

(2002) 04 RAJ CK 0089

In the Rajasthan High Court

Case No : Civil Miscellaneous Application No. 63 of 2001 and SB Company
Petition No. 48 of 1999

Rajasthan State Industrial Development and Investment
Corpn. Ltd.

APPELLANT

Vs

Official Liquidator of Shree Shiva Spinners Ltd.

RESPONDENT

Date of Decision : 05-04-2002

Acts Referred:

Companies Act, 1956 — Section 446, 457

State Financial Corporations Act, 1951 — Section 29, 30, 46

Citation : (2002) 04 RAJ CK 0089

Hon'ble Judges : S.K. Keshote, J

Bench : Single Bench

Advocate : Ajit Bhandari, for the Appellant; Amod Kasliwal, for the Respondent

Final Decision : Allowed

Judgement

S.K. Keshote, J.—This application is filed by the Rajasthan State Industrial Development & Investment Corporation Ltd., Jaipur u/s 446(2) and (4) read with Section 457(3) of the Companies Act, 1956 and rules 6 and 9 of the Company (Court) Rules, 1959.

2. In this application prayer has been made by the applicant to grant it leave to remain out of the winding-up proceedings and to realise its dues by exercising powers under the State Financial Corporation Act, 1951 by selling all the assets of the Company in respect of which mortgage/ charge/hypothecation has been created in favour of the applicant as a secured creditor by taking the possession of the mortgaged and hypothecated properties from the Official Liquidator who is having possession of the said assets after winding up order dated 16-3-2000 passed by this Court. It is prayed to pass any other further order by the Court as it may deem fit and proper in the facts and circumstances of the case in favour of the applicant.

3. It is not in dispute that Shree Shiva Spinners Ltd. (in liquidation) was ordered

to be wound up by the Court under the order dated 16-3-2000 on the recommendation as made u/s 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 by the Board for Industrial and Financial Reconstruction (BIFR). Reply to this application has been filed by the Official Liquidator to which rejoinder has been filed by the applicant.

4. In reply the Official Liquidator has come up with the case that after taking possession of the assets of the company in liquidation by him on 6-4-2000, he vide its letter dated 5-5-2000 asked the applicant-company as to whether it intended to remain outside the winding-up proceedings and if so to move the necessary application before the Court, but inspite of the said communication, the applicant-company has not chosen to move appropriate application before this Court. It is only now after a period of almost one year that the present application has been filed. In para 9 of the reply it is stated that the applicant is liable to pay an amount of Rs. 2,466 per month towards pro rata share of the security expenses being incurred by the Official Liquidator. But after February 2001, the applicant has not deposited with the Official Liquidator its share of Rs. 2,466 p.m. towards the security expenses for the properties of the company in liquidation. Another objection has been raised that the applicant-company is liable to first get the debt determined by way of filing an application u/s 19 of the Banks and Financial Institutions Act, 1993 as like other financial institutions and then only it is entitled to get the said debt satisfied through the assets and properties of the respondent-company. Alternatively it is submitted that the applicant to file its claim before the Official Liquidator for determination of its debt against the respondent-company in liquidation and then only to proceed for recovery of the same. In reply it is prayed that the application filed by the applicant-company may be decided accordingly.

5. In the rejoinder in para 3 thereof the applicant stated that the Official Liquidator had raised last demand of Rs. 14,800 for security expenses from March 2001 to September 2001 vide its letter dated 18-9-2001. The amount of Rs. 14,800 against said demand has already been paid by the applicant vide letter dated 3-11-2001 enclosed cheque No. 827495 dated 6-10-2001 drawn on Bank of Rajasthan Ltd. So as to other objection raised by the Official Liquidator, the applicant submitted that the Banks and Financial Institutions Act, is not applicable to the applicant as it is not a financial institution as defined u/s 2(h) of the Act. The statement of accounts has been filed along with the rejoinder to the reply. So far as applicability of the provisions of the Companies Act, is concerned, the applicant has come up with the case that the provisions of the State Financial Corporation Act, being the special provisions, they override the provisions of the former Act. Reference has been made to Section 46B of the State Financial Corporation Act. It is averred that the applicant being a secured creditor has a choice to opt to remain out of winding-up proceedings of the loanec company and it can proceed to realise its dues in the manner provided under the 1951 Act.

6. I have given my thoughtful consideration to the averments made in the

pleadings of the parties and to the oral contentions raised by the learned counsel appearing for them. In the case of Central Bank of India Vs. M/s. Elmot Engineering Co. and others, Their Lordship's of the Supreme Court observed that the object of Section 446 is to safeguard the assets of the company in winding-up against wasteful or expensive litigation as far as matter which could be expeditiously and cheaply decided by the Company Court are concerned. The Official Liquidator does not dispute that the applicant is a secured creditor of the company (in liquidation). It is uncontroverted that RIICO had sanctioned an interest-bearing term loan amounting to Rs. 90 lakhs to the company (in liquidation) on first charge basis by mortgage and hypothecation of the existing and future fixed assets of the company. The company (in liquidation) was also sanctioned a Central Investment Subsidy of Rs. 25 lakhs. It is also uncontroverted that the repayment of loan amount and central subsidy together with interests, additional interest, liquidated damages, commitment charges, costs, charges, expenses and other monies was secured by the company (in liquidation) by joint equitable mortgage by deposit of title deeds of land and buildings and other immovable properties with the applicant. It is also undisputed that the applicant is acting as an agent of Rajasthan Financial Corporation and Punjab National Bank for their term loans assistance of Rs. 59.70 lakhs and Rs. 8 lakhs, respectively, and by hypothecation of plant and machinery and other movable fixed assets of the company to RIICO. The certificate of registration of mortgage, etc., with the company (in liquidation) and the applicant issued by the Registrar of Companies on 21-4-1987 for Rs. 115 lakhs has been submitted along with application. The applicant has been conferred with the powers under various provisions including powers under sections 29 and 30 of the State Financial Corporation Act, and the reference here may have to the notification issued u/s 46 of the Act aforesaid bearing No. GSR 191 dated 27-2-1987 of the Central Government which has been published in Part II, Section 3(i) of the Gazette of India dated 21-3-1987. This is also an undisputed fact that the Official Liquidator is in possession of the assets of the company since 6-4-2000. The Official Liquidator has not filed any counter to the rejoinder to its reply filed by the applicant. Otherwise also when the applicant made statement on oath in the rejoinder that Rs. 14,800 for the security expenses from March 2001 to September 2001 has been paid to the Official Liquidator, it has to be accepted, more so when it is not controverted. Till day the assets of the company in liquidation remains with the Official Liquidator, the applicant is under a legal obligation to pay to it pro rata share of Rs. 2,466 p.m. for the security expenses. For this, the Official Liquidator is free to raise this demand and as and when this demand is raised, the applicant has to make the payment thereof forthwith. The learned counsel for the applicant also very fairly submitted that it is a matter of raising demand by the Official Liquidator under this head and as and when such a demand is made; the applicant will make the payment thereof. In view of this stand so far this objection of the Official Liquidator against the application of the applicant is concerned no more sustains.

So far second objection of the Official Liquidator that the applicant has to get adjudicated and determined its claim against the company (in liquidation) either under the Bank and Financial Institutions Act, or under the Companies Act by the Official Liquidator, it is suffice to say that for this the Court will take all care in the matter. If the Court permits the applicant to remain out of winding-up proceedings, it does not mean nor it is the law that the Courts supervision goes. By remaining out of winding up proceedings, it only means that the applicant may take the possession of the assets of the company in liquidation in respect of which mortgage, charge, hypothecation has been created in its favour as a secured creditor and to proceed to sell the assets, but it cannot adjust from what sale proceeds received towards its alleged claim. The sale of assets of the company as and when is made by the applicant shall be subject to the confirmation by the Court. Similarly, disbursement of the sale proceeds shall also be under the orders of the Court. In view of this legal position and the provisions of the Companies Act, this objection raised by the Official Liquidator is not of any substance and on this count this application cannot be thrown out.

7. As a result of the aforesaid discussion, this application succeeds and the same is allowed. The Rajasthan State Industrial Development & Investment Corporation Ltd., Jaipur is permitted to remain out of winding-up proceedings, however, subject to the conditions; (1) it shall submit its claim before the Official Liquidator within one month from the date of receipt of the certified copy of this order; (2) it shall take appropriate steps for sale of assets of the company (in liquidation) without any delay. In making the sale of the assets of the company (in liquidation) it will report day to day progress thereof to the Official Liquidator. The applicant shall inform to the Rajasthan Financial Corporation, Jaipur as well the concerned branch of the Punjab National Bank of this order and further to inform that if they so desire may associate with applicant in the matter of sale of assets of the company (in liquidation). Where the Rajasthan Financial Corporation, Jaipur and the concerned branch of the Punjab National Bank has desired to associate with applicant in sale of the assets of the company (in liquidation) the applicant shall form a committee of its senior officers with two officers each of those two institutions nominated by their Chairman-cwm-Managing Director. The applicant shall also inform the date, time and place of the sale of the assets of the company (in liquidation) to the Official Liquidator. The sale of assets both movable and immovable shall be subject to the confirmation of the Court. The amount realised on sale of assets of the company in liquidation shall be kept by the applicant in a separate account. It shall not be permissible to the applicant to withdraw any sum from this separate aforesaid account to be opened without prior approval of the Court. The applicant shall on completion proceedings of sale of the assets of the company in liquidation shall submit the proceedings thereof along with its report to the Official Liquidator. It shall if necessary also submit the statement of expenses incurred by it in those proceedings. On receipt of the report with the proceedings of the sale of the assets of the company (in liquidation) and statement of expenses incurred by the

applicant in those proceedings, the Official Liquidator shall submit the appropriate application on administrative side in the Court. The Official Liquidator is directed to hand over the possession of all the assets of the company in liquidation which are taken in possession by him on 6-4-2000 in pursuance of the winding up order of the company (in liquidation).

8. The application stands disposed of accordingly. No order as to costs.