

(1985) 05 DEL CK 0034

In the Delhi High Court

Syndicate Bank

APPELLANT

Vs

Official Liquidator, Prashant Engineering Co. P. Ltd.

RESPONDENT

Date of Decision : 01-05-1985

Acts Referred:

Citation : AIR 1985 Delhi 256 : (1986) 59 CompCas 301

Hon'ble Judges : H.L. Anand, J

Bench : Single Bench

Judgement

H.L. Anand, J.—By this application under rule 9 of the Companies (Court) rules, 1959, Syndicate Bank, who claims to be a secured creditor of Prashant Engineering Co.(P). Ltd., in liquidation, and has secured a simple money decree for Rs. 2,11,897.20 together with costs and future interest against the company, prays that the official liquidator be directed to pay to the bank sale proceeds of Rs. 85,500 in respect of a diesel generating set toward part satisfaction of the decree and to hand over the other hypothecated machines belonging to the company that may be held by the official liquidator to the bank of the allegation that all the machines installed in the factory of the company, including the generating set aforesaid, were hypothecated by the company in favor of the bank as security for the money advanced by the bank to the company, which formed the subject-matter of the suit and the decree. It is claimed that the aforesaid generating set was disposed of by the official liquidator without notice to the bank.

2. The claim of the bank is resisted by the official liquidator who has denied and knowledge of the hypothecation. It is submitted that no diesel generating set was taken into possession or sold by the official liquidator. It is, however, admitted that certain items of machinery belonging to the company were sold under the order of this court for about Rs. 90,000. It is further urged that the claim for the proceeds of sale of any assets of the company is misconceived and untenable as the bank has obtained only a simple money decree and could not rank as an unsecured creditor along with other and a simple money decree and

could only rank as an unsecured creditor along with other and that the claim of the bank against the company under the decree would be dealt with in accordance with law. It is further claimed that the rights of the bank under the alleged hypothecation could not be enforced against the proceeds of sale of the assets of the company as the decree was obtained long after the sale and that the rights of the bank, if any, under the hypothecation agreement merged in the decree and that the bank could not prove its claim when claims are invited in the course of winding up. It is denied that the official liquidator was under any obligation to give notice to the bank of the proposed sale of the assets of the company that came into the possession of the official liquidator in the course of winding up.

3. In its rejoinder, the bank, by and large, reiterate the allegations made in the application and alleged that the factum of hypothecation was mentioned by the bank in the suit which led to the decree. It was further claimed that the official liquidator having sold the hypothecated assets of the company, was bound to reimburse the sale proceeds to the bank, which was secured creditor, and that in the course of the proceeding of the suit, a receiver was appointed to make an inventory of the various machines and the receiver was appointed to make an inventory of the various machines and the receiver had submitted his report to the court seized of the suit. The right of the official liquidator to dispose of the hypothecated assets of the company was also challenged.

4. On the pleadings of the parties, the following issue was framed :

"Is the petitioner entitled to payment of Rs. 85,500?"

5. In support of their respective case, parties were allowed to produce evidence by affidavits. On behalf of the bank, affidavit of its manager was filed and on behalf of the company, the affidavit of the official liquidator was filed. The bank also filed a copy of the agreement of hypothecation, a copy of the complaint in the suit, a copy of the judgment of this court on the original side, decreeing the suit, and a copy of the report of the commissioner appointed in the proceedings of the suit. The two affidavits are, by and large, a reaffirmation of the respective cases of the parties as set out in the pleadings.

6. I have heard learned counsel for the parties.

7. The winding -up order was made on September 26, 1980. Pursuant to the winding-up order, the official liquidator took possession of the entire assets of the company. The suit was filed by the bank on March 18, 1981, without impleading the official liquidator although the winding-up order had already been made apparently because the bank was not aware of the fact that the company was in winding - up. In the suit, the bank sought a simple money decree even though the factum of hypothecation agreement was mentioned in para. 8 of the plaint. For reasons which are not clear, no relief was sought in the suit with regard to the security. The bank, no doubt, sought the appointment of a commissioner to visit the factory and submit a report "as to whether the factory was lying closed

and, if so, since when and whether it was in charge of any person or was actually running". The commissioner submitted his report on March 24, 1981, and this report mentions that the factory was closed and there were locks on the shutter and "was under seal", but there is no mention that the property was in the possession of the official liquidator. The bank apparently came to know of the winding-up order in 1982 because by its application, C.A. No.3 of 1982, it sought from this court leave u/s 446 of the Companies Act to continue the suit, which was allowed on February 11, 1982.

8. Unlike a mortgage, a pledge or hypothecation does not have the effect of transferring any " interest" in the property in favor of the pledge or the hypothecated. The pledge and hypothecation, however create a special property in the goods in favor of the pledge or the hypothecate. In the case of pledge, the special property is to keep possession of the pledged goods and to dispose them off for the realisation of the debt for which it is held as security. In the case of hypothecation, possession remains with the hypothecator but the hypothecate has the right to take possession of the hypothecated property and to sell it for the realisation of the debt secured by hypothecation. It was open to the bank to take possession of the debt secured by hypothecation. It was open to the bank to take possession of the hypothecated property on its own or through the court, but it failed to do so. It was also open to the bank to enforce the security by the suit that it filed but there again the bank chose to seek a simple money decree. Mere mention of hypothecation in the suit was sufficient. The bank would, Therefore, be deemed to have waived its right as hypothecate and was satisfied with a simple money decree. The bank having filed a suit for the recovery of money and having failed to make a claim on the security, any claim on the security or the sale proceeds thereof would now be barred under Order 2, rule 2, of the Civil Procedure Code, 1908, with the result that the bank has no subsisting claim on the machinery or any part of the sale proceeds thereof and must rank as an unsecured creditor along with the other creditors of the company, and prove its claim before the official liquidator at the appropriate time. See *Official Assignee of Bombay Vs. Chinniram Motilal and Another*, and *The Official Assignee of Bombay Vs. Moulvi Abdul Hayee*, . The bank is itself to blame for the course that it chose to adopt.

9. The claim of the bank accordingly fails and the application is hereby dismissed, leaving the parties to bear their respective costs.