(2015) 04 P&H CK 0321

In the Punjab And Haryana At Chandigarh

Case No : C.A. Nos. 206 and 207 of 2015 in C.P. No. 53 of 2014

SFL Industries Ltd. APPELLANT

Vs

Reliance Capital Ltd. and Others RESPONDENT

Date of Decision : 09-04-2015

Acts Referred:

Companies Act, 1956 — Section 457(1)(c), 48, 529-A
Transfer of Property Act, 1882 — Section 48

Citation : AIR 2015 P&H 116

Hon'ble Judges : Amit Rawal, J

Bench : Single Bench

Advocate : Nitin Jain and M. Jayakumar, Official Liquidator., for the Appellant; Manish Jain, Aalok Jagga and Karanyog Singh Riar, Advocates for the Respondent

Final Decision : Allowed

Judgement

Amit Rawal, J

1. The application is allowed.

2. Exemption from filing certified copies of Annexure A-1 toA-10 is granted.

CA No. 207 of 2015

3. The question posed which arise for determination in the present Company application is whether in terms of Section 48 of the Transfer of Property Act, 1882 the claim of first charge holder shall prevail over the claim of the second charge holder or not. In order to adjudicate the question raised in the present appeal it would be apt to refer brief facts.

4. M/s. SFL Industries Ltd. the Company (in liquidation) had been ordered to be wound up by order dated 26.5.2005 passed by this Court in CP No. 53 of 2004. The aforementioned order was passed on the recommendation of Board of Industrial and Financial Reconstruction (BIFR). Accordingly the Official Liquidator attached to this Court was appointed. The O.L. is stated to have carried out an

inspection in the office of Registrar of Companies, Jalandhar (now at Chandigarh) and as well as the registered office/factory premises of the Company (in liquidation) situated at Village and Post Office Railmajra, Tehsil Balachaur, Distt. Rupnagar now in Distt. Nawanshahar and on inspection it has been found that respondent Nos. 2, 3 and 4 and State Bank of India and ICICI Bank are the Secured Creditors of the Company. Vide order dated 25.9.2009, passed in C.A. No. 651 of 2009, this Court allowed the application for substitution of M/s. Reliance Capital Limited as an Assignee in place of State Bank of India and similarly in C.A. No. 615 of 2009, decided on even date, similar application of Standard Chartered Bank to be substituted in place of ICICI Bank Ltd. was allowed. Thus, M/s. Reliance Capital Limited and M/s. Standard Chartered Bank were impleaded as respondent No. 1 and 5.

5. An application under Section 457(1)(c) of the Companies Act 1956 (hereinafter called as ''1956 Act'') was moved by the Official Liquidator for seeking permission of this Court to sell movable and immovable properties of the Company (in liquidation) and also to invite the claims of the workmen and the creditors of the company (in liquidation).

6. This Court vide order dated 25.9.2009 passed in CP No. 105 of 2009 permitted the Official Liquidator to sell the assets of the Company (in liquidation). Accordingly a public notice was caused in Punjab Kesari (Hindi) on 6.2.2010, The Tribune (English) on 4.3.2010 and Ajit (Punjabi) on 6.3.2010. Various claims viz-a-viz workmen, Secured Creditors and other Creditors of Companies (in liquidation) were received by the Official Liquidator. M/s. A.K. Sood and Associates, Chartered Accountant on the panel of the office of Official Liquidator was appointed for scrutiny of the claims of workmen/creditors.

7. Vide Order dated 5.8.2011, passed in CP No. 79 of 2011, this Court confirmed the sale for an amount of Rs. 4.91 crores in favour of M/s. Mamta Steel Corporation, thereafter vide order dated 16.1.2015 directions were issued to Chartered Accountant to work out the claims of different parties and submit his final report with the Official Liquidator on or before 2.3.2015 and the Liquidator was given liberty to move an appropriate application for apportioning the dividend to various claims on or before 16.3.2015. The Chartered Accountant submitted his revised report dated 17.3.2015 and as per the said report an amount of Rs. 4,94,59,485/- has been considered for an apportionment of funds amongst the workmen and Creditors of the Company (in liquidation). The Official Liquidator submitted the claim status in respect of the workmen, statutory, dues of different departments ESI, PF as well as all the Secured Creditors.

8. It is in these circumstances the Official Liquidator moved a Company Application No. 207 of 2015 with the following prayer:-

"i) the Chartered Accountant report dated 17.3.2015 annexed as Annexure A-9 with the instant application may kindly be taken on record and the official liquidator may please be allowed to release the payment to the creditors (subject to condonation of delay of 2 days in filing the claim of ICICI Bank Limited) and workmen as per report of the Chartered Accountant as given in para 25 herein above if, the secured creditors/creditors have no objection and subject to availability of funds and on furnishing of undertaking by the creditors that if, any amount paid is found in excess in future or any other liability arise in future against the company (in liqn.) the same will be refunded, as and when directed by this Hon''ble Court or by the Official Liquidator along with interest as this Hon''ble Court may deem fit from the date of receipt of amount''

ii) the official Liquidator further prays that there may be some workers, who have unfortunately passed away, the Official Liquidator may kindly be allowed to release the payment to their legal heirs without insisting for succession certificates as otherwise required as per Rule 280 of the Companies (Court) Rules, 1959 on furnishing of Indemnity Bond along with Legal Heir Certificate from competent authority such as SDM/Tehsildar/Municipal corporation/ committee or from Gram Panchayat;

iii) the Official Liquidator may kindly be exempted from publishing notice in newspapers regarding declaration of dividend as envisaged Under Rule 276 of the Companies (Court) Rules 1959 in view of there being less number of creditors and also since the Official Liquidator will be sending individual notices to the creditors herein and the Official liquidator may kindly be permitted to incur postal and other incidental expenses to be incurred to issue of individual dividend notice to the workmen out of the sale proceed of the company (in liqn.)

iv) the exemption may kindly be granted from compliance of procedure prescribed in Rules, 148(2), 163, 167 and 169 of the Companies (Court) Rules 1959;

v) the official liquidator may kindly be authorized to make the payment of dividend to creditors as per Rule 227 and 278 of the Companies (Court) Rules, 1959.

vi) in terms of this Hon''ble Court order dated 16.1.2015 in C.A. No. 11/2014 the ICICI Bank Limited may please be directed to remit the professional fee bill of the Chartered Accountant dated 17.3.2015 (Annexed as Annexure A-10) to the tune of Rs. 2,11462/- and on receipt of the same the Official Liquidator may also be allowed to pay the professional bill of the Chartered Accountant, and

vii) any such other order or direction as Hon''ble High Court may deem fit and proper under the circumstances of the case may also kindly be passed."

9. When the application came up for preliminary hearing the counsel appearing on behalf of the ICICI Bank the first charge holder and Bank of Baroda second charge holder submitted their respective arguments.

10. Mr. Aalok Jagga, learned counsel appearing on behalf of Bank of Baroda submitted that the Official Liquidator has not taken care of the dues of the Bank of Baroda, though admittedly the Bank of Baroda is having the second charge

registered with the Registrar of Companies. He has further submitted that the Chartered Accountant did not call the officials of Bank of Baroda for determination of their claims. It is a matter of record that the Bank of Baroda and State Bank of India (now Reliance Capital Ltd.) have second charge on stock and debtors.

11. Mr. Manish Jain, learned counsel appearing on behalf of IFCI submitted that the Bank of Baroda has only first charge of stock and debt and not in respect of fixed assets qua which Bank of Baroda (Now Reliance Capital Ltd.) has second charge. He further submitted that the claim of first charge holder shall prevail over the second charge holder. In support of his contentions he has cited two judgments of Hon''ble Supreme Court in ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others, AIR 2006 SC 2088 : (2007) 2 BC 51 : (2006) 131 CompCas 451 : (2006) 5 CompLJ 470 : (2006) 2 CTC 847 : (2006) 6 JT 274 : (2006) 5 SCALE 27 : (2006) 10 SCC 452 : (2006) 67 SCL 383 : (2006) 1 SCR 528 Supp : (2006) AIRSCW 2361 : (2006) 6 Supreme 148 and Employees Provident Fund Commissioner Vs. O.L. of Esskay Pharmaceuticals Limited, (2011) 13 JT 104 : (2011) 12 SCALE 479 : (2011) 6 UJ 3800 .

12. He further submitted that Bank of Baroda has given the distorted picture to this Court qua not being associated by the Chartered Accountant while determining the claims of the respondent-Secured Creditors. In this context he drew the attention of this Court to the report dated 17.3.2015 (Annexure A-9) of Chartered Accountant.

13. I have heard learned counsel for the parties and appraised the paper book and the case law cited in support of their respective submissions.

14. The plea of Mr. Aalok Jagga that Bank of Baroda was not associated by the Chartered Accountant, falls flat from the perusal of the report dated 17.3.2015 of the Chartered Accountant (Annexure A-9) it is evident that numerous letters were sent by registered/speed post/reminders to the Bank of Baroda to provide the information/documents, but the Bank of Baroda, did not submit any reply and when a strong worded letter dated 2.4.2012 was issued, copy whereof was also endorsed to the Managing Director, Bank of Baroda, as well as Official Liquidator despite that the Bank failed to prove the details like i) proof of disbursement made from time to time, ii) modified claims iii) details depicting break up of amount due at the time of winding up of the Company which co-relates with the amount in the Statement of Account sheet of the Company. The Chartered Accountant after noticing the aforementioned fact opined that second charge holders are entitled to funds after the payment of first charge holders and the Bank of Baroda though through did not furnish the documents but yet appeared before him, cited the judgment in Jitender Nath Single Vs. O.L. by stating that the provisions of Section 529-A are conspicuously silent qua admission of claim of first and second charge, therefore all the Secured Creditors should be treated at par.

15. I am afraid that the plea of Bank of Baroda by relying upon the provisions of Section 529-A has no merit, in as much as that, the Hon''ble Supreme Court had already culled out the ratio decidendi in ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and others''s case (supra) by holding that though Section 529-A of the Companies Act, 1956 speaks about the respective rights of the Secured Creditors viz-a-viz Secured and Unsecured Creditors but yet once the aforementioned provision do not specifically provide for rights of priorities over the mortgaged assets, the Court cannot remain oblivious of the provisions of Section 48 of the Transfer of Property Act in relation to the Company which had undergone liquidation. The Hon''ble Supreme Court also had an occasion to deliberate upon the applicability of Section 48 filed under Companies Act. Since special statute is silent qua dealing with the contractual and other statutory rights between the different kinds of secured creditors, then in that eventuality the specific provisions contained in the statute shall prevail. Similar is the view laid down by the Hon''ble Supreme Court in Employees Provident Fund Commissioner''s case (supra) wherein the Hon''ble Supreme Court had an occasion to deal with the scope of funds of the workmen by placing them on par with the debts due to the Secured Creditors. Since it is a matter of record that the Bank of Baroda has second charge on the assets/stocks and debts of the Company (in liquidation) and first charge holder of immovable assets are entitled to realization of their dues from the Company (in liquidation). In other words they will have the right to recover first along with claims of the other workmen and borrowers if some amount is left with the second charge holder i.e. Bank of Baroda would be entitled to their statutory claims as per the provisions of Section 529-A of the Companies Act, 1956 as other Secured Creditors shall deemed to be holding pari passu charge in favour of the workmen.

16. The Company Application is thus allowed.

17. The ICICI Bank is directed to remit professional fee of Chartered Accountant. The Official Liquidator is also directed to release the payment to the legal heirs of the workmen who have unknowingly passed away, without insisting for succession certificate as per Rule 280 of the Companies (Court), 1959. Exemption is also granted for prescribing the procedure under Rule 48, 63, 167, 169 of 1959 Rules.

18. The Officials Liquidator is thus authorized to make the payment for dividend to the Creditors strictly as per Rules 277, 278 of 1959 Rules.