

(2006) 02 P&H CK 0130

In the Punjab And Haryana At Chandigarh

Case No : Company Petition No"s. 19 and 97 of 2005 in Company Petition No. 232 of 2003

Punjab Financial Corporation Limited and Another APPELLANT
Vs

Official Liquidator Attached to Punjab and Haryana High Court RESPONDENT
and Another

Date of Decision : 02-02-2006

Acts Referred:

Companies (Court) Rules, 1959 — Rule 147, 148
Companies Act, 1956 — Section 529, 529(1), 529A
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13
State Financial Corporations Act, 1951 — Section 29

Citation : (2006) 134 CompCas 611 : (2006) 143 PLR 507 : (2007) 78 SCL 130

Hon'ble Judges : Hemant Gupta, J

Bench : Single Bench

Advocate : Ashish Gupta, G.S. Sandhawalia, Ranjana Sahi, for the Appellant;
Vikas Behl, for the Respondent

Judgement

Hemant Gupta, J.—Petitioner M/s Punjab Financial Corporation has sought direction to the Official Liquidator to remove the locks from the premises of M/s Indogem Laminations (Pvt.) Limited, Bathinda, the possession of which was taken by the Corporation u/s 29 of the State Financial Corporation Act, 1951 (hereinafter to be referred as "the Act"). The petitioner has also sought permission to sell the mortgaged property of the company in liquidation.

2. Petitioner has advanced a term loan of Rs. 45.59 lacs and another financial assistance of Rs. 8 lacs for setting up of an industry for manufacturing of copper wire. The said financial assistance was secured by mortgaged deed dated 21.12.1989. Since the Company failed to repay the loan, the petitioner took over the possession of the land measuring 8 Kanals situated at Village Jassi on 27.01.2000. The petitioner issued a notice for the sale of unit which was published in the newspaper on 22.2.2004. Notice of such sale was issued to the

promoters of the company as well for 23.02.2004. The company was ordered to be wound up and the Official Liquidator took charge of the assets and effects of the Company on 10.12.2004 after serving notice on 8.12.2004 to the petitioner. The petitioner has, thus, sought a direction to the Official Liquidator to remove the locks from the premises of the company now in liquidation as well as opting Out to remain outside the liquidation proceedings subject to conditions u/s 529A of the Companies Act, 1956 (hereinafter to be referred as "the Companies Act").

3. The reply on behalf of the Bank in respect of financial assistance provided to company in liquidation has been filed. It has been pointed out that company in liquidation has sought Rs. 1.35 crores and another term loan of Rs. 8 lacs for the purchase of machinery. The company has mortgaged industrial plot No. E-53 situated at Industrial Area, Phase-I, Bathinda and plot situated at Handaya, Tehsil Barnala. The land, building and machinery financed by the Punjab Financial Corporation is under second charge of the Bank whereas stock of all types i.e., finished, unfinished and under process, machinery worth Rs. 12.25 lacs purchased with financial assistance of the Bank is under the first charge of the Bank. The bank has initiated proceedings for the recovery u/s 19 of the Recovery of Debts due to Bank and Financial Institutions Act, 1993, before the Debts Recovery Tribunal, Chandigarh. It also issued notice to the Managing Director and guarantors of the company in liquidation u/s 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. Bank has claimed that total dues due to the Bank are more than Rs. 2.5 crores and, therefore, interest of the Bank be kept safe for just, proper and complete realization of the arrears.

4. Another petition has been filed by the Union of India i.e, C.P. No. 87 of 2005 for a direction to the Official Liquidator to liquidate the properties of the company and to release the Government dues in priority to all other dues payable to the creditors, secured and unsecured.

5. It is the stand of the Official Liquidator that after selling the property under the provisions of the Companies Act, he would distribute the amount in accordance with Section 529-A of the Companies Act and interest of one and all would be protected. The official liquidator has pointed out that a sum of over Rs. 50 lacs is due and payable by the company towards the Central Excise as per the letter issued by the Central Excise Range, Bathinda, on 28.02.2005.

6. Hon''ble Supreme Court in A.P. State Financial Corporation Vs. Official Liquidator, , while considering the provisions of Section 29 of the Act and the provisions of Section 529 of the Companies Act held that the statutory right to sell the property u/s 29 of the Act has to be exercised with the rights of the pari passu charge to the workmen created by proviso to Section 529 of the Companies Act. Under the said provision, the liquidator shall be entitled to represent the workmen and enforce the above pari passu charge. Therefore, the Court found that the condition imposed by the Company Court on the State Financial Corporation of discharging the liability to the workers, if any, u/s 529-A

of the Companies Act and to inform the Official Liquidator about the proposed sale of the properties of the company as well as to obtain permission of the Company Court before the finalising the tender was justified. It was held that if conditions are not imposed to protect the right of the workmen, there is every possibility that the secured creditor may frustrate the pari passu right of the workmen.

7. In the later judgment reported as *International Coach Builders Ltd. Vs. Karnataka State Financial Corpn.*, , Hon"ble Supreme Court considered the aforesaid judgment and held that the rights of pari passu charge holders would run equally, temporally and potentially, with the rights of the secured creditors. The official liquidator, as representative of the workmen, to enforce such pari passu charge would have the rights of representing the workmen equally with the rights of the secured creditors. It was held that the statutory right to sell the property u/s 29 of the Act has now to be exercised in tandem with the rights of pari passu charge in favour of the workmen created by the proviso to Section 529 of the Companies Act. It has been further held that the Official Liquidator is in the position of co-mortgagee. State Financial Corporations cannot act independently or by ignoring him for enforcing their security. The realization of the security can only be done by both the charge-holders joining the realising the security simultaneously. If a sale takes place, it can only be simultaneously for recovery of claim of all pari passu charge-holders and sale proceeds are required to be divided proportionately in the same proportion as their dues. The Court concluded to the following effect:

25 ...No doubt, Section 29 of the State Financial Corporation Act was intended to place the State Financial Corporations on a better footing. But, in our view, this better footing is available only so long as the debtor is not a company or is a going company. The moment a winding up order is made in respect of a debtor company, the provisions of Section 529 and 529A come into play and whatever superior rights had been ensured to State Financial Corporations under the provisions of the State Financial Corporation Act are now subjected to and operate only in conjunction with the special rights given to the workmen, who as pari passu charge-holders are represented by the Official Liquidator. We are, therefore, of the view that the unhindered right hitherto available to the State Financial Corporations to realize their security, without recourse to the Court, no longer holds true as the right vested in the official liquidator is a statutory impediment to such exercise and has to be reckoned with. And since the official liquidator can do nothing without the leave or concurrence of the Court, all necessary applications must, therefore, come to the Company Court.

26. We do not really see a conflict between Section 29 of the State Financial Corporation Act and the Companies Act at all, since the rights u/s 29 were not intended to operate in the situation of winding up of a company. Even assuming to the contrary, if a conflict arises, then we respectfully reiterate the view taken by the Division Bench of this Court in *A.P. State Financial Corporation* case

(supra). This court pointed out therein that Section 29 of the State Financial Corporation Act cannot override the provisions of Section 529(1) and 529A of the Companies Act, 1956, inasmuch as the State Financial Corporation cannot exercise the right u/s 29 ignoring a pari passu charge of the workmen. It was observed in the judgment:

Therefore, the power to sell which is given to a Financial Corporation u/s 29 has to be exercised consistently with the right of a pari passu charge holder. Such a right can be exercised with the consent of the pari passu charge holder or on holders of the Court after making him a party to the proceedings to enforce the security. Since the charge holder is the Official Liquidator, his power to consent is subject to the sanction of the Court.

8. While concluding, it was held that the State Financial Corporation cannot unilaterally act to realize the mortgaged properties without the consent of the Official Liquidator representing the workmen for the pari passu charge. If the Official Liquidator does not consent, the State Financial Corporations have to move the Company Court for appropriate directions to the Official Liquidator, who is the pari passu charge holder on behalf of the workmen.

9. Recently, the matter has been again considered by the Hon'ble Supreme Court in a judgment reported as Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another, . After considering all the judgments on the subject, it has been held that once a winding up proceedings has commenced and the liquidator is put in charge of the assets of the Company being wound up, the distribution of the proceeds of the sale of the assets at the instance of the financial institutions under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, or of financial corporations under the State Financial Corporation Act, 1951, can only be with the association of the Official Liquidator and under the supervision of the Company Court. The right of the financial corporations stands restricted by the requirement of the Official Liquidator being associated with it, giving the Company Court the right to ensure that the distribution of the assets in terms of Section 529-A of the Companies Act takes place.

10. In view of the above judgments, it is apparent that in a case where the Company has gone into winding up, the State Financial Corporation cannot unilaterally sell the charged property without associating the Official Liquidator who represents the pari passu charge of the workmen.

11. Since the ex-Management of the Company in liquidation has not filed statement of affairs, it is not possible for the Official Liquidator to determine the claim of the workers who have a pari passu charge along with other secured creditors. Therefore, it is necessary to determine the dues of the workers as well.

12. In view of the above, the Official Liquidator is permitted to sell the movable and immovable property of the company in liquidation in association with secured creditors. The sale shall be subject to confirmation of this Court. The

Official Liquidator shall take steps to complete the sale process within a period of four months from today in association of secured creditors at every stage of the sale process.

13. In terms of Rule 147 of the Companies (Court) Rules, 1959, the Official Liquidator is also permitted to invite claims from the workers and other unsecured creditors by inserting advertisement in Indian Express (Chandigarh Edition), Jagbani, Ajit and Official Gazette of Punjab Government. The requirement of issuing individual notices under Rule 148 of the above said Rules is dispensed with.

14. Both the petitions stand disposed of accordingly.