

(2011) 03 DEL CK 0385
In the Delhi High Court
Case No : CO. A. (SB) 47 of 2006

Industrial Development Bank of India	APPELLANT
Vs	
Thapar Agro Mills Ltd.	RESPONDENT

Date of Decision : 17-03-2011

Acts Referred:

Companies (Court) Rules, 1959 — Rule 164, 165, 6, 9
Companies Act, 1956 — Section 125, 460(6), 529A
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19
Transfer of Property Act, 1882 — Section 100, 55, 73, 77

Citation : (2011) 3 BC 371 : (2011) 164 CompCas 139 : (2011) 179 DLT 766 :
(2011) 123 DRJ 32 : (2011) 5 RCR(Civil) 738 : (2011) 108 SCL 348

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Sangram Patnaik and Renu Nanda, for the Appellant; Mayank Goel, for Official Liquidator and Arvind Kumar Singh, for IFCI, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan, J.—Present appeal has been filed u/s 460(6) of the Companies Act, 1956 read with Rules 6, 9, 164 and 165 of the Companies (Court) Rules, 1959 for directing the Official Liquidator to consider IDBI as secured creditor.

2. The relevant facts of the present case are that Appellant had advanced loan of Rs. 200 lacs to the company in liquidation vide the Subscription Agreement dated 04 August, 1992. In accordance with the said agreement, the company in liquidation was to allot Non Convertible Debentures (in short "NC Ds") after complying with the SEBI guidelines and other pre-requisites like appointment of trustees, creation of security etc.

3. However, despite various reminders, the company in liquidation neither issued NC Ds to the Appellant nor paid interest or other charges in accordance with the agreement. The company also failed to create security as required.

4. Consequently, the Appellant filed an application u/s 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 for recovery of Rs. 2,96,22,963.00 along with pendente lite and future interest and costs of litigation.

5. The Debts Recovery Tribunal, Chandigarh passed a decree th dated 15July, 2003 wherein it passed the following order:

The application for recovery of Rs. 2,96,22,563.00 against the Defendants company and it is ordered to pay:

(i) a sum of Rs. 2,96,22,563.00 along with pendent lite and future interest @ 15% p.a. with quarterly rests from the date of filing of the applicant till its realization.

(ii) The cost of litigation

(iii) The aforesaid amount within 30 days from the date of receipt of this order.

2. In the event of failure of the part of Defendants to pay the aforesaid amount within the stipulated period, the applicant bank shall be entitled to recover the amount by sale of assets of the Defendant company.

6. However, the Official Liquidator vide order dated 06May, 2005 rejected the Appellant's claim as secured creditor on the ground that the Appellant's charge was not registered u/s 125 of the Companies Act, 1956.

7. Mr. Sangram Patnaik, learned Counsel for IDBI submitted that in the present case a charge had been created in favour of the Appellant by virtue of the decree passed by the DRT, Chandigarh read with Section 100 of the Transfer of Property Act, 1882. Section 100 of the Transfer of Property Act, 1882 reads as under:

100. Charges.-Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property and all the provisions hereinbefore contained [which apply to a simple mortgage shall, so far as may be, apply to such charge].

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, [and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge]."

8. In this connection, Mr. Patnaik, learned Counsel relied upon the following judgments:

(i) Smt. Bela Dibya Vs. Ramkishore Mohanty, wherein it has been held as under:

.... The latest decision in support of Mr. Pal's contention is Shyam Narain Singh and Others Vs. Khublal Mahto and Others, . In (1965) 31 Cut LT 932 Diwan

Chitra Bahnu Singh Rai v. Balmukund Singh Rai (1965) 31 Cut LT 932, this Court held that the charge created by a decree of Court even after contest was by operation and would come within Section 100 of the Act

(ii) AIR 1943 354 (Oudh) wherein it has been held as under:

The expression "operation of law" in S. 100 only means working of the law and is not restricted in its application to such cases as fall u/s 55 or Section 77 of the Act. Section 100 assumes that charges can be created only by act of parties or by operation of law and the second paragraph which was added in 1929 refers to charges generally. A charge created by a decree of Court based upon an award made upon an agreement out of Court or otherwise is a charge created by operation of law and comes within Section 100.

...I see no reason why a charge created by a decree should not be considered to come within the purview of Section 100. "Operation of law" only means working of the law and I do not see why the expression should be restricted in its application to such case as fall u/s 55 or Section 73.

(iii) Indian Bank Vs. The Official Liquidator, Chemmeens Exports (P) Ltd. and Others, wherein it has been held as under:

Though as a consequence of non-registration of charge under Part v. of the Act, a creditor may not be able to enforce the charge against the properties of the company as a secured creditor in the event of liquidation of the company as the charge becomes void against the liquidator and the creditor, yet he will be entitled to recover the debt due by the company on par with other unsecured creditors. It is also evident that Section 125 applies to every charge created by the company on or after the 1st day of April, 1914. But where the charge is by operation of law or is created by an order or decree of the Court, Section 125 has no application

.... Reverting to the facts of this case, on the construction of the decree we have already held th that the charge was kept alive till 28August, 1982 and thereafter in default of payment of decree amount, the sale order would take effect. In this case, admittedly the decree amount was not paid th before 28August, 1982, as such the matter had passed from the domain of contract to the realm of the judgment. The Official Liquidator filed application 21st March, 1983 seeking to declare the decree as void. By that date what was operative in the decree was not a mere unregistered charge but an order for sale of mortgaged property for realization of decree amount. The preliminary decree cannot, therefore, be said to be void and inoperative.

(iv) Praga Tools Ltd. v. Official Liquidator of Bengal Engg. Co. (P) Ltd. 1984 (56) CompCas 214 wherein it has been held as under:

If a charge is created by an order of the Court, it will not require registration u/s 125 of the Companies Act, 1956.

That the benefit of the security was entirely the creature of the order of the Court. It was not a charge created by the company and did not require registration.

9. Having heard Mr. Sangram Patnaik, learned Counsel for Appellant, I am of the opinion that the submissions of the Appellant are misconceived on facts. Admittedly, no charge was ever created in favour of the Appellant by the company in liquidation as no charge was registered with the Registrar of Companies u/s 125 of Co. A(SB) 47/2006 Page 6 of 9 the Companies Act, 1956.

10. In my view, a mere money decree passed by a Court of law does not entitle an unsecured creditor to be treated as a secured creditor. The Supreme Court in Textile Labour Association and Another Vs. The Official Liquidator and Another, has held as under:

8...Under Section 529-A the dues of the workers and debts due to the secured creditors are to be treated *pari passu* and have to be treated as prior to all other dues.

9. Therefore, the law is clear on the matter as held in UCO Bank Vs. Official Liquidator, High Court, Bombay and Another, that Section 529-A will override all other claims of other creditors even where a decree has been passed by a court.

(emphasis supplied)

11. From the judgments cited by Mr. Patnaik, it is apparent that to claim the status of a secured creditor, either the charge is to be created by the parties or the charge has to be created by operation of law or by decree of the Court.

12. In the present case, neither a charge was created by the company in liquidation nor by operation of any law or by the decree of the DRT.

13. The order of the DRT, Chandigarh amply proves that no NCD was ever issued and hence no charge/security was created by the company. The DRT did not declare Petitioner to be a secured creditor.

14. In fact, paragraph 2 of the operative portion of the order passed by the DRT, Chandigarh, only states that in the event of failure to pay the decretal amount, Appellant would be entitled to recover the amount from the sale of assets of the company in liquidation.

15. But merely because Appellant is in possession of a decree for recovery, does not mean that Appellant becomes a secured creditor. In fact, every decree holder is entitled to seek sale of assets of the Defendant, in the event the decree is not satisfied. In my opinion, if Mr. Patnaik's submissions were to be accepted, then every sundry/unsecured creditor after obtaining a decree from the Civil Court would have to be treated as a secured creditor - which is untenable in law.

16. Consequently, as there is no charge in favour of the Appellant, the Appellant cannot be considered as a secured creditor.

17. Accordingly, present appeal being bereft of merits, is dismissed but with no orders as to costs.