

Indian Bank vs The Official Liquidator, Chemmeens ... on 8 May, 1998

Equivalent citations: AIR 1998 SUPREME COURT 2111, 1998 (5) SCC 401, 1998 AIR SCW 1991, (1998) 4 JT 172 (SC), (1998) 3 COM LJ 211, 1998 (4) JT 172, (1998) 3 SCR 255 (SC), 1998 (3) SCALE 531, 1998 (5) ADSC 72, (1998) 2 MAD LW 518, (1999) 3 BANK LJ 343, (1998) 79 FAC LR 761, (1998) 2 MAHLR 211, (1998) 3 SCJ 292, (1998) 29 COR LA 425, (1998) 4 SUPREME 599, (1998) 2 RECCIVR 595, (1998) 3 SCALE 531, (1998) 93 COM CAS 76, (1998) 2 BANK CLR 146

Bench: B.N. Kirpal, Sayed Shah Mohammed Quadri

PETITIONER:

INDIAN BANK

Vs.

RESPONDENT:

THE OFFICIAL LIQUIDATOR, CHEMMEENS EXPORTS (P) LTD. & ORS.

DATE OF JUDGMENT: 08/05/1998

BENCH:

B.N. KIRPAL, SAYED SHAH MOHAMMED QUADRI

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T QUADRI,J.

This appeal, by special leave, is directed against the order of the Division Bench of Kerala High Court in M.C.A.No.11 of 1983 passed on January 29, 1986. That was an application filed before the learned Single Judge of the High Court of Kerala (hereinafter referred to as 'the Company Court') by the Official Liquidator against the Indian Bank and respondents Nos.2 to 5 herein under Section 446(2) and Section 460(4) read with Section 125 of the Companies Act, 1956 (for short 'the Act') and

Rule 9 of the Companies (Court) Rules, 1959 praying for a declaration that the charge created by the in Liquidation in favour of the Indian bank against the land and buildings of the company, being plaint schedule properties in O.S.169/80 before the Principal Sub-Court, Cochin, was void and a further declaration that the preliminary decree passed in the said suit to the extent that it created three charge on the assets of the company was contrary to the provisions of Section 125 of the Act and as such void and unenforceable against the Official Liquidator representing the Central body of creditors excluding the decree holder.

It will be necessary to notice the facts giving rise to this appeal for a proper appreciation of the questions raised before us. The Indian Bank advanced certain amounts to M/s. Chemmeens Exports Pvt. Ltd. which was secured by an equitable mortgage by deposit of title deeds of the debtor company with the Bank. Thereafter, winding up proceedings were initiated against the debtor-company and on March 1, 1979 and winding up order was passed in Company Petition No.18 of 1978. The bank sought leave of the Company Court to file a suit for recovery of the debt amount in a sum of Rs.29,50,609.58 due to it. The permission having been granted by the Company Court on 7.12.79, the Indian Bank filed the said suit, O.S.No.169/80 in the Subordinate Judge's Court, Cochin, against the debtor company in liquidation which was represented by the Official Liquidator, duly impleading the Directors of the Company. The Official Liquidator filed written statement and contested the suit taking, inter alia, the plea that the charge against the properties of the company not having been registered under Section 125 of the Act, was void. On 28.5.82, in the said suit the Court passed a preliminary decree in favour of the Bank. No appeal was filed by the Official Liquidator against the said decree.

However, on March 21, 1983, the Official Liquidator filed an application being C.M.A.No.11 of 1983 before the Company Court for the reliefs indicated above. The bank resisted the application on the ground that the decree passed by the Court had become final and operates as *res judicata*. The learned Company Judge referred the case to a Division Bench expressing the view that the question was not free from doubt. By the impugned order of January 29, 1986, the Division Bench held that the preliminary decree passed in the suit did not operate as *res judicata*; that on account of non-registration of the charge it was void under Section 125 of the Act and that plea could be raised by the Official Liquidator as such and also on behalf of the body of the creditors in the application and also declared that the preliminary decree passed on the basis of the charge created by the company in favour of the bank against the land, buildings and machinery of the company, as set out in the preliminary decree, was void against the Official Liquidator and the creditors of the company and that the same was not enforceable against the assets of the company.

Shri Ram Kumar, the learned counsel for the appellant, contended that since no appeal was preferred against the preliminary decree passed in the suit filed by the bank with permission of the Company Court against the company represented by the liquidator on the basis of equitable mortgage of the company's property, it had become final, and the Division Bench could not have gone behind the decree to hold that as the charge, the basis of the decree, was not registered with the Registrar and was void, the decree, was not registered with the Registrar and was void, the decree itself was void; that under Section 125 of the Act, what was required to be registered was charge created by the company and as the preliminary decree in the suit could not be said to be a

charge created by the company, Section 125 had no application to the decree of the court. In any event, submitted the learned counsel, the liquidator himself being a party to the decree, it was binding on him and he could not be permitted to plead to the contrary. Shri E.M.S. Anam, the learned counsel appearing for the contesting respondent, argued that because the charge created by the company on its properties was void in view of mandatory provision of Section 125, the Division Bench had rightly held that the preliminary decree was also void against the creditors and the liquidator and that it was of no consequence that the liquidator did not appeal against it and that the principle of res judicata had no application.

On these submissions, the question which falls for consideration is : what is the effect of Section 125 of the Act on a preliminary decree in a mortgage suit passed on the basis of an unregistered charge; and what is relief to which the judgment creditor will be entitled to in such a case?

Since the preliminary decree is assailed as being void under Section 125 of the Act, it would be useful to read here the said provision, insofar as it is relevant for our purposes. It reads :

"Certain charges to be void against liquidator or creditors unless registered.

125. (1) Subject to the provisions of this Part, every charge created on or after the 1st day of April, 1914, by a company and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with instrument, if any, by which the charge is created or evidenced, or a copy thereof verified in the prescribed manner, are filed with the Registrar for registration in the manner required by this Act within thirty days after the date of its creation :

Provided that the Registrar may allow the particulars and instrument or copy as aforesaid to be filed within thirty days next following the expiry of the said period of thirty days on payment of such additional fee not exceeding ten times the amount of fee specified in Schedule X as the Registrar may determine, if the company satisfies the Registrar that it had sufficient cause for not filing the particulars and instrument or copy within that period.

(2) Nothing in sub-section (1) shall prejudice any contract or obligation for the repayment of the money secured by the charge.

(3) When a charge becomes void under this section, the money secured thereby shall immediately become payable.

(4) This section applies to the following charges :

(a) a charge for the purpose of securing any issue of debentures:

- (b) a charge on uncalled share capital of the company;
- (c) a charge on any immovable property, wherever situate, or any interest therein:
- (d) a charge on any book debts of the company;
- (e) a charge, not being a pledge, on any moveable property of the company;
- (f) a floating charge on the undertaking or any property of the company including stock-in-trade;
- (g) a charge on calls made but not paid;
- (h) a charge on a ship or any share in a ship;
- (j) a charge on goodwill, on a patent or a licence under a patent, on a trade mark, or on a copyright or a licence under the copyright.

Sub-sections (5) to (8) *** **"

On a plain reading of sub-section (1) it become clear that if a company creates a charge of the nature enumerated in sub-section (4), after 1st day of April, 1914, on its properties, and fails to have the charge together with instrument, if any, by which the charge is created, registered with the Registrar of the Companies within thirty days, it shall be void against the liquidator and any creditor of the company. This, however, is subject to the provisions of Part-V of the Act. The proviso enables the Registrar to relax the period of limitation of thirty days on payment of specified additional fees, on being satisfied that there has been sufficient cause for not filing the particulars and instrument or a copy thereof within the specified period. Sub-sections (2) and (3) deal with repayment of money secured by the charge. Sub-section (2) provides that the provision of sub-section (1) shall not prejudice the contract or obligation for repayment of money secured by the charge and sub-section (3) says that when a charge becomes void under the section, the money secured shall become payable immediately. Though as a consequence of non-registration of charge under Part-V of the Act, a creditor may not be able to enforce the charge against the properties of the company as a secured creditor in the event of liquidation of the company as the charge becomes void against the liquidator and the creditor, yet he will be entitled to recover the debt due by the company on par with other unsecured creditors. It is also evident the Section 125 applies to every charge created by the company on or after the 1st day of April, 1914. But where the charge is by operation of law or is created by an order or decree of the court, Section 125 has no application.

In re: Overseas Aviation Engineering (G.B.) Ltd, [1963 (33) Company Cases 315], the Court of appeal held, inter alia, that an order passed by the court giving effect to the charge unregistered under Section 95 of the English companies Act (which is not only in pari materia with Section 125 of the Companies Act but is also identical in terms) was not void against the liquidator of the company on its winding up.

In Praga Tools Ltd. vs. Official Liquidator of the Bengal Engineering Co. (P) Ltd. [1984 (56) Company Cases 214], a consent decree for repayment of money was passed against the Bengal Engineering Company on the suit filed by Praga Tools Company. The decree provided, inter alia, that in the event of non-payment of the decreed amount, the Praga Tools Company would be entitled to execute decree and in the event of execution of the decree, the security furnished by the Bengal Engineering Company with the Registrar under an earlier order of the court to the extent of Rs. 53,000/- would continue as security for the decree. That decree was not registered. Thereafter, Bengal Engineering Company went into liquidation and its entire assets were sold by the official liquidator. The Praga Tools Company applied claiming to be a secured creditor to the extent of Rs.50,000/-. A learned Single Judge of the Calcutta High Court held that as the charge was created by an order of the court, it would not require registration under Section 125 of the Companies Act and that the Praga Tools Company should be treated as secured creditor to the extent of Rs.50,000/- and was entitled to recover the amount from the official liquidator. We approve the principle laid down by the learned Single Judge of the Calcutta High Court. We also make it clear that an order or decree of a Court creating charge on the properties of a company has to be distinguished from a preliminary decree passed in a mortgage suit based on an unregistered charge which is hit by Section 125 of the Act. We shall advert to this aspect presently.

Now, it will be necessary to read here Section 446 of the Act. It deals with the effect of winding up order on the suits and other proceedings pending or in the offing. Section 446 is in the following terms :

" Suits stayed on winding up order,

446. (1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceed with, against the company, except by leave of the Court and subject to such terms as the Court may impose.

(2) The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of --

(a) any suit or proceeding by or against the company;

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made under Section 391 by or in respect of the company;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company;

Whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

(3) Any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court.

(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court."

A perusal of the provisions, extracted above, makes it clear that when a winding up order has been made or the official liquidator has been appointed as provisional liquidator in respect of a company, the Court passing the winding up order is empowered to adopt any of the following courses :

(1) To grant leave to any person to institute or continue suit or legal proceeding, pending at the date of winding up against the company subject to such terms as that court may impose;

(2) to entertain or dispose of

(a) any suit or proceeding by or against the company;

(b) any claim made by or against the company; including claims by or against any of its branches in India;

(c) any application made under Section 391 by or in respect of the company; and

(d) any question of priorities or any other question whatsoever whether of law or fact which may relate to or arise in the course of winding up of the company; and (3) to transfer to itself any suit or proceedings by or against the company which is pending in any court (other than that in which the winding up of the company is proceeding) and disposed of the same.

It may be noted that these provisions have no application to any proceeding pending in appeal before a High Court or the Supreme Court. From this what follows is when a suit is instituted in the court of competent jurisdiction with the leave of the court under sub-section (1) and a decree is passed by that court whether on the basis of mortgage or otherwise, it would be binding on the

official liquidator and no plea inconsistent with the decree passed against the official liquidator can be raised while deciding the questions of priorities under clause (d) of sub-section (2). We wish to make it clear that under Section 446, no power is conferred on the company court to declare a decree of the competent court void - a prayer which is made by the official liquidator in the application out of which this appeal arises - so to that extent the application filed by the liquidator in the company court is not maintainable.

The question, however, remains what is the effect of the preliminary decree passed by the court against the official liquidator on May 28, 1982. It will be useful to read here the material portion of the preliminary decree :

"It is ordered and decreed that a preliminary decree is passed and that the plaintiff is entitled to realise from the defendants a sum of Rs. 29,50,605.59 with interest at 14% from the date of suit till the realization and that plaintiff is entitled to the cost of the suit also and that the defendants 1 to 3 will deposit in Court on or before 28.8.1982 the above said amount and cost of the Suit and on payment of the amount the equitable mortgage will stand discharged and documents of title deposited with the plaintiff by the defendants and which are produced by the plaintiff in Court will be delivered to the defendants and that in default of payment as aforesaid, the plaintiff may apply to the court for passing a final decree for the sale of the plaint schedule property and that the money realised by such sale shall be applied in payment of the amount due under the decree, and the balance if any, shall be paid to the Ist defendant and that if the money realised by the sale of the plaint schedule property is insufficient for payment of the decree debt in full, the plaintiff shall be at liberty to apply for a personal decree against defendants 2 to 5 for the balance and that the defendants will suffer cost hitherto incurred."

From the above quoted extract of the decree the following directions of the Court may be noticed :

(1) that the appellant (plaintiff therein) became entitled to realize from the respondent (defendants therein which included company represented by the official liquidator a sum of Rs.2,50,605.590 with interest and costs of the suit; (2) the respondents were given liberty to deposit the said amounts on or before August 28, 1982; (3) if the amounts are deposited, the equitable mortgage will stand discharged and the documents of title deposited with the appellant-Bank by the respondents will be delivered to them;

(4) in default of payment of the amounts, the appellant was authorised to apply to the court for passing the final decree for the sale of the company's property and realisation of the decreed amount; and (5) in the event of the sale proceeds being less than the amount decreed, a personal decree was also passed against Defendants 2 to 5 therein for recovery of the unrealised amount.

The aforementioned preliminary decree was passed by the Court even though the official liquidator raised the plea in the written statement that the charge created on the company's property was void under Section 125 of the Act. But it may be that plea was not argued at the hearing. However, what is clear from the material on record is that no appeal was filed against the said preliminary decree by the official liquidator and the preliminary decree has attained finality.

From the above discussion, it follows that the right of the respondents including the company represented by the official liquidator to deposit the decree amount was available till August 28, 1982. In other words, the right to recover the amounts pursuant to the contract creating charge, even under the terms of the decree was available till the said date and thereafter 'the matter had passed from the domain of the contract to that of judgment'. In *Rani Sundar Koer vs. Rai sham Krishan* [1934 Indian Appeals P.9 (P.C.)], Lord Davey observed as follows :

"Their Lordships think that the scheme and intention of the Transfer of Property Act (now the corresponding provisions of the Civil Procedure Code) was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day; and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree."

That principle was followed by the Privy Council in *Kusum Kumari vs. Debi Prosad Dhandhanias & Ors.* [1936 P.C. 63] where the question of granting interest under Regulation 6 of 1872 fell for consideration. Regulation 6 provided, "the total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan". The trial court decreed the suit based on mortgage with interest at six per cent per annum from the date of the decree till its realisation. The amount of interest so decreed exceeded the limitation prescribed under the said Regulation. The Privy Council has observed that once a decree had been passed, the loan or debt as the subject of enforcement no longer exists; it was in effect merged in the decree and the allowance of interest on the decree was not the allowance of additional interest on the loan or debt. The same principle was reiterated by this Court in *Gyarsi Bai vs. Dhansukh Lal* [AIR 1965 SC 1055]. This Court observed, "it cannot also be disputed and the rights of the parties are thereafter governed by the said decree".

In *Suryakant Natvarlal Surati & Ors. vs. Kamani Bros Pvt. Ltd.* [1985 (58) Company Cases 121], the company created a charge under a mortgage in favour of the trustees of the Employees' Gratuity Fund. The creditors by a preliminary decree of December 3, 1977 were entitled to receive the amount secured on the property of the company; the court fixed December 8, 1978 as the date for redemption and ordered that in default of payment of the sum due by that date, the property was to be sold by public auction. On an application made on February 16, 1978, the company was ordered to be wound up by an order dated August 3, 1979. As default in payment of the decreed amount was committed, the mortgages applied for leave of the court under Section 446 to execute the decree against the official liquidator by application dated July 10, 1981. Three contributories sought

injunction against taking any further action on the ground that the charge created by the company was not registered under Section 125 of the Companies Act, therefore, the mortgages should be treated only as unsecured creditor. Their application was dismissed by a learned Single Judge. On appeal, speaking for the Division Bench of the Bombay High Court Justice Bharucha (as he then was) laid down, inter alia, the principle that the question of applicability of Section 125 had to be decided on the terms of the decree

- whether the unregistered charge created by the mortgagor was kept alive or extinguished or replaced by an order of sale created by the decree; if upon a construction of the decree, the court found that the unregistered charge was kept alive, the provisions of Section 125 would apply and if, on the other hand, the decree extinguished the unregistered charge, the section would not apply. We are in respectful agreement with that principle. We hold that a judgment creditor will be entitled to relief from the Company Court accordingly.

Reverting to the facts of this case, on the construction of the decree we have already held that the charge was kept alive till August 28, 1982 and thereafter in default of payment of decree amount the sale order would take effect. In this case, admittedly the decree amount was not paid before August 28, 1982, as such the matter had passed from the domain of contract to the realm of the judgment. The official liquidator filed application on March 21, 1983 seeking to declare the decree as void. By that date what was operative in the decree as void. By that date what was operative in the decree was not a mere unregistered charge but an order for sale of mortgaged property for realisation of decree amount. The preliminary decree cannot therefore be said to be void and inoperative.

For the above reasons we hold that the Division Bench ought not to have held that the preliminary decree passed by the competent court on May 25, 1980 was void and unenforceable and accordingly we set aside the order under appeal dated January 29, 1986 by allowing the appeal dated January 29, 1986 by allowing the appeal with costs.