

7. The prime contention put forth by the applicant before the learned single judge and also as the first respondent before this Court is that the sale

transactions covered under the aforesaid two sale deeds, were bona fide ; that all the transactions are not void ab initio in terms of Section 536(2)

of the Companies Act, 1956 and hence it cannot be declared as void by the court; that the entire consideration for the conveyance of the property

was actually paid to the company by way of cheques and payments, and hence it was a bona fide transaction which would not fall under the

mischief of Section 536(2) of the Companies Act, 1956 ; and that under the circumstances, a direction has got to be given to the official liquidator

to hand over the possession of the property. On the contrary, the stand that was taken by the official liquidator before the learned single judge was

that the transactions were not bona fide ; that they were void in terms of Sub-section (2) of Section 536 of the Companies Act, 1956 ; that the

company petition was filed on October 14, 1996 ; that the charge was created by executing mortgage deed on the property only on January 31,

1997 ; that the sale deeds have been executed on February 11, 1999 and February 16, 1999 ; but, the company was ordered to be wound up on

March 13, 1998, itself, and under the circumstances, the transactions are neither bona fide and hence the possession which was taken by the

official liquidator, was proper.

8. As could be seen above, the petition for winding up was presented before the court on October 14, 1996. The company had mortgaged the

property on January 31, 1997, in favour of the applicant by depositing the title deeds pursuant to the earlier lease agreement. The charge created

by the company was duly informed to the Registrar of Companies on February 5, 1997 and the same was also registered. The company in

liquidation has executed two sale deeds on February 11, 1999 and February 16, 1999, in respect of the landed property in question. The

company by an order of court was wound up on March 10, 1999. From the above, it would be quite clear that both the mortgage deeds and sale

deeds were executed by the company in liquidation in favour of the applicant after the filing of the company petition for winding up and before the

order of winding up and hence pursuant to the order of winding up, the official liquidator took delivery of possession of the property on June 8,

1999. The applicant filed an application in C. A. No. 1275 of 1999 seeking re-delivery of the property. On dismissal of the application, the

applicant filed O.S.A. No. 13 of 2005, whereby the order of the learned single judge was set aside and an order of remittal was made which reads

as follows:

9. Though the application has been filed for delivering possession, we are of the view that since the official liquidator has taken over possession, he

is permitted to retain the possession and it is not necessary for him to redeliver the possession to the appellant-company. Further, as already held,

the question whether the transfer is valid or void has to be examined. It is needless to say that it is always open to the learned single judge to permit

the parties to lead evidence.

10. In the result, the matter is remitted back for fresh consideration. No costs.

The learned single judge on remittal was required to decide the question whether the transfer was valid or void. The learned single judge has taken

the view that the sale transactions were valid, and hence these three appeals have arisen.

9. At the outset, it has to be pointed out that these three appellants never appeared as parties before the learned single judge. It was contended by

the appellants'' side that the official liquidator who took delivery of possession of the property pursuant to the order of winding up, has actually

represented the entire body of creditors. All the three appellants called themselves as secured creditors. As far as the appellant in O.S.A. No. 201

of 2005, namely, Indian Bank, was concerned, what was hypothecated to Indian Bank for raising loans by the company under liquidation though

earlier in point of time, was certain movables and also machinery. What were actually mortgaged and conveyed under the deeds were the

immovable properties, namely, the lands. Further, when the official liquidator visited the property on June 8, 1999, the Indian Bank was also very

well available. Along with the applicant, the Indian Bank also raised its objections, but it never raised its little finger all along the years and was

keeping quiet and has now preferred an appeal after the order of redelivery was made.

10. All these three appeals concentrate on the question whether the deeds of mortgage and sale executed by the company under liquidation after

the filing of the petition for winding up and before the order of winding up, could be termed as void or otherwise in terms of Section 536(2) of the

Companies Act, 1956. It would be more apt and appropriate to reproduce Section 536(2) of the Companies Act, 1956, as follows:

536. Avoidance of transfers, etc., after commencement of winding up.-. . .

(2) In the case of a winding up by the Tribunal, any disposition of the property (including actionable claims) of the company, and any transfer of

shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall, unless the Tribunal

otherwise orders, be void.

11. Placing reliance on the above provision, learned Counsel for the appellants would contend that for winding up of the company, the petition was

filed on October 14, 1996 ; that the said date shall be taken as the date from which winding up proceedings were commenced for the purpose of

applicability of the above said provision, and so the sale deeds executed on February 11, 1999 and February 16, 1999, by the company under

liquidation, are void in terms of Section 536(2) of the Act. On the contrary, it is contended by the first respondent''s side that every transfer that is

made even after the commencement of the winding up proceedings, the same would not by itself become void ab initio or void, and the transaction

in question would fall under the clause ""unless the Tribunal otherwise orders"" since the transactions were bona fide. The apex court had an

occasion to consider whether and under what circumstances a transfer made even after the commencement of the winding up proceedings, could

be avoided in a case in Pankaj Mehra and Another Vs. State of Maharashtra and Others, , wherein it has been held as follows (pages 423 to 425

of 100 Comp Cas):

14. In the above backdrop alone we can consider the impact of the legislative direction in Section 536(2) that any disposition of the property of

the company made after the commencement of the winding up (i.e., after the presentation of a petition for winding up) shall be void. There are two

important aspects here. First is, that the word ''void'' need not automatically indicate that any disposition should be ab initio void. The legal

implication of the word ''void'' need not necessarily be a stage of nullity in all contingencies. Black''s Law Dictionary gives the meaning of the word ''void'' as having different nuances in different connotations. One of them is of course ''null, or having no legal force or binding effect''. And the

other is ''unable in law, to support the purpose for which it was intended''. After referring to the nuances between void and voidable the

lexicographer pointed out the following:

The word ""void"" in its strictest sense, means that which has no force and effect, is without legal efficacy, is incapable of being enforced by law, or

has no legal or binding force, but frequently the word is used and construed as having the more liberal meaning of ""voidable"". The word ""void"" is

used in statutes in the sense of utterly void so as to be incapable of ratification, and also in the sense of voidable and resort must be had to the rules

of construction in many cases to determine in which sense the Legislature intended to use it. An act or contract neither wrong in itself nor against

public policy, which has been declared void by statute for the protection or benefit of a certain party, or class of parties, is voidable only.

15. For discerning the legislative idea in employing the word ''void'' in the context set out in Section 536(2) of the Companies Act the second

aspect to be noticed is that the provision itself shows that the word void is not employed peremptorily since the court has power to order

otherwise. The words ''unless the court otherwise orders'' are capable of diluting the rigour of the word ''void'' and to choose the alternative

meaning attached to that word.

16. In Chittoor District Co-operative Marketing Society Ltd. v. Vegetols Ltd. [1987] (Suppl) SCC 167, a two-judge Bench of this Court

considered a plea for validation of payments made by a company after presentation of a petition for winding up. One set of payments were made

before the passing of the winding up order and the other set of payments were made thereafter. This Court declined to validate such payments on

the ground that ''there is no evidence to show that those payments were made either under compulsion of circumstances in order to save or protect

the property of the company or that there was any commercial compulsion to enable it to run its business''. The decision only indicates that such

payments could have been made valid if evidence was adduced to show that there was compulsion of circumstances. In fact, this decision lends

support to the interpretation that the payments which were made after the commencement of winding up proceedings, would not become ab initio

void.

17. An early decision of a Division Bench of the Bombay High Court in Tulsidas Jasraj Parekh v. Industrial Bank of Western India AIR 1931 Bom

2, was sought to be relied on by most of the learned Counsel who argued for different appellants. The question which the court considered therein

pertained to Section 227(2) of the old Companies Act, 1913, which was identical to Section 536(2) of the present Act. Certain payments made

by a company after commencement of the winding up proceedings were questioned and the Division Bench considered the scope of sub-section

and noticed that the principle had been borrowed from the English Companies Act. Hence some of the English authorities were also referred to by

Marten, C.J., who spoke for the Division Bench. The learned judges stated thus:

Now here as regards Section 227(2) the court has to steer a middle course between two extremes. On the one hand the words of the section are

wide enough to include any sale or payment that a company may make after the date of the winding up petition. On that basis any business would

practically have to be stopped if a petition was presented, because it would be unsafe to dispose of any of the company''s assets. For instance, a

mill company might not be able to buy a ton of coal for the use of its furnaces, or, on the other hand, it might not be able to sell any of its goods in

the ordinary course of business. Consequently, the court has very properly laid down that, speaking generally, any bona fide transaction carried out

and completed in the ordinary course of current business will be sanctioned by the court u/s 227(2). On the other hand it will not allow the assets

to be disposed of at the mere pleasure of the company, and thus cause the fundamental principle of equality amongst creditors to be violated. To

do so would in effect be to add to the preferential debts enumerated in Section 230 a further category of all debts which the company might

choose to pay wholly or in part.

18. It is useful to refer to the reasoning adopted by a Division Bench of the Gujarat High Court in Navjivan Mills Ltd., In re [1986] 59 Comp Cas

201, in favour of adopting a pragmatic attitude when a company court was approached for approval of certain dispositions which a company

made after presentation of a petition for winding up. A clear distinction was drawn by the Division Bench between the period till the passing of the

order for winding up and thereafter, so far as dispositions are concerned. The following reasoning is useful for consideration of the issues involved:

The court can exercise the jurisdiction u/s 536(2) of the Companies Act, 1956, of giving directions validating proposed transactions pending a

petition for winding up but before the winding up order is made for the obvious reason that unless these transactions are saved from the

consequence which may ensue, if at all, on an order of winding up being made, the company might find it difficult to keep itself going and its

business might be paralysed. The purpose underlying the investment of the power in court is for the benefit and the interest of the company so as to

ensure that a company which is made the subject of a winding up petition may nevertheless obtain the money necessary for carrying out its business

and so as to avoid its business being paralysed. If that is the purpose and object of the section, it would hardly be proper and just to stultify the

power and restrict its operation since otherwise it is bound to be counterproductive in the sense that the very purpose of keeping the company as a

going concern so as to ensure the interest of the shareholders and creditors would be defeated.

19. In Gray''s Inn Construction Co. Ltd., In re [1980] 1 All ER 814, the Court of Appeal (Civil Division) considered the principle on which

discretion of the court to validate the dispositions of property made by a company, during the interregnum between presentation of a winding up

petition and the passing of the order for winding up, has been dealt with. Section 227 of the English Companies Act, 1948, is almost the same as

Section 536(2) of the Indian Companies Act. Dispositions which could be validated are mentioned in the decision. The said decision was cited

before us in order to emphasise the point that courts would be very circumspect in the matter of validating the payments and the interest of the

creditors as well as the company would be kept uppermost in consideration. Be that so, the said decision is not sufficient to support the contention

that disposition during the interregnum would be irretrievably void.

20. It is difficult to lay down that all dispositions of property made by a company during the interregnum between the presentation of a petition for

winding up and the passing of the order for winding up would be null and void. If such a view is taken the business of the company would be

paralysed, for the company may have to deal with very many day-to-day transactions, make payments of salary to the staff and other employees

and meet urgent contingencies. An interpretation which could lead to such a catastrophic situation should be averted. That apart, if any such view is

adopted, a fraudulent company can deceive any bona fide person transacting business with the company by stage-managing a petition to be

presented for winding up in order to defeat such bona fide customers. This consequence has been correctly voiced by the Division Bench in the

impugned judgment.

12. From the above decision rendered by the apex court, it would be abundantly clear that all transactions done subsequent to the commencement

of the winding up proceedings are neither void ab initio nor could be declared as void. The words ""unless the Tribunal otherwise orders"" would be

quite indicative of the legislative intention that though the transactions entered into subsequent to the commencement of the winding up proceedings,

it can be declared valid. It is a cardinal principle of construction that normally no word or provision should be considered redundant or superfluous

in interpreting the provisions of the statute. The interpretation should advance the legislative intent and serve the purpose for which it was made

rather than to frustrate it. In order to find out whether the transaction is void or not, the court has to necessarily look into the circumstances and the

sequence of events and should also test whether the transaction was bona fide or otherwise. In the case on hand, from the materials available it

could be seen that it is not in controversy that the company in liquidation passed a resolution in the annual general meeting to avail of loan, to create

mortgage and to dispose of the assets by way of sale even on September 29, 1995, itself. The loan agreement was entered into between the

company in liquidation and the applicant on December 1, 1995 and the loan facilities were availed of by the company in liquidation to the tune of

Rs. 65.20 lakhs consisting of Rs. 10 lakhs, Rs. 25 lakhs, Rs. 25 lakhs and Rs. 5.20 lakhs even before the filing of the company petition for winding

up on October 14, 1996. The said facts namely the loan agreement and the loan facilities to the extent of Rs. 65.20 lakhs were raised accordingly by the company in liquidation from the applicant even before the filing of the winding up petition are not disputed either by the official liquidator

before the learned single judge or by the appellants before this Court. It is true that as security for the loan raised, the company under liquidation

has executed the mortgage deed on January 31, 1997. The same was also reported to the Registrar of Companies and registered also on February

5, 1997. Following the same, two sale deeds dated February 11, 1999 and February 16, 1999, were executed conveying the immovable property

to the first respondent. Thus, the passing of the resolution by the company under liquidation, entering into the agreement therefore and raising the

entire loan of Rs. 65.20 lakhs were all ten months prior to the filing of the petition for winding up.

13. Now, at this juncture, it is pertinent to point out that these loan transactions could not have been entered into for the purpose of defeating or

defrauding the creditors. Nowhere the official liquidator came out with the case stating that the said loan transactions were entered into in order to

defeat or deceit the secured creditors. From the resolution passed for raising loan facility and even if necessary, to part with the properties of the

company, it would be indicative of the fact that the company was in financial needs. It is true that in the agreement for raising loans, entered into

between the applicant and the company in liquidation, it was not stated that the loan was raised for day-to-day transactions. But, it should not be

forgotten that the company in liquidation was carrying on its business even at the time of filing of the winding up petition and also till the winding up

order was made. Their Lordships of the apex court in the aforementioned case have pointed out that the purpose underlying the investment of the

power in court is for the benefit and the interest of the company so as to ensure that a company which is made the subject of a winding up petition

may nevertheless obtain the money necessary for carrying out its business and so as to avoid its business being paralysed. It is also pointed out that

if that was the purpose and object of the section, it would hardly be proper and just to stultify the power and restrict its operation since otherwise it

was bound to be counter-productive in the sense that the very purpose of keeping the company as a going concern so as to ensure the interest of

the shareholders and creditors would be defeated.

14. Applying the principle laid down by the apex court in the aforesaid decision and taking into consideration the sequence of events and the facts

and circumstances attendant, this Court is of the view that the transactions entered into, are bona fide. So long as the court is able to see bona fide

transactions, no doubt it would fall within the clause ""unless the Tribunal orders otherwise"", and hence these transactions cannot be declared as

void u/s 536(2) of the Companies Act, 1956. Therefore, this Court has to necessarily affirm the order of the learned single judge.

In the result, these original side appeals are dismissed confirming the order of the learned single judge and leaving the parties to bear their costs.

Consequently, connected CMPs are also dismissed.

