(2013) 12 KAR CK 0054

In the Karnataka High Court

Case No : Company Application No. 470 of 2001 in Company Petition No. 30 of 1997

M/s. Mother Care India Limited (in liquidation) APPELLANT

Vs

Shri. S.N. Rajendran and DHFL Vysya Housing Finance Limited RESPONDENT

Date of Decision : 17-12-2013

Acts Referred:

Citation : (2013) 12 KAR CK 0054

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : K.S. Mahadevan and Shri. V. Jayaram, for Official Liquidators, for the Appellant; S.S. Naganand for Shri Satish, Shri. Arvind, Advocates for Respondent No. 2 and Shri. G. Krishna Murthy, Advocate, for the Respondent

Judgement

Anand Byrareddy, J.—Heard the learned Counsel for the applicants. These applications are filed in common circumstances, in that, it is the common allegation by the Official Liquidator that the respondent - Bank has brought to sale five apartments, which were charged as security for the loans borrowed from the respondent - Bank by the company-in-liquidation and even during the pendency of the winding up petition, the respondent - Bank, which claimed to be unaware of the winding up proceedings, had brought the properties to sale. It is on realizing the fact of such sale subsequent to the order of winding up, that the Official Liquidator has brought these applications seeking to bring the respondent - Bank to book. It is in that background that the present applications are now listed before the court for final hearing.

2. At the outset, the learned Senior Advocate Shri S. Naganand appearing for the Counsel for the respondents - 2 and 3 would point out that the legal issue involved here is factually covered and is settled by a catena of decisions and would draw attention firstly, to the law laid down by the apex court in the case of M.K. Ranganathan and Another Vs. Government of Madras and Others, . While

interpreting Section 232 of the Indian Companies Act, 1913, which corresponds to Section 537 of the Companies Act, 1956, the apex court, in almost similar circumstances, has opined thus:

Prior to the amendment, the law was well settled both in England and in India that the Secured Creditor was outside the winding up and he could realize his security without the intervention of the Court by effecting a sale of the mortgaged premises by private treaty or by public auction.

It was only when the intervention of the Court was sought either by putting in force any attachment, distress or execution within the meaning of Section 232(1) as it stood before the amendment or proceeding with or commencing a suit or other legal proceedings against the company within the meaning of Section 171 that leave of the court was necessary and if no such leave was obtained the remedy could not be availed of by the secured creditor.

This has been followed by a division bench of the Gujarat High Court in Gujarat State Financial Corporation Vs. Official Liquidator and Others, and has further expounded with reference to Section 529 and 529A of the Companies Act, 1957 and have qualified the law laid down in Ranganathan, supra to the following effect:-

The right of the secured creditor to deal with his security and realize the same without intervention of the court remains unaffected notwithstanding such vesting, or the property coming in the custody of the court, on the principle that the right or intervention of the secured creditor does not come to be in custody of the court. It is to be remembered that where a mortgage is created in favour of the mortgagee he has interest in the mortgaged property and to the extent of the charge or mortgage, the property does not come to the court and is not available for distribution of dividends generally unless the mortgagee relinquishes it or the surplus, if any, comes to the court. Enforcement of such right remains outside the insolvency proceedings or winding up proceedings, as the case may be. Therefore, once we have come to the conclusion that amendment in section 529 and insertion of section 529A does not affect the right of the secured creditor to realize the security without intervention of the court by keeping himself outside winding up proceedings, the further contention that the property being in the custody of the court cannot be taken outside its custody without leave of the court. If that were so, the provisions of section 529(1)(c), which correspond to section 229 of the Act of 1913 read in the light of section 29(6) of the Insolvency Act, as interpreted by their Lordships of the Supreme Court in M.K. Ranganathan''s case, (1955) 25 CC 344, would be rendered otiose, because in that event, in no case, after the winding up order has been made, or custody is handed over to the receiver or official liquidator, can the secured creditor remain outside the proceedings of winding up or insolvency inasmuch as in the case of a company, the property would be deemed to be in the custody of the court on making such an order, and in the case of insolvency proceedings, the property shall be deemed to be vested in the court. It is well known that any interpretation which renders any part of the statute otiose, should be avoided. The distinction pointed out by learned counsel, therefore, is not of any substance.

And further, in the case of State Industrial and Investment Corporation of Maharashtra Limited Vs. Maharashtra State Financial Corporation and another, , also drawing sustenance from Ranganathan, supra, it is laid down as follows:-

Section 537 states that where a company is being wound up by or subject to the supervision of the court, any sale held without leave of the court of any of the properties or effects of the company after commencement of the winding up shall be void. A similar provision in the 1913 Act was interpreted by the Supreme Court in M.K. Ranganathan and Another Vs. Government of Madras and Others, . It was held that it was only when the intervention of the court was sought, either by putting in force any attachment, distress or execution or proceeding with or commencing a suit or other legal proceedings against the company, that the leave of the court was necessary and if no such leave was obtained, the remedy could not be availed of by the secured creditor. Section 537 of the present Act must be interpreted in the same manner. The sale by SICOM having been effected outside the winding-up and without the intervention of the court, it is not void.

3. In the light of these authoritative pronouncements, the learned Senior Advocate would submit that the present applications do not merit consideration.

4. The learned Counsel for the Official Liquidator however, would point out that insofar as the workmen''s dues are concerned, they are in any case protected. And notwithstanding the claim that the Secured Creditor was enabled to stand outside the winding up and enforce the security, the interest of the workmen would yet have to be protected and therefore, any realisation of the monies, by bringing the properties to sale, would to the extent of the workmen''s dues still have to be secured and as there-is yet to be a determination of the workmen''s dues, the respondent may be called upon to furnish adequate security to safeguard the interest of the workmen. Accordingly, the applications are partly allowed. In that, the sale effected by the respondents in respect of the properties in question cannot be held to be void. However, respondents - 2 and 3 shall execute a bond in favour of the Official Liquidator securing the interest of the workmen to the extent of their dues, which shall be determined in the near future and the bond shall be kept alive till such determination and a pari passu settlement in favour of the workmen to the extent that the respondents 2 and 3 would be liable.

