
(2005) 08 MAD CK 0168

In the Madras High Court

Case No : Company Application No. 166 of 2003

Official Liquidator, R.P.S. Benefit Fund Ltd.

APPELLANT

Vs

Mrs. K. Tamilselvi

RESPONDENT

Date of Decision : 30-08-2005

Acts Referred:

Companies Act, 1956 — Section 446(2), 447, 448, 449, 450

Citation : (2008) 82 SCL 414

Hon'ble Judges : F.M. Ibrahim Kalifulla, J

Bench : Single Bench

Advocate : Latha Parimala Vadhana, M. Muthusamy, Administrator, for the Appellant; Durairaj and M. Kempraj, for the Respondent

Judgement

F.M. Ibrahim Kalifulla, J.—This application has been taken out by the official liquidator, seeking for the following reliefs:

(a) to direct the respondents to pay Rs. 7,82,312 being the amount due in respect of loan account No. H.O.264 and H.O. No. 265 respectively with interest and penal interest at the rate of 24 per cent per annum from 7-9-1999 to 11-11-2002, amounting to Rs. 12,90,677 aggregating to Rs. 20,72,989 with subsequent interest on balance of principal amounts of Rs. 50,000 and Rs. 2,49,312 from 8-11-2002, till the date of realisation;

(b) to permit the official liquidator to sell the mortgaged property as per mortgage deed. In the event of non-payment of the amount due within ninety days from the date of order of the Hon'ble High Court, permit the official liquidator to adjust the sale proceeds of the property against the decretal amount and further interest; and

(c) to order for payment of costs.

2. In the report of the official liquidator filed in support of the application, it is stated that on a perusal of the records of the company in liquidation and statement of affairs filed on 4-10-1999, by the president of the company in

liquidation, it came to light that the respondents are debtors of the company under the registered mortgage and equitable mortgage in respect of two loan accounts, viz., (i) account No. HO-264, dated 12-12-1994, under which, a sum of Rs. 50,000 was borrowed and (ii) account No. HO-265, dated 17-12-1994, under which a sum of Rs. 2,50,000 was borrowed. It is further stated that in respect of the abovesaid two loans, a mortgage deed has been registered in favour of the company in liquidation for a sum of Rs. 50,000 and a promissory note has been executed by depositing title deeds of the schedule mentioned property in respect of the sum of Rs. 2,50,000.

3. As per the statement of affairs and debtors list dated 7-9-1999, filed on behalf of the company in liquidation, the liabilities of the respondents was ascertained at a sum of Rs. 1,23,000 towards account No. HO-264 and a sum of Rs. 6,59,312 towards account No. HO-265. It also carried a further interest at the rate of 24 per cent per annum for the default committed by the respondents for repayment of mortgage loan.

4. In the Company Application No. 2172 of 2000, this Court passed an order dated 24-10-2000, providing for a concessional scheme to all the debtors reducing the rate of interest at 9 percent simple interest per annum on the principal outstanding from 8-9-1999, till 31-12-2001. Based on the said order, the Official Liquidator is stated to have issued a notice to the respondents, directing them to repay the amounts payable to the company in liquidation. The first respondent in her reply dated 17-9-2002, while admitting her liability towards the amount borrowed under account No. HO-264, denied the liability in respect of the loan under account No. HO-265.

5. It was in the above stated circumstances, the respondents were shown as "debtors" in respect of account Nos. HO-264 and HO-265 and since they failed to discharge the loan amounts even after the issuance of demand notice, the application came to be filed u/s 446(2) of the Companies Act.

6. On a perusal of the back records of the present application, I find that this has got a chequered history. Earlier, there was an order in this application dated 29-9-2003, which states that the respondents having failed to avail the benefit of concession rate of interest, by bringing down the total liability at a sum of Rs. 4,23,577.10 from the present claim of Rs. 20,72,989, coercive action was called for and accordingly non-bailable warrants were issued against the respondents.

7. Subsequently, the first respondent took the stand that the second loan of Rs. 2,50,000 was not really availed by her, that the said amount of Rs. 2,50,000 was by way of sale consideration in respect of two properties in S. Nos. 145/1 and 145/2 executed by her father. In the light of the said stand taken by the first respondent, the copy of the sale deeds were called for, which disclosed that for execution of the above referred to sale deeds, the father of the first respondent, one Thiru Kanniappan received Rs. 1,50,000 on 21-8-1995, and Rs. 1,10,000 on 11-9-1995, respectively. The documents themselves disclose that the payments

were made by cash. Those payments related to the property in S. No. 145/2. In respect of the property in S. No. 145/1, a sale consideration of Rs. 3,52,000 was paid by cash as disclosed in the document. Accordingly, an order came to be passed on 30-10-2003, wherein, this Court brought down the liability from Rs. 20,72,989 (which was calculated as payable up to 31-8-2003) to Rs. 5,02,620. In the said order, the respondents were directed to pay the said amount by 11-11-2003, by cash and failing which, it was stated that coercive action would be taken to recover the money. Thereafter, since the respondents failed to pay the said liability as directed above, non-bailable warrants were issued against the respondents which were also executed.

8. Ultimately, this Court passed an order dated 25-5-2005, which reads as under:

The claim of the administrator is yet to be adjudicated on merits. It is no doubt true that this application was earlier before a number of judges of this Court. I find from those orders that the parties to that application were only negotiating on the claim and in that context, the respective learned judges were directing the debtors to bring that money at least and since they felt that the presence of the debtors have to be secured, non-bailable warrants were issued. Mr. Muthusamy, learned administrator appearing for the company in liquidation would state that the claim of the administrator had been accepted and that is why the debtors were asked to bring the money. I went through all the earlier orders and I do not find anywhere in the earlier orders that the claim of the administrator was adjudicated and a finding was given one way or the other. I asked the learned administrator to point out any finding as referred to above in any one of the orders. The learned administrator is not in a position to show me any such finding. Therefore, it is clear that this application is still pending adjudication on the claim of the administrator. The respondent denies the claim. To avoid any further delay, I am inclined to give the following direction. The proceedings shall stand remitted to the file of the learned master (since the debtors are disputing the claim) for evidence on both sides. The completed proceedings shall be placed before the court on or before 31-3-2005.

9. Thereafter the matter was posted before the master for recording of evidence. PW 1 was examined and exhibits A1 to A13 were marked through him. PW 1 was also cross-examined on behalf of the respondents. Thereafter, the first respondent examined himself as RW1 and one Thiru M. Palani was examined as RW2. Exhibits R1 to R3 were marked on their side. After recording the evidence, the matter was placed before this Court on 23-8-2005.

10. The official liquidator and the learned administrator, after referring to exhibit A1 mortgage deed, exhibit A2 promissory note, exhibits A3 and A4 ledger entries, exhibit A5 receipts issued by the first respondent for the payment of loan amount of Rs. 50,000 and Rs. 2,50,000 on 5-10-1995, and 17-12-1995, respectively, exhibit A6 letter of ICICI Bank confirming the encashment of cheque No. 782248, dated 5-10-1995, for Rs. 50,000 and cheque No. 782249, dated 17-12-1995, for Rs. 2,50,000 respectively in favour of the first

respondent, exhibit A7 letter of the first respondent confirming the deposit of title deeds, exhibit A8 letter of lien dated 19-12-1995, exhibit A9 letter of authorisation given by the first respondent dated 19-12-1995, exhibit A10 series of receipts issued by the company in liquidation dated 11-9-1997, 15-9-1997 and 28-9-1997, respectively in proof of the payment of Rs. 10,000 each and exhibit A11 list of debtors, submitted that as against the above voluminous documents filed, there was no satisfactory explanation forthcoming from the respondents. It is also submitted that exhibits R1 and R2 certified copies of the sale deeds dated 11-9-1995 and 16-9-1995, did not in anyway answer the liabilities of the first respondent as debtor of the company in liquidation. It was also pointed out that in the said exhibits, the sale consideration was shown as Rs. 2,60,000 and Rs. 3,52,000 respectively and that in exhibit R1 itself, it is specifically mentioned that a sum of Rs. 1,50,000 was received on 21-8-1995, and another sum of Rs. 1,10,000 on the date of the execution of the sale deeds and thereby the entire sale consideration of Rs. 2,60,000 had been paid in full. Similarly, in exhibit R2, it is recited that a sum of Rs. 3,52,000 was received on various dates, namely, a sum of Rs. 5,000 on 21-8-1995, a sum of Rs. 1,73,500 and Rs. 28,500 on the date of execution of the sale deed. Exhibit R3 is stated to be an unregistered will of the father of the first respondent and even assuming the said document can be relied upon, it does not in anyway disclose the discharge of the liability due to the company in liquidation. Therefore, the plea that the respondents are not liable to pay any sum to the company in liquidation is not true and the same has not been proved. On the other hand, the signatures found in exhibits A1, A2, A5, A7, A8 and A9 are not in dispute. The said documents read along with the oral evidence of PW1 cumulatively establish the liability of the first respondent as debtor and the second respondent as surety to the company in liquidation. In such circumstances, in the light of the overwhelming oral and documentary evidence placed before this Court, it will have to be held that the debt due to the company in liquidation by the respondents as claimed in the application is established and accordingly, the respondents are liable to discharge the said liability.

11. As narrated in the earlier part of this order in spite of the various opportunities extended to the respondents, they failed to avail the opportunities to discharge the liability. In fact, in the order dated 29-9-2003 and 30-10-2003, a sum which is far less than what is due and payable by the first and second respondents were offered and yet there was no inclination shown on behalf of the respondents in availing the concessions extended to the respondents.

12. The "winding up procedure" prescribed in Chapter II of the Companies Act is a "special procedure" and which is also a self-contained one. u/s 447, it is stated that "an order for winding up of a company would operate in favour of all the creditors and of all the contributories of the company as if it had been made on the joint petition of a creditor and of a contributory". Appointment of official liquidator and the powers of the liquidator have been extensively stated in the other provisions in Sections 448 to 461. u/s 454, it is stated that where a

winding up order is made and an official liquidator is appointed, a statement of affairs is to be submitted in the prescribed format which among other things includes the provision u/s 454(d) the debts due to the company and the names, residences and occupations of the persons from whom they are due and the amount likely to be realised on account thereof. u/s 456(1), it is stipulated that where a winding up order has been made or a provisional liquidator has been appointed, the liquidator or the provisional liquidator as the case may be should take into custody or under his control of the properties, effects and actionable claims to which the company is or appears to be entitled. u/s 457(1)(e), it is prescribed that the liquidator of a winding up company shall have a power to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

Thus, a conjoint reading of the above referred to provisions, makes it amply clear that the object of a winding up proceedings is to ensure the derivation and accumulation of all the wealth of the company in liquidation by ensuring the collection of all the amounts outstanding from the parties, in order to have proportionate distribution of such collection amongst the creditors according to their rankings. If such object of a winding up proceeding is to be achieved, it is imperative that any attempt from any quarter from putting spokes into the smooth running of the wheel is stoutly removed.

13. With the above objective of a winding up proceeding in mind, when the case on hand is examined, I am of the view that it will have to be held that the respondents are liable to pay the ascertained sum of Rs. 20,72,989 with interest on the balance principal amounts of Rs. 50,000 and Rs. 2,49,312 from 8-11-2002, till the date of realisation. Since the liability was, thus, due from 8-11-2002, onwards, the respondents are directed to pay the same within four weeks from the date of receipt of copy of this order. In the event of the respondents failing to discharge their liability by making the payment within the said four weeks time, the respondents are directed to deliver possession of the schedule mentioned property to the official liquidator within one week thereafter. In the event of the respondents failing to comply with the above directions within the stipulated time limit, the official liquidator and learned administrator are at liberty to invoke Section 477(7) of the Companies Act and execute the decree granted in this order for taking possession of the schedule mentioned property through the appropriate execution court within whose jurisdiction the schedule mentioned property is situated. For that purpose, the decree granted in this order shall be duly transmitted to the execution court situated within the local jurisdiction of Kancheepuram, viz., Principal District Munsif's Court or Additional District Munsif's Court at Kancheepuram. After taking possession of the schedule mentioned property, the official liquidator shall take necessary steps for the sale of the property through public auction by calling for bids. The official liquidator shall carry out the above exercise and report to this Court for taking further course of action.

The company application is ordered as above.