
(1974) 01 MAD CK 0016
In the Madras High Court
Case No : Appeal No. 332 of 1968

Sri Chamundi Theatre Mysore Talkies Ltd.	APPELLANT
Vs	
S. Chandrasekara Rao	RESPONDENT

Date of Decision : 08-01-1974

Acts Referred:

Companies Act, 1956 — Section 450(3)

Citation : (1975) 45 CompCas 60 : (1973) ILR (Mad) 416 : (1978) 87 LW 546 : (1974) 87 LW 546

Hon'ble Judges : Ramaprasada Rao, J;Natarajan, J

Bench : Division Bench

Advocate : Nainar Sundaram, for the Appellant; Parasurama Iyer, for the Respondent

Final Decision : Dismissed

Judgement

Ramaprasada Rao, J.—This appeal is directed against the judgment of the learned Subordinate Judge, Coimbatore. The defendant is the appellant. On January 10, 1959, one G.P. Raju Mudaliar as a partner of a managing agency firm to the defendant-incorporated company, executed a simple mortgage for Rs. 10,000 in favour of the plaintiff and mortgaged the immovable properties and all the other properties belonging to the company. The consideration as recited in the deed of mortgage, exhibit A-1, was that it was to pay for two money decrees obtained against the defendant-company by the plaintiff as proprietor of a concern known as ""Standard Commercial Corporation, Coimbatore"". In order to avoid execution of the decrees so obtained by the plaintiff, the managing agents executed the above mortgage and, according to them, averted further proceedings in execution of the money decrees. After the said mortgage was

executed moneys were paid thereunder. The plaintiff unsuccessfully made a demand under exhibit A 9 for the repayment of the amount and, thereafter, instituted the action. The defendant-company denied liability under the mortgage and put the plaintiff to strict proof of the execution of the same. Their second contention was that G.P. Raju Mudaliar did not have the competence to execute the same and, therefore, it is not binding on the company. In support of this contention, it was alleged that on the date when the mortgage was executed, one Mallikarjuna Iyer was in custody and control of all the properties of the company as "provisional liquidator" appointed by the High Court, Madras, in O. P. No. 82/56. Since the provisional liquidator was so functioning on the date when the mortgage was executed in favour of the plaintiff, the mortgage deed is assailed on the ground that it does not bind the company. It was also sought to be made out that there was no resolution by the board of directors of the company which authorised G.P. Raju Mudaliar to execute the said mortgage. The learned subordinate judge after discussing the factual and legal contentions came to the conclusion that Raju Mudaliar had competence to execute the said mortgage and that the mortgage was true and valid in the sense that it was supported by consideration. The court also noticed exhibit A-7 which was a letter written by the counsel for the defendant in a contemporary proceeding filed by the Syrian Bank, Coimbatore, against the defendant-company in and by which the defendant stated that he was not disputing the suit mortgage. The learned judge was inclined to accept the argument that after having stated so in exhibit No. A-7, it is no longer open to the defendant to contest either the competence of G.P. Raju Mudaliar to execute the mortgage or the validity or truthfulness of the mortgage in other respects. The lower court also found that there was a valid notice convening the general body meeting and that Raju Mudaliar, as managing agent of the company, did execute the mortgage deed in conformity with the provisions of the Act and in pursuance of the resolution passed in the said meeting. In the result, a preliminary decree was passed as prayed for by the plaintiff. It is as against this the present appeal has been filed.

2. Mr. Nainar Sundaram, the learned counsel for the incorporated company, does not seriously contend that the mortgage is not supported by

consideration. As a matter of fact, he would fairly concede that the resolutions disclosed that the mortgage was to avert the execution of money

decrees obtained by the plaintiff as against the company and in this sense, exhibit A 1 is not assailable as not being true or binding on the company.

But the sheet-anchor of his contention is that on January 10, 1959, when the managing agents, represented by G.P. Raju Mudaliar, executed this

mortgage, there was a provisional liquidator functioning under the orders of court and that the managing agents not having secured possession of

the properties from the provisional liquidator on the date when the mortgage was effected and as the matter should be deemed to be still lis

pendens on that date or that the properties of the company were in custodia legis, exhibit A-1 was not competently executed by the managing

agents and, therefore, not a valid and enforceable instrument in the eye of law.

3. To appreciate this contention, it is necessary to refer to a few relevant facts which happened during the pendency of the application for winding

up filed by a creditor against the company. One Kalappa Chettiar filed an application, O. P. No. 82/56, on the file of this court praying that the

company may be wound up for the reasons stated by him in his petition and contemporaneously in an Application No. 774/55, sought for the

appointment of a provisional liquidator pending disposal of the main application for winding up. Balakrishna Iyer J., dealing with the said

application, ordered that Mr. M. Mallikarjuna Iyer, Advocate, Coimbatore, be appointed the provisional liquidator of the company and that he do

take possession of, collect and protect all the properties, effects and actionable claims, to which the company above named appears to be entitled

to, but not to distribute or part with the same until further orders of court. This order is dated March 27, 1956. On November 27, 1958, the

petitioning-creditor did not press the main application for winding up. Subramanyam J. disposed of O. P. No. 82/56 by passing the following order

:

This petition is not pressed. The provisional liquidator will convene a general meeting of the members of the company within six weeks from this

date, after giving the requisite notice for the purpose of electing a board of directors consisting of three directors. Immediately after they are

elected, the directors will elect a managing director. The provisional liquidator will

hand over charge of the company and its affairs to the managing director so elected. The provisional liquidator will, out of the funds of the company, meet such liabilities as are incurred during his term of office as such liquidator and will appropriate out of the funds in his hands, money due to him on account of the remuneration and otherwise. Any further sums payable to him will be paid to him by the managing director out of the funds of the company after he assumes charge. The provisional liquidator will have liberty to apply in this petition for payment by the company in the event of such payment not being made out of court.

Subject to these observations, this petition is dismissed.

4. The learned judge obviously allowed the provisional liquidator to continue to be in charge of the company and its affairs until he hands over the same to the managing director to be elected in the manner stated by him in the order. Thereafter, on January 2, 1959, he had to modify certain portions of his earlier order in an application made by the managing agents represented by G.P. Raju Mudaliar. When it was brought to the court's notice that there was no provision under the articles of association of the company for the appointment of managing director and that the managing agents alone were in sole charge and custody of the properties of the company, the learned judge modified his earlier order thus :

In the order passed by me on November 27, 1958, the sentence, immediately after they are elected, the directors will elect a managing director " will be deleted. In the rest of the order, the words " Sri Raju Mudaliar and Sri Natarajan will be substituted in the place of the words, "the managing director", wherever they occur. The following sentences will be added. " Sri Viswanathan says that the firm of G.P. Raju and Company has ceased to exist. Nothing said in this order will preclude his client from urging that contention if and when it becomes material in any proceeding".

5. By this order, it is clear that Subramanyam J. expressed his desire that the provisional liquidator should hand over charge of the company and its affairs to G.P. Raju Mudaliar and Natarajan, the partners of the managing agents' firm in question. The learned judge also made it clear that the modification should be incorporated in the order passed by him on November 27, 1958. It is, therefore, obvious that the direction to the

provisional liquidator to hand over the properties and other assets of the company, if they were in his physical custody, to G.P. Raju Mudaliar and

another should be deemed to have been made even on November 27, 1958. The provisional liquidator, Mr. Mallikarjuna Iyer, in this connection,

filed a report and wanted further directions to hold a meeting of the shareholders. But the learned judge by his order dated January 15, 1959,

specifically directed that he need not hold any meeting but, on the other hand, he should hand over charge of the company to the persons named in

the order dated January 2, 1959. On a fair reading of the orders of this court, we are of the view that it was a direction of this court exercising

jurisdiction under the Companies Act that the provisional liquidator should hand over possession of the properties of the company, including the

immovable properties belonging to it, to Mr. G.R. Raju Mudaliar and that he ought to have done it even as early as November 27, 1958, if not by

January 2, 1959.

6. A resume of the above facts indicates that on and from November 27, 1958, and, in any event, definitely after January 2, 1959, the provisional

liquidator ceased to be in judicial control or statutory control of the custody of the properties of the company and it was the managing agents who

are entitled, as a matter of right, by orders of court and, otherwise, to be in charge of the same.

7. The contention of Mr. Nainar Sundaram, however, is that u/s 450(3) the powers of the provisional liquidator are equitable to the powers of an

official liquidator and the official liquidator under Rule 232 and Rule 233 of the Companies (Court) Rules, 1959, is in the position of a receiver.

Any interference by a third party including the managing agents so as to prejudice such a right of the provisional liquidator to deal with the

properties of the company in his own right as such receiver ought to be held to be a void act or, in any event, an act without competence. This

argument overlooks the text of Clause 3 of Section 450 which says :

Where a provisional liquidator is appointed by the court, the court may limit and restrict his powers by the order appointing him or by a

subsequent order; but otherwise he shall have the same powers as a liquidator.

8. The foremost thing to be looked into is to see whether the court has restricted the powers of the provisional liquidator or prescribed such

powers in accordance with the circumstances of each case. In the instant case, though on March 27, 1956, the provisional liquidator was entitled to take possession of, collect and protect all the properties and effects, etc., of the company, yet, by its order dated November 21, 1958, read in conjunction with the order dated January 2, 1959, this court made it clear that the official liquidator should hand over charge of the company and its affairs to G.P. Raju Mudaliar, a partner of the managing agency firm. This term of appointment prevails over the general powers which a provisional liquidator might otherwise obtain u/s 450(3) of the Act. As the special always excludes the general and as the general part of the provision in Clause 3 of Section 450 is not invocable in the instant case, due to the special powers conferred on the provisional liquidator by orders of court, the argument of Mr, Nainar Sundaram has been characterised by us as fallacious.

9. The next contention of Mr. Nainar Sundaram is that there is an initial vesting of the properties of the company in the liquidator on the date when the provisional liquidator is appointed, in an application for winding up, and that the text of the order of appointment of the provisional liquidator also is to the same effect. It is by now well settled that there is some marked distinction between cases arising in insolvency and those arising under the Companies Act for winding up of companies. Under the former, when the official assignee or the official receiver is appointed as interim receiver, even though the main application for adjudication is still pending disposal on the file of this court, yet by reason of the provisions of law as to insolvency, there is an automatic vesting of the properties of the debtor (the proposed insolvent) in the official receiver or the official assignee, as the case may be. Mr. Parasurama Iyer, the learned counsel for the respondent, rightly invited our attention to a decision of the Division Bench of the Travancore-Cochin High Court (P. Padmanabha Pillai v. South Indian Match Factory, [1953] 23 C.C. 468 which, in turn, relied upon the well-known rulings of English courts on this proposition. In *Employers' Liability Assurance Corporation v. Sedgwick, Collins & Co.*, [1927] AC 95 Viscount Cave said :

A company in liquidation, though the administration of its affairs has passed to the liquidator, retains its complete existence.

10. Sir G. Mellish L.J. in *In re Oriental Inland Steam Co., Ex Parte Scinde Rly. Co.*, [1874] 9 Ch App 557 (CA) observed that :

Winding-up differs from bankruptcy in this respect, that in bankruptcy the whole estate, both legal and beneficial, is taken out of the bankrupt,

and is vested in his trustees or assignees, whereas in a winding-up the legal estate still remains in the company.

11. These well-known propositions were accepted by the learned judges of the Travancore-Cochin High Court. Following these principles which

are well laid and stated, we have no hesitation in accepting the contention of the learned counsel for the respondent that, even though there was an

application for winding up pending and even though there was a provisional liquidator appointed to look after the affairs of the company in terms of

the order under which he was appointed, in the instant case, in particular, and, generally, in all such cases, the properties of the company cannot be

said to have vested in the provisional liquidator which requires a divesting at some future point of time to enable those in charge of the affairs of the

company to deal with them in a manner known to law. To be more specific, by Mr. Mallikarjuna Iyer's appointment as provisional liquidator the

managing agents' right to deal with and the right to retain possession of the properties in its custody for the benefit of the company is not

automatically taken away as there is no vesting of the properties in the provisional liquidator, eo instanti he is appointed in a pending application for

winding up. Whatever may be said of the rights of the official liquidator after an order for winding up is made and which is also circumscribed by

the various and strict provisions under the Companies Act, these do not apply, as a matter of course, to the office of the provisional liquidator. It is

always controlled by the instrument which appoints him and he is equated for technical purposes with the official liquidator. His office is not an

equation to that of an official liquidator but he is an officer of court who has to take directions of court in the matter of exercise of his powers

attached to his office and he cannot assume the role of an official liquidator and invoke the provisions of the Companies Act and the Rules made

thereunder and claim that he is a receiver and in physical, juridical and sole custody and control of the properties of the company and that no one

can interfere with such alleged possession of his and create instruments such as mortgages to his prejudice and to the prejudice of the company.

Here it is conspicuous to note that on November 27, 1958, there was no application for winding up at all since it was withdrawn as not pressed by the petitioning creditor. In these circumstances, we are of the view that on January 2, 1959, G.P. Raju Mudaliar as a partner of the managing agency firm should be deemed to be in lawful custody of the properties and affairs of the company and that the mortgage created by him as such managing agent and pursuant to the resolution of the general body on January 10, 1959, in exhibit A-1 is a valid instrument which is enforceable in a court of law.

12. We have already held, agreeing with the court below, that the mortgage is true and binding in the sense that it is supported by consideration.

The decree and judgment of the court of the learned subordinate judge is, therefore, unassailable. The appeal, therefore, fails and it is dismissed.

There will be no order as to costs.