

(1971) 10 MAD CK 0044

In the Madras High Court

Case No : C.P. No. 89 of 1967 and C.A. No. 180 of 1971

K. Saradambal

APPELLANT

Vs

Jagannathan and Brothers (Automobile Engineers and Motor Works (P.) Ltd.)
T.V. Sundaram Iyengar and Sons P. Ltd. Vs Official Liquidator

RESPONDENT

Date of Decision : 22-10-1971

Acts Referred:

Companies Act, 1956 — Section 125, 529

Citation : (1972) 42 CompCas 359

Hon'ble Judges : Palaniswamy, J

Bench : Single Bench

Judgement

Palaniswamy, J.—In this application, an interesting but a bit difficult point of law under the Companies Act, 1956 (hereinafter referred to as " the Act "), arises for consideration, though the amount of money value involved in this controversy is negligible. The question is whether a person, having a statutory lien on a property of a company, is in the position of a secured creditor and stands outside the winding-up proceedings of the company. The relevant facts, which are not in controversy, may be briefly stated. By order dated 25th October, 1968, in C.P. No. 89 of 1967, this court directed the winding-up of Sri Jagannathan and Brothers, Automobile Engineers and Motor Works Private Ltd., Erode, at the instance of a creditor, who had filed that petition u/s 433(e) of the Act. In May, 1966, the company had entrusted two machineries belonging to it to Messrs. T.V. Sundaram Iyengar & Sons Private Ltd., Madurai, the applicant herein, for carrying out certain repairs. The applicant-company carried out repairs by supplying certain spare parts. The repairs were completed in July, 1967. The applicant-company issued debit notes for a sum of Rs. 489'04. This amount carried interest. By August, 1970, the amount, including interest, was Rs. 649.21. In spite of repeated demands, the amount remained unpaid. After the winding-up order was passed, the affairs of the company were taken over by the official liquidator, the respondent in this application. When the applicant-company

demanded payment of the amount due to it, the official liquidator took up the position that the charge claimed by the applicant was void against him as it had not been registered u/s 125 of the Act and that the applicant-company had no right to retain possession of the machineries but should return them to him and rank only as an ordinary creditor and prove its claim. It is in these circumstances that the applicant-company has come forward with this application contending, inter alia, that it is entitled to a statutory lien on the machineries and is a secured creditor, and that appropriate directions should be given for the sale of the machineries for adjustment of the amount due to it and for deposit of the balance, if any. The official liquidator opposes the application reiterating the stand taken by him in reply to the demand made by the applicant-company for payment of the amount.

2. The necessity for an examination of the right of the applicant as a holder of a lien has arisen for the reason that the Act does not define who a secured creditor is and who an unsecured creditor is. As already observed, the facts not being in controversy, the applicant-company claims two kinds of liens : (1) particular lien as an unpaid vendor of the spare parts supplied for carrying out the repairs to the machineries. Section 148 of the Contract Act defines " bailment", " bailor " and " bailee " thus :

"148. A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the " bailor". The person to whom they are delivered is called the " bailee"".

Section 170 of the Contract Act provides :

" 170. Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them."

3. So far as repair charges are concerned, the applicant-company claims the lien u/s 170 of the Contract Act. Dealing with the principle underlying this lien, the learned author, W. Paine, in The Law of Bailments observed at page 233 :

" And this rule is of general application " where a bailee has expended his labour and skill in the improvement of a chattel delivered to him.....Thus, the articles to whom goods are delivered for the purpose of being worked up into form, or the carrier by whose skill the animal is cured of a disease, or the horse-breaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges. And all such specific liens being consistent with the principles of natural equity, are favoured by the law which is construed liberally in such cases. "

4. That the applicant has a right to retain the repaired machineries until it receives the due remuneration for the services rendered is thus clear. This right is only a right to retain the goods until payment and does not carry with it a right of sale to secure the amount. That is the distinction between the lien u/s 170 of the Contract Act and a pledge carrying with it the right of sale.

5. That the applicant-company has sold spare parts and has made use of those spare parts in carrying out the repairs of the machineries is also not in controversy. The amount due to the applicant-company, by way of sale amount of such spares supplied, has not been paid. Thus, the applicant-company is in the position of an unpaid seller. u/s 46 of the Sale of Goods Act, an unpaid seller has, notwithstanding that the property in the goods may have passed to the buyer, a right of re-sale as limited by that Act. Where the property in the goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and a stoppage in transit where the property has passed to the buyer. Section 47 of the Sale of Goods Act, inter alia, provides that the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price. He is also entitled to exercise the right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer. Dealing with the vendor's lien it is observed in Halsbury's Laws of England, volume 34, third edition, at page 296 :

" The right of the vendor to receive the purchase money is secured, first, by a lien upon the property, and secondly, by his right, in the absence of express stipulation as to the time of delivering possession, to retain possession until the purchase-money is paid... ..The vendor's lien is a charge upon the property subject to which a beneficiary under a will takes a property under a contract for sale uncompleted at the death of the testator."

6. An unpaid seller is not a bailee in the absence of a contract to that effect, but he has a lien as regards the price and also a right of re-sale, whereas the bailee has only a right to retain possession without a right of sale.

7. Elaborate citations were made by the applicant's counsel as well as the official liquidator with a view to show the distinction between lien, mortgage and pledge. It is unnecessary to encumber this order with those citations, as it is not the case of the applicant-company that, apart from the statutory lien, it has any right as a mortgagee or as a pledgee. It would be sufficient only to refer to the following observation in Halsbury's Laws of England, third edition, volume 24, at page 143 :

" A legal lien differs from a mortgage and a pledge in being an unassignable personal right which subsists only so long as possession of the goods subsists. A mortgage is an assignable right in the property charged and does not depend on possession. A pawn or pledge gives a special assignable interest in the property to the pawnee. A Hen is, however, included in the definition of mortgage in the

Law of Property Act, 1925. Where an equitable mortgage is created by deposit of title deeds, the mortgagee has a legal lien on the deeds deposited."

8. That the applicant-company has lien both as a bailee and as an unpaid seller is thus clear. As a matter of fact that position was not controverted by the official liquidator. But his contention was that, as a holder of a lien, the applicant-company did not have the lien registered as required by Section 125 of the Act (Companies Act, 1956) and that in the absence of registration the lien is void as against him. Sub-section (1) of Section 125, which alone is relevant, reads :

" 125. Certain charges to be void against liquidator or creditors unless registered.--(1) Subject to the provisions of this Part, every charge created on or after the 1st day of April, 1914, by a company and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced or a copy thereof verified in the prescribed manner, are filed with the Registrar for registration in the manner required by this Act within thirty days after the date of its creation....."

(Proviso omitted)

9. Placing reliance upon this provision, the official liquidator contended that inasmuch as the lien claimed by the applicant-company is not registered, it is of no avail. A careful examination of the foregoing provision would show that it is applicable only to a charge created by the company and not to a charge arising by operation of law. Section 125 of the present Act corresponds to Section 109 of the Companies Act, 1913. Dealing with the question as to whether that section was applicable to a charge arising by operation of law, a Bench of the Oudh High Court in AIR 1927 55 (Oudh) held that the said section was applicable only to a charge created by the company by contract and not to a charge arising by operation of law. The same principle applies to Section 125 also. Therefore, the fact that the lien claimed by the applicant-company is not registered does not disentitle the applicant-company from working out its rights arising under the lien.

10. This leads us to the question as to what right is available to the applicant-company, as the holder of lien. That again takes us to the question as to what is meant by " lien ". The word " lien " is defined in the Law Lexicon by Ramanatha Iyer as :

" A lien may be denned to be a charge on property for the payment of a debt or duty, and for which it may be sold in discharge of the Hen.....A lien, in a limited and technical sense, signifies the right by which a person in possession of personal property holds and retains it against the owner in satisfaction of a demand due to the party retaining it ; but in its more extensive meaning and common acceptation it is understood and used to denote a legal claim or charge

on property, either real or personal, as security for the payment of some debt or obligation ; it is not strictly a right in or right to the thing itself but more properly constitutes a charge or security thereon." The word " lien " is defined in Stroud's Judicial Dictionary, third edition, at page 1644, as :

" A lien--(without effecting a transference of the property in a thing) --is the right to retain possession of a thing until a claim be satisfied ; and it is either particular or general."

11. Having regard to the foregoing definitions the question arises whether the holder of a lien, as the applicant-company in the instant case, can be considered to be a secured creditor under the company law. Section 529 of the Act is important, and it reads :

" 529. Application of insolvency rules in winding up of insolvent companies.--(1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to--

(a) debts provable ;

(b) the valuation of annuities and future and contingent liabilities ; and

(c) the respective rights of secured and unsecured creditors ;

as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent.

(2) All persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up, and make such claims against the company as they respectively are entitled to make by virtue of this section.

Provided that if a secured "creditor instead of relinquishing his security and proving for his debt proceeds to realise his security, he shall be liable to pay the expenses incurred by the liquidator (including a provisional liquidator, if any), for the preservation of the security before its realisation by the secured creditor."

12. Though the expression " insolvent company " is not defined, obviously it refers to a company which has been ordered to be wound up on a petition founded upon Section 433(c), that is, the company being unable to pay its debts. According to Section 529, in the winding-up of such a company, the same rules shall prevail and be observed with regard to debts provable as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent. The question is whether only the insolvency rules are applicable or all the relevant provisions of the insolvency law are applicable to a case of winding-up of an insolvent company. The intention underlying Section 529 is that all the provisions of the insolvency law are applicable to the case of winding-up of an insolvent company with regard to matters enumerated in Section 529, That was also the view taken by a Full Bench of the Allahabad High Court in *Hansraj and Others Vs. Official Liquidators Dehra Dun Mussoorie Electric*

Tramway Co. Ltd. A similar view was taken by the Oudh Chief Court in *B. Anand Behari Lal v. Dinshaw and Co.*, [1944] 12 Comp Cas 137 (Oudh) Thus, according to Section 529, the provisions of the insolvency law are applicable to debts provable in the winding-up of an insolvent company. That takes us to the question as to what are the provisions of the insolvency law that are applicable to a debt covered by a lien. The Provincial Insolvency Act, 1920, and the Presidency Towns Insolvency Act, 1909, define "secured creditor ". In the former Act, Section 2(e) defines that expression as :

" 2. (e) " Secured creditor " means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor."

13. In the latter Act, Section 2(g) defines that expression as :

" " Secured creditor " includes a landlord who under any enactment for the time being in force has a charge on land for the rent of that land."

14. The latter definition is an inclusive definition. According to the former definition even a person holding a lien on the property of a debtor is a secured creditor. In dealing with the question as to who a secured creditor is in company law, it is observed in *Palmer's Company Law*, 21st edition, at page 765 :

" Secured creditor is one who has some mortgage, charge or lien on the company's property.....A solicitor who holds a lien on documents of a liquidating company for his costs against the company is a secured creditor, and must mention his lien in his proof. "

15. On a consideration of Section 529 read with the relevant provisions of the insolvency law, I come to the conclusion that the holder of a statutory lien or the holder of a lien created by contract and registered as required by Section 125 is a secured creditor in the matter of winding up of the insolvent company with regard to, among other things, debts provable in the winding up proceedings. The applicant-company being the holder of a statutory lien is thus in the position of a secured creditor. Though the lien to retain possession of the goods as a bailor does not confer a right of sale on the applicant-company, the applicant-company, as an unpaid vendor of the spare parts supplied, has a right of re-sale. Having regard to these circumstances, I am of the view that in the interest of justice and for the purpose of closing the administration of the insolvent-company, it is necessary that the machineries, which are in the possession of the applicant-company, are ordered to be sold in public auction by the applicant company after due publicity so as to enable the applicant-company to adjust its dues including the cost of sale out of the sale proceeds. If there is any balance left, it shall be paid over to the official liquidator. The application is ordered in these terms. No order as to costs.