
(1977) 06 KL CK 0001

In the High Court Of Kerala

Case No : Company Application No. 88 of 1976 in Company Petition No. 1 of 1975

Kerala State Financial Corporation

APPELLANT

Vs

Sivasankara Panicker and Others

RESPONDENT

Date of Decision : 01-06-1977

Acts Referred:

Companies Act, 1956 — Section 125, 125(4), 141, 446
State Financial Corporations Act, 1951 — Section 29, 30, 31, 32, 46B

Citation : (1977) 06 KL CK 0001

Hon'ble Judges : G. Viswanatha Iyer, J

Bench : Single Bench

Advocate : K.S. Rajamony, A. Shahul Hameed and Siby Mathew, for the Appellant; K.N. Parameswaran Pillai, for the Respondent

Judgement

Viswanatha Iyer, J.—In Company Petition 1 of 1973 Sreeramavilasom Press and Publications Private Limited, Quilon, was ordered to be wound up. Pending the Petition for winding up, the Petitioner therein filed Company Application 197/75 praying for an order of injunction to restrain Sreeramavilasom Press and Publications Private Ltd. and also Malayalarajyam Private Limited from alienating any of their assets. At that time steps to sell a Plamag Rotary Press and other machinery of the Malayalarajyam Private Limited were being proceeded with in O.P. 54/71 on the file of the District Court, Quilon at the instance of the applicant in this company application 88/76. This court however ordered that proceedings for the sale of the press may go on but that release of the press to the purchaser should not be made except with the sanction of this Court. In company application 254/75 this Court had directed the provisional Liquidator to take possession of the assets of the S.R.V. Press and Publications Private Limited. As this order was likely to affect the proceedings for sale of Rotary Press ordered to be proceeded with in C.A. 197/75 the winding up Petitioner filed C.A. 515/75 to direct the provisional Liquidator to defer taking possession of the Plamag Rotary Press and the Block Studio equipments advertised for sale by the District Court in

O.P. 54/71. Later the winding up Petitioner filed C.A. 550/75 to restrain the sale proceedings in O.S. 54/71 u/s 446 of the Companies Act and this Court stayed the proceedings for sale. It is in these circumstances the Kerala Financial Corporation has come out with this application 88/76 to vacate the order staying the sale of the Plamag Rotary Press and Block Studio passed by this Court as referred to earlier. In Company Application 189/77 leave is also applied for to proceed with the sale of the press.

2. The Kerala Financial Corporation claims to be a pledgee of the Plamag Rotary Press on the basis of certain transactions entered into between the Malayalarajyam Private Ltd. and Kerala Financial Corporation which are stated hereunder. In December 1969, the Malayalarajyam Private Ltd. applied for a loan of 10 lakhs of rupees from the Kerala Financial Corporation for the purpose of acquisition of a Rotary Press. The loan was sanctioned to the extent of Rs. 9 lakhs 60 thousand- The conditions for the sanction of the loan were communicated to the Malayalarajyam by a letter (Ext. P-1) dated 10th February 1970. As per the terms and conditions of that letter a mortgage deed (Ext. P-2) was executed by the Malayalarajyam as the mortgagor, its directors as guarantors and Sreeramavilasom Press and Publications Private Ltd. as co-mortgagor. The property mortgaged belonged to Sreeramavilasom Private Ltd. This mortgage was registered, according to the Corporation, as required u/s 125 of the Companies Act. After execution of the mortgage a sum of Rs. 3,98,000 was received by the Malayalarajyam Private Ltd. and with it they placed an order to M/s Manubhai and Sons, Bombay, to supply the Plamag Rotary Press. The balance of the amount sanctioned was later required by the Malayalarajyam Private Ltd. for payment to the suppliers. A letter was sent by the Corporation to the suppliers on 9 the March 1970 requesting them to surrender to it the documents of title relating to the machine. This was accepted by the suppliers and they agreed to relinquish all their rights in the machine on getting the balance sum of Rs. 5 lakhs. Later the suppliers sent the documents relating to the machine through their bank to the Corporation and the Corporation handed over the delivery order to Malayalarajyam Private Ltd. subject to the terms and conditions specified by the Corporation. Pursuant to this the Malayalarajyam took delivery of the press and kept them as required by the Corporation in the premises mortgaged under the earlier mortgage deed. Thereafter a supplementary deed was also executed pledging the Rotary Press to the Corporation. The original of the supplementary deed is produced as Ext. P-12. Since Malayalarajyam Private Ltd. subsequently defaulted in the repayment of the loan the Corporation filed O.P. 54/71 under the State Finance Corporation Act to recover the amount advanced. An order was passed on 30th January 1973 allowing the Corporation to recover the amount by sale of the properties pledged and mortgaged to the Corporation, and when proceedings were taken to realise the amount a stay order was received by that court from this Court staying the proceedings. According to the Corporation, they are secured creditors entitled to stand outside the winding up and to proceed against the security to realise the

amount advanced and the order staying the execution of the decree in O.P. 54/71 is incorrect and has to be vacated.

3. On receipt of notice of this application the Official Liquidator and also the winding up Petitioner have filed objections. In C.A. 188/77 a person claiming to be a creditor of the Malayalarajyam Private Ltd. has sought permission to intervene in these proceedings. As this is not opposed the same has been allowed. The objection, as specified in the course of the proceeding, of the winding up Petitioner as well as that of the Official Liquidator are that the Financial Corporation cannot be recognised as a secured creditor inasmuch as the registration with the Company Registrar of the first mortgage deed is not in accordance with the provisions of Section 125 of the Companies Act and as such void. The supplementary deed having not been registered at all the claim for priority as a charge holder is not sustainable in view of the mandatory provisions in Section 125 of the Companies Act. It is further contended that there has not been any proper decision of the Board of Directors either of the Sreeramavilasom Press and Publications Private Ltd. or of the Malayalarajyam Private Ltd. to take a loan and as such the two deeds are not binding on the two companies.

4. In answer to these contentions the applicant namely the Kerala Financial Corporation contends that the winding up Petitioner being only a creditor of Sreeramavilasom Press and Publications Private Ltd. has no right to question the proceedings for sale of the Plamag Rotary Press of the Malayalarajyam Private Ltd. which is a separate company under the Companies Act. The applicant also contends that the mortgage deed has been validly registered u/s 125 of the Companies Act and is conclusive as regards the fact of registration. The supplementary deed though not registered is not hit by Section 125 of the Act. A further plea is also taken that under the State Financial Corporation Act an order has been passed for the sale of the press and it is not open to the winding up Petitioner or the Official Liquidator to question the validity of those proceedings. The provisions of the State Financial Corporation Act have overriding effect and therefore the applicant is a secured creditor entitled to proceed against the assets forming the subject-matter of O.P. 54/71 of the Quilon District Court.

5. Two questions arise for consideration in the light of the contentions raised by the parties. The first question is whether there is a valid charge created in favour of the applicant against the assets in respect of which O.P. 54/71 was filed in the Quilon District Court. The second question is whether the two mortgage deeds have to be registered under the Companies Act with the Registrar of Companies, and if so, whether there has been a valid registration. Incidentally a further question also arises regarding the effect of the provisions of the State Finance Corporation Act and the order passed under it by the Quilon District Court in O.P. 54/71.

6. In this connection it has to be remembered that a Petition to wind up Malayalarajyam Private Ltd. had also been filed and an order to wind up that company also has been passed by this Court. A creditor of Malayalarajyam has in

C.A. 188/77 adopted the contentions of other objectors and so the applicant cannot question the locus standi of the objectors. Similarly in view of the prayer in Company" Application 88/76 and 189/77 filed by the applicant it will be highly technical to contend that there is no application u/s 446 of the Companies Act for permission to proceed against the assets in case a permission is required From this Court for the sale of the Plamag Rotary Press forming the subject-matter of O.P. 54/71 of the Quilon District Court. It is admitted that if the applicant, for any reason, is not entitled to be treated as a secured creditor he is not entitled to proceed against the Plamag Rotary Press or the properties mortgaged by the Sreeramavilasom Press and Publications Private Ltd. In that case the applicant can rank only as an ordinary creditor and his application for permission to sell the press will have only to be dismissed. If the applicant is a secured creditor, which aspect I will consider hereunder, it is necessary that the applicant has to obtain permission to proceed with the execution proceedings in O.P. 54/71 against the two companies in liquidation. If it is found that the applicant is a secured creditor, there is no reason why permission should not be granted to proceed against the assets. So I will consider whether there is a valid mortgage or pledge of the assets of the two companies in liquidation and whether Section 125 of the Companies Act is to any extent a bar for the applicant to claim the right of a secured creditor.

7. The applicant has produced Exts. P-1 to P-18 and also examined the Law Officer of the applicant-Corporation to substantiate its case that it is a secured creditor entitled to be treated as such in the winding up proceeding. It is not disputed by the Official Liquidator or the winding up creditor that Private Ltd. applied for a loan of 10 lakhs of rupees from the applicant-Corporation. If any proof is required Ext. P-1 copy of the letter kept by the applicant and produced from proper custody supplies the proof. Ext. P-1, copy of the letter dated 10th February 1970, shows that a sum of Rs. 9,60,000 was sanctioned by the applicant-Corporation on the terms and conditions specified in Ext. P-1. Ext. P-2 is the original mortgage deed registered under the Registration Act and executed by the Malayalarajyam Private Ltd. as the mortgagor company and three of its Directors as guarantors. Sreeramavilasom Press and Publications Private Ltd. has also joined in that mortgage deed as a co-mortgagor. The mortgage is to secure Rs. 9,60,000 to be advanced to the Malayalarajyam Private Ltd. for the purpose stated in the mortgage deed. The mortgage deed provides for repayment of the loan in instalment. Ext. P-3 is a copy of the resolution passed by the Board of Directors of the Sreeramavilasom Press and Publications Private Ltd. to guarantee the repayment of the loan granted by the applicant to the Malayalarajyam Private Ltd. It is also mentioned therein that Board of Directors of Sreeramavilasom Press and Publications Private Ltd. have resolved that the Managing Director Sri N. Chandrasekharan Nair shall execute a guarantee deed mortgaging the properties and buildings mentioned in that letter. Ext. P-4 is a copy of the resolution passed by the Board of Directors of Malayalarajyam Private Ltd. authorising the Managing Director of the latter company to execute a

mortgage deed to avail of the loan of Rs. 9,60,000. He has also been authorised to affix the common seal of the company in the abovesaid mortgage deed and other documents. A contention is raised that in spite of notice the Official Liquidator has not produced the minutes book containing the resolutions of the Board of Directors of the two companies and therefore Exts. P-3 and P-4 are not enough to prove that the two companies have resolved and authorised their Directors to execute the mortgage deed. The non-production by the Official Liquidator of the minutes for reasons best known to himself is not a ground to disbelieve Exts. P-3 and P-4 which are in the letterheads of the respective companies and which contain the signature and seal of the Managing Director of the two companies. The Managing Director has signed Exts. P-3 and P-4 for and on behalf of the company only. Unless it is proved that these Exts. P-3 and P-4 are concocted for the purpose - for which there is no evidence - there is no reason why they cannot be acted upon. Therefore, Exts. P-2 to P-4 clearly prove that a valid mortgage has been executed by the two companies mortgaging the properties scheduled to the mortgage deed and they are valid under the Registration Act.

8. The next question is whether this mortgage deed will bind the Official Liquidator and the creditors of the companies Which have now gone into liquidation. That depends upon the scope and applicability of Section 125 of the Companies Act read along with the State Financial Corporation Act. u/s 125 any charge created by a company to which the section applies by which any security on the company's property or undertaking is conferred will be void against the Liquidator and any creditor of the company unless the prescribed particulars of the charge together with the instrument by which the charge is created are filed with the Registrar of Companies for registration in 30 days after the date of its creation. A discretion, is given to the Registrar to extend the time for a period not exceeding 7 days next following the expiry of the period of 40 days referred to above. Ext. P-2 mortgage has been registered with the Registrar of Companies and Ext. P-5 is the extract of the Register of Charges kept by the Registrar. That shows the particulars of the mortgage and the property mortgaged, the amount for which the mortgage is created in favour of the Kerala Finance Corporation are all mentioned there. Though an attempt was made towards the fag end of the hearing of the case to question the validity of the entry in the Register of Charges and a separate Petition is filed u/s 141 of the Act, there seems to be prima facie no scope for the correctness of such a contention. Section 141 of the Companies Act has no application to the instant case. That section relates to the power of the Company Law Board to extend the time for filing of the particulars or for the registration of the charge under the grounds mentioned in that section. Moreover, there is no allegation of any fraud or other circumstances to doubt the correctness of the extract of the Register of Charges produced in this case. Anyhow, it is not necessary to go into that Petition filed u/s 141 at this stage. If for any reason that the Petition is allowed that will have effect subject to other grounds that are stated hereunder in support of the claim of the applicant for

being treated as a secured creditor. Therefore, Ext. P-2 is not invalid u/s 125 of the Act.

9. Then, coming to Ext. P-12 supplementary deed the question is whether for want of registration with the Registrar of Companies it is hit by Section 125 of the Act. The contention of the applicant is that Ext. P-12 is only pledge of movable property of the company which is exempted u/s 125(4)(e) of the Act. This contention is specifically mentioned in C.A. 189 of 1977 and disputed by the winding up Petitioner in his counter-affidavit to that application. In support of this the applicant's counsel took me to the various records produced by the applicant regarding the transaction- As stated earlier, the initial advance of Rs. 3,98,000 was used by the Malayalarajyam Private Ltd- to place the order for the supply of the Plamag Rotary Press. When the balance covered by Ext. P-2 was required by Malayalarajyam Private Ltd. to pay the suppliers at Bombay there was some correspondence between the applicant and the suppliers. Ext. P- 6 dated 9th March 1970 is a copy of the letter sent by the applicant to the suppliers M/s Manubhai Sons and Co., Bombay. It is mentioned in that letter that the balance amount covered by Ext. P-2 can be paid to the suppliers direct provided that the press is installed in the premises mortgaged under Ext. P-2. Later the documents relating to the machine were surrendered to the Corporation by the suppliers and the borrower company executed the supplementary deed pledging the press also in favour of the Corporation. Ext. P-7 is the reply sent by the suppliers on 12th March 1970. In that the suppliers stated that they have no lien on the machinery after the receipt of Rs. 5 lakhs. The procedure to to be followed in the matter of payment and the delivery of the documents of title are contained in the letter dated 14th April 1970 of the suppliers to the applicant. It provides that the suppliers will send the company's delivery order to the clearing agents at Cochin with a direction to hand over the delivery order to the applicant. Ext. P-8 clearly shows that the documents of title and the delivery order were given to the applicant alone for taking delivery of the machine from the warehouse at Cochin. Exts. P-9 and P-10 are the other letters relating to these and Exts. P-15 and P-17 are the documents of title relating to the Plamag Rotary Press. Ext. P-15 refers to the receipt of the amount of Rs. 4,50,000 by the suppliers. Exts. P-13 and P-14 are the resolutions of the Board of Directors of M/s Malayalarajyam Private Ltd. and Sreeramavilasom Press and Publications Private Ltd. to execute the supplementary deed in favour of the applicant. Ext. P-12 is the supplementary deed in original. That shows that the machinery will be installed as directed by the applicant in the premises mortgaged to it under Ext. P-2. A reading of Ext. P-12 along with Exts. P-6 to P-17 clearly shows that Malayalarajyam Private Ltd. had only pledged the machinery to the applicant and as agents of the applicant held the same in the premises mortgaged to the applicant. The transaction evidenced by Exts. P-6 to P-17 is only a pledge and the legal possession of the machinery is with the applicant though the de facto possession was with the Malayalarajayam Private Ltd. on the terms and conditions entered into between the applicant and

Malayalarajyam. This being so, there is no need to register the same u/s 125 of the Companies Act. Though a pledge of movable property is also a charge only a charge other than pledge of a movable property of the company requires registration u/s 125. Hence, the transaction regarding the Plamag Rotary Press between the applicant and the Malayalarajyam Private Ltd. is not hit by Section 125 of the Act.

10. Even assuming that there is any scope of the applicability of Section 125 to the transactions evidenced by Exts. P-2 and P-12 the legal effect of the order of the District Court in O.P. 54/71 has to be considered in this connection. As stated earlier, when Malayalarajyam Private Ltd. defaulted to pay the instalments as provided for in the deeds Exts. P-2 and P-12 proceedings were started by the applicant to recover the same under the provisions of the State Financial Corporation Act. The State Financial Corporation Act, 1951, as amended from time to time permits the granting of loans to industrial concerns on such terms and conditions as are provided for in the Act. If default is made by any industrial concern in repayment of any loan or advance or any instalment thereof or otherwise fails to comply with the terms of its agreement with the Financial Corporation the Corporation shall have the right to take over the management of the industrial concern or to enforce the claim by applying to the District Judge within whose jurisdiction the industrial concern carries on business for an order of the sale of the property pledged, mortgaged to the Financial Corporation as security for the loan. Sections 31 and 32 prescribe the procedure to be followed by the Financial Corporation and the Court in dealing with an application for enforcement of the claim. Section 31 confers a right on the Financial Corporation to apply to the District Judge for the sale of the property pledged or mortgaged as security. The application shall state the nature and extent of the liability of the industrial concern to the Corporation, the ground on which it is made and such other particulars as may be prescribed. Section 32 provides that the District Judge shall pass an ad interim order attaching the security, or so much of the property of the industrial concern as would on being sold realise in his estimate an amount equal in value to the outstanding liability of the industrial concern. Sub-section (4) of Section 32 further provides that a notice accompanied by a copy of the interim order and the application should be issued to the industrial concern to show cause why the ad interim order of attachment should not be made absolute. The sub-section further provides that if any cause is shown that should be investigated and an order confirming or varying the order of attachment should be passed by the court. Sub-section (8) provides that the order of attachment or sale of the property under the order of attachment should be carried out in the manner provided for in the CPC for attachment or sale of property in execution of a decree as if the Financial Corporation is a decree-holder. Section 46-B provides that the provisions of the State Financial Corporations Act and any rules or orders made thereunder shall take effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force and save as aforesaid the provisions of the said Act shall

be in addition to and not in derogation of any other law for the time being applicable to the industrial concern. Ext. P-18 is the copy of the order passed by the District Judge, Quilon, in O.P. 54/71 filed under Sections 29, 30 and 31 of the State Financial Corporations Act. Schedules 1 to 3 referred to in that order are the assets covered by Exts. P-2 and P-12. The order confirms the earlier interim order of attachment and allows the recovery of the amount by sale of the properties comprised under Exts. P-2 and P-12. The winding up Petitioner contends that the order does not have the legal effect of superseding the provisions of Section 125 of the Companies Act, and as there has not been any valid registration with the Registrar of Companies of Exts. P-2 and P-12 the order Ext. P-18 does not bind the creditors or the Liquidator and the applicant will not get the benefits of a secured creditor. In answer to this counsel for the applicant contends that the order Ext. P-18 has the effect of a decree creating a charge and Section 46-B of the State Financial Corporations Act has overriding effect over the provisions of Section 125 of the Companies Act. The question is whether it is so. Section 46-B, no doubt, provides that the provisions of the State Financial Corporations Act shall have effect notwithstanding anything contained in any other law for the time being in force. An order for realisation of the amount due to the Financial Corporation by sale of the assets of the Company amounts to a charged decree. The assets attached and ordered to be sold constitute the security for the amount due to the Corporation. But Section 125 of the Companies Act declares that the charge so created by the company will be invalid as against the Liquidator and any creditor if it is not registered with the Registrar of Companies. This is inconsistent with the provisions of State Financial Corporations Act and therefore u/s 46-B of the latter Act which is a special Act the legal effect of the order passed will be binding on the Liquidator of the company also. This is further clear by sub-section (10) of Section 32 of the State Financial Corporations Act. That sub-section is in the following terms:

Where proceedings for liquidation in respect of an industrial Concern have commenced before an application is made under Sub-section (1) of Section 31, nothing in this section shall be construed as giving to the Financial Corporation any preference over the other creditors of the industrial concern not conferred on it by any other law.

The effect of this sub-section is that if an application under Sub-section (1) of Section 31 was filed before the proceedings for liquidation of the industrial concern was started the order on that application will confer a preference over other creditors of the industrial concern. Hence the claim for security made by the applicant by virtue of the order Ext. P-18 passed by the District Judge, Quilon, has to be sustained. In this connection counsel for the winding up Petitioner referred to In the matter of Sathgram Coal Co., Ltd. (in liquidation) 40 C.W.N. 1171. In that case an application to proceed with the execution of two decrees in respect of two mortgages which admittedly were not registered u/s 109 of the Indian Companies Act (present Section 125) was refused on the ground that the unregistered charge is void against all creditors irrespective of

the date on which their debts accrued. With great respect, I am not able to adopt that reasoning in this case. Section 125 applies to every charge created by the company in so far as any security of the company's property is conferred thereby. It cannot be said that a decree by which the company's property is ordered to be sold for realisation of the amount due to the creditor is a charge created by the company. It may be that the decree is based on a mortgage created by the company. But, once that mortgage has merged in the decree the relationship of the parties is governed by the terms of the decree and the decree creating a charge is not hit by Section 125 of the Act. (See *Subramanyan v. Muttuswami* 1941 F.C 47. If the charge has not matured in a decree, no doubt, Section 125 will apply and the charge will be void against all creditors and the Liquidator. It is not possible to extend the scope of that section to cases where there are supervening events which are not covered by the section. Moreover, in this case in the light of Section 46-B of the State Financial Corporations Act the charge created by the order of the District Court u/s 32 of the said Act will not be affected by Section 125 of the Companies Act inasmuch as the latter section is inconsistent with the right created in Favour of the creditor by Section 32 of the Act. Hence I hold that the effect of the order of the District Court in O.P. 54/71 supersedes the provisions of Section 125 of the Companies Act. In this view also I hold that the applicant can stand outside the winding up and realise his security created under the orders passed by the District Court in terms of the State Financial Corporations Act.

11. It was feebly contended that the winding up of the company must be taken to have been started on 16th March 1972 when another creditor filed an application for winding up Sreeramavilasom Press and Publications Private Ltd. and Company Petition 1/73 should be taken as a continuation thereof. This contention is put forward to attack the registration with the Registrar of Companies of Ext. P-2 mortgage on 10th October 1972 as evidenced by Ext. P-5. There is no substance in this contention. Company Petition 1/73 is not a continuation of the earlier Petition which was dismissed and therefore the registration with the Registrar of Companies, even assuming it has been done before the liquidation proceedings commenced, of Ext. P-2 is not invalid on this ground.

In the result, I hold that the applicant is a secured creditor who can stand outside the winding up and realise his security. But since he seeks to sell the property by taking legal proceedings in a court the permission of the winding up court is necessary and in the circumstances of this case that permission is granted to proceed against the securities given by the two companies, namely M/s Sreeramavilasom Press and Publications Private Ltd. and also Malayalarajyam Private Ltd. The stay or injunction order passed by this Court in Company Applications 197 of 1975 and 550/75 are cancelled. In the circumstances of this case the parties are directed to suffer their costs.