(1980) 03 CAL CK 0013

In the Calcutta High Court

Case No : Company Petition No. 261 of 1967

Union of India (UOI) APPELLANT

Vs

Official Liquidator RESPONDENT

Date of Decision : 31-03-1980

Acts Referred:

Companies (Court) Rules, 1959 — Rule 149, 177, 7, 9
Companies Act, 1956 — Section 457(3), 528
Industries (Development and Regulation) Act, 1951 — Section 18A

Citation : (1983) 53 CompCas 573

Hon'ble Judges : Salil K. Roy Chowdhury, J

Bench : Single Bench

Judgement

Salil K. Roy Chowdhury, J.—This is a combined application by the Union of India under Sections 457(3), 528 and 539(7)(f) of the Companies Act, 19.56, read with Rules 7, 9, 149 and 177 of the Companies (Court) Rules, 1959, for treating the petitioner, Union of India, as a secured creditor in respect of its claim for Rs. 2.02 crores, and for the respondent, official liquidator, to be directed to execute a deed of assignment and/or reconveyance in favour of the Union of India in respect of the said claim and also for a return of the title deeds and the original mortgage deeds lying with the respondent in respect of immovable properties in Calcutta and delay in filing proof of debt and/or preferring the petitioner''s claim for Rs. 43.17 lakhs as an ordinary creditor to be condoned and for an injunction restraining the respondents from making any disbursement to any creditor out of the money lying in the hands of the respondent.

2. From the facts of this case which are not in dispute it appears that prior to the said company, India Electric Works Ltd., being wound up by an order of this court, an agreement was entered into with the Staff Bank of India, Calcutta, for the advance of money and/or overdraft facilities for running the business of the company by way of cash credit account on various terms and conditions which are set out in the letter dated the 16th of January, 1963, a copy of which is annexed to the affidavit in support of this application by and under which it

transpires that pursuant to the correspondence between the company and the Stale Bank of India, a cash credit accommodation was sanctioned to the company on the terms and conditions set out in the said letter dated the 16th of January, 1963, from the State Bank of India to the company, the limit being Rs. 85,00,000 and the security being hypothecation of the company''s whole assets, stock-in-trade, raw materials, book debts, stores and all other assets together with a guarantee of the President of India. There were two accounts, one being account No. 1, the Cash Credit Account and the other being account No. 2, wherein the limit was Rs. 55,00,000 and the advance was guaranteed by the President of India, and as a collateral security by way of equitable mortgage of the entire immovable properties of the company including the plants and machineries was created in favour of the bank. It appears that the company has already executed a deed of hypothecation dated 2nd of January, 1963, wherein and whereunder, the company hypothecated both movable and immovable properties of the company in favour of the bank and created a first charge on its assets in mortgage in favour of the bank. On or about the 4th of January, 1963, the company deposited with the bank the title deeds of its immovable properties with an intent to create security on these immovable properties for the due payment of the advances made and to be made to the company by the bank under the said arrangement. It further appears that on or about the 8th of November, 1960, the company was taken over u/s 18A of the Industries (Development and Regulation) Act, 1951.

3. The State Bank of India presented a winding-up petition some time in 1967 being Company Petition No. 67 of 1967 and by an order dated the 27th of August, 1968, a winding-up order was passed by this court. After the said winding-up order and the liquidation of the company, the entire claim together with accrued interest thereon of the bank aggregating to Rs. 2,02,71,371 was paid by the Central Govt. to the said State Bank of India and obtained a deed of assignment executed by the State Bank of India in favour of the Union of India being dated the 16th of December, 1970, in respect of the mortgage by and between the bank and the company. It is submitted that by virtue of the said assignment the Central Govt. has the right of subrogation under the said deed of assignment and, as such, the Central Govt. stepped into the shoes of the State Bank of India and became a secured creditor of the company (in liquidation) in respect of the said claim for Rs. 2,02,71,371. It is alleged that the title deeds of the immovable properties were handed over to the official liquidator so as to enable him to execute a reconveyance in respect of the said properties in favour of the Central Govt. There was certain correspondence between the official liquidator and the Central Govt., being letters dated the 7th of August, 1970, and 4th November, 1975.

4. For the purpose of appreciating the correct position it will be convenient to set out some relevant correspondence, the first being a letter dated the 6th of January, 1963, written by the State Bank of India, Strand Road, Calcutta, to the India Electric Works Ltd. sanctioning the cash credit accommodation in the two

accounts being accounts Nos. 1 and 2.

5. Copy of letter No. ADV/C. 365 dated the 16th January, 1963, from the State Bank of India, 3, Strand Road, Calcutta, to the India Electric Works Ltd., Diamond Harbour Road, Calcutta 34.

Private and Confidential

Dear Sirs,

Cash Credit Accounts.

A/c. No. 1--limit Rs. 85 lakhs.

A/c. No. 2--limit Rs. 55 lakhs.

With reference to the correspondence resting with your letter No. ADV/C. 8265 dated the 20th December, 1962, we have pleasure in advising that the bank has sanctioned cash credit accommodation to the company on the following terms and conditions :

Account No. 1 :

(a) Limit--Rs. 85 lakhs.

(b) Security--Hypothecation of the whole of the company''s stock-in-trade of whatever kind and description, whether raw or in process of manufacture, and all articles manufactured therefrom, stores, book debts and other assets plus the guarantee of the President of India.

(c) Margin--20% on drawings will be allowed against store, book debts and other assets, nor against defective goods and non-moving items of raw materials.

(d) Interest--1/2% above State Bank of India Advance Rate, arising and falling therewith, minimum 51/2% per annum with monthly rests.

(e) Insurance--Stocks and stores to be kept fully insured against fire, strike and riot risks the relative policies may be retained by the borrowers.

(f) Inspections-Monthly

(g) Stock Statements-Monthly

(h) Terms of Repayment--On demand : to be reviewed half-yearly.

(i) General--(i) The company should undertake in writing that the proceeds of the Bank''s advance, after payment of their dues to the Punjab National Bank Ltd., will be utilised to build up stocks to the optimum level on the basis of production of 10,000 fans and switch gears of the value of Rs. 2 lakhs per month. To this end, the company should submit to the bank, along with their monthly stock statements, a report of further stocks acquired.

(ii) The company should also furnish the Bank with an undertaking in writing that they will not create any further charge on their assets without obtaining the previous written consent of the Bank.

(iii) The company should confine their entire banking business (inclusive of transactions involving foreign exchange) to the State Bank of India.

Account No. 2

(a) Limit--Rs. 55 lakhs

(b) Security--(i) The advance to be guaranteed by the President of India, and

(ii) collaterally secured by an equitable mortgage over the entire immovable properties including plant and machinery of the company in favour of the Bank.

(c) Interest--1% above State Bank of India Advance rate, rising and falling therewith, minimum 6% per annum, with monthly rests.

(d) Terms of Repayment--On demand: to be reviewed half-yearly. The advance to be repaid strictly in accordance with the following repayment programme.

Rs.

On or before 4th January, 1964 14 lakhs

-- do -- 4th January, 1965 14 "

-- do -- 4th January, 1966 11 "

-- do -- 4th January, 1967 8 "

-- do-- 4th January, 1968 8 "

55 "

(e) General--The entire outstanding on the advance will become immediately repayable, if and when during the stipulated period of repayment, the management of the company u/s 18A(1) of the Industries (Development and Regulation) Act comes to an end.

2. Please return to us the duplicate of this letter duly signed by yourselves and the Secretary to the Government of India, Ministry of Commerce & Industry, in token of acceptance of the terms and conditions of the advance, as indicated above.

Yours faithfully, Sd/- Superintendent.

Duplicate duly signed by Sri Ranganathan, Secretary, Ministry of Commerce and Industry and Shri P. C. Basu, Authorised Controller. India Electric Works Ltd., sent to Bank. "

6. Pursuant to the said agreement, the State Bank of India lent and advanced diverse sums of money and the said agreement was duly guaranteed by the Union of India, in terms of the said agreement/up to the total amount together

with interest aggregating to Rs. 2,02,71,371. Before the said arrangement for the overdraft on cash credit account and the guarantee by the Union of India, the State Bank, pursuant to its cash credit arrangement prior to the liquidation of the company, presented a winding-up petition being C.P. No. 361 of 1967 against the company, and, by an order dated the 27th of August, 1968, the company was wound up and the official liquidator was appointed the liquidator. Before the winding-up order, on the 8th of November, 1968, the company was taken over u/s 18A of the Industries (Development and Regulation) Act, 1951, after obtaining the necessary permission of the Central Govt., but, subsequently, the said winding-up order was made as hereinbefore stated. After the liquidation of the company, the Central Govt. has liquidated the entire claim of the said State Bank of India and the bank executed a deed of assignment dated the 16th of December, 1970, in favour of the Central Govt. in respect of the mortgage executed by and between the said bank and the company. It is alleged that the Central Govt. has become entitled to the right of the bank and got subrogated under the said deed and become the secured creditor of the company in liquidation in respect of the said claim. The title deeds of the movable properties which were mortgaged with the bank by way of security were handed over to the official liquidator. In this respect a letter dated the 7th of August, 1970, written by the, official liquidator to the Joint Secretary, Ministry of Industrial Development & Internal Trade would be relevant, which is set out herein.

"'' Copy of letter of No. 435\\1\\2736\\G dated the 7th August, 1970, from Shri J. P. Mukherjee, Attorney-at-Law, Official Liquidator, High Court, Calcutta, to the Joint Secretary, Ministry of Industrial Development & Internal Trade.

Subject: India Electric Works Limited (In Liquidation).

Kindly refer to your letter No. 3961-JSK-70 dated August 1/3, 1970, received by me on August 6, 1970.

I, as Official Liquidator of India Electric Works Ltd., have no objection in the signing of the assignment deed. But as Official Liquidator of the High Court, Calcutta, I have to take formal permission of the High Court to do so. It may kindly be considered whether Government of India after such assignment deed would have to stand in the queue along with the other creditors. In my view as the State Bank of India is a secured creditor and if the High Court permits me to join as party in the assignment deed then in that case the Government of India will step into the shoes of the State Bank of India and will become a secured creditor. If this position is correct then Government''s dues will have to be paid first before the claims of the preferential creditors as provided in section 530 of the Companies Act, 1956.

As desired by you I discussed the matter with the Superintendent, Advances Department, State Bank of India (Head Office), Calcutta. He, however, informed me that they had not yet received your letter.

Yours faithfully, Sd/- J. P. Mukherjee, Official Liquidator, High Court, Calcutta."

7. It appears that on the 28th of March, 1977, the Union of India made an application for a condonation of the delay in preferring its claim and filing its proof of debt in respect of the said amount before the official liquidator. By an order dated 30th March, 1977, the Union of India was given leave to file the proof of debt before the official liquidator before 13th May, 1977. Pursuant to the said order dated 30th March, 1977, the Union of India filed its proof of debt before the official liquidator on or about 13th May, 1977. The petitioner is also claiming a sum of Rs. 43,17,00,000 as an ordinary creditor in addition to the said claim as a secured creditor for the amount of Rs. 2,02,71,371. It is alleged that between 3rd of August, 1967, and the 30th of November, 1968, the petitioner had advanced 19 short-term loans to the company totalling to Rs. 43,17,00,000 for the purpose, inter alia, of payment of the mounting labour costs, etc., of the company; The said claim is still outstanding. On the 2nd of June, 1978, the petitioner, the Union of India, made an application for payment of its claim as a secured creditor. It is alleged by the petitioner, the Union of India, that the respondent-official liquidator has not executed the said deed of assignment and/ or reconveyance in spite of repeated requests as would appear from the correspondence between the parties, which are annexed to the affidavit of R. Ramanujam affirmed on the 29th of July, 1978.

8. The present application is opposed on behalf of the employees, and Mr. Somnath Chatterjee, appearing with Mr. Samir Ghosh for the workers, submitted that the claim of the Union of India as a secured creditor for Rs. 2,02,71,371 is not maintainable in view of the fact that the title deeds were returned by the State Bank of India to the official liquidator and not to the Union of India and, therefore, the claim, if any, of the petitioner, the Union of India, can be treated not as that of a secured creditor but as one of an ordinary creditor. Mr. Chattarjee submitted that the position of the Union of India was that of a guarantor for the loan granted by the State Bank of India to the company (in liquidation), having been made good by the petitioner. The Union of India never filed any claim within the stipulated time before the official liquidator and, therefore, at this stage they should not be allowed to prefer any. claim as an ordinary creditor, far less as a secured creditor. Mr. Chatterjee submitted that a guarantor cannot be treated as a preferential creditor or an ordinary creditor. Mr. Chatterjee drew my attention to the correspondence and submitted that at no point of time the State Bank of India assigned its debt to the Union of India but '' returned the title deeds to the official liquidator in respect of the properties of the company and, the company in the due course of winding-tip has .disposed of the assets, and the money lying in the account of the, company with the official liquidator is available for preferential payment to the workers and others u/s 530 of the Companies Act, 1956. In any event, it was submitted by Mr. Chatterjee that the Union of India must be deemed to have waived its claim on the security, if any, in respect of the said properties of the company which have now admittedly been sold in the winding-up proceedings by the official liquidator in the course of administration of the company in winding-up. Therefore, Mr.

Chatterjee submitted that the present application should be dismissed with costs and the Union of India is not entitled to any right as a secured creditor or an ordinary creditor in respect of the sum claimed by the Union of India out of the assets lying in the hands of the official liquidator.

9. Mr. S. B. Mukherjee, appearing for the official liquidator, submitted that the Union of India having paid the State Bank of India as the guarantor for the said loan granted by the State Bank of India to the company has now stepped into the shoes of the State Bank of India and is entitled as a secured creditor in respect of the assets and properties of the company, which were charged and mortgaged in favour of the State Bank of India by the said company against the said cash credit accounts hereinbefore stated. Mr. Mukherjee submitted that there is no dispute whatsoever that the State Bank of India has been paid by the Union of India and on such payment the title deeds were released to the company and the claim of the State Bank of India against the company has been satisfied by the Union of India. There is no dispute as to this fact and that payment has been made only pursuant to the said agreement of guarantee, pursuant to the said cash credit account, in terms of the letters as hereinbefore stated. Mr. Mukherjee referred to the provisions of Section 141 of the Contract Act, and also to the Supreme Court decision, which I have referred to in the other application, in Abdul Husein Tayabali and Others Vs. State of Gujarat and Others, , that the Union of India is substituted in place and stead of the State Bank of India as the secured creditor and the right enures for the benefit of the Union of India for payment of the sum guaranteed by the Union of India on behalf of the company to be paid to the State Bank of India in case of non-payment of the dues of the bank in respect of the said overdraft account. It appears from the records that the management of the company, India Electric Works Ltd., was taken over on the Sth of November, 1960, u/s 18A of the Industries (Development & Regulation) Act, 1951, and since then the company was managed by the authorised controller appointed by the Central Govt. under the said Act. In the course of such management the said letter of hypothecation and charge and the mortgage was executed by the company in favour of the State Bank of India which is dated the 16th of January, 1963, as set out hereinbefore and the company also deposited the title deeds in respect of the immovable properties by way of equitable mortgage in favour of the State Bank of India for the loan granted to the company by the State Bank of India, and the Union of India guaranteed the said loan, as would appear from the said letter. Thereafter, as the said work of the company was not satisfactory, the State Bank of India with the permission of the Central Govt. under the relevant provisions of the Industries (Development & Regulation) Act, 1951, presented a winding-up petition before this court being Company Petition No. 261 of 1967 on the ground of inability to pay its debt by the company and by an order dated the 27th of August, 1968, the company was directed to be wound up and the official liquidator was appointed liquidator of the said company The company executed the said document being the Cash Credit (Hypothecation of Goods) Agreement

dated the 2nd of January, 1963, hypothecating and charging various assets of the present and future, and the properties, in favour of the State Bank of India and it also appears that on or about 4th January, 1963, the company deposited with the State Bank of India at Calcutta the title deeds of the immovable properties with intent to create a security by way of equitable mortgage for the money lent and advanced by the State Bank of India to the company during the period it was working under the Industries (Development & Regulation) Act, 1951, through the authorised controller appointed by the Central Govt. The State Bank of India did not file any suit for the recovery of its dues and the enforcement of its securities but applied for a winding-up of the company and the said company was wound up as hereinbefore stated by the order dated the 27th of August, 1968. It appears that after negotiation between the State Bank of India and the President of India, who was the guarantor, a sum of Rs. 2,02,71,371, being the total amount advanced together with interest by the State Bank of India in respect of the said Cash Credit & Loan Account, was paid by the Union of India to the State Bank of India. The Union of India submitted proof of its claim before the official liquidator in which it was alleged that by a deed of assignment dated the 16th of February, 1970, in their favour from the State Bank of India in respect of the mortgage created by the said company in favour of the State Bank of. India, the Union of India has become entitled to be paid by the company out of the securities in respect of the said Cash Credit & Loan Account in favour of the State Bank of India up to the limit specified in the said letter dated 16th January, 1963, that is, 85 lakhs plus 55 lakhs aggregating to Rs. 1.40 lakhs only. It also appears that the State Bank of India thereafter returned the title deeds, in respect of the immovable properties of the company, which were deposited with it, to the official liquidator on or about 18th of December, 1975. Thereafter, the official liquidator invited claims from the creditors of the company but the Union of India did not file any claim within 30th of April, 1974, which was the date fixed for filing claims. It appears that the Union of India made an application on or about 28th of March, 1977, inter alia, for leave to file its proof of debt before the official liquidator and also for a direction to the official liquidator to admit the claim of the Union of India. The said application was finally disposed of by this court on the 30th of March, 1977, by which leave was given to the Union of India to file its proof of debt before the official liquidator. It appears that the Union of India, after making payment as the guarantor of all the dues of the State Bank of India, did not obtain any direction from this court with regard to the payment of its dues. It appears from the correspondence between the Union of India''s advocate and the official liquidator that there was a certain misapprehension as to the correct legal position and the right of the Union of India to get payment in respect of the secured debt in favour of the State Bank of India under the letter of guarantee executed by the Union of India.

10. As I have already made an order in the application of the official liquidator, it is only necessary for me to give directions to the official liquidator as prayed for

in this application.

11. In this matter also I have heard the advocates appearing for the official liquidator and the Union of India being Mr. S. B. Mukherjee and Mr. D. Some respectively on behalf of the Union of India and also Mr. Somenath Chatterjee appearing for the India Electric Workers'' Union.

12. The reasonings parity in this judgment and partly in the other application made by the Union of India cover the entire questions about which the official liquidator has sought a determination and direction in the summons taken out dated the 2nd of June, 1978.

13. Therefore, I am making the following order :

In terms of prayer (i) it is determined that, in the facts and circumstances of this case, the Union of India is a secured creditor for a sum of Rs. 1 crore 40 lakhs only and has the right to pursue the claim preferred before the official liquidator as a secured creditor to that extent. As the properties have already been sold and the securities in respect thereto have shifted to the sale proceeds, there is no question of return of the title deeds by the official liquidator to the Union of India. The official liquidator to retain the costs of this application out of the assets in his hands to be paid at the first instance before paying the Union of India as the secured creditor at 100 G. Ms.

14. The official liquidator and all parties to act on a signed copy of the minute.

