

(2001) 07 DEL CK 0015

In the Delhi High Court

Case No : Company Appeal No. 27/96

Shivalik Agro Poly Products Limited

APPELLANT

Vs

Disco Electronics Limited (In Liquidation)

RESPONDENT

Date of Decision : 25-07-2001

Acts Referred:

Companies Act, 1956 — Section 46B

State Financial Corporations Act, 1951 — Section 29, 29(1), 32E, 32E(1), 5)

Citation : AIR 2002 Delhi 10 : (2003) 114 CompCas 398 : (2001) 59 DRJ 698

Hon'ble Judges : Sanjay Kishan Kaul, J;Devinder Gupta, J

Bench : Division Bench

Advocate : Mr. Sandeep Sethi, for the Appellant; Mr. Amit Duggal, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—The appellant company is aggrieved by the impugned order dated 13th September, 1996 of the learned Company Judge setting aside the sale of property no.A-83., Okhla Industrial Area, Phase-II, New Delhi (referred to as Property) made. In favor of the appellant company by the Delhi Financial Corporation (referred to as DFC).

2. The learned Company Judge has given a finding in the impugned order that the sale effected by DFC was for inadequate consideration and contrary to the subsisting injunction order of the court and the order appointing provisional liquidator in respect of M/s.Disco). M/s.Disco created a mortgage in favor of DFC on 20th January, 1986 for availing of certain loan facilities. There were defaults by Disco in complying with its financial obligations as a result whereof DFC recalled the loan in December,1990 and advertised for sale of the property in October, 1991. The appellant company responded to the said notice for sale. DFC issued another notice dated 29 the October, 1991 to Disco threatening to take over possession of the property and the machinery installed in the property. In the meantime the appellant company also applied for a short term loan facility from the DFC. On 23rd February, 1992 DFC took over the property along with

machinery lying at the premises.

3. A petition for winding up against Disco was filed by its creditors on 3rd March, 1992 which was initially returned under objections and finally came up for admission on 14th March, 1992. DFC was not a party to the petition. On 4th June, 1992 DFC advertised for sale of the property. The proceedings for confirmation of sale continued and on 22nd June, 1992 the highest bid of Rs.18 lacs was received. As a consequence thereof the DFC called upon Disco to produce the highest bidder but nothing materialised. A final notice was issued by the DFC on 24th July, 1992. DFC received a bid of Rs.28.5 lacs from the appellant which was accepted on 23rd September, 1992. In the beginning of October, 1992 DFC sanctioned loan in favor of the appellant company and on 15th October, 1992 issued an order u/s 29 of the State Financial Corporation Act (referred to as Act) in respect of the property in favor of the appellant company. On 16th October, 1992 the appellant company entered into an agreement with DFC in pursuance to the said transfer/sale order and on 23rd March 1993 the appellant company executed a deed of mortgage in favor of DFC by a registered deed.

4. There were certain developments which took place during this process of the DFC taking necessary action in respect of the assets of Disco and transferring to the appellant company. These developments took place in the proceedings initiated by the creditors of Disco. On 4th August, 1992 an order was passed by the learned Company Judge restraining Disco from disposing of any assets or making any payment to the creditors and on 29th September, 1992 the winding up petition was admitted and official liquidator was appointed as a provisional liquidator to take possession of the assets and machinery of Disco. On 19th October, 1992 the order of status quo as to possession was passed by the learned Company Judge and on 15th November, 1992 a restraint order was granted in respect of the possession of the property and the goods in question. Thus, at the time when the DFC was acting in pursuance to the powers vested in it by the Act, certain restraint orders were passed by the learned Company Judge though DFC was not a party to the proceedings.

5. The contention of the DFC before the learned Company Judge was that they had already issued final notice on 24th July, 1992 prior to the admission of the winding up petition and appointment of the provisional liquidator. Further the offer of the successful bidder being the appellant company was received on 23rd September, 1992 which was also prior to the appointment of the provisional liquidator though subsequent to the restraint order granted on 4th August, 1992. Thus it was the contention of the DFC that only delivery of possession took place on 16th October, 1992. DFC strongly relied on the power conferred on it in pursuance to the provisions of the Act more specifically section 46B to contend that the same would override the provisions of the Companies Act, 1956. It was thus the submission of DFC that in view of the powers conferred on it u/s 29 of the Act DFC is deemed to have acquired the rights to deal with the property as its owner and the owner is left with no rights.

6. The Official Liquidator, inter alia, opposed the sale on the ground that in view of the restraint order against Disco, DFC could not have acquired a superior right to Disco to sell it to the appellant company.

7. Mr. Sandeep Sethi, learned counsel for the appellant has strongly relied on the provision of section 29 and section 32E of the Act. This is in line with the submission made before the learned Company Judge on behalf of DFC and naturally so as the interests of the DFC and the appellant company are common to that extent as the transfer in favor of the appellant company was by the DFC.

8. It is necessary to analyze the effect of section 32E of the Act to determine the controversy in question. To appreciate the ambit of the section reference may be made to section 29 of the Act. In terms of section 29 sub-section 5 of the Act where an action has been taken against an industrial concern u/s 29 sub-section 1 of the Act, the Financial Corporation shall be deemed to be the owner of such concern for purposes of suits by or against the concern. In terms of section 29 sub-section 1 of the Act the Financial Corporation has the right to take over the management or possession or both of the industrial concern as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation when the industrial concern is in default of the payment of its financial liability to the Financial Corporation.

9. Section 32E(1)(c) of the Act provides that where management of an industrial concern which is a company under the Companies Act is taken over by the Financial Corporation then no proceedings for winding up of such concern or for appointment of Receiver in respect thereof shall lie in any court except with the consent of Financial Corporation. It is thus the contention of the learned counsel of r the appellant that the winding up proceedings couldn't have continue din view of the prior action of the DFC. It is contended that though there was no take over of the management by the DFC of Disco but possession of the industrial concern was taken over and sold to the appellant company. Mr. Sandeep Sethi, learned counsel for the appellant advanced submission that the take over of possession referred to in section 32E of the Act includes taking over of management keeping in mind the object, purpose and role of the Financial Corporation. In respect of this submission it is contended that the business of a Financial Corporation under the Act is to grant and recover loans and not to manage the business. The role of revival and rehabilitation is under the Sick Industrial Companies (Special Provisions) Act, 1985 and not under the Act. In support of his submission Mr. Sethi relied upon a Division Bench judgment of the Patna High Court in the case of Bihar State Financial Corporation Vs. Jute Mill Mazdoor Sabha and Others, . The Division Bench of the Patna High Court while considering the scope and ambit of section 29 of the Act was of the view that the purpose behind taking over of management or possession or both of the industrial concern is to secure and realise loan advanced by the Financial Corporation and not running the industrial concern.

10. Mr.Sethi, learned counsel for the appellant further submitted that the concept of taking over of possession is much larger than the taking over of the management since a person in possession must necessarily be in management. In any event he submitted, that in the present case since the unit was lying shut down and was not operational. Thus there would be no question of taken over by management on a day-to-day basis and thus the take over of the management is synonymous of taking over of the possession. Mr. Sethi also referred to the treatise of Words and Phrases, Volume 33 published by West Publishing House where the expression "possession" has been defined its various ramifications. Possession has been defined to include control and management of defendant as also of owning or having a thing in ones power and right to deal with the property at pleasure excluding other persons from meddling with it.

11. Lastly Mr.Sethi contended that the unit has been run by the appellant since it came into possession and it continues to be running at present as by an interim order the dispossession of the appellant had been stayed by the Division Bench of this court.

12. The appellant also filed a CM No.3501/99 for direction to DFC to restore to the appellant the original documents of the property in view of the fact that appellant had discharged the entire loan of DFC. This application also contained a prayer of early hearing and so the application was not allowed. Purpose of referring to this application is only for the limited purpose of taking into consideration the fact of the appellant company being in possession and having no liability to DFC at present.

13. We have considered the submissions advanced by Mr.Sandeep Sethi, learned counsel for the appellant and have gone through the record of the case. Mr.Sethi has taken us through the impugned judgment. In our view the appellant is entitled to succeed in the current appeal in view of the fact that winding up petition itself would not be maintainable without the sanction of the Financial Corporation in view of the provisions of the Act. Thus the restrain orders passed in the winding up petition to which the DFC was not a party would not assist the official liquidator in resisting sale to the appellant.

14. It has to be appreciated that present concern was not even a running concern and at the time when the possession was taken over and handed over to the appellant there could be no question of taking over the management of the company. Thus the expression "management" and "possession" would be synonymous, at least for the purposes of the present case inasmuch as Disco was to a running concern at the relevant date. The Act is a special Act providing security to the Financial Corporation for purposes of recovery of its dues and the rights of a Financial Corporation thus must be protected. It is an undisputed position that amounts were owed to the DFC and after notices DFC did take over the possession of the land and assets of the company. Complete procedure was followed and it is only after that the sale was confirmed in favor of the appellant company. The financial Corporation thus become owner of the assets in view of

section 29(5) of the Act prior to its sale.

15. What seems to have weighed with the learned Company Judges is the fact that there was an interim order passed by the Company Court and thus there could have been no question of the Financial Corporation acquiring superior rights to Disco. However, what has to be appreciated is that in view of the provisions of section 32E sub-section 1 of the Act no proceedings could lie in any court without the consent of the Financial Corporation. The DFC took over the property on 23rd February, 1992 while the petition by the creditors was filed on 3rd March, 1992. In fact the restraint order was passed only on 4th August, 1992 and the winding up petition was admitted on 29th September, 1992. In view of the sequence of these dates and the fact that the DFC had taken over possession of the property prior to these proceedings on 23rd February, 1992 and in respect thereof possession and management being synonymous as the company was lying closed, the proceedings could not have been initiated without the permission of the DFC.

16. We may also add that considerable time has since passed and the appellant company is running its affairs in the property and has on fact repaid the loans availed of it by the DFC.

17. In view of the aforesaid facts and circumstances the impugned order dated 13th September, 1996 is set aside and the appeal is allowed. The sale effected in favor of the appellant company is thus confirmed. The parties are left to bear their own costs.