(2006) 03 AP CK 0004

In the Andhra Pradesh High Court

Case No : Company Application No. 1193 of 2005 in Company Petition No. 81 of 1996

Prisma Home Appliances P. Ltd. (In Liquidation) APPELLANT

Vs

Indian Bank RESPONDENT

Date of Decision : 07-03-2006

Acts Referred:

Companies Act, 1956 — Section 529, 529A
Constitution of India, 1950 — Article 226, 227
Income Tax Rules, 1962 — Rule 31
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 34
State Financial Corporations Act, 1951 — Section 29, 31

Citation : (2008) 145 CompCas 702

Hon'ble Judges : S. Ananda Reddy, J

Bench : Single Bench

Advocate : M. Anil Kumar, for the Appellant; C.V.V. Prasad, for the Respondent

Final Decision : Allowed

Judgement

S. Ananda Reddy, J.—This is an application filed by the official liquidator on behalf of the company under liquidation seeking to declare that the action of the respondent-recovery officer of the creditor-bank in effecting the sale of the assets of the company under liquidation without any notice and without obtaining permission of the company court, as the company in question was ordered to be wound up by an order dated July 13, 1999, made in Company Petition No. 81 of 1996, as void and contrary to the statutory provisions as well as the decision of the Supreme Court in Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another, .

2. It is the case of the official liquidator that the company is ordered to be wound up as early as on July 13, 1999. As a result of the order of winding up, the assets of the company under liquidation would vest in the company court and the official liquidator. But, however, the respondent-bank filed O.A. No. 1447 of 1999 before the Debts Recovery Tribunal and obtained a decree, and later obtained a

certificate of debt and proceeded to recover the said debt by resorting to the sale of the assets of the company, but before effecting the sale, neither the creditor-bank nor the sale officer has given any notice to the official liquidator. It is also the case of the official liquidator that even as per the provisions, the sale officer has to conduct the sale in accordance with the procedure provided under Schedule II of the Income Tax Act, 1961. As per Rule 31 of the said Schedule, where the property to be attached is in the custody of a court, or public officer, the attachment shall be made by a notice to such court or officer, requesting that such property or any interest or dividend becoming payable thereon, may be held subject to the further orders of the Tax Recovery Officer by whom the notice is issued.

3. According to learned Counsel for the official liquidator even Rule 31 of the Schedule provides for a notice to be served on the custodian of the property. As admittedly, the official liquidator is the custodian of the property on behalf of the company court, the respondent-bank ought to have issued a notice and ought to have heard the official liquidator before effecting the sale. As no such notice was issued nor the official liquidator was heard about the sale, the sale conducted by the respondent is void and is liable to be set aside. Therefore, learned Counsel appearing for the official liquidator sought for a direction to the respondent to deposit the sale proceeds of Rs. 13 lakhs realised by the respondent-bank with the official liquidator.

4. A counter is filed on behalf of the respondent-bank stating that the bank filed O.A. No. 1447 of 1999 and obtained a decree as well as recovery certificate for a sum of Rs. 4,04,23,607 on January 19, 2003. Thereafter, the bank effected the sale of the assets. It was stated that the proceedings under the provisions of the Debts Recovery Tribunal are not subject to the proceedings of any court, except the jurisdiction of the Supreme Court and the High Court exercising jurisdiction under Articles 226 and 227 of the Constitution of India. It is also the case of the respondent-bank that the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, overrides the provisions of any other Act by virtue of Section 34 of the said Act. Therefore, this Court has no jurisdiction to interfere with the sale that was affected. The respondent also relied upon a judgment of the Supreme Court in Allahabad Bank Vs. Canara Bank and Another, wherein it was held that the execution of the certificate of recovery is within the jurisdiction of the Debts Recovery Tribunal and the recovery officer. Therefore, the application is devoid of merit.

5. At the time of hearing, learned Counsel appearing for the official liquidator contended that though primacy has been declared to the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the proceedings taken under that Act, but however, a three judge Bench of the Supreme Court in Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another, where there was a specific reference to the Bench in view of the conflicting views expressed in Allahabad Bank Vs. Canara Bank and Another, and International

Coach Builders Ltd. Vs. Karnataka State Financial Corpn., after considering the contentions elaborately, held that in fact though there is no such conflict as was contended, but, however, after considering elaborately summed up the legal position, as per which even in the case of a decree passed by the Debts Recovery Tribunal under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the recovery officer before proceeding to effect the sale of the properties has to issue notice to the official liquidator or the liquidator appointed by the company court, and after hearing him only can effect the sale. In the light of the said legal position, learned Counsel sought to set aside the sale, as it is not in accordance with law.

6. Learned counsel for the respondent-bank on the other hand, reiterating the contentions that are stated in the counter sought to dismiss the company application.

7. Heard both sides and considered the material on record.

8. Admittedly, the company in question was ordered to be wound up as early as on July 13, 1999, as a result of which the assets of the company vested in the official liquidator. But, however, the respondent-bank obtained a decree in O.A. No. 1447 of 1999 and obtained a certificate of recovery dated January 19, 2003, for a sum of Rs. 4,04,23,607 and in the process of realization of the said amount, effected the sale of the property on December 18, 2003, but before effecting the sale, the sale officer did not give any notice to the official liquidator nor was heard the official liquidator before effecting the sale. The said action is clearly contrary to the legal position enunciated by the Supreme Court in Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another, which reads (page 400 of 128 Comp Cas):

(i) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, would be entitled to order the sale and to sell the properties of the debtor, even if a company in liquidation, through its recovery officer but only after notice to the official liquidator or the liquidator appointed by the company court and after hearing him.

(ii) A District Court entertaining an application u/s 31 of the SFC Act will have the power to order sale of the assets of the borrower company in liquidation but only after notice to the official liquidator or the liquidator appointed by the company court and after hearing him.

(iii) If a financial corporation acting u/s 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor-company in liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the company court and acting in terms of the directions issued by that court as regards associating the official liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of Section 529A and Section 529 of the Companies Act.

(iv) In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, or the SFC Act are not set in motion, the concerned creditor is to approach the company court for appropriate directions regarding the realization of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the company in liquidation.

9. In view of the above, the sale that was affected by the respondent-bank without issuing any notice and hearing the official liquidator is clearly illegal and contrary to the legal position. In fact, even a reference to Rule 31 of the Schedule II to the Income Tax Act, 1961, which is referred to earlier, also contemplates a notice to the court or public officer in custody of the property before effecting attachment. But no such notice was issued by the respondent-bank''s sales officer. Under the above circumstances, the sale that was conducted by the respondent is clearly illegal and not in accordance with law. Therefore, the same is set aside.

10. The official liquidator is also sought for a direction to deposit of Rs. 13 lakhs realised as and by way of sale consideration. But when once the sale is set aside, the amount that was realized, is to be refunded to the person, who paid the said amount by way of sale consideration. Therefore, the official liquidator is not entitled for the relief of deposit of the said amount by the bank with the official liquidator.

The company application is accordingly allowed to the extent indicated above. No costs.

