(2013) 04 MAD CK 0102

In the Madras High Court

Case No : Comp. A. No. 73 of 2013 in C.P. No. 303 of 2010

Western Cans Pvt. Ltd. APPELLANT

Vs

The Official Liquidator RESPONDENT

Date of Decision : 12-04-2013

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 34, 9
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 54, Order 21 Rule 6
Companies Act, 1956 — Section 125, 446, 458A, 529A, 530
Registration Act, 1908 — Section 17(1)(b), 17(2)(vi)

Citation : (2013) 04 MAD CK 0102

Hon'ble Judges : Vinod K. Sharma, J

Bench : Single Bench

Advocate : Arun Anbumani, for the Appellant;

Final Decision : Dismissed

Judgement

Vinod K. Sharma, J.—This application has been filed to permit the petitioner to proceed with the execution petition being E.P. No. 88/07-

09-2012, pending in the Court of learned Additional District Judge, Gurgaon, Haryana. M/s. Western Cans Private Limited/applicant seeks leave

of this Court to continue with the Execution of proceedings instituted by it against the company in liquidation, i.e. M/s. Rayalseema Commodities

Limited (formerly M/s. Sudarshan Overseas Limited).

2. It is pleaded, that the applicant entered into a Memorandum of Understanding (MOU) with the company in liquidation on 19.01.2009 for

supply of metal cans. The price and quantity to be supplied was agreed between the parties and the company in liquidation had also agreed to

prove bank guarantee for a sum of Rs. 25,00,000/- (Rupees Twenty Five Lakhs only) and had also agreed to issue post dated cheques towards payment of goods supplied.

3. Two purchase agreements were entered into between the parties whereby the company in liquidation agreed to purchase 12 lakhs A-10 cans

and 2 lakhs A-12 cans. The contract was fulfilling by the applicant, but the company in liquidation failed to make payment. The post dated cheques

issued by the company in liquidation were dishonored.

4. The applicant filed C.P. No. 124 of 2010 for winding up of the company in liquidation. The dispute between the parties with regard to non

payment of amount due was also referred to the Arbitration. The applicant, therefore, filed the application u/s 9 of the Arbitration and Conciliation

Act, 1996, before the Hon''ble Bombay High Court for interim reliefs.

5. On 04.05.2011, an order u/s 9 of the Arbitration and Conciliation Act was passed by recording the statement of the learned counsel appearing

for the company in liquidation. Learned counsel appearing for the applicant got recorded the undertaking that the company will not dispose of,

alienate, encumber, part with possession of or create any third party rights in respect of the property belonging to the company in liquidation, i.e.

Plot bearing No. 127 at Sector 44 GGN, Gurgaon, Haryana with the building standing thereon (now part of execution proceedings).

6. The applicant filed its claim for recovery of Rs. 5,71,24,289/- (Rupees Five Crores Seventy One Lakhs Twenty Four Thousand Two Hundred

and Eighty Nine only) along with Rs. 1,83,54,936/- (Rupees One Crore Eighty Three Lakhs Fifty Four Thousand Nine Hundred and Thirty Six

only) as interest and also claimed future interest.

7. The Hon''ble Mr. Justice D.G. Deshpande (Retd.) was appointed as the Sole Arbitrator, who after hearing parties, passed award in favour of

the applicant. Under the award, the applicant was held entitled a sum of Rs. 7,54,79,225/- (Rupees Seven Crores Fifty Four Lakhs Seventy Nine

Thousand Two Hundred and Twenty Five only) with future interest @ 18% from 1st August, 2011 till realization. The company in liquidation was

also directed to bear the cost of arbitration, which was assessed at Rs. 4,75,000/- (Rupees Four Lakhs and Seventy Five Thousand only). It was

also held under the award, that the plot bearing No. 127, Sector 44 GGN, Gurgaon, Haryana, would continue to remain under attachment till all

the dues of applicant are paid either separately or by sale of the said property.

8. The applicant filed execution petition before the Hon''ble High Court of Bombay, but keeping in view the fact, that the property was situated

within the jurisdiction of Gurgaon Court, the Hon''ble High Court of Bombay forwarded/transmitted the original award dated 02.04.2012 and the

affidavit dated 23.08.2012 of the applicant along with certificate issued under Order XXI Rule 6 Clause (b) and (c) of the Civil Procedure Code,

1908 for execution by the Court at Gurgaon. The applicant accordingly filed execution petition E.P. No. 88/07-09-2012 for execution of award.

9. The company in liquidation filed objection and one of the objections was that winding up of company was filed against the company in

liquidation by M/s. Pack master Containers Pvt. Ltd., and that vide order dated 26.04.2012, the said petition was admitted and the Official

Liquidator attached to this Court was appointed as Liquidator of the company.

10. It is submitted by the applicant, that the award dated 02.04.2012 passed by the Hon''ble Sole Arbitrator has not been challenged by the

company in liquidation, therefore, it has attained finality. The applicant therefore is a decree holder, thus, entitled to decree.

11. On the pleadings referred to above, the applicant prays for liberty of this Court to proceed with the execution of the company, which is

pending in the Court of Mr. Mahender Singh, Additional District Judge, Gurgaon, Haryana. It is also submitted, that no proceedings or hardship

would be caused to the respondent if this application is allowed.

12. This company application is opposed by the learned Official Liquidator attached to this Court by submitting,

i) that the application is misconceived, therefore, liable to be dismissed in limine, as it is an attempt by the applicant, who overreached the equitable

distribution of the assets of the company in the course of winding up. The applicant is only unsecured creditor, as the rights to recover the alleged

due are to be dealt with under the provisions of Sections 529-A and 530 of the Companies Act, 1956. The grant of permission to execute the

decree, therefore would be tantamount to giving preferential treatment to unsecured creditor, which is not permissible under the Companies Act;

ii) that application was filed in the Executing Court, wherein specific stand was taken that Thiru V. Nagarajajan, earlier Director of the Company in

liquidation was not empowered to appoint an Advocate to represent him before the Hon''ble High Court of Bombay, where an undertaking was

furnished as recorded in the order dated 04.05.2011. The said Director had resigned from the post with effect from 01.10.2010 and Form-32

was also filed with the Registrar of Companies.

iii) that the statement made by Mr. K.T. Thomas, Advocate was without any jurisdiction and is detrimental to the interest of the body of creditors

and contributories at large. The company is examining the award for challenging the same in accordance with law.

iv) that for want of complete record, the Official Liquidator is not in a position to make further submission at this stage.

13. Learned Senior Counsel for the applicant vehemently contended, that once the Hon''ble High Court of Bombay has transferred the award for

execution to the Court of competent jurisdiction, the applicant is entitled to continue execution proceedings with the permission of the Company

Court u/s 446 of the Companies Act. It was vehemently contended, that once the counsel for the company in liquidation had given an undertaking

on the basis of which the plot was attached, the application, the applicant could be allowed to execute the award against the property and grant

necessary permission.

14. Learned Official Liquidator contended, that the award passed by the Hon''ble Arbitrator is not executable inasmuch as the award will become

executable only after expiry of the limitation prescribed u/s 34 of the Arbitration and Conciliation Act, 1996, and that too in case no objections are

filed. In case of the company in winding up, the period of limitation prescribed u/ s 34 of the Arbitration and Conciliation Act, is to be read with

Section 458-A of the Companies Act and accordingly, limitation to file objections would be extended by another one year. In view of this, the

period to challenge the award has not yet expired, therefore the award cannot be treated to be a decree of Civil Court, for being capable of

execution.

15. Learned Senior Counsel for the applicant was not able to dispute this proposition. Consequently, it can be held, that the award has not yet

become executable, as it is open to the company in liquidation to challenge the award in accordance with law.

16. The other contention of learned Official Liquidator, that the applicant is only

unsecured creditor, therefore, the award on becoming decree of

Civil Court, can be enforced only by filing claim before the learned Official Liquidator in terms of Sections 529-A and 530 of the Companies Act,

as and when notice is issued calling claims from the creditors.

17. In support of this contention, that the applicant cannot claim to be a secured creditor, reliance is placed on the judgment of Punjab and

Haryana High Court in Punjab Scheduled Castes Land Development and Finance Corporation Vs. Punjab Wireless Systems Ltd., , wherein the

Hon''ble Division Bench has laid down as under:

In view of the facts, as have been given above, it was held that the benefit of the security was entirely the creature of the order of the Court. It was

not a charge created by the Company and did not require registration. The order of the Court was not a ""non-testamentary instrument"" within the

meaning of section 17(1)(b) of the Indian Registration Act, 1908, and hence, did not require registration. In the instant case, there was no question

of any property other than property which was the subject matter of the earlier suit being included in the security. As such, registration was not

required u/s 17(2)(vi) of the Registration Act. The appellant was a secured creditor to the extent of Rs. 50,000/- and was entitled to recover that

amount from the Official Liquidator.

We are in respectful agreement with the observations made by the learned single Judge that ""in view of Rule 54 of Order 21 of the Code of Civil

Procedure, the only effect of the order of attachment is that the property attached cannot be transferred nor a third party right can be created

therein, in other words, no right Whatsoever, is created in the decree holder vis-ï¿½-vis the property attached. It is, therefore, natural to conclude

that an order of attachment creates no interest in favour of the decree holder. Therefore, the attachment of property of the respondent-company,

i.e., Punwire vide orders dated August 17,1999, and December 6, 1999 does not have the effect of creating any charge in favour of the

Corporation in respect of the attached property"". For arriving at the conclusion aforesaid, the learned company Judge also relied upon the

observations of Mulla in the Code of Civil Procedure, 13th edition at Page 318 as also judgment in AIR 1931 589 (Lahore) as also judgment of

the Gujarat High Court in Ananta Mills Ltd. (In Liquidation) Vs. City Deputy

Collector, Ahemedabad and Others, .

18. It is also contended by the learned Official Liquidator that the attachment order would be void against the Liquidator for want of registration

u/s 125 of the Companies Act. Therefore, the applicant cannot take any advantage of the order of attachment to claim that it is a secured creditor

to continue with the execution proceedings instead of standing in queue with other creditors. Reliance in support of this was placed on the judgment

of the Hon''ble Patna High Court in the case of Smt. Bhagwati Devi Bubna and Others Vs. Dhanraj Mills Private Ltd. and Others, holding as

under:

12. I agree. I may only add that the present case is one where no objection was raised before the court passing the decree as to the

commencement of the winding up proceeding, and a decree was passed. This case is thus distinguishable from all the other decisions to which our

attention was invited. In fact, there is an observation in a Calcutta case Nabin Kishori Choudhurany Vs. Jagneswar Sanyal and Others, that if no

objection is raised before the Court of first instance the decree is not defective in any sense. But in view of the provision in Section 537 of the

present Companies Act, 1956, the decree cannot be executed as against the effects or properties of the Company in liquidation, without the leave

of the court, which, of course, means the winding up court. Such a case is, therefore, covered by the comment of Solomon Judah on the Act and

quoted with approval by the Lahore High Court in AIR 1942 289 (Lahore) to the effect that if a suit is continued without leave obtained under the

said section, the decree is not binding on the liquidator. Hence the decree under execution in the instant case is not binding on the liquidator and

hence proceedings in execution cannot continue. The matter, has, therefore, to be taken to the winding up court for further order. Any observation

made by the executing court regarding the nature of the decree or its executability must be ruled out as being of no effect.

19. On consideration, this Court finds force in the contentions, raised by the learned Official Liquidator, as the Award in favour of the applicant is

not yet enforceable and the applicant cannot be treated as secured creditor to be out of the liquidation proceedings, nor the applicant can break

the queue to claim preferential right to recover the amount, merely based on attachment of the property in arbitration proceedings, when it is not registered u/s 125 of the Companies Act.

20. The application, therefore, can be said to be totally misconceived, thus, no permission can be granted to proceed with the execution petition.

21. The applicant shall however be entitled to enforce its right along with other creditors in accordance with law at appropriate time by taking over appropriate proceedings.

22. Resultantly, this application, being devoid of any merit, is ordered to be dismissed. No costs. Learned Senior Counsel appearing on behalf the applicant submitted, that the learned Official Liquidator was not protecting the interest of the company. This again cannot be the ground to grant liberty to execute the award, which on the face of it is not executable. However, it is observed, that it is the duty of the learned Official Liquidator to see that the assets of the company are taken over at the earliest for the benefit of the creditors and beneficiaries.

