

(2006) 07 P&H CK 0115

In the Punjab And Haryana At Chandigarh

Case No : Company Application No's. 258 and 260 of 2005 in Company Petition No. 71 of 2000

Punjab State Industrial Development Corporation Limited

APPELLANT

Vs

Punjab National Fertilizers and Chemicals Limited (in Liquidation) and Another

RESPONDENT

Date of Decision : 20-07-2006

Acts Referred:

Companies (Court) Rules, 1959 — Rule 9
Companies Act, 1956 — Section 125, 429A, 442, 537
Contract Act, 1872 — Section 140, 141, 145
Industries (Development and Regulation) Act, 1951 — Section 18A

Citation : (2008) 145 CompCas 293 : (2006) 144 PLR 402 : (2009) 95 SCL 189

Hon'ble Judges : Hemant Gupta, J

Bench : Single Bench

Advocate : L.M. Suri and Deepak Suri, Neeraj Khana, for the Appellant; Manish Jain, for the Respondent

Final Decision : Allowed

Judgement

Hemant Gupta, J.—This order shall dispose of Company Application Nos. 258 and 260 of 2005 filed by the Punjab State industrial Development Corporation Limited u/s 442 429-A, of the Companies Act, 1956 (hereinafter to be referred as "the Act") read with Rule 9 of the Companies Court Rules, 1959, and Sections 141 and 145 of the Indian Contract Act, 1872, for an order to, declare all the liabilities of the Punjab National Fertilizers and Chemicals Limited (In Liquidation) to the Industrial Development Bank of India in C.A. No. 258 of 2005 and to the ICICI Bank Limited in C.A. No. 260 of 2005 stand transferred to the applicant as secured creditor.

2. The applicant is a State Government Undertaking. The company in liquidation was a joint sector company promoted by the applicant. The said company in liquidation has availed financial assistance from various financial institutions and banks. The applicant has issued corporate guarantees in favour of the banks for

due repayment of the advances taken by the Company in liquidation from the said financial institutions.

3. Since there was default committed by the company in liquidation, proceedings were initiated against the said company by banks and the financial institutions under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The applicant has entered into a settlement with the banks/financial institutions and paid a sum of Rs. 22 crores in C.A. No. 258 of 2005 and a sum of Rs. 7,15,95,000/- in C.A. No. 260 of 2005 in full and final settlement.

4. The representatives of the applicant and banks reported in a meeting with the Official Liquidator to determine the strategies of sale. In the said meeting, the representatives of the banks have stated that they have one time settlement with the applicant and the amount payable to the bank/financial institutions would now be payable to the applicant. The Official Liquidator in the said meeting requested that without proper application and without the orders of this Court, this contention of the applicant cannot be accepted. Thus, an application has been filed by the applicant to step into the shoes of the secured creditors.

5. The learned Counsel appearing for the bank/financial institutions have admitted that the applicant has paid its entire dues on account of the liability of the company in liquidation and an application for recovery of all outstanding dues filed before the Debts Recovery Tribunal has since been withdrawn. It is also stated therein that the Official Liquidator would be, now required to treat the applicant as secured creditor of the company in liquidation in place of the banks/financial institutions.

6. On the other hand, the Official Liquidator has taken up a stand in the reply that as per provisions of Section 125 of the Act, every charge created by the company whereby any security of the company is conferred as per the charge would be void against the liquidator unless the said charge together with the instrument by which the charge is created are filed with the Registrar of Companies for registration. It is, thus, the stand of the Official Liquidator that the instrument of charge in favour of the applicant has not been registered with the Registrar of Companies and, therefore, the same is void against the liquidator. It has been further pointed out that, as per Section 537 of the Act, any execution without the leave of the Court is void. It is alleged that payment by the applicant to the banks or financial institutions in execution of the decree against the assets of the company in liquidation is void.

7. Learned Counsel for the petitioner has relied upon decision of the Calcutta High Court reported as *India Electric Works Limited (In Liquidation) Union of India v. Official Liquidator* (1983) 53 Com. Cas 573 as well as decision of the Supreme Court reported as *Amrit Lal Goverdhan Lalan Vs. State Bank of Travancore and Others*, to contend that in terms of Sections 140 and 141 of the Indian Contract Act, 1872, the applicant who is a guarantor, on payment of the

amount on behalf of the principal debtor steps into the shoes of the secured creditors and is entitled to every remedy which the creditor has against the principal debtor; to enforce every security and all means of payment and to stand in place of the creditor. It is also argued that Section 125 of the Act is not applicable in the facts of the case as the charge has not been created for the first time by the company.

8. Amrit Lal Goverdhan Lalan's case (supra) is a case where the appellants have executed a contract of guarantee entered into by the partnership firm. One of the aspects considered by the Supreme Court was scope of Section 140 of the Indian Contract Act, 1872 and it was held to the following effect:

...In this connection it is necessary to consider the provisions of Section 140 of the Indian Contract Act, 1872 which states:

Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety upon payment or performance of all that he is liable for is invested with all the rights which the creditor had against the principal debtor(s)

This Section embodies the general rule of equity expounded by Sir Samuel Romilly as counsel and accepted by the Court of Chancery in *Crythorne v. Swinburne* (1807) 14 Ves.160 namely:

The surety will be entitled to every remedy which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of creditor; not only through the modicum of contract, but even by means of securities entered into without the knowledge of surety having a right to have those securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor. This right of a surety also stands, not upon contract but upon a principle of natural justice.

The language of the section which employs the words "is invested with all the rights which the creditor had against the principal debtor makes it plain that even without the necessity of a transfer, the law vests those rights in the surety.

9. A perusal of the said principle leaves no manner of doubt that the surety i.e., the applicant is entitled to every remedy which the creditors i.e., the banks or financial institutions have against the principal debtor i.e., the company in liquidation. Such remedy includes enforcement of every security and all means of payment and to stand in place of the creditor; not only through the medium of contract but also by means of securities entered into without the knowledge of the surety having a right to have those securities transferred to him. It is further held that the law vests those rights in the surety even without the necessity of a transfer.

10. In *India Electric Works Limited (In Liquidation)* case (supra). State Bank of India presented a winding up petition against India Electric Works Limited. However, the said company was taken over u/s 18 of the Industries

(Development and Regulation) Act, 1951 and the entire claim of the bank together with accrued interest was paid by the Central Government to the said State Bank of India. A deed of assignment was executed by the State Bank of India in favour of Union of India in respect of the mortgage by and between the bank and the company. It was submitted that by virtue of the said assignment the Central Government has the right of subrogation under the said deed of assignment, and as such the Central Government stepped into the shoes of the State Bank of India and became a secured creditor of the company (in liquidation). The Official Liquidator communicated a letter to the Joint Secretary, Ministry of Industrial Development and Internal Trade to the effect that as Official Liquidator he has to take formal permission of the High Court before signing the assignment deed. It was further pointed out that if the Court permits the Official Liquidator to join as a party in the assignment deed in that case the Government of India will step into the shoes of the State Bank of India and will become a secured creditor. Since the claim on behalf of the Union of India was filed after some delay, an application was filed for condonation of delay in preferring its claim and filing its proof of debt before the Official Liquidator. Calcutta High Court held that Union of India is a secured creditor and has a right to pursue the claim preferred before the Official Liquidator as a secured creditor. Thus, the applicant satisfying all the claims of the secured creditors in terms of the deed of guarantee steps into the shoes of the secured creditors and, therefore, has all the rights which the secured creditors have against the principal debtor.

11. Section 125 of the Act has no application in the facts of the case inasmuch as the charge has not been created by the company which is required to be registered with the Registrar of Companies. It is an act between the surety and the creditor. It is an act of substitution of surety as secured creditor in terms of deed of guarantee and, therefore, I have no hesitation to hold that the applicant is a secured creditor and is entitled to recover the amount from the company in liquidation and has stepped into the shoes of the banks/financial institutions. Both the company applications stand disposed of in the above terms.