

(2006) 01 KL CK 0061

In the High Court Of Kerala

Case No : Company Appeal No. 5 of 2005

Infrastructure Leasing and Financial Services Ltd.

APPELLANT

Vs

B.P.L. Ltd.

RESPONDENT

Date of Decision : 17-01-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Companies (Court) Rules, 1959 — Rule 9
Companies Act, 1956 — Section 130, 391
Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2008) 144 CompCas 544

Hon'ble Judges : M. Ramachandran, J;A.K. Basheer, J

Bench : Division Bench

Advocate : S. Virag Tulsapurkar and Satish Murti, for the Appellant; P.K. Kurian and Antony Dominic, for the Respondent

Final Decision : Dismissed

Judgement

M. Ramachandran, J.—The first respondent herein (hereinafter referred to as "BPL Ltd.") had filed an application as M.C.A. No. 84 of 2004, being an application u/s 391 of the Companies Act, 1956, read with Rule 9 of the Companies (Court) Rules, 1959, requesting for an order, whereby a meeting may be permitted to be held for consideration for approving a scheme of compromise or arrangement proposed to be made between a company and its creditors. Consequential prayers had been so made for orders governing the procedures to be complied with.

2. There were 15 respondents arrayed as parties to the proceedings, including the present appellant Infrastructure Leasing and Financial Services Ltd. ("IL and FSL"). By order dated March 14, 2005, the said application had been allowed and it had been ordered that a meeting of the secured creditors be convened on April 16, 2005, for the purpose. A retired judge of this Court had been appointed as chairman for the meeting. In effect, this order is under challenge. The appeal had been admitted on June 24, 2005, and by an interim order, it had been

directed that all further proceedings pursuant to the impugned judgment/order shall be subject to the result of the appeal.

3. BPL Ltd., had entered appearance, being the sole respondent and detailed counter affidavit had been filed and a few number of documents had been made available along with the affidavit., We had the opportunity to hear Mr. S. Virag Tulzapurkar, counsel appearing for the appellant, and Mr. P.K. Kurian representing the respondent.

4. The only contention that had been urged by Mr. Tulzapurkar was that the learned judge had committed an error, when he had overruled the contention raised by IL and FSL that it was not a secured creditor, and consequently it would not have been possible to hold that the order bound them in any manner. They deserved to be deleted from the array of parties and restraints were not warranted to curtail their statutorily available rights. The argument was that Section 391 of the Act, although refers to the power of companies to make arrangements with creditors and members, such compromise could have been possible between a company and its creditors or any class of them, and when an application is filed before the court, where it had been possible to find that the arrangement was not intended to be made with a homogeneous class, the court should have recognised the objection so raised. Ignoring the above, a binding order, could not have been possible to be made. An alternate argument also had been developed to which we would advert later.

5. Counsel points out that admittedly the meeting was proposed to be held as between the company and its secured creditors. Even if it was to be presumed that the appellant initially was a secured creditor, they had been disrobed of the above status consequent to subsequent developments, including an arbitration award, well before the application came to be filed in the court. The contentions raised, although had been subjected to consideration, according to counsel, the learned judge had erred in coming to the conclusion that the appellant was a secured creditor. The order was liable to be set aside, and on the strength of the interim orders, it would not have been possible for BPL Ltd., to bind the appellant to any terms, whereby their entitlements were to be scaled down.

6. We may briefly refer to the background of the case. The appellant was a creditor of the respondent BPL Ltd. They had advanced finance to the company by way of a term loan, which had been defaulted. The appellant claimed to be a company promoted by the Central Bank of India, Unit Trust of India and HDFC Ltd. The default in repayment of the loan amount had resulted in certain proceedings u/s 138 of the Negotiable Instruments Act, 1881. They had also instituted arbitration proceedings and a consent award had been passed on July 1, 2004, for a sum of Rs. 4,86,83,710 together with interest. However, the payments as per the award were not forthcoming. It was at this juncture, the company application had been filed and proceedings u/s 391 came to be initiated. Counsel submits that of course earlier deed of hypothecation, by creation of a charge of money receivable was in the mind of the parties, which

was practically a book debt, but this did not tantamount to a security, as what was to be looked into was the substance and not the form.

7. As required by the hypothecation deed, Form Nos. 8 and 13 thereof, had been submitted before the Registrar of Companies. There was no further action taken by BPL Ltd. As per the deed of hypothecation, so as to meet its payment obligation, they were obliged to open an escrow and no-lien account with a designated bank, and were to undertake to deposit all the receivables from Hewlett Packard India Ltd. in the said escrow account only. BPL Ltd., was further obliged to instruct the third party, referred to above, to remit all the moneys payable by it towards purchase of colour monitors to the escrow account only and were to furnish a confirmation in this regard. The designated bank was also to be advised of the payment obligation of the BPL Ltd., to the appellant and the bank was to allow accumulation of sums receivable from Hewlett Packard India Ltd. If there was deficiency of amount in the escrow account, further arrangements were to be made to deposit all receivables by sale to other consumers or other such category of receivables, as may be acceptable to the appellant. There were also other safeguards incorporated in the deed of hypothecation.

8. It is pointed out that these arrangements were to be in black and white and required to be honoured, but the co-operation expected of from BPL Ltd., had not forth come. No escrow account had been opened and the agreed arrangement remained only in paper. The escrow mechanism was the essence of the agreement, but it had never been put into operation. Therefore, counsel contended that even though prima facie it could have been possible for BPL Ltd., to contend for a position that the appellant was a secured creditor, in essence this was only an empty stand and the original claims of the appellant could not have been watered down.

9. The next contention, as referred to earlier, was that even if it could have been assumable that because of the hypothecation deed, at one point of time, the appellant could have been considered as a secured creditor, the position had changed because of the arbitration award that had come to be passed on consent. A copy of the award dated July 1, 2004, is produced and relied on as annexure B. It had been agreed by an award on admission that a sum of Rs. 48,683,710 was payable as on June 30, 2004, together with further interest till payment and/or realisation. The first instalment was payable by September 30, 2004, onwards and the balance instalments were to be made by April 15, 2017. Counsel points out that there was an agreement recorded that the criminal proceedings will not be pursued and more importantly it was a settlement of money claim and nothing remained in respect of the claims on hypothecation, which originally had been entered into by the parties. The status of a secured creditor thereby irrevocably had been forfeited.

10. Relying on a decision of the Supreme Court in Deva Ram and Another Vs. Ishwar Chand and Another, , learned Counsel submits that the court had

indicated that on principles gatherable from Order 2, Rule 2, of the Code of Civil Procedure, 1908 ("CPC"), which could have been applicable to arbitration proceedings as well, after the award was entered into it would not have been possible for the appellant to pursue his claims on the basis of the hypothecation deed. Counsel had also invited our attention to a Division Bench decision of the Delhi High Court in Delhi Development Authority and Others Vs. Alkarma, , which held that the provisions of Order 2, Rule 2, of the CPC would apply to arbitration proceedings and the view contrary would not have been acceptable. The rights of the parties thereby had crystallised to a pure and simple money claim. The security earlier offered and created had lost its relevance and transformed itself to a decree debt. Legally, it would have been possible for the parties to relinquish their rights, provided it was not against public policy and if there was no statutory prohibition. In its discretionary wisdom, the appellant had adopted a procedure in its best interest. Relying on the decision reported as K.V. George Vs. Secretary to Government, Water and Power Department, Trivandrum and Another, , counsel submits that the circumstances indicated that the appellant was to be deemed as having relinquished rights of hypothecation security and being a party to the proceedings BPL Ltd. could not have turned round and put forward a technical contention that the appellant continued to be a secured creditor. Counsel further submits that in view of the developments in the company application, without prejudice to their stand, the appellant had opted for certain options, exercising prudence, but this could not have been construed as a situation where they had retraced from their earlier stand, as highlighted in the appeal. Looking from any angle, therefore, the appeal deserves to be allowed.

11. The contentions as above are controverted by the respondent. Mr. Kurian, senior Counsel, referred to the general background, wherein the application came to be filed. Because of certain adverse trade reasons, the appellant had lost its position of leadership in electronics industry and had come to suffer colossal losses to the magnitude of over Rs. 1,000 crores. However, in view of its intrinsic strength and will power, efforts were being made to come out of such a position and almost all the financial institutions, to which they became indebted, had been co-operative to the extent possible, so as to see that the company regained its lost glory. Only 3 or 4 institutions, including the appellant herein, who comparatively had only little stakes, were attempting to hold them back, and according to learned Counsel, this appeal itself had resulted from the abovesaid attitude.

12. Counsel submits that there is no merit in this appeal, but nevertheless serious prejudice is being caused because of the proceedings, since arrangements finalised with third parties are frustrated, thus jeopardising the interests of even third parties. According to counsel, the objection as presently highlighted was in fact mostly by way of an after thought, if not sinister. It is pointed out that hardly any materials were placed before the learned single judge and even the additional affidavit filed highlighting the claims was bald and there was nothing placed before the learned judge to act upon the submissions

made at the first stage. Therefore, there was no reason to find fault with the decision of the learned single judge. There was a primary duty for the parties to plead in clear terms and also make available materials in support of the contentions which are likely to affect one and all. Counsel submits that a financial institution will always wish to be recognised as a secured creditor and the present submission that the appellant is to be disrobed of the status is queer. Legally, the submissions made also could not be accepted, as it will operate against the text of the statute.

13. Counsel referred to the progress made after the impugned decision had been rendered. The chairman had arranged to conduct a meeting and report had been filed by him dated April 20, 2004, which is annexure I attached to the counter affidavit. Taking notice of the report as above, the company court has passed further orders in C.P. No. 13 of 2005 on August 23, 2005, and there was no representation from the appellant, when the matter was finally heard, as above. The scheme of arrangements as approved by the meeting of the secured creditors had been sanctioned and taking notice of the option submitted by the appellant, as a matter of fact, a substantial sum had been forwarded to them, but in their wisdom they had refused to accept the amount so tendered. He submits that in law the appellant was always to be recognised as a secured creditor and was, therefore, bound not only by the impugned order, but also by the subsequent proceedings validly brought about.

14. Our attention was invited to annexure X appended to the affidavit, which is a copy of the hypothecation in favour of the appellant. The company had bound itself by entering into the above covenant. The failure on the part of the appellant to take follow up action to get an escrow account might have been for reasons known to them alone, and in law, it should have been possible for them to compel the company to conform with the terms of the bond. It is submitted that it would have been possible for them to make arrangements in respect of receivables even from third parties and the inaction could not have given them any further advantage. Perhaps the attempt was to sit on the fence.

15. Referring to Part V of the Act, dealing with registration of charges, it is pointed out that the formalities for creating a charge have been duly followed. The particular reference was made to Section 130 of the Act, whereby the Registrar of Companies was obliged to maintain a register containing the particulars of all the charges requiring registration, as envisaged. This had been done and advertence was made to the communications sent over to the Registrar in Form No. 8 and Form No. 13, registered as 09-2015. The instrument presented had been described as the deed of hypothecation in favour of IL and FSL. This indicated that the receivables were hypothecated to IL and FSL as security for and charge with repayment facility. It is submitted that there is power for the Registrar to make entries of satisfaction and release, as referable to Sections 138 and 139 of the Act. But there were no such proceedings, which legally meant that the disability as far as the company was concerned always

continued. According to senior Counsel, even in the arbitration award, there was no reference to any circumstance where the appellant had agreed for a position to lift the charge created. Thus, the comprehensive answer is that there was charge on the properties of the company and, therefore, from the date of hypothecation the appellant was to be considered as a secured creditor and the arbitration award did not make any difference in their status and so long as the records of charge maintained by the Registrar of Companies remain as they are, legally they will continue to be the secured creditors.

16. Counsel also submits that provisions of the CPC definitely will have no application after Arbitration Act, 1996, was brought in, as expressly it had been provided that provisions of the CPC were not applicable to the proceedings under the Act. Therefore, advertence to the principles possibly arising from Order 2, Rule 2, of the CPC had no relevance.

17. Evidently, the contentions highlighted by the appellant have been effectively countered by the respondent. It is possible to assume that at all relevant times the appellant was a secured creditor, after the hypothecation deed was executed. The legal position as canvassed by the respondent, that once such charge has been registered, it continues to bind the parties till the steps are retraced, appears to be sustainable.

18. Resultantly, we dismiss the appeal and hold that the appellant was always a secured creditor and, therefore, the finding entered into by the learned single judge was unexceptionable. Also it would have been appropriate that persons, who right have been adversely affected by the appeal, were made parties to the proceedings.

19. We make no order as to costs.