

(2002) 08 RAJ CK 0038

In the Rajasthan High Court

Case No : Civil Company Application No. 79 of 2000 in Civil Company Petition No. 1 of 1995

Official Liquidator of Amfort Agro Finance Ltd.

APPELLANT

Vs

Chhittar Luhar

RESPONDENT

Date of Decision : 16-08-2002

Acts Referred:

Companies Act, 1956 — Section 446, 446(2), 458A, 477, 477(5)

Citation : (2003) 46 SCL 31

Hon'ble Judges : S.K. Keshote, J

Bench : Single Bench

Advocate : Amod Kasliwal, for the Appellant; Vikas Jain, for the Respondent

Judgement

S.K. Keshote, J.—Heard learned counsel for the parties, perused the company application, reply filed thereto by the respondent and the rejoinder filed by the Official Liquidator. In this application under Sections 446 and 477 of the Companies Act, 1956 (hereinafter referred to as the Act), the prayers made by the Official Liquidator of M/s. Amfort Agro Finance Ltd. (in liquidation) read as under:

- (i) The respondent(s) may be summoned and may be examined u/s 477 of the Companies Act of 1956 on oath in order to fix up the liability with regard to the aforesaid amount and order for payment of Rs. 3,25,360.00 (Rupees Three lacs twenty five thousand three hundred sixty only) as on Sept. 1999 plus further interest @ 12% on the amount thereafter till the date of payment may be passed in favour of the applicant Petitioner and the Respondents may be held liable for payment jointly and severally.
- (ii) In the alternative the application may kindly be tried u/s 446 of the Companies Act, 1956 and a decree for the outstanding amount may be passed.
- (iii) Any other appropriate order or direction which may be considered just and proper in the facts and circumstances of the case may kindly be passed in favour

of the applicant.

2. In the reply to the application the respondent has admitted that he took a loan of Rs. 1,96,000 for purchase of an HMT Tractor and a Trolley from the company (in liquidation) in the month of March 1994. It is submitted that for this purchase of the tractor and trolley a sum of Rs. 48,000 was paid by the respondent as margin money to the company (in liquidation) The company (in liquidation) also recovered a sum of Rs. 3,920 from the respondent on 15-3-1994 as service charges, but no service was effected. The next averment made is that the Official Liquidator in the application has not shown the payments made by the respondent to the company in liquidation. The claim filed by the Official Liquidator is stated to be barred by time. The amount of interest, as per the case of the respondent, is not at all chargeable as there was no agreement to pay interest. It is urged that otherwise also the respondent could not be said to be defaulter for the reason that he was always ready and willing to repay the loan money as per schedule, but the company itself went in liquidation. Lastly a defence has been taken that on account of negligence committed by the company (in liquidation) by not registering the vehicle and by not getting it insured in an accident one Ram Gopal filed a claim case before the MACT Tonk on 16-10-1996 which was registered as Claim Case No. 243 of 1996 - Ram Gopal v. Khemraj in which the respondent is one of the non-applicant. In that case the claimant has claimed a sum of Rs. 11,00,000 as compensation. On account of negligence of the company in liquidation in not getting the vehicle duly insured and registered, the claim has to be reimbursed by the company. The prayer has been made for rejection of the application and a direction to the Official Liquidator to contest the claim case before the MACT and in case any award is passed by the MACT, the same to be paid by the Official Liquidator.

3. Rejoinder to the reply is filed by the Official Liquidator. It is admitted that a sum of Rs. 48,000 has been paid as margin money by the respondent. After adjustment of the margin money of Rs. 48,000, a sum of Rs. 1,48,000 was given to the respondent as loan for purchase of tractor and trolley in the month of March 1994. It is next stated that the tractor and trolley were purchased and delivery of the same was taken by the respondent, but not a single pie has been paid towards the loan. The Official Liquidator has come up with the case that it is always the duty of the purchaser of the vehicle to get the same insured as per the provisions of the Motor Vehicles Act, and as such the respondent himself was required to get the vehicle insured. As to the claim made for a sum of Rs. 3,920, it is submitted that the respondent has not filed any receipt of the same. It has next been stated that otherwise also it is the amount paid towards the service charges and not towards the repayment of the loan. Re the plea taken of the limitation, it is submitted the properties of the company vest in the custody of the High Court from the date of the order dated 14-7-1995 and the Official Liquidator is entitled to recover the amount of debt from the respondent. Re the plea taken by the respondent that the interest is not be payable it is stated that as per the documents provided by Shri Sajjan Singh Rathore in the form of

Register, the rate of interest has been mentioned as 12% p.a. On the loan amount disbursed to the respondent interest @ 12% p.a. was payable and is chargeable till realisation of the amount and accordingly upto September, 1999 a sum of Rs. 1,29,360 was due and payable towards interest. So far as defence taken regarding the sum claimed in the MACT case, it is urged that the respondent being the owner of the vehicle is liable for any act or negligence and there is no question of any liability of the company (in liquidation) to register the vehicle.

The respondent has not filed any further pleadings to the rejoinder filed by the Official Liquidator.

The following points for consideration arise in the matter :

- (1) Whether the respondent is entitled for set off a sum of Rs. 3,920 against the outstanding loan amount;
- (2) Whether the application is barred by limitation;
- (3) The respondent is not a defaulter in payment of instalments of loan amount as the company itself went in liquidation;
- (4) Whether it is the liability of the company in liquidation to get the vehicle insured and as a result of default therein it is liable to reimburse for the ultimately amount of compensation to be awarded to the claimant in the claim case No. 243/1996.

3A. The respondent has not produced any evidence that Rs. 3,920 has been paid by him to the company. Otherwise also as per his own case, this amount has been taken by the company towards the service charges. What were the terms and conditions of the services to be provided have also not been brought on record by the respondent. So on both these counts, this claim made by the respondent cannot be accepted.

This application is filed by the applicant under Sections 446 and 477 of the Act. The respondent in the reply has taken a point that the claim made by the Official Liquidator is barred by time, but nothing has been said with reference to any of the provisions of the Act or limitation Act. How this claim is barred by time has not specifically been mentioned with respect to the provisions of the Limitation Act or Act. Be that as it may, otherwise also if we go by the provisions of Section 477 of the Act, there is no limitation prescribed for taking proceedings thereunder. u/s 477 the court may, at any time after the appointment of a provisional liquidator or the making of a winding up order, summon before it any officer of the company or person known or suspected to be indebted to the company. Winding up order in this matter has been made on 14-7-1995.

4. Sub-section (5) of Section 477 of the Act provides that if, on his examination, any person so summoned admits that he is indebted to the company, the Court may order him to pay to the provisional liquidator or, as the case may be, the

liquidator at such time and in such manner as to the Court may seem just, the amount in which he is indebted, or any part thereof, either in full discharge of the whole amount or not, as the Court thinks fit, with or without costs of the examination. Sub-section (7) of Section 477 lays down that the orders made under Sub-sections (5) and (6) shall be executed in the same manner as decrees for the payment of money or for the delivery of property under the Code of Civil Procedure, 1908.

5. In the reply to the application the respondent has admitted that the loan has been taken by him from the company. What he stated that Rs. 48,000 has been paid as margin money and this has been accepted by the official liquidator and to this extent set off has been given in the claim raised or made in the application. Thus, it is the case of admission of this claim of official liquidator and accordingly u/s 477(5) of the Act an order for payment thereof by the respondent can be made by the court and that order as per provisions of Sub-section (7) shall be executable as decreed of Civil Court under the Code of Civil Procedure.

This application is also filed u/s 446 of the Act. Sub-section (2) of Section 446 of the Act reads as under :--

"(2) The court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of--

- (a) any suit or proceeding by or against the company;
- (b) any claim made by or against the company (including claims by or against any of its branches in India);
- (c) any application made u/s 391 by or in respect of the company;
- (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in 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 arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

This claim as raised by the official liquidator against the respondent clearly falls under Clause (b) of the aforesaid provisions. So far as to the limitation to raise this claim is concerned, the reference may have to Section 458A of the Act. It provides that notwithstanding anything in the Indian Limitation Act, or in any other law of the time being in force, in computing the period of limitation prescribed for any suit or application in the name and on behalf of a company which is being wound up by the Court, the period from the date of commencement of the winding up of the company to the date on which the winding up order is made (both inclusive) and a period of one year immediately following the date of the winding up order shall be excluded."

6. Section 441 of the Act provides that in the case other than voluntary winding up, the winding up of the company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.

7. The respondent has not given the date of presentation of the winding up of the petition, but the order of winding up has been made as said earlier on 14-7-1995, This application is presented on 16-2-2000. The loan has been advanced in the month of March, 1994. Learned counsel for the respondent has not come out from which date, the limitation starts for filing of this claim. Naturally for the obvious reason as in view of this provisions of the Act, this application is within limitation. Burden to establish that this application is barred by limitation is on the respondent, who utterly failed to discharge the same.

8. Learned counsel for the respondent has failed to show any provision from the Act or any decision that as this company has ordered to be wound up, the liability of the respondent to pay this debt comes to an end. The winding up order has been passed much after the date of advancement of the loan i.e., March 1994. Even after this winding up order is passed the respondent could have paid this amount to the official liquidator. The respondent has not paid single pie towards this loan account from April 1994 to July 1995. Leaving apart this, it is a dishonest plea. Under Sections 446 and 477 of the Act this amount is recoverable by the official liquidator from the respondent. This point is without any merit and substance.

9. Learned counsel for the respondent has failed to show any agreement or any other evidence on record that it was the obligation of the company to take insurance of the tractor and trolley. Not only this he failed to show any agreement in between the company and the respondent where this obligation has been taken by the company and further the provision therein that for non-fulfilment thereof what are the liabilities fall upon the owner of the vehicle of compensation in the MACT case are to be reimbursed by on the company. These are contractual matters and unless it is agreed upon no corresponding liability or obligation on the parties are there. I find sufficient merit in the contention of the learned counsel for the applicant that the respondent being owner of the vehicle, it is his legal duty to take the insurance of the vehicle. The accident would have been there much after taking of the delivery of the tractor and trolley. Otherwise also I fail to see any justification in this approach of the respondent. He has taken delivery of the vehicle and he is owner of the vehicle. Thus under an legal obligation to take insurance thereof. Be that as it may, where ultimately claim has been accepted of claimants by MACT, he has to pay sum of compensation to the claimant. Otherwise also this point cannot be gone into in these proceedings. If legally any such claim can be lodged, it is to be lodged before the official liquidator. Last but not least, till date it is not the case where the compensation has been awarded by the MACT in that case. Only case has been filed Matter can also be looked into yet from another angle. Delivery of the tractor and trolley would have been to the respondent in the month of March 1994. Third party

insurance of the transport vehicle is statutorily compulsory. Respondent being the owner of the vehicle and in possession thereof should have taken the same. Even where it is taken to be the obligation of the company and same has not been discharged he has to take all necessary steps in this respect. There is nothing on the record from the side of the respondent that he at any time raised issue on this point with the company. Raising of this issue after about six years of taking loan and delivery of vehicle is wholly dishonest and afterthought.

10. Learned counsel for the respondent contended that there is no liability of the respondent to pay the interest and that too @ 12% p.a. He has failed to show any such agreement or other evidence on record in support of this claim. It is the case of taking of the loan for purchase of tractor and trolley and it would have been certainly subject to payment of interest. Interest free loan otherwise also difficult to accept would have been advanced by the company. Be that as it may, burden lies on the respondent to prove that there was no liability to pay interest which he utterly failed to discharge.

11. In the result, this application succeeds and the respondent is directed to pay Rs. 1,48,000, principle amount and interest thereon @ 12% p.a. from 1-4-1994 till the date of payment thereof. The respondent is further directed to pay Rs. 2,000 as costs of this application. This amount of cost on receipt thereof to be kept in the common pool of the companies.