

Appellant Vs. Respondent

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Court : Kolkata

Decided On : Apr-02-2014

Judge : Nadira Patherya

Appellant : Appellant

Respondent : Respondent

Judgement :

ORDER

SHEET CA No.284 of 2013 CA No.218 of 2013 With BIFR No.52 of 1988 IN THE HIGH COURT AT CALCUTTA Original Jurisdiction In the matter of: SHRI MANJUSHA PAPER MILLS LTD.(IN LIQN.) AND SYNDICATE BANK BEFORE: The Hon'ble JUSTICE PATHERYA Date : 2nd April, 2014.

Appearance:Mr.M.Rajasekhar, Adv.and Mr.N.Thakur, Adv..for petitioner.

Mr.J.Rakshit, Adv..for P.F.Authority.

Mr.N.K.Rakshit, Adv..for Indian Overseas Bank.

Mr.Indranil Nandi, Adv.with Mr.D.P.Samanta, Adv..for PIC Up.

Mr.Amiya Kumar Sur, Adv..for IFCI LTD.& IDBI Bank.

Mr.Tilok Basu, Sr.Adv.with Mr.A.Dasadhikari, Adv..for Official Liquidator.

The Court : This is an application filed under Rule 164 of the Company Court Rules, 1959.

The company (in liquidation) is represented by the Official Liquidator who called for claims of the secured creditors in 2004.

The applicant herein, namely, Syndicate Bank had obtained a decree in January, 2004 from the Debts Recovery Tribunal, New Delhi and on basis thereof a claim was lodged.

The said claim was considered and disposed of.

A Letter for Direction was also filed by the Official Liquidator declaring the dividend therein and on basis thereof disbursement was sought to be made amongst the secured credit ORS. The said initial adjudication of the Official Liquidator was acceptable to the applicant herein but an order was passed on 15th January, 2010 which directed the Official Liquidator to once again adjudicate the claim of the applicant herein.

This order for the reasons set out in the order dated 6th April, 2010 subsequently has been recalled.

This has been recorded in the order dated 30th April, 2010.

At the time of passing the said order dated 30th April, 2010 submissions were made by IFCI and IDBI through Counsel whereby it was stated that certain affidavits had been filed and therefore, the matter could be considered on the basis of such affidavits.

This exercise, therefore, was undertaken by the Official Liquidator and while doing so an adjudication was made.

The said adjudication being unsupported by reasons was once again challenged by the applicant herein and by order dated 2nd September, 2011 the same was set aside.

This once again required the Official Liquidator to adjudicate into the matter and adjudication took place which adjudication again by order dated 12th October, 2012 was set aside.

On the basis of the said order of 12th October, 2012 an adjudication has been made on 22nd April, 2013 which is under challenge in this application.

It is contended on behalf of the applicant that by virtue of the impugned order Rs.20 lakhs has been admitted to rank on pari passu basis along with the fiRs.charge holders viz.

the financial institutions on the fixed assets of the company.

To this finding it has no objection but it is aggrieved by the balance claim being treated as a second charge.

This objection has been raised on the basis of two documents, namely, a letter issued by IFCI on 24th September, 1991 and the agreement with the company (in liquidation) on 7th August, 1992 followed by registration of charge with the Registrar of Companies, West Bengal.

According to the applicant initially certain credit facilities were granted to the company (in liquidation) and fiRs.charge created.

The company (in liquidation) filed a reference before BIFR.

Pursuant to directions and because of the intervention of BIFR further credit facilities were sanctioned by the applicant bank and it is for this credit facilities that the letter dated 24th September, 1991 was issued by IFCI for itself and on behalf of the other financial institutions.

By virtue of the said letter ceding of charge was effected, and the applicant bank ought to have been treated as a fiRs.charge holder having pari passu charge with the other financial institutions.

More so in view of the charge filed with the Registrar of Companies, West Bengal and issuance of certificate in 1996.

Form 8 so also Form 13 have been filed wherein the agreement of August, 1992 with the company is reflected.

The applicant bank by parting with sums of money has altered its position.

Registration of charge with Registrar of Companies, West Bengal in 1996 also evidences the alteration and there can be no doubt that the document creating charge in 1996 is a public document.

No application has been filed by IFCI or IDBI or any other financial institution for correction of records of the Registrar of Companies.

As letter of September, 1991 constitutes an agreement by IFCI the holder of the title deeds for self and on behalf of the other financial institutions the said agreement cannot be diluted by a requirement of a further agreement and for non-consideration of the letter which is an agreement between the financial institutions and the applicant bank by the adjudicating authority the order dated 22nd April, 2013 be set aside.

Reliance is placed on 2013(8)J.SC181 for the proposition that a letter will also create charge.

Reliance is also placed on (2006) 10 SCC452 and AIR 2013 SC2036 for the proposition that it is the adjudicating officer of the Debts Recovery Tribunal who is the authority competent to adjudicate into the claims of banks and financial institutions so also distribution thereof and not the Official Liquidator.

As no step has been taken by either IFCI or IDBI to challenge the registration of fiRs.charge, therefore, the said financial institutions are barred from raising an objection on principles of estoppel.

For all the said reasons the order dated 22nd April, 2013 be set aside.

Counsel for the Official Liquidator submits that in 2004 when claims were called, a claim was lodged by the applicant Syndicate Bank with it.

There is no dispute as regards the sum of Rs.20 lakhs in respect of which the applicant bank is the fiRs.charge holder.

The dispute arises in respect of the balance sum which is to be paid to the applicant bank as a second charge holder.

To be a fiRs.charge holder certain acts were required to be performed by the applicant bank, one of them being creation of rights under Section 48 of the Transfer of Property Act, 1882.

This act has not been performed by the applicant bank.

Therefore, in the absence of a special contract the earlier transferees cannot be bound.

Section 456 recognises the sole authority of the Official Liquidator to adjudicate on the assets of the company post liquidation and to understand the principles of priority reliance is placed on (2005) 8 SCC190 (2006) 10 SCC452has been followed while adjudicating the claim of the applicant bank.

The applicant bank has filed its charge on fixed assets with Indian Overseas Bank alone and not with the other charge holdeRs.Therefore, it is only to the extent of Rs.20 lakhs that the applicant bank is the fiRs.charge holder and for the balance sum it is undoubtedly a second charge holder.

Therefore, the order dated 22nd April, 2013 calls for no interference.

Counsel for IFCI and IDBI submits that the applicant bank has admitted that it is a pari passu fiRs.charge holder with other financial institutions in respect of Rs.20 lakhs which has been given to it by the Official Liquidator.

The letter of September, 1991 is a conditional letter, condition whereof has not been complied with.

Therefore, in view of the non-compliance of conditions set out in the said letter the applicant bank cannot be placed as a pari passu fiRs.charge holder with other financial institutions.

Section 2 of the Contract Act is relevant in the present issue.

While sanctioning of credit facilities in 1991 the applicant bank had agreed to obtain fiRs.charge on a pari passu basis on the fixed assets.

This exercise has not been undertaken by the applicant bank.

Therefore, in the absence of creation of a subsequent charge the findings of the Official Liquidator cannot be interfered with.

In reply, Counsel for the applicant bank submits that there is no dispute with the proposition of law laid down in (2005) 8 SCC190but in view of AIR 2013 SC2036it is the adjudicating officer under the 1993 Act who is entitled to adjudicate the claims so also distribute sums to secured creditors in respect of a company (in liquidation).Having considered the submissions of the parties undoubtedly Syndicate Bank, the applicant herein is a secured creditor of the company (in liquidation).In 2004 claims were called from secured creditors and the applicant bank without much ado filed such claim.

This resulted in adjudication of not only the claim of the applicant bank but also other secured credit ORS.The adjudication was to the benefit of the applicant bank.

Therefore, no objection was raised thereto but on 15th January, 2010 an order was passed giving liberty to the applicant bank to furnish appropriate records with the Official Liquidator and directing the Official Liquidator to resettle the claim.

This subsequently came to the knowledge of the Syndicate Bank and, the applicant bank approached the Court and pointed out the mischief that had been committed.

Accepting the submission of the applicant bank by order dated 6th April, 2010, the order dated 15th January, 2010 was recalled.

If things had stopped here, there would have been no problem but on the submission of Counsel for IFCI and IDBI the Court by its order dated 30th April, 2010 directed the Official Liquidator to take up the claim of the applicant bank.

This order was passed as it was submitted on behalf of IFCI and IDBI that some affidavits were on record.

It is an admitted position that on 29th June, 2009 a letter for direction was filed by the Official Liquidator which could not be proceeded with in view of the order dated 15th January, 2010 but by virtue of the order dated 6th April, 2010 not only was the order of 15th January, 2010 recalled but all steps taken thereunder became non est.

Therefore, the letter for direction of 29th June, 2009 in the correctness of facts stood revived.

On 30th April, 2010 there would have been only two sets of affidavits, filed by IFCI and IDBI.

One in respect of the claim lodged with the Official Liquidator which affidavit lost its force on adjudication by the Official Liquidator.

The said adjudication was never in dispute.

The second set of affidavit could have been filed only after the order of 15th January, 2010, which when recalled all proceedings or steps taken thereunder became non est and the said affidavits would have lost its force.

But it must be stated that counsel for IFCI and IDBI misled the Court on 30th April, 2010 in informing the Court of existing affidavits when there was none which resulted in the order dated 30th April, 2010.

This is the root cause for all the subsequent events which have occurred, namely, the adjudication made by the Official Liquidator which has resulted in the order of 2nd September, 2011 and thereafter, the order dated 12th October, 2012 and the present application, in which the order dated 22nd April, 2013 is to be examined.

The Official Liquidator by the said order has treated the sum of Rs.20 lakhs as fiRs.charge pari passu with the other fiRs.charge holder on the fixed assets of the company (in liquidation).For the balance sum the applicant bank has been treated as second charge holder.

To support the case of being fiRs.charge holder pari passu with the financial institutions, the applicant bank has relied on two documents, namely, the agreement with the company dated 7th August, 1992 and the letter of 24th September, 1991 written by IFCI.

While there is no dispute with the agreement on 7th August, 1992, the document of 24th September, 1991 requires scrutiny and on reading of the said letter what emerges is that IFCI for itself and on behalf of other financial institutions agreed and confirmed that the mortgage and the charge which was created in favour of the other financial institutions would rank pari passu with the charge created or to be created in favour of the applicant bank.

So far so good.

By the said letter the applicant bank was authorised to mention the said pari passu charge over the assets of the company and the charge required to be filed by the company with the Registrar of Companies, West Bengal.

Such charge has been filed on the basis of the agreement between the company and the applicant bank.

But there is no evidence of pari passu charge created in favour of the applicant bank by the other financial institutions or any consent being given thereto by the other financial institutions.

This is an admitted fact and all that the applicant bank seeks is that the letter of 24th September, 1991 be treated as an agreement of ceding charge by not only IFCI but the other financial institutions.

This argument in the light of Section 48 of the Transfer of Property Act, 1882 cannot be accepted.

True that an independent letter between each financial institution and the applicant bank would have been sufficient to evidence creation of fiRs.charge on pari passu basis, but such letter is also absent.

Therefore, in the absence of consent by each of the fiRs.charge holders to creation of pari passu charge with the applicant bank, the findings of the Official Liquidator cannot be interfered with and the letter dated 24th September, 1991 cannot be treated as a letter given by each of the financial institutions ceding charge in favour of the applicant bank.

Although reliance is placed on AIR 2013 SC2036for the proposition that it is the Debts Recovery Tribunal (DRT) which is entitled to adjudicate and distribute sums to a secured creditor and not the Official Liquidator, the said proposition will not apply to the fact of the instant case, as in the reported case, winding up petition was pending when adjudication was undertaken by the Debts Recovery Tribunal and the winding up order was passed subsequent thereto.

Such is not the case here.

Therefore, this case will not apply to the facts of this case.

The applicant bank has for the same proposition relied on (2006) 10 SCC452which decision has been cited by it for the fiRs.time and was never raised as an issue on earlier occasions, therefore, for the applicant bank to raise this issue at this stage is just a desperate attempt to seek an adjudication by the Debts Recovery Tribunal as the order dated 22nd April, 2013 is not interfered with.

This issue is of no relevance.

But, as stated earlier, if it had not been for the submission made by Counsel for IDBI and IFCI the matter would not have travelled from Court to Court for three years and for making proceedings protracted and cumbersome costs of 2000 GMs each is imposed on IFCI and IDBI which costs if it so desires can be realised by it from its Counsel, in the event it is of the opinion that the instruction on the basis of which submission was made had not been given by it.

But this is left to the discretion of the two financial institutions mentioned above (IFCI and IDBI).50% of such costs be paid to the Official Liquidator by 9th April, 2014 and 50% to the State Legal Services Authority, West Bengal, to be credited to the account marked juveniles.

In view of the aforesaid, this application fails and is dismissed.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(PATHERYA, J.) pa/nm

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