

(1959) 03 MAD CK 0015
In the Madras High Court
Case No : O.S. Appeal No. 82 of 1958

T.R. Thyagarajan

APPELLANT

Vs

Official Liquidator and Others

RESPONDENT

Date of Decision : 20-03-1959

Acts Referred:

Companies Act, 1956 — Section 125, 125(1), 127

Citation : AIR 1959 Mad 538 : (1959) ILR (Mad) 827 : (1959) 72 LW 603

Hon'ble Judges : P.V. Rajamannar, C.J;Ganapatia Pillai, J

Bench : Division Bench

Advocate : R. Narasimhachari, for T.R. Arunachalam, for the Appellant; Official Liquidator, V.V. Raghavan, K.R. Vepa and C. Vasudevan, for the Respondent

Final Decision : Dismissed

Judgement

Rajamannar, C.J.—This is an appeal against the order of Subrahmanyam J. passed by him on an application made by the appellant, T. R.

Thyagarajan (Appln. No. 584 of 1858) to modify alt order of the Official Liquidator dated 27-1-1958 passed in the course of the proceedings in

the liquidation of a public limited company named Messrs. Kutty and Rao (Engineers) Ltd. The Indian National Industries Ltd. were the managing

agents of Kutty and Rao Ltd. There was another private limited company called Sayanas Ltd., of which the appellant claims to be a secured

creditor for a sum of Rs. 21,180, He alleged that Messrs. Sayanas Ltd., gave security for the sums advanced by him--certain moveable properties

of the approximate Value of Rs. 20,000. They comprised:

Chandler and Price Folio size tradle 1

Hongkong half Crown tradle 1

Chandler and Price 24"" cutting machine 1

Perforating machine 1

Lead types 4000 Lbs

Racks for types 50

Stands 12

Subsequently instead of the Indian National Industries Ltd., Messrs. Sayanas Ltd., were appointed as managing agents of Messrs. Kutty and Rao

Ltd. There was an agreement entered into dated 11-5-1955 in and by which it was inter alia agreed that there should be a transfer of the assets

and liabilities of Sayanas Ltd. to Kutty and Rao Ltd. On 3-6-1955 the Board of Directors of Sayanas Ltd., passed a resolution approving the

agreement entered into by its managing director with the then managing director of Messrs. Kutty and Rao Ltd.

They further resolved to hand over the fixed assets and liabilities of the company at the time of handing over. On 25-6-1955 the general body of

Kutty and Rao Ltd., passed an extraordinary resolution agreeing to accept the agreement mentioned, above and to accept the taking over of the

assets and liabilities of Messrs. Sayanas Ltd., at the valuation approved by the board of directors.

On 1-7-1955 the Board of directors of Kutty and Rao Ltd., passed the following resolution:

That the business of Messrs. Sayanas Ltd., be merged with this company from 25-6-1955 tentatively the actual de facto merger to take place

from the date of approval of the managing agency and issue of consideration shares to the managing agents. On 11-3-1957 Balakrishna Iyer J.,

construed the effect of the above transactions to mean that there has been a transfer of the entirety of the assets and liabilities of Sayanas Ltd., to

Messrs. Kutty and Rao Ltd. It is evidently on this footing that the appellant came to make his claim before the Official liquidator in the winding up

of Messrs. Kutty and Rao Ltd. The claim of the appellant was made under three promissory notes dated 10-11-1952, 17-12-1952 and 7-11-

1955 for Rs. 2000, Rs. 8000 and Rs. 6000 respectively Carrying interest at the rate of 12 per cent, 13 per cent, and 10 per cent per annum.

The Official liquidator admitted the claim of the appellant for principal and interest due on the first two promissory notes but refused to admit his

claim in respect of the third promissory note because it had been executed on 7-11-1955 after the date of the agreement between the two

companies on 25-6-1955, The appellant also claimed to be a secured creditor so far as the properties mentioned earlier in this judgment were

concerned. He relied upon a letter given by I. S. Rao, managing director of Sayanas Ltd., on 17-12-1952.

The Official Liquidator refused to recognise this charge because it had not been registered with the Registrar of Companies and was, therefore,

void against the Official liquidator u/s 125 of the Indian Companies Act, 1958. The appellant thereupon made an application, out of which this

appeal arises, to the Judge dealing with company matters praying that the order of the Official liquidator may be modified by treating the appellant

as a secured creditor for the amount claimed on the ground that even after the merger between Sayanas Ltd., and Messrs. Kutty and Rao Ltd., so

far as the creditors of Sayanas Ltd. were concerned, they were not to be affected by the merger and the provisions of Section 125 of the Indian

Companies Act do not affect the right of the creditors of Sayanas Ltd., who must be deemed to have the same rights against the company in

liquidation so long as they were enforceable against Sayanas Ltd., which had not gone into liquidation.

2. The only party to the application taken out by the appellant before Subrahmanyam J., was the Official liquidator but it appeared that there were

other parties who were vitally interested in the claim made by the appellant as a secured creditor. There was one Kalyanji N. Suchede who had a

mortgage executed on 16-8-1956 over all the assets of Messrs. Kutty and Rao Ltd., and there was also one P. B. Raju who held a mortgage of

the properties of the company created in 1950 and there "were also holders of debentures issued with a floating charge over all the assets of the

company in liquidation. They were certainly proper parties to the appellant's application before Subrahmanyam J., but notice was not taken to

them. It was only on the last day of the hearing of the appellant's application that their advocates were heard. But they were not made parties.

Before us they have been added as parties and their counsel were heard.

3. Subrahmanyam J., dismissed the application of the appellant. Hence this appeal.

4. The following are the provisions of the Companies Act, 1956 in so far as they are material to the purpose of this appeal.

Section 124: "'Charge'" to include mortgage in this part -- In this part, the expression "'charge'" includes a "'mortgage'."

Section 125: Certain charges to be void against liquidator or creditors unless registered;

1. Subject to the provisions of this part every charge created on or after the 1st day of April 1914, by a company and being a charge to which this

section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any

creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or

evidenced, or a copy thereof verified in the prescribed manner, are tiled with the Registrar for registration in the manner required by this Act within

21 days after the date of its creation.

2. Nothing in this Sub-section (1) shall prejudice any contract or obligation for the repayment of the money secured by the charge,

3. Where a charge becomes void under this section, the money secured thereby shall immediately become payable.

Section 127: Registration of charges on properties acquired subject to charge:

1. Where a company acquires any property which is subject to a charge of any kind as would, if it had been created by the company after the

acquisition of the property, have been required to be registered under this pan, the company shall cause the prescribed particulars of the charge,

together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge was created or is

evidenced, to be delivered to the Registrar for registration in the manner required by this Act within 21 days after the date on which the acquisition

is completed;

2. If default is made in complying with Sub-section (1) the company and every officer of the company who is in default, shall be punishable With

fine which may extend to five hundred rupees.

Section 134(1). It shall be the duty of a company to file with the Registrar for registration the particulars of every charge created by the company,

and of every issue of debentures of a series, requiring registration under this

part; but registration of any such charge may also be effected on the application of any person interested therein.

Section 125 of the present Act corresponds to Section 109 of the Indian Companies Act, 1913, Ss. 127 and 134(1) of the present Act

correspond to Sections 109-A and 116(1) of the Act of 1913. The several sections are all based on the corresponding sections of the English Act.

No direct authority on the question which falls for decision in this appeal was cited to us at the Bar. Learned counsel however relied on the

observations in a few decisions to which we shall refer.

5. Obviously neither Section 125(1) of the Act of 1956 nor section 109(1) of the Act of 1913, in terms applies to the, facts of the present case if

the properties belonging to Sayanas Ltd., are deemed to have been conveyed by that company to Messrs. Kutty and Rao, Ltd. It is only Messrs.

Kutty and Rao Ltd., that is in liquidation. Sayanas Ltd., as such has not been wound up. The parties who oppose this appeal are not creditors of

Sayanas Ltd. They are only creditors of Messrs. Kutty and Rao Ltd. It was on this footing that the learned Judge Subrahinanyam J., disposed of

the application before him.

He starts by saying that certain properties which belonged to Messrs. Sayanas Ltd., were transferred by them to Messrs. Kutty and Rao Ltd., and

one item of these properties was subject to a charge created in favour of the appellant in 1952. In another part of his judgment the learned Judge

proceeds on the footing that Messrs. Kutty and Rao, Ltd., purchased the property subject to a charge. Section 127(1) which deals with a case

where the company acquires any property which is subject to a charge requires the acquiring company to furnish particulars of the charge to the

Registrar within 21 days after the date on which the acquisition is completed. But there is no further provision as is contained in Section 125 that if

the company, fails to comply with this requirement the charge would be void against either the liquidator or the creditors of the acquiring company.

Sub-section (2) of Section 127 only provides that if default is made in complying with Sub-section (1) the Company and every officer of the

company who is in default shall be punishable with fine. Nevertheless the learned Judge held that the unregistered charge in favour of the appellant

was void not only against the liquid also and creditors of Messrs. Sayanas Ltd.,

but also against the liquidator and creditors of the company which acquired the subject matter of the charge. He came to this conclusion by construing the word "created" in Section 125(1) as including "accepted".

His reasoning can be set out in his own words:

It is obvious that in order that the policy underlying Sections 125, 127 and 134 of Central Act 1 of 1956 (and the corresponding sections of the

Act of 1913) might be given full effect to, it is necessary to construe the word "created" in Section 125(1) as including "accepted". Where a charge

is created by one company and the company or the charge-holder neglects to have the charge registered and the property subject to the charge is

acquired by another company and such subsequent company also neglects" to have the charge registered then unless the word "created" is

interpreted as including the word "accepted" the policy of the law that a charge not registered with the Registrar of Companies should be void as

against the creditors or the liquidators would in cases like the present, be defeated.

He based this reasoning on a canon of statutory construction that where in order to give effect to the policy of an Act it is necessary to extend the

literal meaning of a word, such extension is not only permissible but obligatory. The learned Judge thought that it would not be correct to hold that

the content of the charge got enlarged by reason of the acquisition of the property by Messrs. Kutty and Rao Ltd.

6. Learned counsel for the appellant contended that there was no warrant for the interpretation placed by Subrahmanyam J., on Sections 125 and

127 of the Indian Companies Act, 1956.

7. Section 125 in terms renders an unregistered charge created by a company void only against the liquidator and the creditors of that company.

An unregistered charge is not void for all purposes. It is binding on the company itself, of course, so long as it is a going concern. So the argument

ran. This argument is certainly supported by authority. In *re Monolithic Building Co. Tacon v. The Company*, 1915 1 Ch. 643, Lord Cozens

Hardy M. R. made the following observations about an unregistered encumbrance:

Of course, the deed is not void to all intents and purposes. It is a perfectly good deed against the company so long as it is a going concern. It is

not void to all intents and purposes but it is void as between the two incumbrancers.

Phillimore L. J., said :

We have to construe Section 93 of the statute. It makes void a security; not the debt, not the cause of action, but the security and not as against

everybody, not as against the company grantor but against the liquidator, and against any creditor and it leaves the security to stand as against the

company while it is a going concern.

The decision of the Rangoon High Court in *Aung Ban Zeya v. C. R. M. A. Chettiar* firm, ILR (1927) Rang. 585 : AIR 1927 Rang 288, is direct

authority for the position that a mortgage created by a company it not registered, with the Registrar as required by law is void only as against the

liquidator and any creditor of the company but cannot be repudiated on that ground by the company itself while it is a going concern. The company

could have sold away the very properties covered by the charge and with the proceeds repaid the charge-holder. Learned counsel further relied on

the contrast between Sections 125 and 127 of the Act. Whereas in the case of an unregistered charge created by a company it is declared that the

charge is void against the liquidator and the creditors of the company (Section 125) when a company acquires a properly subject to such a charge,

there is no similar declaration that that charge is not binding against the liquidator or the creditors of the purchasing company.

8. Mr. Vepa in his able argument In support of the judgment under appeal contended that the learned Judge's interpretation accords with the

policy underlying Sections 125, 127 and 134 and to give effect to that policy it was permissible to give an extended meaning to the term ""created"".

He relied on the following observations of Buckley J., in *re Cardiff Workmen's Cottage Co., Ltd.*, 1906-2 Ch. 627 at p. 629,

The purpose of the Act of Parliament in requiring within 21 days registration of securities on the company's properties is to ensure the means of

notice to those who contemplate giving credit to the company.

It is not always safe to construe the language of an enactment to accord with the supposed intention of the Legislature. That is why courts have

been careful whenever they refer to the intention to confine it to the intention as expressed in the statute itself. Ample authority can be found in text

books on interpretation of statutes in support of a plain and literal interpretation of the words used in a statute as well as in support of an extension

of meaning when such extension is considered necessary in certain circumstances. For the former rule of construction we may refer to the following

observations of the Privy Council in the AIR 1936 5 (Privy Council)

Where there is no ambiguity in the provisions of a section in an enactment the words must properly be construed in their ordinary and natural

meaning. The court cannot countenance a construction involving an insertion in the section of words which are not found therein and are not in the

least necessary for an intelligible construction thereof.

In our opinion this is a salutary rule and departure from this rule can only be justified in extreme cases where the words construed in their ordinary

and natural meaning clearly conflict with the obvious intention of an enactment as gathered from the enactment itself.

9. As Lord Macmillan said in *Mayor Councillors and Burgesses v. Taranaki Electric Power Board*, (1933) 66 M LJ 87: AIR 1933 PC 216:

It is the rule that words are used in an Act of Parliament correctly and exactly and not loosely and inexactly. Upon those who assert that that rule

has been broken the burden of establishing their proposition lies heavily.

10. After giving the matter our best consideration we are clearly of the view that the word "created" in Section 125(1) does not include in its

meaning "accepted." It is not clear what the learned Judge meant by the word "accepted". Evidently he was referring to a case when a company

acquires property with notice of and subject to a charge. For one thing if the word "created" is given an extension of meaning as to include also

"accepted" in the above sense then there is no purpose served by Section 127 because Section 127 specifically deals with a case where a

company acquires property which is subject to a charge which requires registration if it had been created by the company.

11. It must not be overlooked that a company may acquire a property subject to a charge created not by any company but by a private individual.

In such a case what the company acquires is only the equity of redemption. To give a concrete case suppose a company purchases Immovable

property worth Rs. 50,000 subject to a mortgage for Rs. 20,000 for a consideration of Rs. (SIC). This value obviously represents the value of the

equity of redemption (Rs. 50,000 minus Rs. 20,000: Rs. 30,000). We fail to see any justice or equity in holding that if the company making such a

purchase fails to furnish the Registrar with particulars of the charge within the prescribed time, the mortgagee loses all his rights under the mortgage

as against the Liquidator or the creditor of the purchasing company.

To so hold would mean that the liquidator and the creditors would have recourse to what could in no sense be described as assets of the company.

In the illustration we have given above the creditors would become entitled to properly worth Rs. 50,000 though all that the company purchased

was only properly worth Rs. 30,000. It is impossible for us to subscribe to this proposition. u/s 127 it is true that the acquiring company is directed

to furnish the Registrar With particulars of the charge and for default in complying with this direction the company and the officers of the company

are made punishable but Section 127 does not purport to enlarge the extent of the property acquired by the company. Such a construction would

be laying a premium on dishonesty. A company has only to acquire a property to a mortgage and deliberately fail to comply with the requirements

of Section 127(1) and the result is that the creditors of the company will be benefited by having recourse to the property free of the mortgage.

The mortgagee cannot be blamed at all because he took the mortgage from an individual under a registered deed and at the time of the mortgage

there was nothing to compel either the mortgagor or the mortgagee to comply with the provisions of the Companies Act. Why should such a

mortgagee lose the benefit of his mortgage when without his being a party to the transaction the mortgagor sells" the equity of redemption to a

company and that company fails to do its duly, that is, falls to furnish the Registrar with the particulars of the charge? There is only one case to

which we shall refer though it is not a direct decision on the construction of the language of the corresponding provision of the English Companies

Act.

In re, Connolly Bros. Ltd., Wood v. The Company, 1912 2 Ch. 25, the facts were these: A company issued debentures creating a floating charge

upon their undertaking and all their properties one of the conditions of the debentures being that the company should not be at liberty to create any

other mortgage or charge in priority to the debentures.

The company thereafter desiring to purchase certain property which they had not the money to pay for, borrowed of 1000 from O upon terms

(that she should have a charge upon the property so purchased. The company then bought the property for of 1100 out of which of 1000 came

from O. After the purchase the company executed in favour of O a memorandum of equitable charge upon the property for of 1000. It was held

by the Court of Appeal that what the company acquired upon the purchase was only the equity of redemption in the property subject to the

equitable charge of O, who was accordingly entitled to priority over the debentures. Cozens Hardy M. R. tersely put it:

We should be shutting our eyes to the real transaction if we were to hold that the unencumbered fee simple in the property was over in the

company so that it became subject to the charge of the debenture holders.

12. If Kutty and Rao Ltd. purchased a certain property from Sayanas Ltd. on the footing that it was subject to a charge in favour of the appellant

and the consideration paid by Kutty and Rao Ltd., represented only the equity of redemption then it would not only be shutting our eyes but also

perpetrating an injustice if we were to hold that the creditors of Kutty and Rao Ltd., would have the benefit of the purchased property free of the

charge subject to which it was purchased simply because Kutly and Rao Ltd., failed to do their duty laid on them u/s 127(1) of the Act: If it were

necessary to decide this case on the footing that Kutty and Rao Ltd., purchased the property over which the appellant held a charge then it would

have been necessary to go into the facts to ascertain what exactly was purchased and subject to what terms and conditions.

13. But in our opinion this appeal can be disposed of on a short ground. From the records it appears that Kutty and Rao Ltd., took over the entire

assets and liabilities of Sayanas Ltd. by the transactions referred to earlier in this judgment. It was because of this fact that though it was only Kulty

and Rao Ltd., which went into liquidation the creditors of Sayanas Ltd., were also permitted to file their claims before the Official Liquidator. In

paragraph 5 of the affidavit filed on behalf of the appellant it is stated that in the winding up proceedings the creditors of Sayanas Ltd., had also

been directed to file their claims relating to the respective amounts due to them. The judgment of Balakrishna Aiyar J., dated 11-3-1957 in Appln.

No. 2799 of 1956 is based on this assumption. He inter alia stated

As I read the documents, there has been a transfer of the entirety of the assets and liabilities of Sayanas Ltd., to Kutty and Rao (Engineers) Ltd.

The learned Judge, therefore, held that the Official liquidator would be entitled to collect all the moneys due and payable to Sayanas Ltd. It follows

that on and from after the date of such transfer the appellant must be deemed to be a creditor of Kutty and Rao Ltd., and Kutty and Rao Ltd., is in

liquidation. The appellant cannot, therefore, rely on his unregistered charge as against the other creditors of Kutty and Rao Ltd., who would

include also the other creditors of Sayanas Ltd. This flows from the provisions of Section 125(1) read without giving any extended definition to the

word "created". It follows that the claim of the appellant to be recognised as a secured creditor was rightly rejected by the Official liquidator and

by the learned Judge.

14. The appeal fails and is dismissed but in the circumstances, there will be no order as to costs.