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**Praga Tools Ltd. Vs. Official Liquidator of Bengal Engineering Co. (P.) Ltd.  
(In Liquidation)**

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(In Liquidation)**

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**Court :** Kolkata

**Decided On :** Apr-20-1982

**Reported in :** [1984]56CompCas214(Cal)

**Judge :** T.K. Basu, J.

**Acts :** [Companies Act, 1956](#) - Section 125; ;Indian Registration Act, 1908 - Section 17(1) and 17(2)

**Appeal No. :** Company Application No. 209 of 1981 connected with Company Petition Nos. 17 of 1974 and 137 of 1976

**Appellant :** Praga Tools Ltd.

**Respondent :** Official Liquidator of Bengal Engineering Co. (P.) Ltd. (In Liquidation)

**Disposition :** Application allowed

**Judgement :**

**Basu, J.**

1. In this application, the applicant Praga Tools Ltd., a company incorporated under the [Companies Act, 1956](#), prays, inter alia, for an order giving leave to

execute the decree dated August 1, 1978, against the monies lying with the official liquidator, who is respondent No. 1, arising from the sale of the assets of Bengal Engineering Co. (P) Ltd. (in liquidation) and for a direction to respondent No. 1 to pay the sum of Rs. 50,000 to the applicant in pro tanto satisfaction of the decretal dues of the applicant.

2. The facts relating to the making of the present application may be briefly noted.

3. On or about July 18, 1969, the applicant filed a suit against the company in liquidation in the court of the Additional Chief Judge at City Civil Court, Secunderabad, being Original Suit No. 64 of 1969. The suit was decreed on July 7, 1972, for a sum of Rs. 90,343.37 with interest at the rate of 6% per annum from the date of the suit till the date of realisation and the assessed costs of Rs. 6,838.

4. As the decretal dues remained unpaid, the applicant on or about January 3, 1974, presented a winding up application in this court being Company Petition No. 17 of 1974 alleging non-payment of the decretal dues which was amounted to Rs. 1,01,303.61.

5. Thereafter, there were various proceedings in the above winding-up application, some of which are not very material for our purpose.

6. Suffice it to note that on September 30, 1974, an order was made by R.M. Datta J., whereby a direction for advertisement of the winding-up application was given in the Calcutta Gazette and in certain other newspapers. Thereafter, several applications were moved on behalf of the company before R.M. Datta J. The one that is material for our purpose is the one that resulted in an order dated February 11, 1975, modifying an earlier order dated October 11/1974, to the following effect |

'The order dated October 11, 1974, is modified to the following extent. Upon the company depositing with M/s. Khaitan & Co., Solicitors for the petitioning-creditor, a sum of Rs. 25,000 in cash within three weeks from date to be held by them free from lien and subject to further orders of the court and upon the company furnishing security to the extent of Rs. 50,000 to the satisfaction of the Registrar,

Original Side, within six weeks from the date hereof in which case the Registrar, Original Side, would be at liberty to accept by way of second charge the immovable properties situate outside the jurisdiction of the court and in respect whereof there is a charge of mortgage already existing in favour of the Rehabilitation Industries Corporation Ltd., there will be an order for stay of publication of the advertisement of the petition till the disposal of the appeal pending before the Andhra Pradesh High Court.'

7. It may be noted that the security for the sum of Rs. 50,000, with which we are concerned in the present application, was duly furnished in favour of the Registrar, Original Side, pursuant to the above order.

8. A Division Bench of the Andhra Pradesh High Court dismissed the appeal which had been filed against the decree in favour of the applicant by the Secunderabad Court. Thereafter, the applicant made this application on June 5, 1978, before this court praying that the winding-up petition, being Company Petition No. 17 of 1974, filed by the applicant be heard and for other reliefs.

9. The application was heard by Salil Kumar Roy Chowdhury J. (as he then was), and on August 1, 1978, an order was passed thereon which is annexure 'A' to the petition starting from page 14 thereof. The salient features of the order, in so far as it is material for our purpose, may be noted.

10. At page 15, it is stated that the order is being made 'with the consent of the parties'. By a later part of the order the claim of the applicant company in respect of the decretal amount along with interest is settled at rupees one lakh and forty-five thousand. Thereafter, the order lays down the mode by which the amount has to be paid by the company. Thereafter, the order provides the usual default clause which is the most material part for our purpose and which is set out hereunder verbatim. 'The said applicant company shall be at liberty to execute this order as a decree or to institute a fresh winding-up proceeding against the said respondent company for the balance sum then remaining due together with interest thereon as aforesaid which it may be advised and it is further ordered that in case of execution the security furnished by the said respondent company with the Registrar of this court to the extent of rupees fifty thousand shall continue as

security for the said applicant company for the satisfaction of the decree and shall be the security for decree until the said entire decretal amount together with interest as aforesaid is satisfied in the manner aforesaid.'

11. It is on the basis of this order that the petitioner in the present application claims to be a secured creditor of the company to the extent of Rs. 50,000. It is an admitted fact that the entire assets of the company in liquidation have been sold and the sale proceeds are being held by the official liquidator. It is also the admitted position that the sum that is being so held by the official liquidator is far in excess of the sum of Rs. 50,000.

12. The application is being opposed by the official liquidator. In the affidavit filed by Maha Prabhu Roy affirmed on July 9, 1981, on behalf of the official liquidator, the only objection with regard to the claim of the applicant appears to be contained in paragraph 11 where it is stated that in the absence of registration of the charge in favour of the applicant in accordance with the provision of the [Companies Act, 1956](#), the applicant cannot claim to be a secured creditor to the extent of Rs. 50,000 and that the applicant stands as any other unsecured creditor for its dues and, as such, cannot claim any preference.

13. Mr. R.C. Nag, appearing on behalf of the applicant, submits that the security or the charge which is created in favour of his client by an order of this court does not require registration under 9. 125 of the Companies Act. Mr. Nag draws my attention to the opening part of Section 125(1) of the Act which speaks of valuable charge created 'by a company'. According to Mr. Nag, this section postulates volitional act on the part of the company in creating a charge. Since in the instant case the charge in favour of the applicant was not created by any volitional act on the part of the applicant company but was the creature of an order of court, it does not attract the operation of Section 125 of the Companies Act.

14. In support of this proposition Mr. Nag drew my attention to a passage in the Indian Companies Act, 1913, by Sarkar & Sen. While dealing with Section 109 of the Indian Companies Act, 1913, which corresponds to Section 125 of the 1956 Act, the learned author made the following comment at page 319 of the book. 'The opening words show that the section contemplates registration of mortgages and

charges created by the company which fall within the classification given above. Secondly, it has been held that a charge which comes into existence by operation of law is not within the purview of this section. Thus, a solicitor's lien or a vendor's lien is not required to be registered.' Thereafter, a reference is made to the case of Brunton v. Electrical Engineering Corporation [1892] 1 Ch. 434 (Ch D), a case that was cited before me by Mr. Nag and which deals with a solicitor's lien which, according to this decision, does not require any registration.

15. Mr. Nag also drew my attention to a decision of the Madras High Court in the case of T.V. Sundaram Iyengar & Sons P. Ltd. v. Official Liquidator, High Court, Madras [1972] 42 Comp Cas 359. It was held that Section 125 of the [Companies Act, 1956](#), is applicable only to a charge created by a company and not to a charge arising by operation of law.

16. Lastly, on this point, Mr. Nag referred me to a decision of the Division Bench of the Oudh High Court in the case of Hukmichand v. Pioneer Mills Ltd., AIR 1927 Oudh 55, in which the following passage occurs (p. 59):

' As regards the arguments advanced on the side of the defendants-respondents and based on the provisions of Section 109 of the Indian Companies Act, 1913, much need not be said. Those provisions are only applicable to a 'mortgage or charge created.....by a company'. The charge arising in favour of the plaintiffs in the circumstances of this case is a charge by operation of law and not by a contract.

17. I do not consider it necessary to deal with the submissions made by Mr. S.B. Mookherjee, who appeared for the official liquidator on this aspect of the matter including his submissions on the various cases which I have noted above. This is because of the fact that although Mr. Mookherjee appeared to contest this proposition which was submitted by Mr. Nag towards the end of his argument, he appeared to me to have accepted the position that if a charge is created by an order of court it will not require registration under Section 125 of the [Companies Act, 1956](#).

18. Although there is no indication of this point in the affidavit filed on behalf of the official liquidator, Mr. Mookherjee made the submission that the security in favour of the Registrar, Original Side, the benefit whereof was given to the applicant-company by the order of S.K. Roy Chowdhury J. (as his Lordship then was), dated August 1, 1978, required registration under the Indian Registration Act, 1908. I allowed Mr. Mookherjee to urge this point. It appeared at a subsequent stage of hearing that the argument was really academic in view of the fact that the security in favour of the Registrar, Original Side, which was given pursuant to the order of R.M. Dutta J., had in fact been registered under the Indian Registration Act,

19. Mr. Mookherjee also submitted initially that this charge in favour of the applicant was not created by an order of court and, as such, is liable to be registered under Section 125 of the [Companies Act, 1956](#), in the absence whereof it will be void against the official liquidator. This submission of Mr. Mookherjee is based on a misconception. This is because the original security that was executed in favour of the Registrar, Original Side, was certainly not by an order of court. The court merely provided for the furnishing of security which might or might not have been furnished by the company which went into liquidation. As it appears, the security was furnished. That security which was furnished by the company is in my view within the mischief of Section 125 of the [Companies Act, 1956](#). Therefore, it is conceivable that if the Registrar, Original Side, tried to enforce that security against the company, the official liquidator could have taken the point that this security, in the absence of registration under Section 125 of the [Companies Act, 1956](#), is void against the official liquidator.

20. The fallacy in the argument of Mr. Mookherjee, in my view, is that after the passing of the order of S.K. Roy Chowdhury J. (as his Lordship then was), dated August 1, 1978, the position with regard to the security assumed a completely different complexion. By that order, as I have already indicated, the claim of the petitioning-creditor was settled at a certain amount. A mode for payment of that money was indicated. Then there is a default clause. That default clause contained a twin option either of initiating a fresh winding up proceeding or of executing the balance as a decree of court. It is only in the event of an option being exercised in favour of the last contingency, viz., in the event of the execution

as a decree of court, that the security which was furnished pursuant to the order of R.M. Dutta J. would be a security for the applicant company for the satisfaction of the decree and would be the security for the decree until the decretal dues were paid. Thus, the benefit of the security in so far as the applicant company is concerned is entirely the creature of the order of Roy Chowdhury J. dated August 1, 1978. This can, in my view, by no stretch of imagination, be called a charge created 'by a company' within the meaning of Section 125 of the [Companies Act, 1956](#), requiring registration under the above section.

21. It would follow, therefore, from what I have said that the question as to whether the security as originally furnished was registered under Section 125 of the [Companies Act, 1956](#), or not, would be totally irrelevant for the purpose of determining the right of the applicant company after the order of Roy Chowdhury J., dated August 1, 1978.

22. In so far as the registration under the Indian Registration Act is concerned, as I have already indicated, it was duly registered with the Registrar of Assurances.

23. Another submission was made by Mr. S.B. Mookherjee for the official liquidator, although there is no basis for that submission in the affidavit filed on behalf of the official liquidator. That is the submission that the order of Roy Chowdhury J. (as his Lordship then was), dated August 1, 1978, being an order 'by consent of the parties' required registration under the Indian Registration Act, 1908. This submission of Mr. Mookerjee was sought to be met by Mr. R. C. Nag by drawing my attention in the first place to the provisions of Section 17(1)(b) of the Indian Registration Act, 1908, which provides for 'other non-testamentary instruments' which purport to Create any right, title and interest in immovable property and requires registration. According to Mr. Nag, the order of court cannot possibly be called a non-testamentary instrument as requiring registration.

24. In my view, this contention of Mr. Nag appears to be sound and should be accepted. I hold that an order of court, as, in the instant case, is not a 'non-testamentary instrument' within the meaning of Section 17(1)(b) of the Indian Registration Act, 1908, requiring registration.

25. Another submission of Mr. Mookherjee was on the basis of Section 17(2)(vi) of the Indian Registration Act, 1908, which provides in the list of what does not require registration any decree or order of court with the exception that if it is a decree or order made on compromise and comprises of immovable property other than what is the subject-matter of the suit or proceeding, then it will require registration. According to Mr. Mookherjee this order of Roy Chowdhury J. is by compromise and is in respect of a security of a property which is admittedly outside the jurisdiction. As such, in the absence of registration of the order under the Indian Registration Act, 1908, the security cannot be enforced.

26. Mr. Nag in answer to the submission submitted that if the decree is a compromise decree and comprises of property other than what is the subject-matter-of the suit then the above provisions requiring registration is attracted. In other words, this requirement would proceed on the assumption that in the suit there are certain properties which are subject-matter of the suit. In the compromise decree, however, if certain other properties are sought to be brought in, in which event registration would be required under Section 17(2)(vi) of the Act.

27. It was' submitted by Mr. Nag that the property outside the jurisdiction was the only subject-matter of the security by virtue of the earlier orders mentioned above. Therefore, in the instant case, there was no question of any property other than the property which is the subject-matter of the suit being included at all. As such the question of requirement of registration under Section 17(2)(vi) of the Indian Registration Act did not arise.

28. Finally, my attention was drawn to the provisions of Order 23, Rule 3 of the CPC, 1908. This rule, after its amendment in 1976, provides that any lawful agreement or compromise must be in writing and signed by parties thereto. As, admittedly, in the facts of the present case, there was no agreement in writing and signed by the parties evidencing the compromise, Section 17(2)(vi) could not possibly be attracted to the proceedings.

29. In my view, both the arguments of Mr. Nag with regard to the subject-matter of the decree or order and with regard to the compromise are sound and should be accepted. I hold that the security created in favour of Mr. Nag's client by the order

of S.K. Roy Chowdury J. (as his Lordship then was), dated August 1, 1978, cannot be said to be unenforceable in view of the provisions of Section 17(2)(vi) of the Indian Registration Act, 1908.

30. This disposes of all the contentions raised on behalf of all the parties.

31. In the result this application succeeds. There will be order in terms of prayer (a) of the summons. There will also be an order in terms of prayer (d) of the summons directing respondent No. 1 to pay a sum of Rs. 50,000 to the applicant forthwith in pro tanto satisfaction of the decretal dues of the applicant. Such payment may be made by the official liquidator to the advocate-on-record of the applicant company.

32. Having regard to the facts and circumstances of the case, there will be no order as to costs.

33. The applicant company would be at liberty to prove for the balance of its claim in the liquidation proceedings. In so far as the official liquidator is concerned, he will be entitled to retain the costs which is assessed at Rs. 2,000 out of the assets in his hands.

34. All parties are to act on a signed copy of the minutes of the operative portion of the order on the usual undertaking.

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