
2005 eGLR_HC 10008158,2007 CC (136)387 ,2006 (72) SCL 145

Before the Hon'ble MR JAYANT PATEL, JUSTICE

EXPORT-IMPORT BANK OF INDIA Vs. O.L.OF SHRI MINAL OIL AND AGRO INDUSTRIES PVT. LTD.

COMPANY APPLICATION No: 228 of 2004 , Decided On: 14/09/2005

Singhi & Co., Nalini Lodha, A.C.Gandhi, Nanavati Associates

MR. JAYANT PATEL J.,

1. I have heard the learned advocates for the parties for final disposal.

2.The present application is preferred for the reliefs, inter alia, to direct the OL to give account of the expenses for a sum of Rs.75,000/- withheld by the OL on ad hoc basis out of the first instalment of Rs.5 crore and to pay the surplus amount, if any, to the applicant bank after adjusting the expenses as are statutorily required to be borne by the applicant-bank to the extent prescribed by law. The applicant has also prayed for directing the OL to handover the first instalment of Rs.5 crores received by him from the purchaser along with interest @ 15% p.a.

3.Mr.Singhi, Ld.counsel for the applicant submitted that the second prayer made for handing over the instalment of Rs.5 crores with interest does not now survive and as on today the OL has retained the amount of Rs.63.52 lacs only. Therefore what is required to be considered in the present application is only to the extent of lawful liability of the applicant company or in the alternative whether the OL is justified in deducting the said amount or not.

4.It appears that the communication is made to the applicant company by the OL as per letter dated 8.6.04 which inter alia provided that the total amount of Rs.63,53,898/- is deducted for various bills which includes Rs.14,41,530/- for the expenses of security deployed at the factory premises, Rs.54,000/- for valuation charges to be reimbursed to the Centurian Bank, Rs.41,000/-to be paid towards professional fee of Mr.N.K.Shah, the Govt. approved valuer, Rs.15,02,400/- towards the fees of Central Govt, Rs.77,968/- towards advertisement charges and Rs.32,37,000/- towards workers dues as per statement of affairs subject to final verification and confirmation by this court.

5.Mr.Singhi, Ld.advocate for the applicant contended that there are no details submitted for expenses incurred for security deployed at the factory premises and therefore he submitted that in the absence of such details produced before this court it is not open to the OL to deduct the said amount as if the expenses to be deducted in view of the earlier passed by this court (Coram: D.A.Mehta,J) dated 20.2.2004 in OL Report No.46/02 in Com.Petition No.207/2001.

6.As such, the perusal of the order passed by this court (Coram: M.S.Shah,J) dated 2.12.2003 passed in OL Report No.46/2002 in Com.Petition No.207/01 shows that there is reference to the

earlier order dated 6.9.02 in OL Report No.46/02 whereby the action of the OL of appointing the security agency and to pay their salary from the fund lying with the OL from the Company Paid Staff Salary Reserve Fund subject to reimbursement from the secured creditors was already granted and therefore on the question of admissibility of said action, the said dispute can not now be allowed to be reopened. At the most, the applicant may be entitled for the details of expenses already incurred for the security deployed by the OL. No details are submitted even in the report for the composition of the amount of Rs.14,41,530/-. Hence, it is hereby directed that the OL shall furnish the details of the composition of expenses incurred towards the deployment of security to the applicant bank within a period of six weeks from today.

7.MR.Singh, Ld.advocate for the applicant bank also attempted to submit that though there was first charge of the applicant bank over the factory premises, there were other secured creditors also and therefore the applicant bank can not be directed to bear the total expenses of the security deployed by the OL and at the most proportionate amount may be borne by the applicant and the other secured creditors may be directed to pay their share of amount towards expenses of security deployed and incurred by the OL.

8.As such, the security expenses which are deducted pertains to the factory premises only and the other secured creditors barring the applicant are not distributed any amount. It is true that if the property is yet to be sold and before the sale the court may in a given case in view of the statutory provisions direct the secured creditors to deposit or bear the proportionate share on the basis of their security interest. However, as the money is already realised, the applicant has already received the full consideration of the immovable property. It appears that the money is also realised by disposal of stock/movables over which Centurian Bank as well IndusInd Bank were also claiming the charge. The money realised from the disposal of the factory is of Rs.23.80 crores and in comparison to the said amount if the amount of Rs.29 lacs is considered, it comes to approximately Rs.1.3%. Therefore, keeping in view the said aspects, it is directed that out of the amount of Rs.14,46,530/- being security expenses, the amount forming 1.3% shall be borne by the other secured creditors who are claiming their first charge over the movables for which the money realised is of Rs.29 lacs. Considering the facts and circumstances, as the sale of moveables as well as the factory has already taken place, I find it proper to apportion and fix the liability for payment of security expenses between the applicant bank and two banks, namely, Centurian Bank and IndusInd Bank Ltd accordingly. To say, in other words, except to the extent of 1.3% the expenses of security shall be borne by the applicant bank. The OL shall be at liberty to recover from Centurian Bank as well as IndusIN Bank the security expenses being 1.3% of Rs.14,46,530/-.The OL shall give effect accordingly.

9.Mr.Singhi, Ld.advocate for the applicant submitted that proportionate amount for security expenses is also to be deducted from the share of workers dues of Rs.32,37,000/- since there is also pari passu charge for workmen dues and the amount is already deducted, the OL may be directed to refund the amount. If the amount of Rs.32,37,000/- itself is considered, it would be roughly around 1.5%. Therefore, if the proportionate share is considered, the amount at the rate of 1.5% of Rs.14,46,530/- is to be borne by the workmen towards security expenses. Therefore, the OL shall give the effect by taking into consideration of 1.5% share of the workmen from the total expenses of security. Accordingly, the OL will be required to refund the amount by calculating 1.3% plus 1.5% of Rs.14,46,530/- to the applicant.

10.So far as the amount of valuation charges are concerned, it was sought to be contended by Mr.Singhi, Ld counsel for the applicant that it was agreed that the amount was to be borne by Centurian Bank and therefore the liability of the said amount of valuation charges can not be

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fastened upon the applicant.

11. In this regard, if the proceedings of the meeting dated 7.2.03 are considered, it appears that it was agreed that the valuation expenses shall be of first priority by the OL when the sale proceeds from the assets of the company is realised, keeping in view the total amount realised of the immovable property of Rs.23.80 crores and the movable property of Rs.29 lacs, it is directed that the applicant shall bear the burden of valuation expenses except to the extent of 1.3% which shall be borne by the Centurian Bank and IndusInd Bank. It will be for the OL to give effect accordingly.

12. So will be the case for the professional fee of Shri N.K.Shah. However, the grievance of the applicant is that no bills are submitted nor it appears that the bills are placed in the present proceedings. Therefore, for the present amount of Rs.41,000/- shall remain as it is and it will be for the OL to submit separate report by producing the bills of professional fee of Shri N.K.Shah and the justification thereof.

13. So far as the advertisement charges are concerned, no bill is produced on record. However, it has been stated by the OL that the payment is already made. Therefore, it will be for the OL to move appropriate report for ratification of such expenses by producing the proof for bill of advertisement etc.

14. As regards the workmen claim is concerned, as per the statement of affairs the OL has received the claim of Rs.32,37,000/- and therefore the amount is deducted and retained with the OL. It will be for the OL to examine the claim and to communicate to the applicant bank regarding admissibility or otherwise of such claim of the workmen. Such exercise shall be undertaken and completed as early as possible preferably within a period of three months from today. After the communication is made by the OL to the applicant bank concerning to admissibility of the claim of workmen dues, it would be open to the applicant bank to resort to appropriate proceedings as may be available in law.

In any case, until such question is finalised the OL can not be directed to refund the amount to the applicant.

15. Mr. Singhi, Ld. advocate for the applicant has strongly objected to the deduction of amount of Rs.15,02,400/- by the OL as being the fee of Central Govt though in the communication it is mentioned as OL commission. He submitted that as the applicant has remained outside the winding up and has realised the security interest in the property, it can not be said that the OL has realised the money from the property of the company in liquidation. Therefore, he submitted that no fee as required to be paid as per Rule 291 of the Company Court Rules will be permitted in the present case. He also submitted that the question of payment of fee would arise only if the OL has realised the property of the secured creditors as per sub-Rule (4) or for any other property after realisation of the property of the secured creditors, the fees are prescribed as per Sub-Rule (2). He submitted that as such the secured creditors like the applicant bank by remaining outside the winding up proceedings has realised the security interest in the property by participation in the form of sale committee constituted by this court, where the OL has to take decision with the permission of the said sale committee. He submitted that such aspect being special, no fees are payable to the OL or to the Central Govt and even if such fees are to be paid without prejudice to the earlier contention, such is required to be quantified under Sub-Rule (6) of Rule 291 and therefore he submitted that the deduction of fee by the OL is unwarranted and he also submitted that in any event there is no liability to pay such fees and therefore such amount is wrongly deducted and must be

paid back to the applicant bank

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16. The OL has submitted that he is functioning as the OL and the money is realised therefrom and therefore as per Rule 291 there are inherent powers with him to deduct the said fees as expenses. He also submitted that the amount of fee is deducted in accordance with Rule 291(2)(i) and therefore the contention raised on behalf of the applicant bank may not be accepted by this court.

17. To appreciate the contentions raised on behalf of the applicant, it is necessary to take into consideration the provisions of Section 529 of the Companies Act (hereinafter referred to as "the Act"). As per section 529 of the ACT, same rule is to prevail in the proceedings of winding up as prevailing in the insolvency proceedings as per the Provincial Insolvency Act, 1920 (hereinafter referred to as "Insolvency Act"). Section 47 of the Insolvency Act deals with security of the secured creditors.

Therefore, two modes can be said to be available to the secured creditor, namely, (i) claiming the amount by remaining outside the winding up and (ii) to remain inside the winding up and to realise the security interest. However, even if the security interest is to be realised in a property of the company which is in liquidation and when it is under the possession of the OL, it may not be possible for the secured creditors to realise the security interest in the property by disposal of sale or otherwise until the possession of the property is handed over to the secured creditor by the OL. The creditor or the secured creditor, as it is on the basis of rights available as per Transfer of Property Act would be entitled to sale the property only after the decree of the competent court or there is foreclosure of the mortgage and consequential order therefrom. Therefore, as it is without intervention of the court, when the secured creditor is not in possession of the property or that the property of the company concerned is in possession of the OL, it may not be possible for the secured creditor to realise the security interest. Even without intervention of the court if secured creditor is to enforce the security interest it should be in a position to get the possession of the property and before that the opportunity is required to be given to the mortgager for redemption. In the event the mortgager declines to handover the possession, the remedy available to the secured creditor would be to approach the court of law for enforcement of the mortgage and realisation of the security interest. It can be said that as it is the secured creditor without intervention of the court may not be in a position to realise the security interest if the mortgager does not surrender the property or even if the property is not in possession of the secured creditor for the purpose of enforcement of security interest. However, it is after Securitisation of and Reconstruction of Financial Assets and Enforcement of Security Interest act, 2002 (hereinafter referred to as "the Securitisation Act") the remedial measures are provided to the secured creditors for enforcement of security interest without intervention of the court. The position as prevails prior to the Securitisation Act was the same as referred to herein above namely that without intervention of the court, in normal circumstances, if the possession of the property is not with the secured creditor or if the possession of the property is not given by the mortgager it may not be possible for the secured creditor to enforce the security interest. Even if the property is to be sold for realisation of security interest by the secured creditor, the conveyance is to be executed by the owner of the property unless such powers are transferred by any instrument for such purpose. Therefore, in such a situation with a view to see that the money is realised by disposal of the property of the company in liquidation which is in possession of the OL, at the time when the secured creditor is interested to realise the value of the security interest by disposal of the said property, in normal circumstances, the court is appointing the sale committee under the Chairmanship of the OL attached to this court and in the said committee the representative of secured creditor as well as the workmen and other parties which the court finds it proper are allowed to be made. Not only that,

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but after the report of the sale committee the report is being submitted to the court by the OL and the sale is confirmed or rejected by this court. The sale deed is also being executed by the OL on behalf of the company in liquidation and at the most the secured creditor may be the confirming party at the time when the conveyance is executed in favour of the purchaser. Therefore, it can not be said that no duty is being discharged by the OL or no power is exercised by the OL under the Act for disposal of the property which results into realisation of liquid money of the company in liquidation. It may be that so far as secured creditors are concerned with a view to see that their rights may not be prejudiced, they do not join themselves in the winding up proceedings and this court is also permitting the secured creditors to remain outside the winding up proceedings, but at the same time the fact remains that the property of the company in liquidation is realised by disposal of sale or otherwise. It may be that so far as the secured creditors are concerned, by disposal of the said property and by remaining outside the winding up, the security is realised or the property is converted into in liquid cash money but it can not be said that thereby no benefit whatsoever is derived by the secured creditor. Therefore, there is realisation of assets of the company through OL who is under supervision of this court under the Companies Act. If there is realisation of the assets of the company, the fees as required under Rule 291 would be payable. The chargeability of the fees, as it appears from Rule 291(2) is upon the realisation of the assets of the company in liquidation. If the secured creditor by remaining inside the winding up proceedings has realised the security interest through the OL the chargeability of the fees may be as required under sub-Rule (4) but if, irrespective of the intervention of the secured creditors may be inside or outside the winding proceedings, the property of the company in liquidation is realised, the fees is required to be paid as provided under Rule 291)(2) of the Company Court Rules.

18. Apart from the above, even if the contention on behalf of the secured creditors to the extent, that it is a special duty assigned by the court in constitution of the sale committee, is examined, it appears that the process for realisation of the properties of the company in liquidation as being undertaken and the functions performed by the OL by remaining as the Chairman of the sale committee and thereafter submitting report to this court of the confirmation of the sale, the realisation of the property, supervision of the property, handing over the possession of the property, execution of conveyance deed etc remains the same as it is for realisation of the property of the company in liquidation which are required to be performed in normal course by the OL had there been participation of secured creditor or no participation. Therefore, even if the matter is considered for quantification of the fees as per Sub-Rule (6) of Rule 291 by this court, in view of constitution of the sale committee and the sale through the sale committee, it would not be a case where the OL only remains as Chairman of the sale committee and thereafter renders no other work or duty in capacity as OL of the company in liquidation. After the proceedings of the sale committee as in normal case report is to be submitted to the court and all procedure as required for disposal of the property of the company in liquidation for realisation as required under the Companies Act read with relevant Rules are required to be followed and under taken by the OL. Therefore, keeping in view the said aspects even if this court is to quantify the fees of the OL the work to be considered may be in addition to the statutory duty imposed upon the OL by the Act read with Rules. When the Act read with Rules provide for a particular percentage of fee as per rule 291 (2) of the Company Court Rules, even if the fees is to be quantified, this court would be guided by the fees schedule as provided in the Company Court Rules. In view of the fact that there is no distinction in performance of the duty by the OL the fees provided under rule 291(2) is required to be quantified as fees under Rule 291(6) of the Rules, since the procedure right from the stage of getting permission of the court to sell the property until the final conveyance deed is executed and the possession is handed over remains same.

19. Therefore, merely because the secured creditors have remained outside the winding proceedings, in my view, is no ground for repudiating or avoiding the liability to pay the fees to the Central Govt as required under Rule 291(2)(i) of the Company Court Rules. As observed earlier, since the secured creditors having remained outside the winding up proceedings the fees may not be chargeable as required under Rule 291(4) but in the matter where the property is realised by the OL and when even secured creditors have remained outside the winding up, net effect is the realisation of properties of the company in liquidation by OL and as the benefit is also to be derived consequently by the secured creditors by remaining outside the winding up proceedings, it can not be validly contended that no fees whatsoever is required to be paid since the OL has not discharged any duty or has not performed any duty for realisation of the property of the company in liquidation. Further, as observed earlier, even if the quantification is to be made, it should be as provided under Rule 291(2)(i) of the Company Court Rules. Therefore in my view it would be of no difference if the matter is considered under Rule 291(6) of the Company Court Rules.

20. On behalf of secured creditors it has been contended that even under the Securitisation Act the applicant bank could have realised the security interest without intervention of the court. It was submitted that as this court passed the order on 2.12.2003 in OL Report No.46/02, the said contention was not decided and therefore also the fees is not required to be paid or the burden is not required to be carried by the applicant company which was holding the security interest in the property.

21. The contention appears to be attractive but on close scrutiny it can not be accepted for the reasons stated hereinafter.

22. Even if under the Securitisation Act any person having security interest in the property can realise the interest if there is consent of the secured creditor representing more than 3/4th of the interest. Not only that but it was not a case where the rights under the Securitisation Act were pressed in service, after getting the consent of the secured creditors representing more than 3/4th of share. In any event the possession of the property in question was with the OL and therefore unless the possession was handed over by the company court to the applicant bank it could not have realised the security interest nor could it take further steps under the Securitisation Act. It is on account of arrangement made by the court by exercising its powers under the Companies Act the sale is effected and the property of the company in liquidation is realised. Therefore, it is not a matter where the applicant bank has realised the security interest without intervention of the court or without taking any assistance of the proceedings of liquidation. In any event, after the order passed by this court, dated 2.12.2003 the procedure and position for realisation of the property of the company in liquidation has remained the same, and there was no exercise of power under Securitisation Act. Therefore once the property is realised by the OL under the supervision of this court under Companies Act there would not be any valid reason on the part of the applicant bank to repudiate or avoid the liability for the fees as required under Rule 291 of the Company Court Rules. Therefore, considering the facts and circumstances said contention of MR.Singhi can not be accepted.

23. In view of the above, it will be for the OL to calculate the fees as required under Rule 291 (2) (i) and to deposit the same with the Central Govt and in case there is any surplus then only the same may be required to be disbursed to the applicant company.

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24. Under the circumstances, the fund retained by the OL of Rs.63,53,898/- is required to be used, appropriated and retained as the case may be in accordance with the observations and directions given by this court herein above.

25. Mr.Chokshi, Ld.counsel appearing for the purchaser of the property wanted to press his claim for electricity dues, land revenue expenses from time to time etc. However, same can not be considered in the present proceedings and it will be for the said purchaser to move appropriate claim in the appropriate proceedings.

26. Company Application No.228/04 stands disposed of accordingly in terms of the aforesaid order.

27. Company Application No.248/04 be placed for hearing on 29.9.05.

Appeal allowed

