
(1998) 10 BOM CK 0028

In the Bombay High Court

Case No : Company Application No. 512 of 1998 in Company Petition No. 305 of 1991

M/s. Iflex Oild and Chemicals Pvt. Ltd

APPELLANT

Vs

The Official Liquidator and others

RESPONDENT

Date of Decision : 16-10-1998

Acts Referred:

Companies Act, 1936 — Section 171, 232

Companies Act, 1956 — Section 441, 529(1), 536, 537, 537(1)(a)(b)

State Financial Corporations (Amendment) Act, 1985 — Section 28, 29

Citation : (1999) 1 BomCR 259 : (1999) 96 CompCas 386 : (1999) 1 MhLj 129

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : R.M. Kadam and B.B. Parikh, for the Appellant; K.D. Parikh, M.P. Rege, S.H. Doctor, Shekhar S. Shetye and Ms. Nina Kapadia, instructed by y M/s. Pandya Gandhi and Co., S.C. Gupta, Dy. Official Liquidator present., for the Respondent

Judgement

F.I. Rebello, J.—The applicant herein by the present application has sought a declaration that the respondent M/s. Dhake Dyes & Chemicals Pvt. Ltd. (In Liquidation) through the Official Liquidator has no claim whatsoever on the factory premises situated at Plot No. 22/2, Roha industrial Area, Village Dhatav, Taluka Roha, District Raigad, admeasuring 12152 sq. mtrs. In support of their application, it is the contention of the applicant that an advertisement appeared at the behest of Maharashtra State Financial Corporation (M.S.F.C.) in the Times of India dated 13th December, 1993. Their offer in an amount of Rs. 80 lacs was accepted on 16th February, 1994. On 27th June, 1994 possession was handed over to the applicant. On 23rd September, 1994 conveyance was executed in favour of the applicant by the M.S.F.C.

On 19th June, 1991, a petition for winding up of the Company was presented before this Court. On 22nd April 1998 an order was passed to wind up the company based on the suo motu petition on reference by the B.I.F.R. Though the

papers from B.I.F.R. were received or placed before the Court on 19th June, 1991 the petition was admitted on 23rd October, 1991 orders for winding up was passed on 22nd April, 1998. On 6th July, 1998 the Official Liquidator issued a letter proposing to take possession of the registered office on 9th July, 1998 and factory premises on 14th July 1998. The applicant came to be aware about this through the Ex-Management of the Company and SICOM. On 13th July, 1998 applicant moved this Court. The Official Liquidator was directed not to take possession. Matter was adjourned to 15th July, 1998. On 15th July, 1998 the Official Liquidator sought time to file reply. Matter was adjourned on various dates before it was finally heard. In the course of the proceedings notice was given to M.S.F.C. and SICOM as secured creditors. They have been subsequently added as respondents. This was because on the sale of the assets which is the subject matter of the present application, the sale proceeds were apportioned amongst the two secured creditors. An affidavit in support of the application has been filed alongwith the Annexure in support thereof. In the affidavit dated 13th July, 1998 it is averred that the entire consideration has been paid by the applicant in terms of the offer accepted by MSFC. It is contended that the respondent No. 1 has no right to take possession without making necessary enquiries which constitutes a grave danger to the business and reputation of the applicant Company. It is, therefore, prayed that the relief as prayed for by the applicant be granted.

An affidavit in reply has been filed on behalf of the Official Liquidator pointing out that on 22nd April, 1998 this Honourable Court was pleased to order winding up of the company and the Official Liquidator was appointed as Liquidator thereof. It is contended that in terms of section 536(2) of the Companies Act, 1956 any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members made after the commencement of the winding up, shall unless the Court otherwise orders be void. It is further pointed out that the sale of assets had taken place after the presentation of the winding up petition and in view of the provisions of section 536 of the Companies Act the sale is void. An affidavit has also been filed on behalf of the respondent No. 3. In the said affidavit it is pointed out that respondent No. 2 was the lead Financial Institution which has arranged finance for the Company in liquidation. Being the lead institution the respondent No. 2 in order to protect the interest and recover the pari passu charges of respondent Nos. 2 and 3 against the company in liquidation caused the mortgaged assets to be sold in exercise of its powers u/s 28 of the State Financial Corporation Act. It is further pointed out that the sale effected was bona fide and in accordance with the legitimate rights of respondent No. 2 under the State Financial Corporation Act. It is further pointed out that no Liquidator was appointed previous to 22nd April, 1998 and as such the charge of the workmen of the company in liquidation were not crystallised nor was a Provisional Liquidator appointed. In these circumstances, it is contended the question of seeking relief did not arise at all. Without prejudice it is contended that the sale

is bona fide.

2. At the hearing of the petition it is contended that :-

(a) The sale was by secured creditors, outside the winding up and as such no permission was required u/s 537 of the Companies Act.

(b) The claim of the workmen would only arise on the Court passing an order for winding up or appointing a provisional Liquidator. The sale having been effected before the order of winding up, there was no right created in favour of the workmen.

(c) u/s 536(2) of the Companies Act all that the Court must consider is whether the sale is bona fide and no other consideration can weigh with the Court in granting the permission. At any rate it is pointed out that the sale is not void. The sale becomes only void if the Court refuses to grant approval.

Respondent No. 2 has supported the contention of the applicant. It is contended that the question of returning the sale proceeds does not arise and all that has to be examined is as to whether the sale was validly conducted or not. The manner in which the sale proceeds were dealt with, is not a question that can be gone into in the present application. It is contended that to decide whether the sale was valid or not the manner in which the sale proceeds were dealt with cannot be a criteria. It is, therefore, further contended that the present application which seeks relief in respect of the disposition of the property does not require decision of question whether the disposal of sale proceeds was valid or not and as such this Court would not go into the question as to how the sale proceeds were disposed of in the present application. It is reiterated that a charge/right in favour of the workers created by section 529 and 529A comes into existence only with effect from the date of winding up and as such only transactions after that date require the permission of the Court. This it is argued is the principle adopted by the Madras High Court in *A Shanmugham v. Official Liquidator and others* 1992 (75) Comp Cas 181. The judgment of the learned Single Judge was confirmed in appeal as reported in 1994(80) Comp Cass 531. The said contention has also been taken on behalf of respondent No. 3. In the light of the above the application can now be decided.

3. By virtue of section 441(2) of the Companies Act except in the case of voluntary winding up, the winding up of the company shall be deemed to commence at the time of the presentation of the petition for winding up. In other words, once an order for winding up is made it relates back to the date of presentation of petition by a deeming provision. Section 536(2) provides that in case of winding up by or subject to the supervision of the Court, any disposition of the property and any transfer of shares or alteration in the status of its members, made after the commencement of the winding up, shall, unless the Court otherwise orders, be void. By virtue of section 536 therefore, the disposition of property, transfer of shares or alteration in the status of its members is not void ab initio but in the event a transaction has taken place after

a petition is presented it is subject to the order of this Court. If the Court does not grant its approval, the transaction is rendered void. The other section is section 537 which provides that where any company is being wound up by or subject to the supervision of the Court, any attachment, distress or execution put in force, without leave of the Court, against the estate or effects of the company, after the commencement of the winding up or any sale held without leave of the Court, of any of the properties or effects of the company after such commencement, shall be void. Section 537 therefore applies in a case where any sale is held of the properties of the company, whereas section 536(2) are transaction by the company including sale after the winding up order. Effect is therefore the same, if the transactions are done without the leave of the Court.

In the instant case, we are concerned with a sale held by a financial institution after the presentation of a petition for winding up but before an order for winding up was made. Further, the present is a case by a secured creditors outside the winding up proceedings. I need not dwell at length on this aspect of law as this is covered by a Judgment by the Apex Court in the case of *M.K. Ranganathan and Another Vs. Government of Madras and Others*, and the subsequent decree of the Division Bench of this Court in *Maharashtra State Financial Corporation, Bombay Vs. Ballarpur Industries Limited, v. The Official Liquidator*, High Court Bombay and Liquidator of *M/s. Atrois Chemicals Private Limited*, where the subsequent amendments to the Companies Act have been noted. The Apex Court was considering the provisions of section 171 and 232 of the Companies Act, 1936. The corresponding provisions for which are sections 537 of the Companies Act, 1956. In that case respondent No. 2 therein had agreed to sell to respondent No. 3 by an Agreement of 16th July, 1954 the moveable properties of the company for a particular price. Half the price was paid on the signing of the agreement and other half was agreed to be paid out of the proceeds of the sale of the assets as scrap. An order for winding up had been made on 20th January, 1954. On 23rd July, 1954 the Official Receiver, High Court, Madras moved for setting aside the same on the ground that it was prejudicial to the interest of the general body of the unsecured creditors. It is on record that during the course of the proceedings that the purchaser therein had agreed to sell to the Madras Municipal Corporation the assets for the same price which he had purchased. The matter came up in appeal before the High Court of Madras where the question arose whether the sale was void as being without the leave of the Court in view of section 232 of the Indian Companies Act. The High Court of Madras held that the secured creditors had a right to release its security without the assistance of the Court. The matter came up before the Apex Court. The Apex Court after considering various Judgments of the High Courts, English law on the subject and the amendment to the Companies Act held that the secured creditors could in spite of the order of winding up realise dues by disposing of the securities outside the winding up by the Court and that no permission in such an event was required.

That ordinarily would have been the law, if not for subsequent amendment to the

Companies Act, 1956. Two sections introduced by the Companies (Amendment) Act, 1985 are material. By a proviso introduced to section 529(1) it was provided that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workman to the extent of the workmen's portion therein. The next section is section 529A again introduced by Companies (Amendment) Act, 1985. By this amendment Parliament provided that notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company, workmen's dues, debts due to secured creditors to the extent such debts rank under Clause(c) of the proviso to sub-section (1) of section 529 pari passu with such dues, shall be paid in priority to all other debts. Therefore the secured creditors no longer have absolute right to the security but a pari passu charge has been created in favour of the workers. The effect of this amendment came up for consideration before a Division Bench of this Court in Maharashtra State Financial Corporation, Bombay Vs. Ballarpur Industries Limited, v. The Official Liquidator, High Court Bombay and Liquidator of M/s. Atrois Chemicals Private Limited, . The Court therein was considering the rights of a Corporation u/s 29 of the State Financial Corporation Act. The Division Bench held that the rights of the State Financial Corporation are not obliterated u/s 29 of the State Financial Corporation Act. However, statutory rights u/s 29 to sell the property has to be exercised with the right of a pari passu charge holder in whose favour a charge is created and that as such the power u/s 29 can be exercised only with the concurrence of the Official Liquidator and the Official Liquidator before giving concurrence is required to take permission of the Court and act under the directions of the Court while exercising its powers on behalf of the workers. The Division Bench, therefore, held that whenever there was pari passu charge over any property of a company in winding up by virtue of the proviso to section 529 leave of the Court is necessary for the sale of property as the charge holder is the Official Liquidator. It is, therefore, clear that though a secured creditor can realise his debts outside the winding up, he could not proceed to dispose of the property without the permission of the Court. The Division Bench of this Court also considered the judgment of the Apex Court in the case of M.K. Ranganathan (supra). The Division Bench thereafter went on to hold that the sale cannot take place without the Court sanction and the provisions of section 537(1)(b) of the Companies Act are attracted and distinguished the judgment of the Apex Court on the ground that it would apply to a sale where there was no pari passu charge in favour of the Official Liquidator. A similar view was taken by a learned Single Judge of this Court in Indian Textiles and another v. Gujarat State Financial Corporation and others 1994 B.J. 429(Bom.) : 1994(81) Comp Cas 599.

The Judgment of the Division Bench was sought to be distinguished by pointing out that the Division Bench relied on a Judgment of the Single Judge of the Karnataka High Court which itself was set aside by a Division Bench of that Court in the case of International Coach Builders Ltd., (in Liquidation) v. Karnataka State Financial Corporation 1994 (81) Comp Cas 191994 (81) Comp Cas 19. The

question in issue in that case was whether the decision of the Company Court permitting the Karnataka State Financial Corporation to sell the assets of a Company in winding up by denying the right to the Official Liquidator to carry out such sale was according to law. It may therefore be noted that the Company Court had granted permission and as such the Judgment is distinguishable. It was further pointed out that some other High Courts have taken a different view of the matter. I do not propose to go into that question as in my opinion the Judgment of the Division Bench of this Court is binding on me. Nor is it possible to accept the contention that the view taken by a learned Judge of the Delhi High Court in *Aryavarta Plywood Limited v. Rajasthan State Industries and Investments Corporation Ltd.* and another, 1991(72) Company Cases 5, is the better law. In that case the issue herein was not clearly in issue though one of the contentions was of section 537(1) of the Companies Act. There is no discussion on the subject as to the effect of the amendments of 1985. Even otherwise the possession of the property was taken in custody in 1984 and the financial institutions has agreed to pay the dues of the workers, if outstanding. Nor for that matter the view of learned Judge of the Rajasthan High Court in *Boolani Engineering Corporation v. Asup Synthetics and Chemicals Ltd*, 1994(81) Company Cases 872 or for that matter the Judgment of the Division Bench of the Gujarat High Court in the case of *Gujarat State Financial Corporation v. Official Liquidator and others*, 1996(87) Comp Cas 658 which has held that the principle laid down in *M.K. Ranganathan (supra)* still applies.

I am, therefore, of the considered view that apart from being bound by the Judgment of the Division Bench of this Court the view of the Division Bench is in conformity with the amendment as incorporated in the Companies Act by Act 35 of 1985. My attention was invited to another Judgment of another Division Bench of this Court in the case of *State Industrial and Investment Corporation of Maharashtra Limited v. Maharashtra State Financial Corporation* and another 1988(64) Comp Case 102. A perusal of the said Judgment would show that the Act 35 of 1985 whereby section 529 was amended and section 529A was introduced was not considered as the transactions were previous to that date and what was followed was the view of the Apex Court in the case of *M.K. Ranganathan (supra)*. The said Judgment was considered in *Maharashtra State Financial Corporation v. Ballarpur Industries (supra)* and distinguished.

5. The next question that has to be considered as to whether it is possible to accept the view contended on behalf of the applicant and respondents that the *pari passu* charge in favour of the workers will only arise on the appointment of a provisional Liquidator as Liquidator or order of winding up and not previous to that date. The contention is that in such cases a secured creditor can move outside winding up and realise his dues. In such a case where no order for appointment of a provisional Liquidator or winding up is passed there would be no *pari passu* charge in favour of the workers. I am unable to accept the said contention. The contention if accepted would defeat the very purpose and object of the Amendment Act of 1985. If all assets could be sold before the order of

winding up is made then the purpose and object of introducing proviso to section 529 and introduction of section 529A will be frustrated. In the first instance section 536(2) or section 537(1)(a)(b) of the Act has made it clear that any disposition of the property of the Company made after the commencement of the winding up shall unless the Court otherwise orders be void. As pointed out earlier, the proceedings for winding up are deemed to commence u/s 441(2) on the date of presentation of the petition. In other words by a deeming provision, the order for winding up relates back to the date when the petition is presented. The object of this is clear. A company on a petition for winding up being filed cannot strip the company of its assets, before the order of winding up is made or a provisional Liquidator appointed on the contrary it attempts to protect the assets by providing for taking permission of the Court. If any other view is taken there would be no assets left before the Court in winding up, to distribute the same amongst the various creditors. Therefore, in order to prevent the assets being fraudulently disposed or to defeat an order of winding up section 536(2) or section 537(1)(b) provides that any sale or disposition of the property would be void unless the Court otherwise provides. Thus by a provision of law from the date when the petition is presented all persons dealing with the company are warned that in cases covered by sub-section (2) of section 536 or section 537(1)(b) any transaction falling within that section are subject to the scrutiny of the Court and unless the Court otherwise orders, be void. A power is therefore conferred on the Court. This is so because there may be genuine transactions effected with the purpose of reviving or rehabilitating the Company. There may be other transaction done in the best interest of its business. A secured creditor may want to realise his dues without waiting for the winding up order to be made. Power is therefore conferred on the Court to approve such transaction if bona fide and if so, they would not be void. The power u/s 536(2) or section 537(1)(b) will also enable the Court to have a control on the assets so that in the event permission of the Court is sought before the order of winding up is made or provisional Liquidator is appointed the Court can always grant permission subject to conditions. The sale held by respondent No. 2 is therefore subject to the approval of this Court.

6. That takes me to the Judgment of the Single Judge of the Madras High Court in the case of A. Shanmugham (supra) which was thereafter approved in appeal. A consideration of the Judgment of the learned Single Judge would show that it does not support the contentions raised by the applicants and respondent Nos. 2 and 3. The point was not in issue. In that case the order for winding up was made on October 27, 1978 i.e. much earlier to Act 35 of 1985. Sections 529 and 529A were not under consideration. What was in issue was payment of closure compensation on account of the order of winding up and whether the act of closure could be said to be due to unavoidable circumstances beyond the control of the employer. To my mind it is impossible of construing section 529 in the manner as sought be construed by the learned Counsel. The expression used in the section itself is "workmen"s dues". It is, therefore all dues of the workmen as

and on the date of the order of winding up. If contention of the learned Counsel is accepted, then all earlier sale transactions done without the permission of the Court would not come within the ambit of the Company Court. This would defeat the object and requirement of the Amendment Act of 1985 which requires that the claims of the secured creditors and workers have preferential claim over the claims of all other creditors.

7. My attention was thereafter invited to a Division Bench Judgment of this Court in the case of *S.P. Khanna, Dy. Official Liquidator, Laxmi Bank Ltd., v. S.N. Ghosh* 1976 M.L.J. 150 where the Division Bench has taken¹ a view that the Court has the power to protect all bona fide transaction. As pointed out earlier there is no difficulty in accepting the said proposition as only in the event Company Court refuse to grant permission the transaction becomes void. In *Kamani Metallic Oxides Limited v. Kamani Tubes Limited* 1984(56) Comp Cas 19, another Division Bench of this Court took the view that the rule of harmonious construction supports the view that the Court can exercise jurisdiction u/s 536(2), even before the winding up order is made. I am in respectful agreement with the said proposition. As pointed out earlier, merely because the petition for winding up is made the Company cannot be stopped from carrying out its business. A Company Court in the event an application is made can always grant such permission. In granting permission if the situation so warrants, the Company Court can make it subject to such condition as the Court may impose.

8. That brings me to the last contention that this Court should only consider as to whether the transaction is bona fide and not go into aspects of the sale proceeds as it cannot be done in the present application. The very purpose of the Court granting sanction or approval is that the Court can make such orders which are required in justice and equity to protect the interest of all the creditors beginning with the secured creditors. By amendment Act of 1985 workers have a pari passu charge on the property secured by the secured creditors. If the secured creditors are allowed to sell the assets without considering the pari passu charge of the workers this again would defeat the very objective of the amendment. As held by a Division Bench of this Court in *Maharashtra State Financial Corporation v. Ballarpur Industries Ltd.* (supra) by virtue of the amendment the workers have a pari passu charge on the assets of the secured creditors. It is, therefore, open to the Court to grant permission by imposing conditions for the same.

9. In the instant case after considering the fact that the sale was by public auction and that the price obtained cannot be said to be unreasonable, it cannot be said that the sale is not bona fide. In terms of the documents filed by the applicant which includes the Agreement to Sell dated 23rd June, 1994, the applicant was to pay to the respondent No. 1 by installments. The last such installment was payable on 23rd June, 1998. In the affidavit filed the applicant has averred that it has paid entire consideration. The order of winding up of the Company by this Court is dated 22nd April, 1998 i.e. before the last installment was paid. The applicant has also averred that they have made various changes in

the property and are presently carrying on activities therein. If the sale therefore is not approved they will suffer for no fault of theirs. I find no difficulty in accepting the contention of the applicant that the sale is bona fide and therefore has to be protected. The only question is while protecting the interest of the applicant the interest of workers who have a pari passu charge will also have to be protected by issuing certain directions to respondent Nos. 2 and 3 who have been heard in the matter.

10. In the light of that it would be appropriate if respondent Nos. 2 and 3 are directed to file undertakings in this Court that they will on demand being made by the Official Liquidator deposit with him the amounts due and payable to the workers in full or if funds are not sufficient in the ratio to which each secured creditor including workers will be entitled to. The undertakings must contain a clause that such sums will be deposited within four weeks of the claims of the workers being ascertained by the Official Liquidator. The workers from the date of winding up would also be entitled to simple interest on the amount claimed by them at the rate of 12% per annum. An undertaking to that effect should also be given as the money is presently with respondent Nos. 2 and 3 who are using the same. The respondent Nos. 2 and 3 to advance such sums to the Official Liquidator for the purpose of proceeding with the work of ascertaining the claims of the workers. Hence the following order :

ORDER

(a) The sale by respondent No. 2 in favour of the applicant is confirmed subject to respondent Nos. 2 and 3 filing undertaking in this Court as set out in the paragraph 10 of the Judgment within eight weeks from today.

(b) In the event any difficulty arises, it is open to the parties to move this Court.

Judges Summons disposed off accordingly. In the circumstances of the case, parties to bear their own costs.

11. Application allowed.