

Appellant Vs. Respondent

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Court : Kolkata

Decided On : Sep-18-2013

Judge : Harish Tandon

Appellant : Appellant

Respondent : Respondent

Judgement :

ORDER

SHEET C.A.No.751 of 2012 C.P.No.324 of 1991 IN THE HIGH COURT AT CALCUTTA Original Jurisdiction TEA TRADING CORPORATION OF INDIA LTD.(IN LIQUIDATION) And THE OFFICIAL LIQUIDATOR & ORS.BEFORE: The Hon'ble JUSTICE HARISH TANDON Date :

18. h September, 2013.

Appearance: Mr.Gautam Kumar Ray,Advocate Mr.B.P.Subba,Advocate Mr.D.Dutta,Advocate Mrs.Mithua Sen,Advocate Mr.S.Banerjee,Advocate Mr.Victor Dutta,Advocate Mr.A.B.Das,Advocate.

The Court : This is an application at the instance of the State Bank of India being one of the secured creditors for release of the further amount out of the proceeds of the company in liquidation by the Official Liquidator.

The Official Liquidator adjudicated the amount payable to the State Bank of India.

In an earlier application taken out by the State Bank of India, the Court directed the Official Liquidator to pay an adhoc payment of Rs.2 Crores and odd.

The Court further directed the Official Liquidator to adjudicate the claims of the workers of the tea estates belonging to the company in liquidation.

The Official Liquidator has, in fact, adjudicated the claim and disclosed the same in affidavit in opposition filed to this application.

The State Bank took an exception to the adjudication of the claim by the Official Liquidator as its claim was not kept in paripassu with the claims of the other secured creditors in respect of the money realized on account of plants and machineries and other landed properties of the company in liquidation.

According to the State Bank of India, there was a charge registered in respect of the entire tea estate of the company in liquidation and therefore, his claim should also be considered along with the other persons coming under section 529 of the Companies Act so far as the amount realized by the Official Liquidator from the lands, buildings, structures and plants and machineries.

The reliance is heavily placed upon Form-8 annexed to the affidavit filed by the State Bank of India that the entire tea estates were under charge and therefore, the Official Liquidator should not have excluded the claim of the State Bank of India relating to the immovable properties.

According to the State Bank there was an agreement for mortgage entered into coupled with creation of a charge orally.

It is tried to be contended by the learned advocate for the bank that the charge does not require to be created on the basis of an instrument which is distinguished from the mortgage and relied upon the provisions contained in section 100 of the Transfer of Property Act.

Learned advocate for the bank was very much vocal on the issue that in the affidavit it is averred that by several letters the agreement for mortgage was

handed over to the Official Liquidator and those facts have not been denied in a counter affidavit filed by the Official Liquidator.

The supplementary affidavit filed by the Official Liquidator contains the agreement dated 5th March, 1990 which was entered into by the company (in liquidation) and the bank.

The reading of the aforesaid document does not suggest that there was any creation of a charge and/or mortgage in respect of the immoveable property of the company (in liquidation) or its plants and machineries.

The charge which was registered with the Registrar of Companies annexed to the supplementary affidavit also does not indicate the creation of charge over the landed properties as well as plants and machineries.

Part-5 of the Companies Act which deals with the registration of charges contains sections 124 to 145 dealing with the nature and procedure as well as declaration of the charge to be void.

Section 124 of the said Act defines the expression the charge.

which includes the mortgage. Section 125 which is the provision where the charges can be treated to be void against the Official Liquidator requires the charges to be made by the instrument depicting the prescribed particulars of the charge and the copy thereof are to be filed with the Registrar for registration in a prescribed manner within thirty days from the date of its creation.

The bank on the basis of the aforesaid document annexed to its affidavit, firstly, tried to contend that there was a mortgage created in respect of the tea gardens and alternatively it is contended that in the event, the said mortgage fails for any reasons, by oral assent the charge was created.

As already indicated that the said agreement for mortgage is annexed by the Official Liquidator in a supplementary affidavit which does not reveal that any mortgage was intended to be created in respect of the lands and/or plants and machineries.

The charge, as alleged to have been created by the company is opposed to the provisions contained in section 125 of the Companies Act.

The Official Liquidator placed reliance upon the judgement of the Supreme Court in case of J.K.(Bom)P.Ltd v.

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& Wvg.Co.reported in AIR 197.SC 104.to contend that in absence of any express intention manifest from the different clauses of the agreement to create a charge it does not constitute either a mortgage under section 58 or charge under section 100 of the Transfer of Property Act.

As indicated above, the agreement for mortgage does not contend any manifest intention of the parties to create any interest in respect of the immovable properties as well as the plants and machineries of the tea garden nor does it reflect that any charge was created thereupon.

This Court, therefore, does not find that the Official Liquidator has committed any illegality in adjudicating the claims keeping the bank excluded in respect of an amount realized from the immovable properties and the plants and machineries of the company in liquidation.

It is to be recorded that though such a dispute was not intended to be raised in the application as there is no prayer made by the bank but the respective parties have addressed the Court on the aforesaid issue and this Court, therefore, have decided the same treating the parties to have raised such dispute in the instant application.

The aforesaid objection raised by the bank, therefore, fails.

It appears from the affidavit filed by the Official Liquidator that certain amount of dividends can be disbursed to the workmen as well as the secured creditors in respective categories.

The Official Liquidator has also disclosed the fund available with him for the disbursement.

The Official Liquidator is directed to make the disbursement of the amount as indicated in the supplementary affidavit at an earliest.

This application is, thus, disposed of.

After the order is passed, the bank prays for stay of operation of this order.

The same is considered and rejected.

(HARISH TANDON, J.) ssaha AR(CR)

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