(2000) 01 AP CK 0040

In the Andhra Pradesh High Court

Case No : Company Application No. 179 of 1999

Model Financial Corporation Ltd. APPELLANT

Vs

Montana International Limited RESPONDENT

Date of Decision : 22-01-2000

Acts Referred:
Companies Act, 1956 — Section 456

Citation : (2000) 2 CompLJ 229

Hon'ble Judges : A. Gopal Reddy, J

Bench : Single Bench

Advocate : B. Vishwanatha Reddy, for the Appellant; K. Gopala Krishna Murthy, for the Respondent

Final Decision : Allowed

Judgement

A. Gopal Reddy, J.—This is an application filed by the applicant for a direction to the Official Liquidator to hand over the equipments, i.e., hot air generators (2 Nos.) HD-120 along with accessories as per specifications to the applicant which were given to the respondent company in liquidation under hire purchase agreement.

2. The petitioner is the hirer and M/s Montana International Limited (company in liquidation) approached the applicant company for purchase of hot air generators along with accessories following specifications mentioned in the invoice of A & M Technologies (P) Ltd. The company in liquidation submitted a proforma invoice along with duly filled application to the applicant for financial assistance. As the proposal submitted by the respondent company in liquidation is found to be viable, the applicant company accepted to extend financial assistance and also entered into a hire purchase agreement with the applicant company on 24.4.1996 for a sum of Rs. 23,60,600.00 that includes financial assistance and financial charges. The respondent company undertook to discharge the said amount in 36 monthly instalments, which has been clearly mentioned in Schedules A and B of agreement. The machinery was also delivered to the

respondent. Creation of charge was also registered under Form 8 with the Registrar of Companies on 9.5.1996. As the respondent company has been irregular in payment of instalments and the cheques issued by it were dishonoured, the applicant company demanded the amount. The applicant also states that as per the terms and conditions of the agreement, until and unless the hirer pays all the instalments, the equipment cannot be transferred in his name and the ownership will still remain with the owner. The respondent company has paid only six instalments and it failed to pay the remaining amount. When the applicant company wanted to seize the equipment as per the hire purchase agreement, they were informed about the order passed by this court for winding up and the Official Liquidator by his letter, dated 4.2.99, refused to re-deliver the equipment ; hence, he filed the present application.

3. On filing the report by the Official Liquidator, notice was ordered to SBI and IFB of Hyderabad who are secured creditors. On service of notice, SBI filed a counter stating that the respondent company have first charge by way of hypothecation on all the assets belonging to and held by M/s Montana International Limited (in liquidation) and the application of the petitioner for orders to take over possession of the machinery is not maintainable and the petitioner company does not have any right as against the hypothecation charge of the bank who is a secured creditor. The respondent company created an equitable mortgage in favour of the bank and submitted necessary forms to the Registrar of Companies and the Registrar of Companies issued charge certificate on 27.11.95 for a sum of Rs. 10,57,00,000.00. The equipment, if any, supplied by the petitioner is with due notice and full knowledge of particulars of the creditor bank as charge holder and the petitioner does not have any right to seek for delivery of equipment described in the petition.

4. In the reply affidavit filed by the applicant, it is stated that the Official Liquidator himself admitted about creation of charge regarding hot air generator on 24.2.96 and the applicant alone is having right over the said charge as the respondent has no interest over the assets.

5. Sri B. Viswanatha Reddy, learned counsel appearing for the applicant, contended that under the hire purchase agreement, the machinery supplied by the petitioner on hire purchase basis, the ownership never transferred to the respondent and the applicant will be the owner of the said property until the last instalment is paid and the hirer exercised an option for transfer of the same. Charge created in favour of the secured creditor, i.e., SBI will not cover the hot air generator. Admittedly, the same were supplied in the year 1996, whereas the charge according to the bank, if any, was created much prior to the supply of hot air generators. In support of his contentions, he relied upon a judgment of the Delhi High Court in Foremost Industries India v. Credit Capital Finance Corporation Ltd. (2000) 2 Comp LJ 227 (Del): (1997) 89 Comp Cas 670 (Del) and also order passed by this court in Company Application No. 162/96 in C.P. No. 4 and 5 of 1992 dated 29.8.96.

6. On the other hand, Sri K. Gopala Krishna Murthy, learned counsel for the State Bank of India contended that hire purchase is different from hire in lease and the respondent company acquired the machinery from the funds provided by the bank and hence any initial amount paid by the company in liquidation is out of the funds pro vided by the bank and the machinery also belongs to the bank. In an application filed u/s 446 of the Companies Act, the bank will have control over the entire properties of the company, and the respondent company executed necessary loan documents and the charge against the machinery of the respondent company was registered with the Registrar of Companies, therefore, the properties belong to the bank. As the bank is a secured creditor, the hot air generator cannot be released in favour of the petitioner.

7. Learned counsel for the respondent company is unable to show or establish that these two hot air generators are the properties belonging to the company, nor is he able to establish that the said properties were shown as properties of the company in the certificate issued by the Registrar of Companies, dated 1.12.96 or on 27.11.95. The certificate issued on 27.11.1995 is only a modification of the authority to the original charge, dated 16.10.1992 made between the respondent company and SBI in which it is mentioned that charge/ mortgage for Rs. 82,25,00,000.00 has been modified to Rs. 10,57,00,000.00 except that what are the properties which are registered in which charge was created in favour of the bank was not filed. Admittedly, the list of properties which were supplied by the applicant to the respondent company is in the year 1996 under hire purchase agreement, dated 24.4.96 filed along with the CA No. 91911/99 in CA No. 179/98. In the additional material papers applicant also filed Form Nos. 8 and 13 duly filled in respect of creation of charge in favour of the applicant through letter dated 13.4.1996. The Registrar of Companies on 9.5.1996 as per the registration No. 01-11779 received the letter dated 23.4.1996. Once the properties are registered and charge is created in favour of the applicant company and until the company pays the entire loan, the properties will not become the properties of the company and the said property still will be the property of the owner as per the terms and conditions of the hire purchase agreement.

8. In the case of Foremost Industries India (2000) 2 Comp LJ 227 (Del), supra, the Delhi High Court held as follows :

".... (2) All the property and effects of the company shall be deemed to be in the custody of the court as from the date of the order for the winding up of the company.''

Under the said provision, [i.e., Sub-section (1) of Section 456 of the Companies Act, 1956] the appointment of the provisional liquidator could relate only to ''all the properties, effects and actionable claims to which the company is, or appears to be entitled''.

It is not disputed that the boiler in question in this case, which is fired by rice husk was the subject matter of a lease agreement, the lease money in connection whereof had not been paid. Upon failure to pay the lease money, instalments and arrears, the company from which it had been hired, i.e., the Credit Capital Finance Corporation Ltd., the respondent herein, could take possession of it as that boiler was owned by them.

In these circumstances, it is not possible for us to say that the boiler was something to which the company was entitled. The boiler was owned by the Credit Capital Finance Corporation Ltd."

9. This court also in similar circumstances, directed the Official Liquidator to release the Kirlosker Cummins Diesel Engine, Model NTC 4956 with accessories after verification of necessary documents.

10. In the present case, the applicant amply demonstrated that the property belongs to them in view of the hire purchase agreement entered into by the respondent company and also by filing certificate of sanctioning finance and necessary correspondence with the respondent company and charge was also created in favour of the applicant company over the above said property with the Registrar of Companies on 9.5.96. Therefore, me applicant company is entitled to the above property.

11. In the circumstances, the application is allowed and the official liquidator is directed to hand over the possession of hot air generator (2 Nos.) HD-120 along with accessories to the petitioner.