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In the Andhra Pradesh High Court

Case No : Company Application No. 280 of 1991 in C.P. No. 13 of 1981

Official Liquidator APPELLANT

Vs

Managing Director, Andhra Pradesh State Financial Corporation and Others RESPONDENT

Date of Decision : 31-12-1999

Acts Referred:
Companies Act, 1956 — Section 531, 531A, 537
State Financial Corporations Act, 1951 — Section 29

Citation : (2003) 115 CompCas 284

Hon'ble Judges : Krishna Saran Shrivastav, J

Bench : Single Bench

Advocate : P.V. Rama Raju, for the Appellant; Y.N. Lohita, for Respondent No. 1, Ravi (S.) and None for Respondent Nos. 2 and 4, for the Respondent

Final Decision : Dismissed

Judgement

Krishna Saran Shrivastav, J.—This is an application under Sections 531/531A and 537 of the Companies Act, 1956, for declaration that the transfer of assets of Durga Industrial Estates Ltd. now in liquidation, (hereinafter referred to as "the company") in favour of the third respondent is invalid and void as against the petitioner-official liquidator and also for recovery of possession of the said assets.

2. The company had taken a term loan of Rs. 4,81,000 on interest from the first respondent that is the A. P. State Financial Corporation (for short, "APSFC") through a mortgage deed dated January 20, 1973, and had taken another term loan of Rs. 2,20,000 through hypothecation of plant and machinery. On August 3, 1981, the company had passed a special resolution to sell the land, building, machinery, etc., for a sum not below Rs. 7,00,000. The second respondent namely B. P. Agarwala was authorised to negotiate the sale of the units as also to execute the document in favour of the prospective purchaser. On December 1, 1981, after negotiation with the first respondent-APSFC and the third respondent-Anand Steel Rolling Mills, the company sold through registered sale deed the

land and building belonging to the company for a consideration of Rs. 48,000. Through a receipt and delivery note dated November 30, 1981, the second respondent sold the machinery, furnaces, chimney etc., to the third respondent for a consideration of Rs. 6,52,000 totalling to Rs. 7,00,000, out of which Rs. 1,61,352.40 was paid in cash and the balance was agreed to be paid in instalments by the third respondent to the first respondent, and had handed over possession to the third respondent. On December 3, 1981, the fourth respondent, that is the State Bank of Hyderabad, filed an application for winding up the company in C. P. No. 13 of 1981. On November 9, 1987, the petition was allowed and the winding up order was passed and official liquidator was appointed. On June 8, 1989, the second respondent filed the statement of affairs in which the assets of the company were shown as "nil" while the liabilities were shown at Rs. 14,56,537.43. The brother-in-law of Pramod Kumar Agarwal, R. W. 1, proprietor of the third respondent, is the son of the second respondent B. P. Agarwala.

3. The petitioner-liquidator has alleged that the second respondent did not employ a qualified valuer to value the assets of the company, but had requested the first respondent for permission to transfer the assets of the company in favour of the third respondent. The properties were sold at Rs. 7,00,000 though in the balance-sheet dated March 31, 1991, the value of the assets has been shown as Rs. 11,57,455.43. The transaction has been done fraudulently by the second respondent in collusion with the third respondent who had fraudulently requested and obtained permission of the first respondent to transfer the assets of the company to the third respondent on inter se basis. Fraudulent preference has been given to the first respondent causing heavy loss to the company. Therefore, the sale is invalid and void under Sections 531, 531A and 537 of the Companies Act and is not binding on the petitioner-liquidator.

4. The first respondent through its counter denied the allegations and pleaded that the APSFC is entitled to take action under Sections 29 and 46(b) of the State Financial Corporations Act, 1951. The transaction was made in the ordinary course of business in good faith and to protect the interests of the Corporation. It being a secured creditor was entitled to remain outside the liquidation proceedings. Permission was granted as per the usual practice of the Corporation. Therefore, the application is liable to be dismissed. It has also been pleaded that the answering respondent had initiated action u/s 29 of the State Financial Corporations Act for recovery of its amount and had issued notice on June 16, 1979.

5. After filing the counter, no representation was made on behalf of the first respondent and it was set ex parte.

6. The second respondent did not file any counter and remained absent and, therefore, he was set ex parte.

7. The third respondent through its counter has also denied the allegations. It is

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pleaded that the company was continuously suffering losses. On September 9, 1981, this respondent had filed an application before the first respondent for approving the transfer of assets of the company. On October 9, 1981, permission was granted to the company to transfer its assets to the third respondent. On October 10, 1981, payment of Rs. 1,00,000 was made to the first respondent and on November 28, 1981, another amount of Rs. 61,352.40 was paid to the first respondent as down payment for the purchase of the assets of the company. It got the valuation done through its valuer who had valued the assets of the company at Rs. 5,99,615 only excluding office furniture and equipment, and vehicles the market price of which was about Rs. 70,000 only. The area in which the factory is located was naxalite infested and the workers union had also damaged a part of the properties of the company. This respondent has no knowledge about the liquidation proceedings. The company had committed defaults in making payments to the first respondent which has taken action for the recovery of dues against the company. The third respondent has also granted loan of Rs. 9,81,000 and another amount of Rs. 50,79,000 was advanced by the first respondent on October 29, 1987. The third respondent has since become a private limited company. The properties were sold at the reasonable price of Rs. 7,00,000. The provisions of Sections 531, 531A and 537 of the Companies Act are not at all attracted. The allegation of fraud and collusion has been specifically denied.

8. The fourth respondent, State Bank of Hyderabad, through its counter had supported the petition of the official liquidator in toto.

9. The legal assistant in the office of the official liquidator petitioner, namely, Vinod, P. W. 1, has been examined on behalf of the petitioner-liquidator. The third respondent examined Pramod Kumar Agarwal, R. W. 1.

10. It is a matter of record that neither R. W. 1 was cross-examined on behalf of the fourth respondent nor has any evidence been let in by it.

11. Vinod, P. W. 1, has stated that the liability of the company has been shown to be Rs. 14,63,561.40 in the statement of affairs, exhibit B1, which bears the signature of the second respondent. He has also stated that the assets of the company in liquidation were not valued by an approved valuer before the transfer of the assets by the second respondent in favour of the third respondent. In cross-examination he has stated that in spite of letters written, copies of which are at exhibit P-6 to P-8, the balance-sheet of the company was not delivered to the official liquidator. From the office of the Sub-Registrar, enquiry was not made regarding the market value of the properties similar in nature to the assets sold to the third respondent. The balance-sheet was also not verified by the staff of the official liquidator. He has stated that he does not know whether the properties in question are situated in the naxalite infested area.

12. From the evidence of P. W. 1, only this fact is established that the properties of the company were not valued through a recognised valuer before the transfer

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of assets of the company by the second respondent in favour of the third respondent.

13. R. W. 1 has testified that he had appointed one A. G. Argade to value of the property and after valuation, A. G. Argade has submitted his valuation report dated October 20, 1981, which is exhibit R3. The valuer has assessed the value of the property at Rs. 5,99,615. At the relevant time, the unit was not in working condition. It has been closed a year back due to labour problem. Labourers also destroyed a part of the property of the company. He had taken loan of Rs. 9,80,000 from the first respondent-Corporation to restart the unit. He has denied to have purchased the assets of the company at a price below its market value. He has stated not to have purchased the furniture, fixtures and vehicles of the company. In cross-examination he has stated that he did not see the balance-sheet before purchasing the assets. He has admitted that the company had not valued the property in question. He had purchased the property before the application had been filed for winding up the company. He has denied that in collusion with the father of his brother-in-law that is the second respondent, he has purchased the property at a very low price. Thus, according to R. W. 1, the assets have been purchased at a reasonable price.

14. The provisions of Section 537 of the Companies Act are applicable when there is attachment, distress or execution put in force without the leave of the court against the properties of the company if they are effected after the commencement of the winding up proceedings. As noted above, the application for winding up the company had been filed on December 3, 1981, that is after the sale was effected. Therefore, the provisions of Section 537 of the Companies Act are not at all applicable.

15. It is too well settled that, to constitute fraudulent preference, the dominant motive in the mind of the company as represented by its directors should be to prefer a particular creditor. Where the transaction is made in favour of a creditor solely with a view to avoid civil or criminal proceedings, that will not be termed as a fraudulent preference. It must be shown that the preference was made with a view to give him a favoured treatment. If the transaction is tainted with an element of dishonesty, questions of fraud may arise. The burden lies on the petitioner to establish that the transaction is fraudulent preference to the concerned creditor. It must be established by the petitioner that the company really intended to prefer the concerned creditor to other creditors. Fraudulent preference cannot be inferred from the mere suspicion but should be based on legal evidence. Mere preference is not sufficient for drawing an inference that the preference is fraudulent. It should be established that both the transferor and the transferee had joined hands to defraud the creditors. If the transaction has been made in good faith for valuable consideration, it cannot be said that the transaction is void. It should be proved that both the transferor and the transferee had shared common intention to defraud the creditors.

16. There is no evidence on record that the assets have been sold for inadequate

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consideration to the third respondent. As noted above, the Immovable property of the company was mortgaged with the first respondent and the moveable properties had been hypothecated with the first respondent. The company was unable to pay its debts. The first respondent was entitled to take action u/s 29 of the State Financial Corporations Act. There is no acceptable evidence on record that the first respondent who is a secured creditor has been preferred to the other creditors of the company. True that the second respondent is related to the proprietor ,of the third respondent, but it by itself is not sufficient to infer that the transaction in question is a fraudulent transaction. There is unchallenged testimony of R. W. 1 that the area where the factory is located is naxalite infested area and the unit was closed a year before the transaction had taken place.

17. For the foregoing reasons, I reach the conclusion that the petitioner-liquidator has failed to discharge his burden in establishing that the transaction in question is a fraudulent transaction and/or the first respondent-secured creditor has been preferred to the other creditors of the company by making payment of its dues from the consideration received by the third respondent.

18. There is material on record that the vehicle, furniture, equipment belonging to the company and amounting to Rs. 70,000 as in the month of December, 1981, were not sold by the second respondent to the third respondent. Thus, it appears that incorrect statement of affairs has been filed by the second respondent. The petitioner-liquidator would be at liberty to recover the unsold properties from the second respondent and other directors or its current market value.

19. In the result, the application fails and is hereby dismissed. Costs as incurred.

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