
(2004) 08 DEL CK 0091

In the Delhi High Court

Case No : C.A. No's. 1339 of 2000, 563 and 716 of 2003 in C.P. No. 159 of 1994

Sneh Contracts (P.) Ltd.

APPELLANT

Vs

Tara Cements Pvt. Ltd.

RESPONDENT

Date of Decision : 13-08-2004

Acts Referred:

Companies Act, 1956 — Section 529, 529(1), 529A, 531

State Financial Corporations Act, 1951 — Section 29, 31, 32, 46B

Citation : (2005) 128 CompCas 908

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Rana Ranjit Singh, Adv Atul Kumar, Adv R.K. Kapoor, Adv S.K. Luthra, for the Appellant; Randhir Jain, for the Respondent

Judgement

A.K. Sikri J.

1. Tara Cements Private Limited, against whom C. P. No. 159 of 1994 was filed for winding up by the petitioner had taken finance from the Haryana Financial Corporation (HFC) as well and the immovable and movable properties were mortgaged/hypothecated with HFC. As the respondent-company failed to make payment to the HFC, the HFC put the property on land measuring 15 kanals 9 marlas situated in the revenue estate of village Tajpur, Tehsil Narnaul, District Mahendragarh to auction by inviting tenders. After various attempts ultimately the bid of Sh. Mukesh Kumar Sanghi, the applicant herein was accepted at Rs. 18 lakhs by the High Level Committee of HFC, vide order dated November 26, 2001. The applicant had deposited a sum of Rs. 15,000 at the spot on the date of auction and Rs. 2.70 lakhs, to cover 15 per cent. of the bid amount, after receipt of letter dated November 26, 2001. On January 23, 2002, an agreement to sell was entered into between the applicant by which time total payment of Rs. 4.50 lakhs was made by the applicant which was recorded in the agreement and it represented 25 per cent. of the total consideration. Remaining 75 per cent. amount was to be paid in twelve Installments along with interest on the total

outstanding amount. The applicant made certain payments from time to time in the following manner :

Rs. 1,12,500 + Interest before 1-5-2002

Rs. 1,12,500 + Interest Installment on 1-8-2002

Rs. 1,12,500 + Interest 3rd Installment on 1-11-2002

Rs. 1,12,500 + Interest 4th Installment on 1-2-2003

2. Besides Rs. 50 thousand was deposited on April 10, 2003, in advance to be adjusted against Installment falling due on May 1, 2003.

3. However, before full payments could be made and sale deed could be executed in favor of the applicant, because of the winding up orders passed in this petition the official liquidator visited the premises in question on April 6, 2003, pursuant to the orders passed by this Court. The applicant narrated the details of sale of the unit to him by the HFC which is reflected in the proceedings dated April 6, 2003, prepared by the team of the official liquidator. However, on April 16, 2003, the premises were sealed. In these circumstances in the application (C. A. No. 563 of 2003) filed by the applicant-Mr. Mukesh Kumar Sanghi, he has prayed for unsealing of the premises and handing over the possession thereof to him. The HFC has also filed C. A. No. 716 of 2003 making similar prayer, i.e., desealing of the property on land measuring 15 kanals 9 marlas situated in the revenue estate of village Tajpur, Tehsil Narnaul, District Mahendragarh.

4. In the reply filed by the official liquidator, he has taken the plea that agreement to sell alleged to have been entered between the applicant and HFC on January 23, 2002, pursuant to sale proclamation published in Economic Times dated September 24, 2001, is null and void as it would amount to "fraudulent preference" within the meaning of Section 531 of the Companies Act, 1956 (for short "the Act"). In support of this plea, it is pointed out by the official liquidator that the winding up petition was presented on August 30, 1994, in which order dated February 28, 2003, was passed winding up the company provisionally and appointing the official liquidator attached to this Court as the provisional liquidator with direction to take over the assets/goods of the respondent-company. This order shall relate back to the date of commencement of winding up proceedings, i.e., August 30, 1994 and Therefore agreement to sell dated January 23, 2002, is "fraudulent preference" and is liable to be set aside. The petitioner joins the official liquidator improving upon the aforesaid factual position narrated by the official liquidator. It is stated that there was another petition filed initially by M/s. Puran Chand Packaging Industries Private Limited which was admitted to hearing on February 21, 1997 and citations were directed to be published in Statesman and Jansatta as well as Delhi Gazette. The HFC took over the factory premises in its possession u/s 29 of the State Financial Corporations Act, 1951 (hereinafter called as "the SFC Act") on February 22, 1997. The petitioner-Sneh Contracts Private Limited filed C. A. No. 651 of 97 for

its substitution in place of M/s. Puran Chand Packaging Industries Pvt. Ltd. which was allowed, vide order dated December 4, 2000. The petitioner also filed C. A. No. 1339 of 2000 praying for a restraint order against the respondent-company not to auction the property. Therefore, the prayer of the petitioner is also to the same effect, i.e., the HFC could not sell the property.

5. Before we deal with the legal issue, some of the important dates as flow from the aforesaid narration of facts may be noticed again. The company petition was filed on August 30, 1994, which was admitted on February 21, 1997 and citations were published. However, the provisional liquidator was not appointed at that time. This appointment came vide order dated February 28, 2003. Since the HFC had also financed the respondent-company, taking action u/s 29 of the SFC Act for non-payment of its dues, it took over the factory premises in its possession on February 27, 1997, which was put to auction on November 26, 2001 and agreement to sell was entered into between the applicant and the HFC on January 23, 2002. By that time the applicant had paid 25 per cent. of the purchase price. The balance amount was to be paid in twelve Installments out of which four were deposited by February 1, 2003 and Rs. 50,000 was deposited on April 10, 2003, which was to be adjusted against the 5th Installment which was falling due on May 1, 2003. Before this date the premises were sealed on April 16, 2003.

6. Whereas the contention of the HFC is that it was empowered to sell the property in question, by exercising its right u/s 29 of the SFC Act, the stand of the official liquidator is that on the appointment of the provisional liquidator and passing of the provisional winding up order, which relates back to the date of filing of the petition, exclusive jurisdiction vests in the official liquidator to deal with the properties of the respondent-company (in liquidation) under the supervision of the company court. The parties on either side agree that the matter is covered by a judgment of the Supreme Court in the case of International Coach Builders Ltd. Vs. Karnataka State Financial Corpn., .

7. However, arguments of both the sides is that the said judgment decides the issue in their favor. Therefore, it is the interpretation of that judgment to the facts of that case which would determine the fate of the present proceedings. It would, Therefore, be necessary to ascertain the true scope of the principle of law laid down in the aforesaid judgment.

8. In the aforesaid case decided by the Supreme Court, the court was concerned with resolving the purported conflict between the rights of the State Financial Corporation as contained in Sections 29, 31, 32 and 46B of the SFC Act and the powers of the company court as contained in Sections 529 and 529A of the Act in respect of those companies which go into liquidation on passing winding up order. The court noted that there were conflicting views of different High Courts which necessitated the Supreme Court to settle the law.

9. Section 29 of the SFC Act stipulates that if any industrial concern is under

liability to the financial corporation under an agreement and makes default in repayment of loan, it empowers the financial corporation to take over the management or possession or both of the industrial concern and realize the property pledged, mortgaged, hypothecated or assigned to financial corporation. Section 31, inter alia, provides that without prejudice to the provisions of Section 29 of the SFC Act any authorised officer of the financial corporation, may apply to the District Judge for an order for the sale of the property pledged/mortgaged/hypothecated/assigned, etc. Section 46B is a non obstinate clause and stipulates that provisions of the SFC Act and of any rule or orders made there under shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, etc.

11. Sections 529 and 529A of the Act, on the other hand, inter alia, stipulate the respective rights of the secured and unsecured creditors and are in the following terms :

"Section 529. Application of insolvency rules in winding up of insolvent companies.--(1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to--

- (a) debts provable ;
- (b) the valuation of annuities and future and contingent liabilities ; and
- (c) the respective rights of secured and unsecured creditors ; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent :

Provided that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favor of the workmen to the extent of the workmen's portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to realise his security,--

- (a) the liquidator shall be entitled to represent the workmen and enforce such charge ;
- (b) any amount realised by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues ; and
- (c) so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso or the amount of the workmen's portion in his security, whichever is less, shall rank pari passu with the workmen's dues for the purposes of Section 529A.

Section 529A. Overriding preferential payments.--(1) Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company--

- (a) workmen's dues ; and
- (b) debts due to secured creditors to the extent such debts rank under Clause (c)

of the proviso to Sub-section (1) of Section 529 *pari passu* with such dues, shall be paid in priority to all other debts.

(2) the debts payable under Clause (a) and Clause (b) of Sub-section (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions."

12. In a detailed analysis of the aforesaid provisions of both the Acts, the Supreme Court found that there was no conflict between the two provisions and these provisions could be given harmonious interpretation and the law succinctly dealt with by the court finds expressions in paras. 17 to 19 and 21 of the judgment. Thereafter, the court summarized the position in paras. 22 and 23 and reproducing of these two paras. can subserve the purpose (page 626 of 114 Comp Cas) :

"Para. 22 : Since the official liquidator is in the position of a co-mortgagee, the SFCs cannot act independently or by ignoring him for enforcing their security. It is established law that, in case of co-mortgagees, all of them should join in the suit for enforcing the security, but if some of them refuse to join, they have to be included as defendants, not merely as proforma parties, but as necessary parties inasmuch as the mortgage right vests in them along with the plaintiffs-mortgagees, (see in this connection the judgment of the Privy Council in *Sunitibala Debi v. Dharae Sundari Debi* AIR 1919 PC 24. The same principle would be substantially true and applicable in the case of a mortgagee and a *pari passu* charge-holder over the same security for Realizing the security. The realisation of the security can only be done by both the charge-holders, joining and Realizing the security simultaneously. If a sale takes place, it can only be simultaneously for recovery of the claim of all *pari passu* charge-holders and sale proceeds are required to be divided proportionately in the same proportion as their dues.

Para. 23 : In support of their respective contentions, parties have referred to and relied upon judgments of different High Courts. The view taken by the Bombay High Court commends itself to us. The Division Bench of the said High Court pointed out that, like a secured creditor, the official liquidator as a *pari passu* charge holder cannot independently bring the security to sale ignoring the secured creditor. He must, Therefore, either obtain concurrence of the secured creditor for sale and take the court's sanction, or he can apply for sanction of the court after notice to the secured creditor. In either event, the court while granting sanction may impose appropriate conditions and give directions regarding the conduct of the sale, the fixing of the reserve bid, acceptance of the bid, confirmation of sale and distribution of sale proceeds."

13. The harmonious result between the aforesaid provisions of the SFC Act and the Act was achieved in the following manner (page 628 of 114 Comp Cas) :

"Para. 25 : ... No doubt Section 29 of the SFC Act was intended to place SFCs on

a better footing. But, in our view, this better footing is available only so long as the debtor is not a company or is a going company. The moment a winding up order is made in respect of a debtor company, the provisions of Sections 529 and 529A come into play and whatever superior rights had been ensured to SFCs under the provisions of the SFC Act are now subjected to and operate only in conjunction with the special rights given to the workmen, who as *pari passu* charge-holders are represented by the official liquidator. We are, Therefore, of the view that the unhindered right hitherto available to the SFCs to realise their security, without recourse to the court, no longer holds true as the right vested in the official liquidator is a statutory impediment to such exercise and has to be reckoned with. And since the official liquidator can do nothing without the leave or concurrence of the court, all necessary applications must, Therefore, come to the company court.

Para. 26 : We do not really see a conflict between Section 29 of the SFC Act and the Companies Act at all, since the rights u/s 29 were not intended to operate in the situation of winding up of a company. Even assuming to the contrary, if a conflict arises, then we respectfully reiterate the view taken by the Division Bench of this Court in *A.P. State Financial Corporation v. Official Liquidator* [2000] 1 C C 102. This court pointed out therein that Section 29 of the SFC Act cannot override the provisions of Sections 529(1) and 529A of the Companies Act, 1956, inasmuch as the SFCs cannot exercise the right u/s 29 ignoring a *pari passu* charge of the workmen."

14. The court summed up the legal position in para. 32 which reads as under (page 630 of 114 Comp Cas) :

"Para. 32 : We, Therefore, hold as under :

1. The right unilaterally exercisable u/s 29 of the SFC Act is available against a debtor, if a company, only so long as there is no order of winding up ;
2. The SFCs cannot unilaterally act to realise the mortgaged properties without the consent of the official liquidator representing workmen for the *pari passu* charge in their favor under the proviso to Section 529 of the Companies Act, 1956 ;
3. If the official liquidator does not consent, the SFCs have to move the company court for appropriate directions to the official liquidator who is the *pari passu* charge holder on behalf of the workmen. In any event, the official liquidator cannot act without seeking directions from the company court and under its supervision."

15. We may now apply the aforesaid legal position to the fact situation of the present case. Here the order for provisional winding up was passed on February 28, 2003. However, the HFC had taken over the factory premises in its possession u/s 29 on February 22, 1997 and put to auction several times but failed. The successful auction, which is the subject-matter before this Court, was

held on November 26, 2001, and agreement to sell was entered into between the parties on January 23, 2002. This before the passing of the winding up order the HFC had already approved the bid of the applicant and agreement to sell dated January 23, 2003, was entered into as the applicant had paid 25 per cent. of the bid amount and for remaining amount he was allowed 12 quarterly Installments which were being paid. It is, Therefore, clear that the HFC had already exercised its right available to it u/s 29 of the SFC Act. In an attempt to overcome this difficulty coming in the way of the official liquidator, learned Counsel for the official liquidator contended that once winding up order is passed, it relates back to the date when the winding up proceedings were commenced. That may be so. However, for the purpose of ascertaining the rights between the financial corporations u/s 29 of the SFC Act and other secured creditors under Sections 529 and 529A of the Act, it is the actual date of the winding up order which would be determinative of such rights and doctrine of relation back cannot be applied to this situation. If the argument of learned Counsel for the official liquidator is accepted, then it may lead to serious consequences. The official liquidator, in such circumstances, could question all such auctions by financial corporations under the SFC Act on the specious plea that winding up order is effective from the date of commencement of winding up proceedings and make the provisions of the SFC Act totally redundant. It will set at naught the harmonious results achieved by the Supreme Court in the aforesaid judgment. It is common knowledge that between the filing of winding up petition and making the order of winding up, there would be a time lag. On many occasions, such gap would be substantial. In the present case itself the petition was filed on August 30, 1994, and winding up order came to be passed only on February 28, 2003. Therefore, in my considered opinion, the intention behind the observations of the Supreme Court in the aforesaid judgment while interpreting the two provisions of the Acts harmoniously was to take into consideration the actual date of winding up order in this particular situation.

16. Even if we were to hold otherwise, the question would be as to what is the required to be done at this stage. In para. 31 of the aforesaid judgment, the Supreme Court stated that the result of the amendment made by the Act of 1985 in the Companies Act, 1956 would be that the SFCs as secured creditors, must seek leave of the company court for the limited purpose of ensuring that the pari passu charge in favor of the workmen is safeguarded by the imposition of suitable conditions under the supervision of the company court. Subject to the protection of this pari passu charge of the workmen's dues, SFCs can continue to exercise their statutory rights as secured creditors without being reduced to the status of unsecured creditors required to prove their debts in insolvency and stand in the line with other unsecured creditors. Therefore, what is required to be done is to protect the pari passu charge of the workmen, in the present case. Otherwise as noted above, 16 attempts were made to sell the property in question by the HFC which failed and the HFC succeeded only in 17th attempt. Further, the reserved price was Rs. 15.13 lakhs which was fixed after getting the

property valued and the property was auctioned at Rs. 18 lakhs. After-all, the HFC is also a statutory body and public authority and has followed proper procedure for inviting the tenders. Acceptance of bid of the applicant for Rs. 18 lakhs, in these circumstances, was nothing but a reasonable and proper exercise and no useful purpose would be served in cancelling the said sale and inviting fresh tenders which may even be counter productive having regard to the antecedents leading to the sale. However, as the applicant had given only four Installments out of twelve and against the 5th Installment only a sum of Rs. 50,000 was deposited, and at that stage the winding up order came to be passed, in respect of the balance Installments to be paid, the interest of workers and their pari passu charge in this behalf needs to be protected.

17. Therefore, while approving the sale in question, since this Court has the right to impose suitable conditions limited to protecting the pari passu charge of the workmen dues, it is directed that the remaining amount which is to be paid by the applicant, shall be deposited with the official liquidator. As the Installments which have become due as of today, under the agreement to sell dated January 23, 2003, shall be deposited by the applicant with interest within four weeks from today. The remaining Installments as and when falling due in future shall be deposited on due dates with the official liquidator. On deposit of the Installments becoming due as of today within four weeks as mentioned above, the official liquidator shall de-seal the premises and hand over possession to the applicant. However, in case the applicant defaults in making remaining future Installments the official liquidator shall be within his rights to take possession of the premises in question and seal them again. How the aforesaid balance consideration which is now to be deposited with the official liquidator, is to be disbursed shall be decided by this Court after claims are invited by the official liquidator and on receipt of the claims from the workers, if any.

18. These applications stand disposed of with aforesaid directions.