
(2005) 07 MAD CK 0160

In the Madras High Court

Case No : Company Application No. 793 of 2003 in C.P. No. 39 of 1994

V.K. Seshasayee and Another

APPELLANT

Vs

Official Liquidator

RESPONDENT

Date of Decision : 26-07-2005

Acts Referred:

Companies (Court) Rules, 1959 — Rule 232, 270
Companies Act, 1956 — Section 10GD, 442, 446, 448, 449
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 19(19), 25
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 20

Citation : (2005) 6 CompLJ 463 : (2006) 66 SCL 414

Hon'ble Judges : D. Murugesan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

D. Murugesan, J.—The applicants are the ex-directors of the company in liquidation, viz., M/s. Seshasayee Industries Limited. They have approached this court seeking for a direction to the official liquidator to effectively represent in the proceedings initiated by the ICICI Limited and now pending before the Debt Recovery Tribunal-I, Mumbai, in O. A. No. 355 of 2001 so as to protect the interest of creditors, workers and shareholders.

2. The cause for this application, as could be seen from the affidavit filed on behalf of the applicants, is as follows :

The company in liquidation was ordered to be wound up on February 20, 1996, by this court in C. P. No. 39 of 1994 pursuant to the recommendation of the BIFR u/s 20 of the Sick Industrial Companies (Special Provisions) Act, 1986. Even before the company was ordered to be wound up, one of the secured creditors of the company, viz., ICICI Ltd. instituted a Suit No. 3781 of 1994 on the file of the High Court, Mumbai. The High Court, Mumbai, appointed a receiver, who took possession of the company's factory at Vadalur, South Arcot District and also

books and records of the company. As the winding up of the company was ordered and the official liquidator was appointed, the receiver ought to have handed over possession of the assets of the company to the official liquidator, High Court, Madras. Hence, an application in C. A. No. 701 of 2002, was filed seeking for a direction to the receiver, High Court, Mumbai, to hand over the assets, books and accounts and the records of the company in liquidation and also for a further direction to the receiver not to proceed with the sale of properties of the company in liquidation. It appears that the receiver appointed by the High Court, Mumbai, informed the respondent that she was discharged as receiver pursuant to the order passed by the Presiding Officer, Debt Recovery Tribunal, Mumbai, on May 24, 2002 and M/s. Industrial and Technology Consultant of Tamil Nadu Ltd., was appointed as a new receiver by the Debt Recovery Tribunal. The above order came to be passed in view of the fact that the suit pending in the High Court, Mumbai, came to be transferred to the Debt Recovery Tribunal, Mumbai, after its constitution.

3. Though the winding up was ordered and the official liquidator was appointed as early as in the year 1996, no steps were taken to defend the secured creditors as well the workmen before the Debt Recovery Tribunal. The official liquidator allowed the sale of the property and that too for a very low price, thereby has not acted in the interest of the secured creditors as well as the workmen of the company and has not discharged his duty as required under law.

4. In the report filed by the official liquidator, it is stated that as the claims of the workmen have not been concluded, the official liquidator has not participated in the proceedings before the Debt Recovery Tribunal. It is his further case that the applicants being the ex-directors of the company have no locus standi to file this application.

5. Section 448 of the Companies Act, 1956 (hereinafter referred to as "the Act"), relates to the appointment of official liquidator in the event a company is ordered to be wound up. In terms of Section 449 of the Act, on a winding up order being made in respect of a company, the official liquidator shall, by virtue of his office, become the liquidator of the company. In terms of Sub-section (1) of Section 456, where a winding up order has been made or where a provisional liquidator, as the case may be, has been appointed, the liquidator or the provisional liquidator, as the case may be, shall take into custody or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled. In terms of Section 457, the official liquidator shall have the following powers :

"(1) The liquidator in a winding up by the Tribunal shall have power, with the sanction of the Tribunal,--

(a) to institute or defend any suit, prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company;

(b) to carry on the business of the company so far as may be necessary for the

beneficial winding up of the company ;

(c) to sell the immovable and movable property and actionable claims of the company by public auction or private contract, with power to transfer the whole thereof to any person or body corporate, or to sell the same in parcels ;

(ca) to sell whole of the undertaking of the company as a going concern ;

(d) to raise on the security of the assets of the company any money requisite ;

(e) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets ..."

6. In terms of Section 459, the liquidator may, with the sanction of the Tribunal, appoint one or more chartered accountants or company secretaries or cost accountants or legal practitioners entitled to appear before the Tribunal u/s 10GD to assist him in the performance of his duties.

7. In terms of Section 529, in the winding up of an insolvent company, the rules applicable to the winding up shall prevail and be observed. As per the proviso to the said section, which was introduced by the Companies (Amendment) Act, 1985, the security of every secured creditor shall be deemed to be subject to a *pan passu* charge in favour 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, the liquidator shall be entitled to represent the workmen and enforce such charge and the amount realised by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues. In terms of Section 529A, notwithstanding anything contained in any other provision of the Act or any other law for the time being in force, in the winding up of a company (a) workmen's dues ; (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. In this context, the following rules of the Companies (Court) Rules, 1959, are referable. Rule 232 contemplates that the duties imposed on the court by Sub-section (1) of Section 467 with regard to the collection of the assets of the company and the application of the assets in discharge of the company's liabilities shall be discharged by the official liquidator as an officer of the court subject to the control of the court. Rule 270 contemplates that in a winding up by or subject to the supervision of the court, no claim by the company against any person shall be compromised or abandoned by the liquidator without the sanction of the court. By that rule, even for abandonment of any claim the liquidator has to act under the supervision of the court. The official liquidator, thus, has a duty coupled with the power to institute or defend any suit, prosecution or other legal proceedings both civil and criminal in the name and on behalf of the company. Such power includes the power to carry on the business of the company so far as may be necessary for the benefit of the company in liquidation. The official liquidator has also the power to sell the immovable and movable property and

actionable claims of the company by public auction or private contract. Once the winding up of the company is ordered, the official liquidator shall take the custody of all the properties, effects and actionable claims to which the company is or appears to be entitled. The position of the liquidator is essentially that of an agent employed for the purpose of winding up of a company.

8. Participation of the official liquidator in the proceedings before DRT, Mumbai, is in discharge of his duties and as a necessary corollary, non participating the proceedings and not defending the interest of the company or the secured creditors or the workmen who stand on par with the secured creditors with preference to settlement of claim would amount to failure in discharging the duty. As the provisions of the Companies Act mandate the official liquidator to defend the suits or any other legal proceedings, the objection as to the locus standi of the petitioner to file the application is purely technical and is liable to be rejected. That apart, by the duty cast upon the official liquidator he ought to have taken similar application for permission to participate the proceedings before the DRT, Mumbai, if so required.

9. In this context, the provisions of Section 19(19) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, and Section 529A of the Companies Act are referable. While considering both the provisions, the Supreme Court in Allahabad Bank Vs. Canara Bank and Another, has held that even the priorities among the various creditors can be decided only by the Debt Recovery Tribunal in accordance with the provisions of Section 19(19) of the Recovery of Debts Due to Banks and Financial Institutions Act, read with Section 529A of the Companies Act. The relevant portion of the judgment reads as under (page 88 of 101 Comp Cas) :

"For the aforesaid reasons, we hold that at the stage of adjudication u/s 17 and execution of the certificate u/s 25, etc., the provisions of the RDB Act, 1993, confer exclusive jurisdiction in the Tribunal and the Recovery Officer in respect of debts payable to banks and financial institutions and there can be no interference by the company court u/s 442 read with Section 537 or u/s 446 of the Companies Act, 1956. In respect of the monies realised under the RDB Act, the question of priorities among the banks and financial institutions and other creditors can be decided only by the Tribunal under the RDB Act and in accordance with Section 19(19) read with Section 529A of the Companies Act and in no other manner. The provisions of the RDB Act, 1993, are to the above extent inconsistent with the provisions of the Companies Act, 1956 and the latter Act has to yield to the provisions of the former. This position holds good during the pendency of the winding up petition against the debtor company and also after a winding up order is passed. No leave of the company court is necessary for initiating or continuing the proceedings under the RDB Act, 1993."

10. The Supreme Court in a recent decision in Andhra Bank v. Official Liquidator 2005 124 Comp Cas 453 : 2005 59 SCL 239 has explained the above judgment by holding that the language of Section 529A is also clear and unequivocal in

terms whereof the workmen's dues or the debts due to the secured creditors to the extent such debts rank under Clause (c) of the proviso to Sub-section (1) of Section 529 *pan passu* with such dues shall have priority over all other debts. Once the workmen's claims are worked out in terms of proviso (c) of Sub-section (1) of Section 529, indisputably the claim of the workmen as also the secured creditors will have to be paid in terms of Section 529A.

11. Admittedly, the official liquidator was appointed after the company was ordered to be wound up on February 26, 1996. Though a suit was filed by one of the secured creditors before the High Court, Mumbai, in the year 1994, the Debt Recovery Tribunal appointed the receiver only by an order dated May 24, 2002 and the receiver took possession of the assets only during August 2002. The Debt Recovery Tribunal, Mumbai, approved the draft sale memorandum and fixed valuation as the reserve price vide order dated November 28, 2002. Advertisement for public sale was issued on December 6, 2002. The sale was accepted and a certificate of sale was issued by the Debt Recovery Tribunal on July 9, 2003.

12. The proceedings of the Debt Recovery Tribunal show that after the suit was transferred from the High Court, Mumbai notice was ordered on June 25, 2001. The Debt Recovery Tribunal was informed on July 11, 2001, as to the fact that the company was in liquidation and the official liquidator, Madras, was appointed in the matter. Hence an application was taken out to bring the official liquidator on record on September 27, 2001. Notice was issued on October 8, 2001. The said notice was served on the official liquidator, as could be seen from the endorsement made by the Debt Recovery Tribunal on May 24, 2002, viz., "notice is issued to the official liquidator. None present." Thereafter, the Debt Recovery Tribunal allowed O. A. No. 355 of 2001 and discharged the High Court receiver and thereafter appointed M/s. Industrial and Technical Consultancy Organisation of Tamil Nadu Ltd. (ITCOT) as receiver. The remaining endorsements up to the confirmation of sale show that the official liquidator has not participated in the proceedings and has allowed the proceedings to go on without any representation. As the determination of the claim of the workmen u/s 529A of the Companies Act should also be done along with the claim of the secured creditors pending before the Debt Recovery Tribunal, it is, therefore, necessary that the official liquidator should represent the interest of the workmen as he is competent to do by virtue of the provisions of Section 529 of the Companies Act and for the said purpose he should participate in the proceedings pending before the Debt Recovery Tribunal-I, Mumbai.

13. For the foregoing discussions, I am of the considered view that the official liquidator ought to have participated in the proceedings pending before the Debt Recovery Tribunal-I, Mumbai, even before the sale was effected. Nevertheless, in the interest of the company and particularly in the interest of the secured creditors and the workmen, the official liquidator shall effectively represent the proceedings initiated by the ICICI Ltd. before the Debt-Recovery Tribunal-I,

Mumbai, in O. A. No. 355 of 2001 for the distribution of the sale consideration to the secured creditors, workers and the shareholders of the company. Accordingly, the application is allowed and there will be a direction as prayed for.