

(2007) 11 MP CK 0006
In the Madhya Pradesh High Court

Official Liquidator (Jiyajeerao Cotton Mills Ltd.) (In Liquidation) APPELLANT

Vs

Board for Industrial and Financial Reconstruction and Others RESPONDENT

Date of Decision : 16-11-2007

Acts Referred:

COMPANIES ACT, 1956 — Section 446, 529, 529A, 530
Transfer of Property Act, 1882 — Section 48

Citation : (2008) 141 CompCas 1 : (2008) 83 SCL 541

Hon'ble Judges : R.S. Garg, J;Abhay Gohil, J

Bench : Division Bench

Judgement

1. With the consent of the parties, the matter is finally heard.

In this appeal the appellant originally challenged the order dated April 25, 2007, but later on also started challenging the order dated April 4, 2007. The appellant has already made an application (I.A. No. 16142 of 2007) seeking permission of the court to challenge the order dated April 4, 2007. After going through the application, we are of the opinion that the appellant should be given appropriate opportunity in this very appeal to challenge the order dated April 4, 2007.

2. From the records it would appear that the company petition was filed in the year 1997 and the company came under liquidation from the year 1998. The official liquidator was accordingly appointed to receive the assets, properties, accounts, etc., of the said company and was also required to work under the directions of this court.

3. We are told that the property of the company was time and again disposed of and certain properties have been converted into cash. It appears that the company came to a closure in the year 1992 and some of the secured creditors thereafter moved this Court for liquidation of the company. It is also to be noted that up to the year 1998 the workers neither lodged their claim nor respondent No. 3 ever asserted its rights to recover the contribution of the employees or the contribution of the employer by going in appropriate proceedings either under

the Companies Act, 1956, or under the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short, the "Provident Funds Act").

4. At this stage, Shri Gupta submitted that respondent No. 3 had submitted its claim for recovery of the money before the official liquidator, who was appointed under the orders of this court. This statement of Shri Gupta supports what we have recorded earlier.

5. From the order dated April 4, 2007, passed by the learned company judge, it appears that the learned company judge has directed the official liquidator to deposit an amount of Rs. 6,45,40,834 with the respondent-employees provident fund organisation. It also appears that the said amount has already been deposited by the official liquidator with the employees provident fund organisation. However, before this Court it is asserted by learned Counsel for the official liquidator that the learned single judge was not justified in directing the deposit with the EPF organisation. Shri Ankur Mody, learned Counsel for the State Bank of India also supported the submissions made by Shri Saraswat.

6. Shri Gupta, learned Counsel for respondent No. 3, after taking us through the provisions contained in Section 11(2) of the Provident Funds Act and Section 446(2)(d) of the Companies Act, submitted that the claims of the workers shall have the top priority and the same will have to be paid even before the claims of the secured creditors are settled. Shri Gupta also submitted that the Department is not making any claim against the company or the official liquidator in its official capacity but being a statutory body being obliged under the Provident Funds Act is making a demand to subserve the cause of the workers.

7. Shri Mahesh Goyal, learned Counsel appearing for Mazdoor Congress however submitted that the amount of Rs. 18 crores or more has already been paid to the secured creditors and their further claim is hardly Rs. 2 crores to Rs. 4 crores. He further admitted that an amount of Rs. 32 crores has already been paid in favour of the workers and the workers still have their claim. He also submitted that while making pari passu distribution the claimant coming u/s 529 in accordance with the priority fixed u/s 529A of the Companies Act would be entitled to his share and the said share would be fixed on the basis of the total claim lodged or is ultimately found receivable by the company court.

8. Shri Gupta also relied upon the judgment of the Supreme Court in the matter of ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others, , to contend that Section 529A is to be understood to mean that the priority of the claim of a workman should be taken to be on the top even against the priority of the claim of the secured creditors.

9. Section 446 of the Companies Act refers to the suits which are stayed on winding up order. Sub-section (2)(d) says that the court shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of any question of priorities or any other question

whatsoever, whether of law or of fact, which may relate to or rise in the course of the winding up of the company, whether such suit or proceeding has been instituted or is instituted or such claim or question has been arisen or arises or such application has been made or is made before or after the order of the winding up of the company. A fair reading and understanding of Sub-section (2) of Section 446 would make it clear that the same applies to the matter where certain suits have been filed or are likely to be filed. Section 446(2)(d) independent of everything does not confer any extra power to the company court to decide the priorities of any creditor. The right and entitlement of the creditors of the company are well described in Section 529, the priorities are fixed u/s 529A and Section 530 of the Companies Act. Section 446 has nothing to do with the present dispute. For proper appreciation of the dispute it would be necessary for us to refer to the provisions of Sections 529, 529A and 530 of the Companies Act.

10. Section 529 relates to the application of insolvency rules in winding up of insolvent companies. It declares as to how the company would be put under winding up, how the money would be realized and how the money would be distributed. However, Section 529A controls the rights of the parties and issues a mandate to the court. Section 529A reads as under:

529A. Overriding preferential payments,--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,-

(a) workmen's dues; and

(b) 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.

(2) The debts payable under Clause (a) and Clause (b) of Sub-section (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

11. A fair reading and understanding of Section 529A would make it clear that notwithstanding anything contained in any other provision of the Act or any other law for the time being in force, in the winding up of a company, the workmen's dues and 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.

12. It is indisputable that the right to recover the money is conferred upon the workmen so also on the secured creditors. The amount is to be distributed pari passu. After the claims of the secured creditors and workmen are satisfied and money is left then the money shall be paid in accordance with Section 530 of the Companies Act.

13. Shri Gupta, learned Counsel repeatedly submitted that the provisions of Section 11(2) of the Provident Funds Act shall have an overriding effect over the provisions of the Companies Act, therefore, Section 529A of the Companies Act would be subserving Section 11(2) of the Provident Funds Act.

14. It is to be seen that the Provident Funds Act is of the year 1952 while the Companies Act is of 1956. If one Act fixes the priorities and rights of the parties to some extent or makes it absolute then such provisions of the Act would be applicable but however, if any Act comes into force or operation subsequent to the first Act and later Act starts with a non-obstante Clause that notwithstanding anything in any other law for the time being in force then the provisions of the subsequent law would override the first law. The Companies Act being Act of 1956 would even otherwise have overriding effect over the provisions of the Provident Funds Act.

15. The judgment in the matter of ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others, , is not an authority or authoritative pronouncement of the apex court to show that while fixing and deciding the priorities the workmen's dues shall have priority over and above the priority given to the secured creditor. In the said matter the apex court did not say that the provisions contained in Section 529A are to be given an absolute go by. The question before the Supreme Court was that if the priorities are already fixed then whether the priorities inter se the secured creditors can be fixed or the secured creditors shall stand on the same foundation. In the said judgment the Supreme Court has observed that Section 529A is enacted only with a view to bring the workmen's dues pari passu with the secured creditors. According to the apex court, Section 529A contains a non-obstante Clause but in construing the provision thereof, it is necessary to determine the purport and object for which the same was enacted. The Supreme Court further observed that only because the dues of the workmen and the debts due to the secured creditors are treated pari passu with each other, the same by itself, would not lead to the conclusion that the concept of inter se priorities amongst the secured creditors had thereby been intended to be given a total go by. The said judgment nowhere says that despite the intention of the Legislature and the mandate contained in the Companies Act the right of the workman would still have a priority over the dues claimed by the secured creditors. In the said matter the question before the apex court simply was that in accordance with Section 48 of the Transfer of Property Act, 1882, whether the secured creditors having first charge over the property would be entitled to have priority in comparison to the second charge holder third charge holder or a person who is not a secured creditor.

16. Once it is held that Section 529A has effected overriding preferential payment and treats the dues of the workmen and debts due to the secured creditors at par then before entering into any other controversy the company court is obliged to see as to whether the amounts already paid or proposed to be paid to the workmen would stand pari passu with the rights of the secured

creditors.

17. With due respect to the learned company judge, we hold that the learned single judge did not see as to whether the payment of amount of Rs. 6,45,40,834 would still be under the provisions of Section 529A, whether it would come beyond the pari passu claim of the workmen and whether the Department still would be entitled to recover the money before settlement of the dues of the secured creditors so also of the workmen. It appears that all these arguments were not raised before the learned single judge and the question for making an order on those lines never cropped up before the learned single judge.

18. With utmost respect at our command we set aside the judgment/order dated April 4, 2007, passed by the learned single judge. As a consequence of this order, we direct respondent No. 3 to deposit back the amount of Rs. 6,45,40,834 with the official liquidator. We remit the matter to the learned single judge with a request to reconsider the entire matter in accordance with law. The parties present in this Court shall appear before the learned company judge on December 5, 2007. No costs.