(2009) 01 GUJ CK 0010

In the Gujarat High Court

Case No : Company Application No. 413 of 2008 in Company Petition No. 181 of 2007

Indoco Remedies Ltd. APPELLANT

Vs

O.L. of Kay Packaging P. Ltd. and Another RESPONDENT

Date of Decision : 12-01-2009

Acts Referred:
Companies Act, 1956 — Section 433, 441(2), 529, 529(1), 529A
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 20(1), 20(2), 20(4)
State Financial Corporations Act, 1951 — Section 29, 46

Citation : (2009) 150 CompCas 770 : (2009) 4 CompLJ 156 : (2009) 96 SCL 384

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : D.V. Parikh, for the Appellant; Nitin K. Mehta and Sanjay A. Mehta, for the Respondent

Judgement

K.A. Puj, J.—The applicant, Indoco Remedies Ltd., has taken out this judge''s summons seeking an order against the official liquidator restraining him from interfering with the possession of the property situated at plot No. A 28/1, MIDC Patalganga Industrial Area, Maharashtra. The applicant has also prayed for a declaration that the company in liquidation has no right, title and interest in the aforesaid property and that the same is not the assets of the company in liquidation.

2. An affidavit is filed by one Jagdish Babu Salian in support of the judge''s summons. Mr. Deven Parikh, learned advocate appearing for the applicant company submitted that the land ad measuring 2650 sq.mtrs. situated at plot No. A 28/1 at MIDC Patalganga Industrial Area was in the possession of Kay Packaging P. Ltd. By an agreement to lease dated October 9, 1984, Maharashtra Industrial Development Corporation (MIDC) inter alia agreed to give on lease to Kay Packaging P. Ltd., a plot of land bearing plot No. A 28/1 situated in the Patalganga Industrial Area of MIDC within the village limits of Kaire taluka and registration sub-district Khalapur district and registration district Raigad ad

measuring 2650 sq. mtrs. for a term of 95 years with a proviso for granting lease in the usual form of lease in such cases on the terms and conditions mentioned therein. The company thereafter made construction of building and other structure on the said plot of land.

3. By its letter dated May 22, 1985, MIDC granted its permission to the company to mortgage/charge its right, title and interest under or benefit of the said MIDC agreement in favour of the vendor, namely, SICOM. By an indenture of mortgage dated May 30, 1985, executed by the company in favour of the vendor, namely, SICOM in consideration of the amount of Rs. 72 lakhs lent and advanced or agreed to be lent and advanced by the vendor to the company, the company covenanted to repay to the vendor the said sum of Rs. 72 lakhs by instalments together with interest, additional interest and compound interest as mentioned therein. By and under the said mortgage the company, inter alia, agreed that in the event of the company committing default in payment of any instalment of the said term loan of Rs. 72 lakhs or any part thereof or of the interest thereon on their respective due dates as mentioned in the said mortgage, the vendor has power to take over possession of the mortgaged premises and to sell, transfer, assign, deal with and dispose of the same and to appropriate the sale proceeds towards the outstanding amount of the said loan. The company defaulted in payment of instalment of the principal amount of the said term loan as well as the interest and failed and neglected to pay the same to the vendor in spite of repeated requests made by the vendor to the company.

4. The SICOM is established by the Government of Maharashtra for financing of industrial concerns and is a deemed financial corporation within the meaning of Section 46 of the State Financial Corporations Act, 1951, by virtue of notification dated December 11, 1986, issued by the Government of India. Accordingly, u/s 29 of the State Financial Corporations Act, the SICOM is empowered to take over possession of the securities/assets mortgaged by the concerned mortgagor and sell the same for the recovery of its dues, without intervention of court or permission of any authority. Under these circumstances, the SICOM in exercise of the powers reserved/vested unto it under the said mortgage and under the provisions of Section 29(i) of the State Financial Corporations Act, 1951, after giving due notice to the company entered into and/or took over possession of the said premises being the mortgaged premises. The SICOM thereafter advertised the sale of the mortgaged premises and invited offers for the purchase of the same on "as is where is and whatever there is" basis on the general conditions of sale mentioned therein.

5. In response to the said advertisement Clarion Laboratories P. Ltd. ("CLPL") offered to purchase the land and building at or for the price of Rs. 20,30,000 in accordance with the general conditions of sale, which was accepted by the SICOM. Thereafter, CLPL by and under its letter dated August 17, 2005, nominated one La Nova Chem (India) P. Ltd., ("LNCIPL") as its nominee for the purchase of the said land and building from the SICOM, which nomination has

been accepted by the SICOM and agreed to transfer the said land and building in favour of LNCIPL. Since CLPL have already paid SICOM the full purchase price of Rs. 20,30,000 the possession was handed over to CLPL and, thereafter, a sale deed was executed by the SICOM in favour of LNCIPL on August 18, 2006. Prior to the execution of the sale deed the entire shareholding of LNCIPL was purchased by the present applicant. Subsequently, by an order dated September 28, 2005, of the Bombay High Court in Company Petition No. 562 of 2007 connected with the Company Application No. 559 of 2007, LNCIPL was merged with the applicant company. The applicant thus holds possession of the property in question from the effective date, i.e., July 5, 2006.

6. Based on these facts, Mr. Parikh has submitted that the applicant is legally entitled to the right, title and interest in the property in question. The official liquidator has, therefore, no right to issue notice dated July 4, 2008, asking for the possession of the said property. He has further submitted that the transaction in question was taken place long back and the petition for winding up has only been filed in September, 2007. Thus, the petition is much after the above transaction. He has further submitted that there is a settled law that the secured creditor exercising powers under the State Financial Corporations Act can stay outside the winding up proceedings and initiate the proceeding to recover its dues by taking recourse available to it under the said Act. The SICOM was thus clearly entitled to winding up proceeding and was entitled to its remedy of foreclosure of the mortgage and to recover its dues.

7. On notice being served Mr. Nitin Mehta, learned advocate appears on behalf of the official liquidator and a report is filed on October 8, 2008, wherein it is submitted that vide BIFR opinion dated April 25, 1990, in BIFR Case No. 83 of 1988 M/s. Kay Packaging P. Ltd., was ordered to be wound up. The company has filed appeal against the said opinion of BIFR which was registered before the Appellate Authority being Appeal No. 33 of 1990. The said appeal after proper hearing was dismissed by the Appellate Authority vide order dated July 28, 1993 and communication in accordance with the BIFR opinion dated April 25, 1990, was forwarded to the Registrar of High Court of Bombay vide letter dated August 12, 1993. On the basis of the BIFR opinion, Company Petition No. 401 of 1990 was registered by the Bombay High Court. After hearing the matter the Bombay High Court has transferred the said opinion to this Court along with the order dated August 17, 2007, on the ground that the registered office of the company is situated at Gujarat. On receipt of the said opinion the High Court registry renumbered the same as Company Petition No. 181 of 2007 in which an order dated December 10, 2007, was passed by this Court appointing the official liquidator as the provisional liquidator of the company.

8. It appears that during the pendency of the proceedings before the AAIFR and the Bombay High Court various properties of the company were disposed of by the SICOM without any prior permission or sanction of the Bombay High Court. (1) Plot No. 1806, Vapi Industrial Estate, GIDC, Vapi was sold by GSFC vide its

advertisement dated September 17, 1993, to Mark Lubricants. (2) Plot No. A 28/1, Patalganga Industrial Area, village : Kaire, taluka and district Raigarh (Maharashtra). The said plot was sold by SICOM to La Nova Chem (India) P. Ltd., on August 18, 2006.

9. The official liquidator has further stated in his report that initially the recommendation for winding up of the company was presented on June 8, 1990, before the Bombay High Court by the BIFR vide its opinion dated April 25, 1990 and subsequently the said matter was transferred by the Bombay High Court to this Court. Hence, the date of commencement of winding up proceedings may be treated as the date of presentation of the petition before the Bombay High Court, i.e., June 6, 1990. In this view of the matter, as per the provisions contained in Section 531A of the Companies Act, 1956, the transfer of property movable or immovable of the company in liquidation shall be treated as null and void against the liquidator and any transaction during the pendency of the winding up petition without the sanction of the court as invalid unless validated by this Court. He has, therefore, submitted that unless and until the applicant proves along with all necessary documents to the satisfaction of this Court in term of Section 531A of the Companies Act, 1956, that the transfer of the above referred immovable property is made in the ordinary course of business, in good faith and for valuable consideration, this application of the applicant cannot be considered and the same deserves to be rejected.

10. This court vide its order dated October 14, 2008, granted leave to join SICOM as party respondent and notice was issued on SICOM. On notice being served, Mr. Sanjay Mehta, learned advocate appeared on behalf of SICOM and an affidavit is filed by one Mr. Vinod C. Deo, Manager (Legal) of SICOM. Mr. Mehta has submitted that in exercise of its powers conferred upon it under the provisions of the State Financial Corporations Act, 1951, SICOM issued a take over notice dated March 2, 1990, calling upon the defaulting company M/s. Kay Packaging P. Ltd., to pay the amounts found due and payable by the company to SICOM, failing which SICOM expressed its intention to proceed in accordance with the provisions of law and take over possession of the mortgaged assets. Since the company failed to act as per the requisites of the said notice, SICOM took over the possession of the assets of the company on March 9, 1990. He has further submitted that by an order dated February 22, 1990, passed in Case No. 83 of 1988, the BIFR permitted SICOM to enforce its statutory rights by invoking Section 29 of the State Financial Corporations Act, for the recovery of its dues and pursuant to the same SICOM auctioned the properties of the said company. The said auction had taken place pursuant to the permission granted by the BIFR and the possession of the land and building sold was handed over to the purchaser M/s. Clarion Laboratories P. Ltd., on December 20, 1995, after the receipt of the entire sale consideration of Rs. 20,30,000. He has further submitted that SICOM has also received an amount of Rs. 45 lakhs towards the sale proceeds of the plant and machinery which were sold to M/s. Kumar Intermediates P. Ltd., and Rs. 20,30,000 towards the land and building which

was sold to M/s. Clarion Laboratories P. Ltd. In this view of the matter, Mr. Mehta submitted that the official liquidator has no right to ask for the possession of the properties in question.

11. An interesting question of law arose in this matter. The BIFR has granted permission to the company to create mortgage on the property. Thereafter, the BIFR formed its opinion in 1990. However, despite the fact that the registered office of the company was situated in Gujarat the said opinion was forwarded to the Bombay High Court and based on that opinion Company Petition No. 401 of 1990 was registered. During the pendency of the said petition the properties of the company were sold by SICOM being secured creditors, while exercising its powers u/s 29 of the State Financial Corporations Act. After more than 17 years the petition was transferred to this Court by the Bombay High Court and it was registered as Company Petition No. 181 of 2007. The said petition was admitted by this Court on December 10, 2007 and the official liquidator attached to this Court was appointed as the provisional liquidator of the company. The final winding up order was passed by this Court on November 24, 2008. The question arose before this Court for its consideration as to whether the winding up order relates back to the date of the commencement of the winding up proceedings and if it is so which is the date of commencement of winding up proceeding?, whether the petition is filed before the Bombay High Court or whether the petition is registered in this Court after it is transferred by the Bombay High Court to this Court. If it is considered that the date of commencement of winding up proceeding is the date on which the petition was registered by the Bombay High Court then all transactions entered into by the company during the pendency of the petition before the Bombay High Court are hit by the provisions contained in Section 530A of the Companies Act, 1956.

12. Mr. Parikh''s argument is that the doctrine of relation back does not apply to such transaction. In support of this submission he relied on the decision of BPL Ltd. v. Inter Modal Transport Technology Systems (Karnataka) Ltd. (in liquidation) [2001] 107 Comp Cas 313 (kar): [2002] 1 CLJ 121 (Kar), wherein it is held that having regard to the provision for relating back contained in Section 441(2) of the Companies Act, 1956, the words "commencement of the winding up" occurring in Section 537(1) of that Act refers to the time of presentation of the petition for winding up and not the date of order of winding up, where the winding up order is passed u/s 433 of the Companies Act. The intention of relating back the winding up of a company to the date of presentation of the petition for winding up is to avoid dispositions of the property, made after presentation of the petition for winding up. Therefore, when an order of winding up is made, even though the actual process of winding up starts from the date of the order, the winding up of the company is deemed to commence from the date of filing of the petition for winding up. But such relating back to the commencement of winding up of the company to the date of filing of the petition for winding up, does not extend to relating back of the passing of the custody of the company''s properties, to the date of the winding up petition. Where the

order of winding up is u/s 20(2) of the SICA, 1985, on the basis of an opinion u/s 20(1) of the SICA, there is no presentation of the petition for winding up. Consequently there is no relating back of the winding up to any date prior to the order of winding up, when the order of winding up is passed u/s 20(2) of the SICA. It follows, therefore, that where the order of winding up is u/s 20(2) of the SICA, any sale without the leave of the company court will be void u/s 537(1) of the Act, only if such sale takes place after the date of winding up, and not earlier. Again, the proviso to Sub-section (1) of Sections 529 and 529A provides that the workmen''s dues shall rank pari passu with the debts due to the secured creditor in the winding up of the company. This overriding deeming provision is applicable only when there is winding up of a company. If there is no order of winding up, the workmen''s dues will not rank pari passu with the debt due to the secured creditor. As in the case of an order of winding up u/s 20(2) of the SICA, the winding up commences from the date of the order of winding up, and not the date of presentation of any petition u/s 433 for winding up, when a secured creditor effects a sale of the secured assets either by a private treaty or by public auction, before an order of winding up, with the permission of the BIFR u/s 20(4), there is no need to seek or obtain the leave of the company court or associate the official liquidator in the sale process.

13. The next question is whether the disposition of the property of the company in winding up in favour of the applicant by the SICOM without seeking prior permission of this Court would result in any illegality. According to the official liquidator, it was not open for the SICOM to sell the properties of the company without seeking prior permission of this Court. Admittedly, the SICOM has disposed of the properties of the company in exercise of its rights under the provisions of the State Financial Corporations Act much before the order of winding up is passed. Reliance has been placed by Mr. Parikh and Mr. Mehta on the decision of the apex court reported in International Coach Builders Ltd. Vs. Karnataka State Financial Corpn., in the case of International Coach Builders Ltd. v. Karnataka State Financial Corporation to contend that it is always open to the secured creditors such as the SICOM to opt to proceed in exercise of power under the provisions of the State Financial Corporations Act to secure its dues. The contention of Mr. Parikh that as and when winding up order is passed by the company judge, the liability of the secured creditor, who has invoked such remedy, will have to be considered only with reference to the provisions of Sections 529 and 529A of the Companies Act. In other words, the SICOM will not be entitled to resist the claim of the workers as well as the tax dues and such other dues recognised by Sections 529 and 529A of the Companies Act are to be considered as pari passu charge.

14. Considering the above submissions of the parties and the relevant statutory provisions as well as the decided case laws on the subject this Court is of the view that the properties in question were transferred by the SICOM long back. No winding up order was passed at that point of time. It is true that the winding up proceedings were already commenced. Whether they were before the Bombay

High Court or before this Court is immaterial. It is rather shocking and surprising that despite the fact that the registered office of the company is situated in Gujarat the BIFR has forwarded its opinion to the Bombay High Court. The proceedings before the Bombay High Court were kept pending for almost 17 years after the BIFR opinion was registered as Company Petition No. 401 of 1990. But for the connivance of the parties such a thing would not have happened. The company, secured creditor, namely, SICOM and the officials of the BIFR as well as the High Court registry might be involved in not bringing the correct facts before the court for 17 long years. The proceedings were kept pending before the Bombay High Court. In the meantime, all the assets of the company were conveniently transferred. Way back in 2007 the said petition was transferred to this Court on the ground that the Bombay High Court has no jurisdiction since the registered office of the company is situated in Gujarat. With respect, this Court is not in agreement with the view taken by the Karnataka High Court in the case of BPL Ltd. v. Inter Modal Transport Technology Systems (Karnataka) Ltd. (in liquidation) (supra). Once the winding up order is passed it relates back to the date of commencement of the proceedings whether such commencement is on the basis of the petition filed by the creditor or it is on the basis of the opinion forwarded by the BIFR. Once the petition is filed or the opinion is forwarded and it is registered as company petition, the winding up proceedings are commenced. Hence, the present winding up proceedings are said to have been commenced in 1990 and the properties of the company were sold after the commencement of the winding up proceedings and hence such transactions are certainly hit by the provisions of Section 441(2) read with Sections 530 and 531A of the Companies Act, 1956.

15. The only question now remains whether the properties are sold at the market value. There is nothing on record which shows that the same are not sold at the market value. A proper procedure has been followed, advertisement was given, offers were invited and thereafter the properties were sold at the market value by public auction. The court, therefore, does not find any illegality in the sale of the assets of the company in liquidation.

16. This leads us to another question as to whether the amount received by the SICOM on the sale of the properties is subject to the provisions contained in Sections 529 and 529A of the Companies Act. It is the say of the applicant that there is no claim of the workers. However, the claims of the workers have not been invited. The submission of Mr. Parikh that Sections 529 and 529A applies only after the winding up order is passed by the court. However, once the winding up order is passed it relates back to the date of commencement of the proceeding and if any amount is realised by the secured creditor on the sale of the assets of the company in liquidation, after presentation of the winding up petition, it is always subject to the claim of the workers u/s 529A of the Companies Act. The SICOM in the present case is, therefore, certainly liable to part with the amount if required for satisfaction of the claims of the workers u/s 529A of the Companies Act, 1956.

17. Accordingly, the SICOM is hereby directed to file an undertaking before this Court that the SICOM will subject itself to such directions that may be given by this Court including to bring back the proportionate amount which is required to be disbursed to the workers or any other claim which is covered by Sections 529 and 529A of the Companies Act, to be treated as pari passu charge equally with the rights of the SICOM being secured creditors. The official liquidator is, therefore, directed to invite claims from the workers and creditors and on adjudicating the claims so received if he finds that any amount is payable to any other person covered by Sections 529 and 529A to receive the payment on pari passu basis equally with the rights of the SICOM being the secured creditor, may record that finding and call upon the SICOM to bring back such amount to facilitate the disbursement thereof, in favour of eligible persons. To enable the official liquidator to invite the claims, the SICOM for the time being, shall deposit a sum of Rs. 50,000 with the official liquidator within four weeks from today. This direction is necessitated as no funds are available with the official liquidator in respect of the company in liquidation. The SICOM shall be liable to deposit further amount as and when required towards the expenses and/or disbursement by the official liquidator.

18. Subject to the aforesaid direction this company application is disposed of.

