
(2015) 03 DEL CK 0181

In the Delhi High Court

Case No : Co. App. 23/2013 and CM Appl. 5115/2013

Punjab State Power Corporation Limited

APPELLANT

Vs

Ceylon Biscuits Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 02-03-2015

Acts Referred:

Companies Act, 1956 — Section 451(2), 476, 529, 529(1)(c), 529A
State Financial Corporations Act, 1951 — Section 29

Citation : (2015) 3 AD 685 : (2015) 126 CLA 308 : (2015) 189 CompCas 508 :
(2015) 3 CoMPLJ 233 : (2015) 218 DLT 675

Hon'ble Judges : R.K. Gauba, J.;S. Ravindra Bhat, J.

Bench : Division Bench

Advocate : Tara V. Ganju, for the Appellant; Prashanto Chandra Sen, Ankita Salkia and Anushruti, Advocates for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—The present appeal is directed against the judgment and order of the Ld. Company Judge in Company Petition No. 204/2003. The appellant Punjab State Power Corporation Limited (hereinafter referred to as "the PSPCL") is aggrieved by the directions in the impugned order and in respect of payment of electricity charges for the period the premises were under control of the first respondent (hereinafter referred to as "CBIL") during liquidation proceedings.

2. For the purposes of this appeal, only the brief facts need to be re- counted. Sixteen separate winding up petitions were initiated by the creditors of M/s. Bakemans Industries Pvt. Ltd. On 06.04.2004, one of those petitions was admitted and citations were published. A secured creditor i.e. State Industrial Corporation of Maharashtra Limited (hereinafter referred to as "the SICOM") had issued notice under Section 29 of the State Financial Corporations Act, 1951 (hereinafter referred to as "the SFCA") on 22.01.2003. After winding up petitions were filed in Court, a second notice was issued by SICOM on 06.06.2003. In the

meanwhile, disputes between M/s. Bakemans Industries Pvt. Ltd. and one NRI Lead bank were referred to an Arbitral Tribunal pursuant to which, an award was made on 16.08.2003. This led to execution proceedings in which CBIL, purchased the properties in the form of land, plant and machinery at Patiala, Punjab. This auction purchase was eventually set aside by the Supreme Court in its judgment dated 16.05.2008, i.e., Bakemans Industries Pvt. Ltd. Vs. New Cawnpore Flour Mills and Others, . The Supreme Court was of the opinion that the sale of the property in favour of the CBIL treating SICOM as an agent was not sustainable and that the Company Court was obliged to follow mandatory provisions of company law before putting the property to sale.

3. The offshoot of these events was that CBIL was directed to continue in possession of the premises but now as a receiver. The genesis of the present dispute was that on account of default in payment of electricity dues PSPCL disconnected supply to the unit on 16.12.2008. This impelled CBIL to apply to the court (CA No. 1457) seeking urgent orders for restoration of the electricity for purposes of security and maintenance. That application was disposed of by order dated 18.12.2008. Interestingly, the same order also rejected an application for impleadment of PSPCL i.e. CA No. 1458 of 2008. Eventually on 20.12.2010, the company court made an elaborate order covering several issues. The CBIL was directed to re-install some equipments which it had taken away to Sri Lanka; at the same time the Court held that CBIL was entitled to a refund of certain amount by financial institutions along with interest upon the re-installation of the equipments in operational state. Counsel for CBIL and PSPCL highlight different parts of the same order; whereas CBIL heavily relies on Para 46 of that judgment; PSPCL, on the other hand, relies on Para 44 and 45 of the same judgment.

4. In the background of these facts, when the impugned order was made, the Company Judge apparently considered the status of various amounts due to determine which of that fell within description of statutory dues so as to merit treatment under Sections 529 and 529A of the Companies Act, 1956. It is these directions which the PSPCL is aggrieved by.

5. Counsel for the appellant urges that the impugned order is in error of law in that, it treats the dues payable to PSPCL on the same footing as those recoverable by secured creditors. Counsel argues that by virtue of Section 476 of the Companies Act, the Company Court, (in the event of insufficiency of assets which to satisfy the liabilities) is empowered to make an order of the payment out of the assets, of costs, charges, and expenses incurred in the winding up, in the order of priority inter se, emphasizing that electricity dues fall within this category and cannot be treated as secured debt, to be relegated to the status of a pari passu claim of a secured creditor standing in queue. Counsel emphasized that such dues were incurred on account of the order of the court directing CBIL to act as a receiver for protecting and maintaining the property. Ld. Counsel relied upon several judgments, including that of the Andhra Pradesh High Court

in Voltas Ltd. Vs. Allwyn Auto Ltd., ; in Re U.P. State Cement Corporation Ltd. 2007 (9) ADJ 558 [Allahabad High Court]; in Re National Arms and Ammunition Company, 1885 (Ch) 476 to say that the Company Court's determination regarding status of the dues is erroneous.

6. Counsel for CBIL and SICOM argue that the Company Judge has not expressed any final view as to the status of the amount payable to PSPCL. Therefore, they contend that this court should refrain from expressing its views and rather leave to the official liquidator to decide the issue in the circumstances of the case.

7. It is apparent from the above narration that the company was directed to be wound up long back; proceedings commenced on 08.05.2003 with the filing of the winding up petition; a provisional liquidator was appointed on 06.04.2004. The auction resulted in CBIL purchasing the properties in 2004 which was set aside by the Supreme Court in 2008. There is no dispute about the payment of dues for the period CBIL operated the factory. The only dispute is with respect to the period post 16.12.2008 after which the electricity was ordered to be restored - i.e. January, 2009 to January, 2013. This is not disputed by the counsel for the parties.

8. This Court does not agree with the submissions of CBIL and SICOM that the impugned order left questions to be decided by the official liquidator. It is quite apparent that ordinarily it is the official liquidator who would have made arrangement for maintenance of the premises. The obligation to keep the unit and whatever equipment was within it, was placed on CBIL in its capacity as receiver pursuant to the Supreme Court direction. CBIL, had previous experience of running the factory/industrial unit for about four years was of the opinion that bare minimum maintenance was required for purposes of which it sought restoration - which was done in January 2009. This Court does not propose to deal with the nature of the expenses and as to the apportionment of such liability, except to notice that CBIL's admitted dues were spelt out in the order dated 20.12.2010; they were limited upto 15.09.2008/16.10.2008 then. The factual dispute is as to what should be the amount payable by CBIL, and if not paid, what ought to be the consequences. However, in view of the final order this court proposes, it would not be appropriate to express any opinion on this.

9. To decide the main issue i.e. the status of the electricity dues, it would be necessary to notice the relevant provisions. Section 476 of the Companies Act reads as follows:-

"476. Power to order costs. The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order for the payment out of the assets, of the costs, charges and expenses incurred in the winding up, in such order of priority inter se as the Court thinks just."

Rule 338 of the Companies (Court) Rules 1959 reads as follows:

"338. Cost and expenses payable out of the assets in a winding-up by the Court.

(1) The assets of a company in a winding-up by the Court remaining after payment of the fees and expenses properly incurred in preserving, realizing or getting in the assets including, where the company has previously commenced to be wound-up voluntarily, such remuneration, costs and expenses as the Court may allow to the liquidator in such voluntary winding-up, shall, subject to any order of the Court and to the rights of secured creditors, if any, be liable to the following payments which shall be made in the following order of priority, namely -

First - the taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the Court;

Next - the costs and expenses of any person who makes, or concurs in making, the company's statement of affairs;

Next - the necessary disbursements of the Official Liquidator other than expenses properly incurred in preserving, realizing or getting in the properties of the company;

Next - the costs of any person properly employed by the Official Liquidator;

Next - the fees to be credited to Government under section 451(2);

Next - the actual out of pocket expenses necessarily incurred by the members of the Committee of Inspection, and sanctioned by the Court.

(2) Save as otherwise ordered by the Court, no payments in respect of bills of advocates, shall be allowed out of the assets of the company without proof that the same have been considered and allowed by the taxing officer of the Court. The Taxation Officer shall before passing the bills or charges of an advocate, satisfy himself that the appointment of an advocate to assist the liquidator in the performance of his duties has been duly sanctioned.

(3) Nothing contained in this rule shall apply to or affect costs which, in the course of legal proceedings by or against the company which is being wound-up by the Court, are ordered by the Court in which such proceedings are pending, to be paid by the company or the liquidator, or the rights of the person to whom such costs are payable."

10. The above provisions specially bear out PSPCL's submissions that an order with respect to costs, charges and expenses to be incurred in the winding up of a company follow their own pattern of priority and do not depend on Section 529A. Section 529A - which was introduced in 1998 spells out the order of priority in making preferential payments. Section 529A(1)(b) states that the debts due to the secured creditor to the extent that they rank under Section 529(1)(c) *pari passu* with workmen's dues would be payable in full. The ruling in *M/s. Voltas Ltd. v. Allwyn Auto Ltd.* (supra) clarified that clause 529(a) would apply only to the extent that it deals with secured debts and that it would not operate with respect to expenses which is properly the subject matter of Section 476. In *Re:*

U.P. State Cement Corporation Ltd. (supra), the Allahabad High Court had the occasion to deal with electricity dues; the court stated as follows:-

"The directions to continue to supply electricity as such were issued for effective liquidation of the company (in liquidation) and for proper and smooth sale and transfer of the assets to the purchaser. The Court cannot foresee a situation, which may have arisen in the long process of liquidation in refusing to provide basic amenities of the life to the workmen. The continuous supply of the electricity on the residential accommodations provided to the workmen was absolutely essential for effective liquidation of the company (in liquidation) and thus these charges can be included along with the charges of security, inspections, valuation, expenses of settlement claims committee etc., in the liquidation expenses to be borne by the OL for effective winding up of the affairs of the company mid for distribution of its assets. The proviso to Sub- section (2) of Section 529 will not be attracted as it is applicable in a situation where secured creditor, instead of relinquishing his security and proving for his debts, proceeded to realize his security and for that purpose the liquidator to bear the expenses for preservation of security before its realization. The workmen cannot be treated to be secured creditors, who do not relinquish their security and proceed to realize their debts as security."

11. It is, thus, clear that the amounts paid or payable towards maintenance and other allied expenses, necessary to keep the asset or assets in good repair or protect them, cannot be characterized as secured debts so as to be covered by Section 529A. They are undoubtedly expenses within the meaning of Section 476. In the present case, the impugned order of the Single Judge left the actual determination of the amounts to the official liquidator. This Court does not propose to alter that direction; however, it is open to the PSPCL and all other parties to urge such contentions as are available to them in respect of the charges claimed by the former. It is submitted by PSPCL that the dues payable for the disputed period are not only in respect of electricity charges of actual consumption, but also charges recoverable on account of services and monthly minimum charges and "wheeling charges", without which such services cannot be made available to the individual unit, as in the case of the factory in question. The Official Liquidator (OL) shall go into these rival contentions and decide the issue having regard to the submissions made as to whether any apportionment is to be made between the various respondents and if so, to what extent.

12. The appeal is allowed in the above terms. The PSPCL shall file its comprehensive claim with respect to the amounts to be paid for the disputed period i.e. January, 2009 to January, 2013 within six weeks from today, before the official liquidator.

The OL shall then, after providing reasonable opportunity to the parties likely to be affected by his order, decide on the merits of the claim in accordance with law within four months from today. All contentions of the parties are kept open.