SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

State of Mysore Vs. Official Liquidator H.C. Mysore and anr.

State of Mysore Vs. Official Liquidator H.C. Mysore and anr.

SooperKanoon Citation : sooperkanoon.com/373262

Court : Karnataka

Decided On : Feb-02-1964

Reported in : AIR1965Kant261; AIR1965Mys261

Judge : A. Narayana Pai, J.

Acts : Companies (Court) Rules, 1959 - Rule 164; Mysore State Aid to Industries Act, 1951 - Sections 7, 13, 19(1) and 22; Companies Act - Sections 530(1)

Appeal No. : Company Appln. No. 2 of 1964 in Company Petn. No. 206 of 1958

Appellant : State of Mysore

Respondent : Official Liquidator H.C. Mysore and anr.

Judgement :
ORDER

(1) In this application under Rule 164 of the Companies (Court) Rules, 1959, the applicant, State Government of Mysore, appeal against an order of the Official Liquidator dated 26th November 1963, totally rejecting its claim for payment to it, out of the assets of the Company in winding up of a sum of Rs. 62,817-01 as a preferential claim.

(2) The claim is described as guarantee commission payable to the State Government on account of the Government having guaranteed due repayment by the Company of a loan of Rs. 10,00,000 advanced to it by the Bank of Mysore on

the mortgage of its immoveable property and hypothecation of its machinery and other moveables.

(3)Among the facts stated in the order of the Official Liquidator under appeal, there is no dispute regarding the following facts:--

Late in 1948, the Company appears to have approached the State Government for a loan in aid of the industry it was contemplating to set up. The Government, however, did not themselves grant the loan but agreed to stand as guarantors in respect of secured loan if granted by the Bank of Mysore on certain terms and conditions. The conditions on which the Government agreed to guarantee the loan are set out in an order of the Government bearing No. D. 8925-7 dated 16-6-1949. Omitting the preamble which is of no relevance, the operative portion of the order read as follows:--

'After carefully considering the request of the Management of the Kapila Textiles., Government are pleased to direct as follows:--

1. If the Bank of Mysore grants a loan to the Company at a rate of interest not exceeding 41/2 per cent. to be repaid after a period of 2 years in equal instalments during the next 4 years on the security of all the assets of the Company, Government may agree to guarantee the repayment of the loan according to the terms arranged by the Bank of Mysore.

2. The Company should agree to the Government's proposal that the assets of the Company should be free from all encumbrances except to the extent secured by the Bank of Mysore.

3. The Company should agree to the payment of a further 1/2 per cent. interest to the Government on such loan as is outstanding from time to time with the Bank of Mysore, for service charges.

4. The Company should agree to a Director nominated by the Government who will have full powers of inspection and obtaining information on all aspects of the work of the Company. The Company should further agree to such directions as may be given by the Government from time to time in the conduct and

management of the Company on the report of their Government-Director or on any further report that may be received by them from the Bank of Mysore.

In case there is default, in the payment of any of the instalments, the Company should agree to such action as Government may decide upon including the taking over by the Government of the entire management of the concern on such terms as the Government may decide upon.

5. The Bank of Mysore may authorise to pay the loan in instalments as and when necessary up to the amount prescribed as soon as all the necessary documents embodying these conditions are signed by the Company.

The Comptroller to Government is requested to issue necessary instructions to the Bank of Mysore Ltd., and to take all necessary further action in the matter.'

(4.) At their meeting held on 19th July 1949, the Board of Directors adopted a resolution on this matter. The Liquidator has not set out the entire resolution in his order. I think it is necessary to copy the first four paragraphs of that resolution which appear at page 95 of the Minutes Book of the Directors produced before me by the Liquidator. They read as follows:

'* * * * * *

4. The Government order No. D-8925-7, I & C 550-483 dated 16-6-1949, guaranteeing the loan through the Bank of Mysore, Ltd., was considered.

Resolved (1) that all the terms and conditions contained in the above Government order be and are hereby accepted.

(2) To borrow up the limit of ten lakhs of rupees from the Bank of Mysore Ltd., against mortgage of the Company's lands, buildings, plant and machinery and against hypothecation of tools and spare parts, at one and a half per cent. per annum over the rate of the Reserve Bank of India.

(3) That the Chairman and two Directors f the Company of whom one will be a Special Director, be authorised to execute the documents in respect of the loan to be raised from the Bank and the guarantee papers to the Government.

(4) That the Government of Mysore be paid a half per cent. per annum on the loan as service charges, on sums as may be outstanding from time to time.

* * * * * *'

(5) The Bank of Mysore agreed to grant the loan but with some variations regarding the terms, particularly on the question of the rate of interest. Whereas the Government in their order cited above stipulated a rate of interest not exceeding 41/2 per cent. per annum, the Bank stipulated a rate of 11/2 per cent above the rate of the Reserve Bank of India. The necessary documents of land were later executed by the Company in favour of the Bank on 31-10-1949. The documents were two in number,--a registered simple mortgage in respect of lands and buildings for a principal sum of two lakhs of rupees and a deed of hypothecation of moveable for a principal sum of eight lakhs of rupees. Before these deeds were executed, the Board of Directors adopted a further resolution by circulation on 26-10-1949 (which was later confirmed at the meeting held on 23-11-1949) to the effect that the common seal of the Company be affixed to the mortgage deed and other documents to be executed in connection with the loan of ten lakhs of rupees to be granted to the Company by the Bank of Mysore on the guarantee of the Government of Mysore.

(6) On the day on which the loan documents were executed in favour of the Bank, i.e., 31-10-1949, the Government passed letter No. D.O.D. 30 to the Manager of the Bank of Mysore, which reads as follows:

'In accordance with Government Order No. D. 8925-7/1 & C/350/48/3, dated 16-6-1949 under which the Kapila Textiles Mills, Ltd., Mysore, by the Bank of Mysore, Ltd., under the terms and conditions, contained in the Deed of Simple Mortgage dated 31-10-1949 and the deed of Hypothecation of moveables dated 31-10-1949 executed by the Mills in favour of the Bank, the Government of Mysore hereby guarantee the due repayment by the mortgagors of the amount due to the Bank of Mysore with all interest and costs which may be due and payable under the said deeds.

If the Mills do not pay the amounts due to the Bank for interest and instalments of principal regularly in accordance with the terms of the said deeds, the Government of Mysore will on demand pay the amount payable to the Bank in accordance with the said deeds and thereupon the Bank will transfer and assign in favour of the Government of Mysore all their right, title and interest under the mortgage deed and deed of Hypothecation of moveables including the rights and remedies in the matter of collecting and the Policies of Insurance, if any, which may have been taken out in accordance with paragraph 4 of the mortgage deed and thereafter the Government shall stand subrogated to all the rights of the Bank as the first mortgagee and the Government shall be entitled to recover from the mortgagors the amount so paid by them with interest due by the mortgagors under the deeds together with the higher rate of interest or other service charges which may be due and payable to Government by the mortgagors.

While the giving of any time to the mortgagors without consent of the Government of Mysore or any delay or failure in taking any steps to recover any instalments of principal or interest shall not discharge the Government from the responsibility under this Bond, it is understood that the Government will be kept informed of the grant of any such time of the steps which may be taken for the recovery of the sums.'

(7) No separate document appears to have been executed by the Company in favour of the Government in regard to the payment required to be made to the Government under clause(3)of the Government order dated 16-6-1949, or agreeing to act upon other conditions and stipulations made by the Government in the said order. No such document was produced either before the Liquidator or before me during the hearing of this application.

(8) In the proof first presented to the Liquidator the amount claimed was Rs. 69,098-03. Later, however, the amount was reduced to Rs. 62,817.01 by producing an affidavit in which it was admitted on behalf of the Government that after enquiry they had discovered the following five payments had been made to the credit of the Government either at the District Treasury at Mysore or the Taluk Treasury at Nanjangud by the Company:

30-9-1954 ..... Rs. 1,260-4-616-12-1954 ..... Rs. 1,246-9-317-5-1956 ..... Rs. 1,249-1-316-7-1958 ..... Rs. 1,260-4-624-1-1957 ..... Rs. 1,263-12-9

(9) The affidavit further states that the officer who swore to it. Viz., Shafiqur Rahman, Deputy Director of Industries and Commerce, Bangalore states that he had deputed one of his officials to check up the entries in the Treasury schedules of the District Treasury at Mysore and the Taluk Treasury at Nanjandud and that he was able to collect only five challans relating to the above five payments.

(10) The Company's general ledgers for the year 1955-56 and for the period from 1-7-1956 to 30-6-1957 produced before me by the Liquidator show that after crediting the payments made upto 30-6-1956, the arrears of guarantee commission due to the Government stood at Rs.19,572-5-3, that thereafter two payments were made,--one in July 1956, and the other in January 1957,--leaving a balance of Rs. 17,048-25 due to the Government and that no further debits in commission account or corresponding credits in the name of the Government for guarantee commission were made.

(11) On 14-6-1958 the Government issued an order or notification bearing No. CI, 18 FAS 57 under Section 22 of the Mysore State Aid to Industries Act, 1951, reading as follows.

'In exercise of the powers conferred by Section 22 of the Mysore State Aid to Industries Act, 1951 (Mysore Act XX of 1951), the Government of Mysore hereby orders that the guarantee given by the Government in respect of a loan of Rs.10,00,000 advanced by the Bank of Mysore, to Messrs. Kapila Textile Mills, Ltd., Nanjangud, on 31-10-1949 as per Government Order No. D. 8925-7 dated 16-6-1949 shall be deemed to be aid given under the Mysore State Aid to Industries Act of 1951.'

(12) The petition to wind up the Company was presented to this Court on 19-6-1958 and the Company was ordered to be wound up on 19-1-1959.

(13) There was considerable delay in presenting the claim to the Liquidator but that delay was condoned by me by an order dated 6-9-1963 in Company

(14) In rejecting the claim the Liquidator has proceeded on the footing that the guarantee given by the Government was only for a stipulated period which expired sometime in 1951 but was from time to time extended, that the latest extension expired on 31-10-1958 after which there has been no extension, except that the Government have from time to time acknowledged their liability to the Bank, the latest such acknowledgment being by letter dated 19/21-7-1958. He also thought that having regard to the provisions of Section 13 of the Mysore State Aid to Industries Act, 1951, there could be no guarantee beyond the maximum period of ten years stipulated in the Section. The other reasons stated by him are that according to clause(3)of Government Order dated 16-6-1949 the payment was intended to be in the nature of service charge and that the Government cannot in any event claim that they have rendered any services after the presentation of the petition to wind up the company and that by reason of the Government's failure or default to take any steps to enforce payment or to enforce what he calls 'penal clauses' by taking over the management, etc., it was not equitable on the part of the Government to make this claim at this stage.

(15) It has been contended on behalf of the applicant Government before me that these reasons stated by the Liquidator are neither sound nor sufficient to reject their claim.

(16) It seems to me that the reasons stated are either weak or actually irrelevant. The Government have taken steps, by extending the guarantee period (if at all such an extension was considered necessary in law) and by acknowledging its liability to the said Bank, to keep the guarantee alive. It does not appear that the Government disclaimed their liability to the Bank as guarantors. Keeping alive the guarantee may itself in one sense be said to amount to service rendered to the Company. No question of any equity arises because if the claim is enforceable and is not barred by the law of limitation or for any other reason, the fact that they did not pursue any special remedies available to them is not sufficient to wholly destroy their claim.

(17) I therefore proceed to examine the claim, afresh in the light of the facts stated above.

(18) The first question for examination is whether there is any contract binding on the Company for payment to the Government of the guarantee commission claimed in this application which is enforceable at the instance of the Government against the Company.

(19) So far as the affidavit in support of the proof goes, the only basis appears to be what is stated in paragraph 4 of the affidavit which reads:

'The Company had agreed as stated in clause (3) of Government Order dated 16-6-1949 to pay half per cent interest per annum to the Government of Mysore on the loan outstanding from time to time.'

(20) The statement, on the face of it, is inaccurate. It suggests that there had already been an agreement by the Company to make this payment and that clause(3)of the Government Order merely recorded a completed agreement. The position is quite the reverse. The order of the Government dated 16-6-1949 merely made an offer to the Company that it could guarantee a loan which the Company may take from the Bank of Mysore if the Company would abide by the conditions stipulated in the order. At the highest, therefore, clause(3)of the order of the Government may be read only as a stipulation by the Government made to the Company as a condition of its extending aid by way of guarantee.

(21) The resolution of the Board of Directors dated 19-7-1949 indicates that the Directors were willing to accept all the terms stipulated by the Government including the payment now claimed. But, as already stated, no document was executed by the Directors on behalf of the Company undertaking its liability to the Government, nor is there any proof of even this resolution having been formally communicated to the Government. In contrast, we may notice that so far as the Bank is concerned, the Directors took all steps to execute the documents and also take power to affix the seal of the Company to the contracts they were going to enter into on behalf of the Company with the Bank. The Government, while they issued a formal letter of guarantee to the Bank of Mysore, do not appear to have

obtained any document from the Company or its Directors in regard to the payment of guarantee commission.

(22) It has therefore to be held that there is no proof of a completed agreement or contract between the company and the Government undertaking the recurring future liability of having to pay guarantee commission which the Government may enforce.

(23) No attempt has been made before me to question the correctness of this conclusion. The argument, however, has been addressed on behalf of the applicant-Government that though there is no such written contract, the Company must be taken to have accepted that liability by conduct. The only conduct relied upon is the payment of guarantee commission from time to time right upto January 1957. It is therefore necessary to assess the legal effect of this conduct.

(24) It must first be pointed out that the conduct which is of relevance would be not the individual conduct of the Directors or even the Board of Directors but such conduct on their part as may rightly be attributed to the Company as an entity. The payment undoubtedly may be taken as having made on the orders of the Directors; but not having been made on the basis of any contract regularly entered into by them on behalf of the Company and binding on the Company, such payments were open to question by the Company in general meeting and may be taken as having been validly made only if ratified by the Company.

(25) On this aspect of the matter, there is the material brought on record in this application. Fortunately, however, for the Government, there is some material accepted and acted upon by the Court in Company Application No. 45 of 1961 to which both the Liquidator and the State Government were parties. In that application in which some of the unsecured creditors questioned the availability of the mortgage and hypothecation as security to the Bank, certain confirmations of the balance stated as due to the Bank signed by the Directors and the balance sheet of the Company were produced. The latest balance sheet produced therein and relied upon by the Court as constituting an acknowledgment of liability by the Company was the one as on 30-6-1956.

I have already noticed above that, according to the ledgers of the Company produced before me in this application, there was a balance of Rs. 19,572-5-3 shown as due to the Government as arrears of guarantee commission. That amount, we may take it, must have been included in the figures of the balance sheet as on 30-6-1956. To the extent of that amount therefore, the Government may be taken to have succeeded in establishing their claim, because by adopting the said balance sheet the Company must be taken to have ratified the actions of its Directors resulting in that liability and to have accepted that liability. For the period subsequent thereto, there are neither debits in commission account nor credits in the name of the Government in the books of the Company nor any proof of the Company itself having acknowledged its liability to the Government.

(26) Since then, as already pointed, there have been two payments made to the Government which brought the liability down to Rs. 17,048-25.

(27) I hold therefore that the only amount out of the claim made by the Government which can be admitted is that said amount of Rs. 17,048-25nP.

(28) The next question is whether the Government is right in claiming preferential payment in respect of this amount.

(29) The claim is made on the basis that the amount due to the Government falls under clause (a)of sub-s. (1)of S. 530 of the Companies Act as being in the nature of revenue due to the Government. That it is of such a nature is sought to be made out in the following manner:

By the notification under S. 22 of the Mysore State Aid to Industries Act, 1951 published in June 1958 (copied above), the guarantee given by the Government was treated as aid given under the said Act. According to S. 7 of the Act, 'aid', includes aid extended to an industry by guaranteeing cash credit, overdraft or fixed advance with a Bank. S. 19(1)reads as follows:

'All moneys payable under this Act, including any interest chargeable thereon and costs, if any, incurred, if not paid when due, may be recovered from the person aided and his surety, if any, under the law for the time being in force, as if they

were arrears of land revenue.

(30) The Liquidator has taken the view that the notification is ineffective because it purports to give retrospective effect to the Act. The view is wrong. When S. 22 of the Act itself states that any aid of the type referred to in S. 7 given to any industry prior to the commencement of the Act, shall, on the issue of notification by the Government to that effect, be deemed to be aid given under the Act and that thereupon all provisions of the said Act and Rules shall apply thereto, a notification pursuant to and in accordance with that section cannot be held to be ineffective. This view, however, is not sufficient to uphold the claim for the preferential payment made by the Government. The only effect if the provisions of S. 19(1)is that the amount due to the Government may be recovered as if it were land revenue. The very expression 'as if it were land revenue' means that the same in its proper nature is not land revenue at all. The effect of the section is that the procedure for recovery of land revenue prescribed under Land Revenue Code is made available to the Government for the purpose of recovering any amount due to it in respect of any aid given by it under the Act to an industry. It cannot be read as converting the aid itself into land revenue.

(31) I hold therefore that the guaranteed Commission recoverable by the Government is not land revenue or a tax due to the Government entitled to preferential payment under clause (a)of sub-s. (1)of S. 530 of the Companies Act.

(32) In the result, in partial reversal of the order of the Liquidator, I admit the claim of the applicant-Government to the extent of Rs. 17,048-15nP. as an ordinary unsecured debt ranking for payment pro rata along with other unsecured debts. The claim in excess of the said amount is rejected.

(33) The parties will bear their own costs in this application.

(34) Order accordingly.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com