

(1995) 07 DEL CK 0037

In the Delhi High Court

Case No : C.A. No. 82 of 1995 in C.P. No. 234 of 1992

The Peerless General Finance and Investment Co. Limited

APPELLANT

Vs

Majestic Apparels Pvt. Ltd.

RESPONDENT

Date of Decision : 04-07-1995

Acts Referred:

Citation : AIR 1995 Delhi 373 : (1999) 96 CompCas 937

Hon'ble Judges : J.K. Mehra, J

Bench : Single Bench

Advocate : S.K. Misra, for the Appellant; B.N. Navar, for the Respondent

Judgement

1. This is a petition by Uttar Pradesh Financial Corporation (herein referred to as the Corporation) under Sections 446 and 537 of Companies Act for leave to sell the property, which is stated to be Constituting security of Uttar Pradesh Financial Corporation. The facts, as stated in the petition, are as under:--

That the petitioner Corporation had sanctioned in ail five loans, aggregating to an amount of Rs. 30,60,000/- to the company in liquidation between November, 1983 and October, 1985. Under the said loans, a sum of Rs. 29,65,040/- was actually disbursed to the company in liquidation. It is further alleged that the aforesaid loans were secured, inter alia, by equitable mortgage of land and building situated at B-12, Sector-VIII, Noida and by hypothecation of plant and machinery. On company in liquidation committing several defaults in repayment of the said loans, the petitioner corporation served a notice on the company in liquidation on or about 9th November, 1987 calling upon it to clear the balance amount outstanding at that time and threatening to take over the possession of the company"s unit in exercise of the corporation"s powers u/s 29 of the State Financial Corporations Act, 1951. Having failed to obtain regularisation of. the account of the company in liquidation, the said corporation is staled to have taken possession of the aforesaid unit of the company in liquidation on or about 5th November, 1992. However, soon after the take over of the possession, a petition by some of the creditors of the company for its winding up was

presented and was registered as C. P. No. 234 of 1992 whereupon a show cause notice was issued and after certain proceedings, the said petition was admitted and thereafter it was allowed and the company was ordered to be wound up on 14th December, 1994. Following the winding up, the liquidator was directed to take possession of all the assets of the company in liquidation which he did. The liquidator also has put his lock on the door of the aforesaid property in question at Noida on or about 23rd December, 1994. However, before 23rd December, 1994, it is alleged, that the petitioner corporation had already invited offers for sale of the property in exercise of its powers u/s 29 of the State Financial Corporations Act and had negotiated the sale thereof with one Seva Agrotech Limited for a sum of Rs. 19 lakhs and issued a notice to the company under liquidation, requiring it to file objections against the said sale within 15 days. The State Financial consequently has filed present application seeking leave of this Court to proceed with the sale of the said mortgaged land and building, situated at B-12, Sector-VIII, Noida, Ghaziabad District and also allow it to sell hypothecated plant and machinery in realisation of its dues from the company in liquidation. The grant of such an application was opposed by the liquidator. Though no formal reply was filed on behalf of the liquidator to this application, but parties agreed to proceed with the arguments in the absence of a formal reply and detailed arguments were addressed.

2. The main argument advanced by the petitioner corporation was that it is a financial corporation under the State Financial Corporations Act and is a secured creditor standing outside the purview of winding up proceedings. It claimed that by virtue of provisions like Sections 29 and 46B of the said Act, it had the right under the agreement to take possession of the property mortgaged and to sell it by virtue of the powers vested in it u/s 29 of the State Financial Corporations Act and to apply the sale proceeds to the satisfaction of its dues. It is further contended that by virtue of the provisions of Section 46B of the State Financial Corporations Act, any rules or orders made there under would prevail over the provisions of any other Act or law for the time being in force. On behalf of the State Financial Corporation, reliance has been placed on various cases. It is contended that rights of the secured creditors under the provisions of Companies Act, 1913 were duly considered and interpreted by the Hon"ble Supreme Court in the case of M.K. Ranganathan and Another Vs. Government of Madras and Others, . It is contended that Section 232(1) of the 1913 Act is similar to sub-section (1) of Section 537 of the Companies Act, 1956. While interpreting that the Court examined the position by reading together Sections 229 and 232 which is what was enacted as Section 529 of the Companies Act, 1956 (prior to its amendment in 1985) and Section 537. The Hon"ble Supreme Court, while interpreting Section 232 of the Indian Companies Act 1913, had held that it was only when the intervention of Court was sought, either by putting in force any attachment, distress or execution or proceeding with or commencing a suit or other legal proceedings against the company that the leave of the Court was necessary and if no such leave was obtained, the remedy could not be availed of

by the secured creditors. The Hon"ble Supreme Court in para. 21 expressed the view that since the words "any sale held without leave of the Court of any of properties" had been used in juxtaposition with the words "any attachment, distress or execution put into force without leave of the Court against the estate or effects" it would be legitimate construction to be put upon them that they refer only to sales held through intervention of Court and not sales effected by the secured creditors outside the winding up and without intervention of the Court. It will be appropriate to examine the two sections, i.e., Section 232(1) of Indian Companies Act, 1913 and Section 537(1) of the Companies Act, 1956. Section 232(1) of the Companies Act, 1913 is reproduced as under:--

232.(I) Where any company is being wound up by or subject to the supervision of the Court, any attachment, distress or execution put in force without leave of the Court against the estate or effects or any sale held without leave of the Court of any of the properties of the company after the commencement of the winding up shall be void."

Section 537(1) of the Companies Act, 1956 is reproduced as under:--

"537.(I) Where any company is being wound up by or subject to the supervision of the Court -

(a) any attachment, distress or execution put in force, without leave of the Court, against the estate or effects of the company, after the commencement of the winding up; or

(b) any sale held, without leave of the Court, of any of the properties or effects of the company after such commencement; shall be void."

3. From the above, it can be seen that in Section 232(1), the words appearing before the words "any sale held" in the Section were appearing immediately after the preceding words relating to attachment, distress or execution and on account of such juxtaposition, the Hon"ble Supreme Court in M.K. Ranganathan and Another Vs. Government of Madras and Others, had construed this expression is confined to sales held through intervention of Court and not sales effected by the secured creditors outside the winding up and without intervention of the Court. That position was altered in 1956 Act inasmuch as attachment, distress and execution have been put into a separate sub-clause of sub-section (1), while sale has been put in sub-clause (b) separately and are no longer juxtaposed. It is well known principle if there is any amendment or change introduced by the legislature in any provision. That change has to be construed by Courts in a manner so as not to render it redundant. It cannot be said that the change in the provision was without any intention to bring about any change. Such change cannot be read or be construed in the manner as if no alteration or change had been effected and each change has to be given a meaning. It cannot be said that though the sub-section (1) has been split into two sub-clauses, they would still continue to be construed in the same manner in which the earlier section was construed and the change introduced did not change anything at all. That would

amount to saying that the change was meaningless. It appears that the very purpose of splitting that section into two sub-clauses is to treat sale separately and if that be so, then the expression "any sale held" cannot but mean every sale whether held with the intervention of Court or otherwise. All that this section requires is that for any sale including the sale to be effected by secured creditor without intervention of the Court should be effected with the leave of the Court, if it is held after the commencement of the liquidation/winding up proceedings, which u/s 441 of the Companies Act, 1956 would be the date on which the petition for winding up is presented. By asking for leave, the secured creditor is not required to surrender his security nor can it be deemed to compromise his position of standing outside the winding up and would be free to realise his security.

4. Such rights of the secured creditors is, however, to the rights of the workmen whose claim for wages and dues have come to rank *pari passu* with the claims of secured creditors by virtue of Section 529A of the Companies Act, 1956 and proviso to Section 529. The liquidator is entitled to represent the workmen or enforce such claim/charge. The introduction of provisions like Section 529A and proviso to Section 529 also make it proper, just and appropriate for the Court to associate the O.L. with such sale. Any other interpretation may result in frustrating the very purpose of amendment and will lead to O.L. running after the secured creditors for claiming amounts on *pari passu* basis. That would inevitably lead to multiplicity of proceedings. Such leave when asked should normally be granted liberally subject to association of the Official Liquidator in such sale since he is to watch the interest of a category of creditors whose claim by amendment of 1985 have come to rank *pari passu* with the claims of the secured creditors. The term *pari passu* as per Black's Law Dictionary means "By an equal progress; equality, without preference. Used especially of creditors who, in marshalling assets, are entitled to receive out of the same fund without any precedence over each other." The Court which orders winding up has a responsibility to ensure that the interests of creditors and the company in liquidation do not suffer any prejudice and for that reason, the Court can impose such terms and conditions for sale, which will ensure that the maximum price is obtained for the securities and to eliminate/minimize the chances of any transaction going, through, which is lacking in *bona fides* such as under sale or collusive sale etc. or which may amount to fraud being played on other creditors and/or the company in liquidation. One way of achieving this could be association of Official Liquidator with the sale.

5. In the present case, as an application seeking leave has already been filed by the secured creditor, as such, it would not be necessary to go into these pleas in any further detail.

6. Coming to the question of the provisions of Section 29 of the State Financial Corporations Act and Section 46B. I find that in Section 29, the State Financial Corporation has been given certain additional powers as a secured creditor to

realise to seize/take possession of and transfer the property, which forms its security and for that limited purpose, the State Financial Corporation is vested with the powers to pass on good title to the purchaser as if they were the owners of the property or they could be sued or sue as if they were the owners thereof. Apart from this limited additional right, they have no status other than that of a secured creditor which becomes clear on a plain reading of the Section, particularly sub-section (4), which provides for the payment of the residue amount recovered in excess of the Financial Corporation's dues to be paid to the person entitled thereto, which means in the present context, the company in liquidation. Right of the Financial Corporation is only confined to recovery of its dues, costs, charges and expenses and nothing more. The true owner also remains entitled to redeem the property. For these reasons also, the section cannot be construed to give State Financial Corporation rights of full ownership, as contended by counsel. So long as the winding up proceedings have not commenced, the State Financial Corporations enjoy the absolute right as contemplated by Section 29, but in the case of industrial concerns, which are "existing companies" or companies incorporated under the provisions of the Companies Act, 1956 and in respect whereof winding up proceedings have commenced, if any sale of security is contemplated by the State Financial Corporation, they would be required to proceed to sell the security only after obtaining leave from the Court. In this context, a reading of Sections 31(1) and 32(10) would also be helpful to ascertain the legislative intent. The said sub-section reads as under:--

"31. Special provisions for enforcement of claims by Financial Corporation.-- (1) Where an industrial concern, in breach of any agreement, makes any default in repayment of any loan or advance or any Installment thereof (or in meeting its obligations in relation to any guarantee given by the Corporation) or otherwise fails to comply with the terms of its agreement with the Financial Corporation or where the Financial Corporation requires an industrial concern to make immediate repayment of any loan or advance u/s 30 and the industrial concern fails to make such payment (then, without prejudice to the provisions of Section 29 of this Act and of Section 69 of the Transfer of Property Act, 1882 (4 of 1882), any officer of the Financial Corporation, generally or specially authorised by the Board in this behalf, may apply to the District Judge within the limits of whose jurisdiction the industrial concern carries on the whole or a substantial part of its business for one or more of the following reliefs, namely:--

(a) for in order for the sale of the property pledged, mortgaged, hypothecated or assigned to the (Financial Corporation), as security for the loan or advance; or

(aa) for enforcing the liability of any surety; or

(b) for transferring the management of the & It; industrial concern to the Financial Corporation; or

(c) for an ad interim injunction restraining the industrial concern from

transferring or removing its machinery or plant or equipment from the premises of the industrial concern without the permission of the Board, where such removal is apprehended."

"32.

(10) Where proceedings for liquidation in respect of an industrial concern have commenced before an application is made under sub-section (1) of Section 31, nothing in this section shall be construed as giving to the Financial Corporation any preference over the other creditors of the industrial concern not conferred on it by any other law."

Thus it becomes clear that in the cases where winding up proceedings have commenced in respect of industrial concern, which is a company, the legislature did not intend to give to the Financial Corporations any preference over the creditors of the industrial concern, not conferred on it by any other law. I have already held hereinabove that the Financial Corporation or any other secured creditor by seeking leave of the Court u/s 537(1)(b) of the Companies Act would not lose its right to stand outside winding up or to sell the security. This right, however, is subject to other provisions such as Sections 529, 529A of the Companies Act, 1956.

7. The next question, which arises, is relating to the interpretation of Section 46B, which reads as under:--

"46B. Effect of Act on other laws. -- The provisions of this Act and of any rules or orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the memorandum or articles of association of an industrial concern or in any other instrument having effect by virtue of any law other than this Act, but save as afore said, the provisions of this Act shall be in addition to, and not in derogation of any other law for the time being applicable to an industrial concern.

I consider it appropriate also to notice some of the provisions of the Companies Act such as Sections 446(2), 456(2), 529 and 529A. For the sake of convenience, the relevant part of the said provisions are quoted hereunder:--

"446(2) The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain and dispose of-

- (a) any suit or proceeding by or against the company;
- (b) any claim made by or against the company (including claims by or against any of its branches in India);
- (c) any application made u/s 391 by or in respect of the company;
- (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company;

whether such suit or proceeding has been instituted or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960

"456.(2) All the property and effects of the company shall be deemed to be in the custody of the Court as from the date of the order for the winding up of the company."

"529.(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.)"

"529A.(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."

At the time of introducing the amendment of 1985, the legislation was well

aware of the existence of Section 46B and also of the merit of the words contained at the end of the said Section 46B, i.e., "the provisions of this Act shall be in addition to and not in derogation of any other law for the time being applicable to an industrial concern. The legislature in its wisdom considered it appropriate to create another class of creditors, who would rank *pari passu* with the secured creditors and that the interest of that class of creditors, that is the workmen of one industrial concern are to be looked after and taken care of by the Official Liquidator as provided u/s 529, Clause (a) of 1st Proviso. It is for that reason that it has become desirable and necessary to associate Official Liquidator with any sale of security by the secured creditors. I do not see any conflict between the two acts in reading the provisions of Financial Corporations Act in addition to and not in derogation of the provisions of Companies Act. The only way to harmoniously construe the provisions of the two Acts would be that the provisions of Section 537(1)(b) are applicable to all sale? and for the Court to grant leave/permission to sell to the secured creditors their security by associating Official Liquidator with such sales. I am supported in this view by a Division Bench of Bombay High Court in the case of Maharashtra State Financial Corporation v. Official Liquidator, reported as 1995 (2) C LJ 162. Mr. Misra, also cited the ruling of State Industrial and Investment Corporation of Maharashtra Limited v. Maharashtra State Financial Corporation (MSFC) and MSFC v. Charan Investment Corporation, reported as 1995 (2) C LJ 175. The main question in this case was about the validity of the charge created by the company and the interpretation of Section 125. However, in this case, the Court did not go into the question of the change in sub-section (1) of Section 537 of Companies Act introduced by the legislature as distinct from Section 232 of the 1913 Act. There is, however, no quarrel with the proposition that a secured creditor is entitled to stand outside winding up. In the case of Mysore Surgical Cotton Pvt. Ltd. v. Karnataka State Financial Corporation, reported as 1995 (1) C LJ 212, the Karnataka High Court had also taken the same view as was taken by Bombay High Court in the case of Maharashtra State Financial Corporation v. Official Liquidator, High Court Bombay and had held that even though the secured creditor stands outside the winding up once the Official Liquidator is appointed for the company in liquidation whose properties are sought to be disposed of by the secured creditor, the Official Liquidator has to be associated with such exercise since he is entitled to represent the workmen, and enforce their *pari passu* charge. For achieving this also, it will be necessary that the proposed sale is brought to the notice of Court so that appropriate order for associating Official Liquidator with the said sale could be passed.

8. A judgment of Allahabad High Court had been brought to my notice in the case of Dabur India Ltd. v. Transtel, Company Petition No. 11 of 1986, decided on 31-8-1987, an extract whereof is quoted hereunder:--

"In this case only objection raised on behalf of the Financial Corporation is that since the Financial Corporation has taken possession of the assets of the respondent company, no order of winding-up should be passed as the Financial

Corporation is a secured creditor and the realisation of dues of its creditor can only be made in accordance with the aforesaid 1951 Act. It was thus urged that since there is a separate procedure and Act for Realizing the debt and the Financial Corporation is a secured creditor, the winding-up order should not be passed under the Indian Companies Act. The aforesaid argument of the learned counsel for the respondent is not sustainable. There is nothing in the 1951 Act which excludes the power of this Court from making an order of winding-up under the Companies Act. In fact secured creditor of the company means a person who holds a mortgage claiming a lieu on the company's property or in part of it as security for any debt due to him from the company. The secured creditor, Therefore, cannot stop the proceeding for winding-up. The learned counsel for the respondent further urged that the secured creditor is outside the winding-up and, Therefore, the winding-up proceedings should not be proceeded. This argument is also fallacious and is not sustainable. Only exception in respect of secured creditor is that he stands outside the winding-up proceedings for proving its debt in winding-up proceedings. In fact a secured creditor may realise all security and proceed to realise its debt in ordinary course of law but there he has to do with the leave of the Court where winding-up has been ordered. In the present petition, the question is not regarding the right of the secured creditor or in what way the interest of the secured creditor should be completed or in which way by passing the winding-up the right of the secured creditor is not curtailed. It is always open to the secured creditor to make an application to this Court for the purpose for obtaining necessary orders for proceeding under the forum which is provided to him under law. The aforesaid objection of the Financial Corporation is, Therefore, not in fact any objection to the order of winding-up but only regarding the right to realise the amount due from the respondent-company in accordance with law."

I further notice that Section 29 does not take into account a situation where there is a statutory pari passu charge holder in existence which situation has come to exist after 1985 amendment. By introducing Section 529A the legislature has created such a category of creditors and it is for that reason also that the provisions of Section 29 alone will not be of much help to the petitioner Corporation in claiming exclusive right to realise security. Further under the provisions of Section 456(2) of the Companies Act, once the debtor company is directed to be wound up. the Company Court is deemed to be in custody of all assets of the company by virtue of the provisions of Section 456(2) of the Companies Act. Taking a cumulative view of the provisions of the two Acts, I am of the considered view that once the winding-up proceedings have commenced against a company and it is ordered to be wound up, then the State Financial Corporation is not entitled to dispose the assets mortgaged or hypothecated to it without obtaining leave of the Court which should normally be granted by Court subject to a direction that Official Liquidator be associated with the proposed sale. A reference be also made to the following decisions of different High Courts:

(1) Karnataka State Financial Corporation v. Patil Die and Chemicals, reported as

(1991) 70 Comp Cas 38.

(2) Indian Textiles v. Gujarat Financial Corporation (case Reports on corporate and Business Law).

(3) Kerala Financial Corporation v. Official Liquidator, reported as (1991) 71 Comp Cas 334 .

(4) Mysore Surgical Cotton (P.) Ltd. v. Karnataka State Financial Corporation, reported as (1988) 1 C L J 63.

9. Mr. S. K. Misra has placed reliance on the case of Damji Valji Shah and Another Vs. Life Insurance Corporation of India and Others, wherein the Hon'ble Supreme Court has held that the act regarding nationalisation of the Life Insurance Companies was special law while Companies Act was general law and, Therefore, the provisions of the said special law will prevail. On the basis of that analogy, it is contended that the provisions of the Financial Corporations Act should be held to be special law and should prevail over the provisions of Companies Act which is general law and has also placed reliance on the language of Section 46B. On the other hand, Mr. B. N. Nayar, appearing for the Official Liquidator, placed reliance upon various cases including that of S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co. Ltd. Vs. V.M. Deshpande, Income Tax Officer, Companies Circle I(8), Bombay and Another, , wherein the Court had ruled the I.T.O. could go on with the assessment, but for enforcing recovery the permission of Court was necessary. I think, it is not necessary to go into this question in the facts of the present case as I do not find any inconsistency in the State Financial Corporations Act and provisions of Companies Act particularly in the light of last part of the Section 46B of the State Financial Corporations Act. Once legislature has treated a category of creditors to rank pari passu with the secured creditors, that category cannot be excluded from sharing on pari passu basis with the secured creditor on the basis of this argument alone.

10. In the light of the discussion here in above, I consider it in the interest of justice and appropriate and in accordance with the letter and spirit of law to allow the application of UPFC subject to the following conditions:--

(i) The UPFC may proceed with the sale of land and building situated at B-12, Sector-VIII, Noida, Ghaziabad, U. P. and also to sell hypothecated plant and machinery installed therein subject to the condition that the Official Liquidator attached to this Court shall be associated with the said sale;

(ii) That the proclamation for sale and any notice for sale inviting offers shall be settled in consultation within the Official Liquidator and in the event of any disagreement, the same shall be settled by this Court; and

(iii) The sale shall be subject to the final orders of this Court.

11. The application is disposed of in the above terms with no order as to costs.

11. Order accordingly.