(2001) 10 P&H CK 0149

In the Punjab And Haryana At Chandigarh

Case No : Company Appeal No. 21 of 2001

Punjab Scheduled Castes Land Development and Finance Corporation — APPELLANT

Vs

Punjab Wireless Systems Ltd. — RESPONDENT

Date of Decision : 29-10-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 11 , Order 11 Rule 11A, Order 21 Rule 54, Order 38 Rule 11, Order 38 Rule 11A

Companies Act, 1956 — Section 433 , 439

Citation : (2003) 115 CompCas 501 : (2004) 50 SCL 478

Hon'ble Judges : A.B. Saharya, C.J;V.K. Bali, J

Bench : Division Bench

Advocate : L.M. Suri and T.P. Singh, for the Appellant;

Final Decision : Dismissed

Judgement

V.K. Bali, J.—Company Petition bearing No. 226 of 1999, H. S. Oberoi and Associates v. Punjab Wireless Systems under Sections 433 and 439 of the Companies Act, 1956, for winding up was filed on September 23, 1999. During the pendency of the petition aforesaid, the court vide its order dated July 27, 2000, appointed the official liquidator as the provisional liquidator. On February 1, 2001, the company court disposed of the company petition by passing an order of winding up against the respondent. The appellant after disposal of the company petition aforesaid, filed a petition with a prayer that it should be permitted to execute the recovery proceedings initiated by it, consequent upon the judgment and decree passed by the civil judge dated September 9, 1999, vide which the appellant had been found entitled to a sum of Rs. 7,42,27,312 from Punjab Wireless Systems Ltd. (hereinafter referred to as "the respondent"). In the alternative, it was the prayer of the appellant that the company court should transfer the execution proceedings to itself and to execute the same. This petition with the aforesaid prayer has since been dismissed by the learned company judge, hence the present appeal.

2. The bare minimum facts of the case would reveal that the appellant filed a civil suit on July 31, 1999, for the recovery of Rs. 7,42,27,312 along with future interest. During the currency of the suit aforesaid, the appellant moved an application under Order 38, rule 5 of the Code of Civil Procedure, 1908, for attachment of the movable and immovable properties of the respondent. The learned civil judge vide order dated August 17, 1999, accepted the said application inasmuch as the respondent, i.e., Punwire was directed to furnish a bank guarantee in the sum of Rs. 7.50 crores, failing which two of its properties were ordered to be attached. Thereafter, an application under Order 23, rules 2 and 3 of the CPC was moved on behalf of the parties, i.e., the appellant and the respondent for passing a compromise decree and the learned civil judge, after recording statements of the concerned parties, disposed of the suit in terms of the said compromise. Accordingly, as mentioned above, a decree for recovery of Rs. 7,42,27,312 was passed with interest at the rate of 17.5 per cent. per annum from the date of filing the suit till its realisation. The appellant was permitted to recover the decretal amount in accordance with the compromise, failing which the appellant was allowed to recover the decretal amount in accordance with law. The respondent failed to make any payment to the appellant, thus, the appellant was compelled to initiate execution proceedings by way of Execution Case No. 25 of 1999. In furtherance of the execution case filed by the appellant, the learned executing court on December 6, 1999, ordered the attachment of the properties of the respondent. Inasmuch as, execution proceedings in view of the provisions contained in Section 446 of the Companies Act, 1956, could not proceed any further as after the official liquidator had been appointed as the provisional liquidator, no suit or legal proceedings pending could be proceeded with except with the leave of the court. The application for alternative reliefs as mentioned above was filed. It has been the case of the appellant that the provisions of Section 125 of the Companies Act, 1956, could not obstruct the continuation of the proceedings initiated by it before the executing court, as the claim made by the appellant was not based on a charge created by the company but based on the judgment and decree passed by the learned civil judge. It was further argued on behalf of the appellant that a charge must be deemed to have been created over the properties in question vide orders dated August 17, 1999, and December 6, 1999. The appellant was, thus, a secured creditor and it had legitimate right to recover the decretal amount by continuing the execution proceedings.

3. The claim of the appellant was contested primarily on the ground that the attachment proceedings were not initiated validly being after the commencement of winding up. It was also the contention of the other side that the order of attachment does not create a charge and inasmuch as, no charge had been created, the appellant could not be considered to be a secured creditor for the recovery of decretal amount.

4. It would not be disputed before the learned single judge that winding up proceedings must be deemed to be initiated with effect from the date on which

the winding up petition, i.e., Company Petition No. 226 of 1999, was presented, i.e., September 23, 1999. In the context of the facts, as have been given above, it was the case of the respondent that the order of attachment in furtherance of Execution Case No. 25 of 1999 was passed on December 6, 1999, and since the aforesaid order had not been passed with the leave of the court, the same was void under the mandate of the provisions contained in the Companies Act, 1956.

5. On the basis of Rules 11 and 11A of Order 38 of the Code of Civil Procedure, the learned company judge returned a finding that "if an order of attachment has been passed in respect of certain properties before the passing of any final judgment and decree, no further order of attachment is required to be passed for execution of the decree subsequently passed in favour of the appellant. In the instant case, an order of attachment was passed on August 17, 1999, whereas final judgment and decree was passed on September 9, 1999. In the final judgment and decree, the suit filed by the appellant for the recovery of Rs. 7,42,27,312 was decreed with costs along with interest at the rate of 17.5 per cent. per annum from the date of filing of the suit till its realisation. It is, therefore, evident that in the instant case, the order of attachment must be deemed to be the order passed on August 17, 1999. The subsequent order dated December 6, 1999, was wholly unessential and must be deemed to be a mere surplusage in view of the rules extracted hereinbelow. In the aforesaid view of the matter, I find no merit in the first submission advanced on behalf of learned counsel for the respondent".

6. The other contention raised by counsel representing the respondent before the learned company judge that an order of attachment does not create a charge in view of the law laid down in Buta Singh and Sons Ltd. v. People''s Bank of Northern India Ltd. AIR 1931 Lah 589 and the judgment of Gujarat High Court in Ananta Mills Ltd. (In Liquidation) v. City Deputy Collector 1972 42 Comp Cas 476, was, however, accepted. The learned company judge also relied upon rule 54 of Order 21 of the CPC in coming to the conclusion, as noted above. The learned company judge held that "after perusal of the aforesaid rule, it clearly emerges that the only effect of the order of attachment is that the property attached cannot be transferred nor a third party right can be created therein. In other words, no right whatsoever is created to the decree holder vis-a-vis the property attached. It is, therefore, natural to conclude that an order of attachment creates no interest in favour of the decree holder. Therefore, the attachment of property of the respondent-company, i.e., Punwire vide orders dated August 17, 1999, and December 6, 1999, does not have the effect of creating any charge in favour of the Corporation in respect of the attached property." Reliance was placed upon Praga Tool Ltd. v. Official Liquidator of Bengal Engineering Co. (P.) Ltd. (In Liquidation) 1984 56 Comp Cas 214 (Cal) by learned counsel representing the appellant. The contention of counsel representing the appellant based upon the judgment aforesaid was repelled by observing that in the case in hand, no charge was created relating to the property of the respondent by the judgment and decree passed by the learned

civil judge on September 9, 1999.

7. Mr. Suri, learned senior advocate, representing the appellant on the basis of the very same judicial precedents as were relied upon before the learned company judge and in particular in Praga Tools Ltd. v. Official Liquidator of Bengal Engineering Co. (P.) Ltd. (In Liquidation) 1984 56 Comp Cas 214 vehemently contends that compromise decree that came to be ultimately passed in favour of the appellant and against the respondent by the terms thereof, i.e., terms of compromise was a security for the decree. One of the terms of the compromise was that it shall be a charge over the properties of the respondent. This charge was effected by the respondent and did not require registration. The appellant was thus a secured creditor to the extent of the decretal amount and was entitled to recover the same by way of execution.

8. We find no substance in the only contention of learned counsel, noticed above. The learned single judge has passed a detailed order by giving all necessary facts and the contentions that were raised before him. Nothing at all could be pointed out from the impugned judgment which may even remotely suggest that any contention based upon the terms of compromise culminating into the decree, that may result into creation of a charge over the assets/properties of the company, thus, making the appellant a secured creditor, was ever pressed into service. It is not even the case of the appellant that such an argument was raised but has not been noticed by the learned company judge. No terms of the compromise, as argued before us, were even brought to the notice of the learned company judge. In so far as, reliance upon Praga Tools Ltd. v. Official Liquidator of Bengal Engineering Co. (P.) Ltd. (In Liquidation) 1984 56 Comp Cas 214 is concerned, all that was held therein by the Calcutta High Court is that if a charge is created by an order of the court, it will not require registration u/s 125 of the Companies Act, 1956. A decree for repayment of money owed by B Co. to PT Co. was passed in 1976 with the consent of the parties. The order settled the decretal amount and laid down the mode by which it was to be paid. The default clause provided that PT Co. could execute the order as a decree or institute fresh winding up proceedings and in the event of execution of the decree, the security already furnished by B.Co. with the Registrar under an earlier order of the court to the extent of Rs. 50,000 would continue as security for the decree. B Co. went into liquidation and its entire assets were sold and the proceeds held by the official liquidator. PT Co. applied claiming to be a secured creditor to the extent of Rs. 50,000.

9. In view of the facts, as have been given above, it was held that the benefit of the security was entirely the creature of the order of the court. It was not a charge created by the company and did not require registration. The order of the court was not a "non-testamentary instrument" within the meaning of Section 17(1)(b) of the Indian Registration Act, 1908, and, hence, did not require registration. In the instant case, there was no question of any property other than property which was the subject matter of the earlier suit being included in

the security. As such, registration was not required u/s 17(2)(vi) of the Registration Act. The appellant was a secured creditor to the extent of Rs. 50,000 and was entitled to recover that amount from the official liquidator.

10. We are in respectful agreement with the observations made by the learned single judge that "in view of Rule 54 of Order 21 of the Code of Civil Procedure, the only effect of the order of attachment is that the property attached cannot be transferred nor a third party right can be created therein, in other words, no right whatsoever, is created in the decree holder vis-a-vis the property attached. It is, therefore, natural to conclude that an order of attachment creates no interest in favour of the decree holder. Therefore, the attachment of property of the respondent-company, i.e., Punwire vide orders dated August 17, 1999, and December 6, 1999, does not have the effect of creating any charge in favour of the Corporation in respect of the attached property". For arriving at the conclusion aforesaid, the learned company judge also relied upon the observations of Mulla in the Code of Civil Procedure, 13th edition at page 318 as also judgment in Buta Singh and Sons Ltd. v. Peoples'' Bank of Northern India Ltd. AIR 1931 Lah 589 as also judgment of the Gujarat High Court in Ananta Mills Ltd. v. City Deputy Collector (In Liquidation) 1972 42 Comp Cas 476.

11. Finding no merit in this appeal, we dismiss the same in limine.

