

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CAPP No. 22 of 2014 in
Company Appeal No. 547 of 2009
Date of Decision: 19th May, 2015

IDBI Trusteeship Services Ltd.

..Appellant

versus

M/s Chattar Industries Ltd. and others

..Respondents

**CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE.
HON'BLE MR. JUSTICE G.S.SANDHAWALIA.**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. Whether to be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

Present : Mr. C.S.Pasricha, Advocate, for the appellant.
Mr. Nitin Jain, Advocate for respondent No.1-O.L.
Mr. Manish Jain, Advocate, for respondent Nos. 2 and 3.
Mr. Kamal Sehgal, Advocate, for respondent No.4.

S.J.VAZIFDAR, ACTING CHIEF JUSTICE

This is an appeal against the order and judgment of the learned Company Judge rejecting the appellant's application to be treated as a first charge holder/secured creditor pari-passu with respondent No.2-Industrial Development Bank of India, respondent No.3-Industrial Finance Corporation of India Ltd. and respondent No.4-Haryana Financial Corporation. The learned Judge dismissed the application on the ground that the appellant's charge had not been registered under section 125 of the Companies Act, 1956 (for short 'the Act').

2. For the purpose of this appeal, we will proceed on the basis that in the event of a charge not being registered under section 125 of the Act, it would be void against the liquidator and other creditors. We have come to the conclusion that the appellant's charge was infact registered under section 125 of the Act.

3. The appellant-IDBI Trusteeship Services Ltd. is referred to in the proceedings and in the impugned order as ITSL. The appellant is a

Debenture Trustee of which the beneficiaries are four nationalized insurance companies, namely, Life Insurance Corporation of India; General Insurance Corporation of India; New India Assurance Co. Ltd. and Oriental Insurance Company Ltd. A Trustee Agreement dated 31.11.1995 was entered into between the first respondent which is a company in liquidation and respondent No.2-IDBI. The appellant is the successor-in-interest inter-alia to the benefit of the trustee agreement. Apparently, in view of section 13A of the SEBI (Debenture Trustees) (Amendment) Regulations, 2000, respondent No.2 was prohibited from acting as Trustees and the Debenture trustee business of respondent No.2 was, therefore, transferred to the appellant.

4. Under the Trustees agreement, respondent No.2 agreed to subscribe to 18.5% secured redeemable non-convertible debentures of respondent No.1 of an aggregate nominal value of ₹ 200 lacs. Article-II of the agreement reads as under:-

‘ARTICLE-II

SECURITY

2.1 SECURITY FOR THE DEBENTURES

(A) The Debentures, together with premium on redemption, interest, liquidated damages, remuneration payable to Trustees, costs, expenses and other monies whatsoever stipulated in this agreement, shall be secured by :-

- a) a first mortgage and charge in favour of the Trustees in a form satisfactory to the Trustees of all the Company's immovable properties, both present and future; and
- b) a first charge by way of hypothecation in favour of the Trustees of all the Company's movables (save and except book debts), including movable machinery, machinery spares, tools and accessories, present and future, subject to prior charges created and/or to be created in favour of

the Company's Bankers on the Company's stocks of raw materials, semi-finished and finished goods, consumable stores and such other movables as may be agreed to by the Trustees for securing the borrowings for working capital requirements in the ordinary course of business;

The mortgage and charge referred to above shall rank pari passu with the mortgagees and charges created and/or to be created in favour of :-

- i) Haryana Financial Corporation (HFC) of its
 - a) term loan of Rs.39.90 lacs; and
 - b) term loan of Rs. 63 lacs.
- ii) Industrial Development Bank of India (IDBI) of its
 - a) short term loan of Rs.200 lacs;
 - b) term loan of Rs. 200 lacs;
 - c) additional term loan of Rs. 600 lacs; and
 - d) First additional term loan of Rs. 300 lacs.

(B) The Company shall make out a good and marketable title to its properties to the satisfaction of the Trustees and comply with all such formalities as may be necessary or required for the said purpose.

2.2 CREATION OF ADDITIONAL SECURITY

If, at any time during the subsistence of this agreement, the Trustees are of the opinion that the security provided by the Company has become inadequate to cover the debentures then outstanding, then, on the Trustees advising the company to that effect, the company shall provide and furnish to the Trustees to the satisfaction of the Trustees such additional security as may be acceptable to the Trustees to cover such deficiency.

2.3 ACQUISITION OF ADDITIONAL IMMOVABLE PROPERTIES

So long as any monies remain due and outstanding to the Debenture holders, the company undertakes to notify the Trustees in writing of all its acquisitions of immovable properties and as soon as practicable thereafter to make out a marketable title to the

satisfaction of the Trustees and charge the same in favour of the Trustees by way of first charge in such form and manner as may be decided by the Trustees.

2.4 DECLARATION OF TRUST

The Trustees agree that they shall, within a period of three months after the creation of the aforesaid security execute a Declaration of Trust for the benefit of the Debenture holders in a form and manner acceptable to the Debenture holders and cause the same to be registered if considered necessary.”

5. It is important to note two letters addressed by respondent Nos.2 and 4 that preceded this agreement. Respondent No.4-Haryana Financial Corporation had by a letter dated 18.07.1994 addressed to respondent No.2 stated that they had no objection in respondent No.1 offering pari passu charge to the said four insurance companies i.e. beneficiaries of the trust to secure the said debentures of ₹ 200 lacs subject to respondent No.1 obtaining a similar ‘No Objection Certificate’ from all the existing participating financial institutions. Respondent No.2 by a letter dated 18.05.1995 stated that they had no objection to the first respondent’s proposal for creation of pari-passu charge in favour of the four insurance companies in respect of debentures of an aggregate value of ₹ 200 lacs. Obviously, thereafter the arrangement was entered into between the company and respondent No.2 as a debenture trustee on behalf of four insurance companies on 03.11.1995.

Respondent No.3-IFCI acquired a charge in respect of the property in the year 1996. As it had acquired the charge subsequently, there was no question of IFCI-respondent No.3 agreeing to the creation of pari-passu charge in favour of respondent No.2.

6. There is, therefore, no doubt whatsoever and indeed it is virtually admitted that the appellant's dues are secured as aforesaid. The appellants dues are also admitted. The only contention on behalf of the respondents is that the charge in favour of the appellant had not been registered under section 125 of the Act.

7. This is a curious and an unfair contention at least in so far as the respondents are concerned. As we noted earlier respondent Nos. 2 and 3 expressly agreed to the appellant being granted a pari-passu charge. Moreover, the evidence which we will shortly refer to establishes beyond doubt that the charge was infact created. As we noted earlier, the appellant is the successor-in-interest of the benefit of the trustee agreement pursuant to which the charge was created. The charge was originally created in favour of respondent No. 2 i.e. the appellant's predecessor-in-interest. Respondent No.2 and indeed respondent No.1 i.e. the mortgagor, therefore, have personal knowledge of the facts of the case. Respondent Nos.1 and 2 have for obvious reasons failed to disclose the material particulars of the charge and the registration thereof although they being the original parties to the trustee agreement have knowledge of all the facts and quite possibly are in possession of the original record. Fortunately, even the limited record available establishes the registration of the charge and thereby enables us to do justice.

8. A hypothecation agreement was also executed on 03.11.1995 i.e. the day on which the trustee's agreement was executed. Forms 10 and 13 had obviously been filed. The same is evidenced by a receipt dated 20.11.1995 issued by the "Department of Company Affairs, Registrar of Companies Cash Counter receipt, office of the Registrar of Companies" acknowledging receipt of a sum of ₹ 130/- in respect of the said Forms 10

and 13. Form-10, however, is allegedly not traceable in the records of the first-respondent company. Respondent No.2 has not produced the same either. On account of the receipt issued by the Registrar of Companies, it must be presumed that both the Forms were filed. Neither respondent No.1 nor respondent No.2 contended that they were not filed. Form-13 is, however, dated 28.12.1995 i.e. after the date of the receipt. That Form, however, may have been different from the one which is on record. The fact of the matter, however, is that on the basis of the receipt, it must be presumed that Forms 10 and 13 had been filed for otherwise the Registrar of Companies would not have issued the receipt.

9. The creation of the equitable mortgage is admitted. The Managing Director of respondent No.1 had executed a declaration and undertaking dated 01.12.1995. The declaration stated that the immovable properties of respondent No.1 both present and future “are now proposed to be mortgaged and charged to IDBI as trustees (respondent No.2) for the holders of non-convertible Debentures to the extent of ₹200 lacs subscribed by LIC, GIC, NIA and OIC”.

That the declaration states that the mortgage was proposed to be created make no difference. It was admittedly created. This is evident from Form-8 which was filed on 28.12.1995 and which we will refer to next.

10. A receipt dated 29.12.1995 was also issued by the Registrar of Companies to respondent No.1 acknowledging receipt of ₹ 130/- in respect of Forms 8 and 13.

Form-8 refers to the said deed of hypothecation against Sr. No.1. It is, however, of vital importance to note the particulars at Sr. No.7 which are as follows:-

7.	Particulars of modification specifying the terms, conditions or the extent of operation of charge in which modification is made and the details of the modification:	IDBI, the trustee of NCDs to the extent of Rs. 200 lacs together with interest, additional interest, liquidate damages, premia on prepayment or on redemption, cost charges, expenses and all other monies payable by the company to IDBI the trustee in terms of the deed of Hypothecation dated 03.11.1995 being the original charges <u>is now also secured by the said mortgage by deposit of title deeds created by the company on 01.12.1995 in favour of IDBI, the trustee.</u>
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(emphasis supplied).

Thus the Form expressly refers to the creation of the equitable mortgage. That there was no document is irrelevant. An equitable mortgage can be created by the deposit of title deed alone. It is not necessary for the parties to execute a formal document in respect thereof. The Form is evidence of the mortgage having been created. There is thus an express admission that the dues of respondents No.2 and 3 were also secured by the said mortgage by deposit of title deeds created by the company on 01.12.1995. The rights now stand vested in the appellant.

11. It is important to note that the Assistant General Manager of the Ist respondent in a letter dated 17.05.1999 addressed to the Official Liquidator stated that respondent Nos.2 to 4 as well as the four insurance companies had a pari-passu first/exclusive charge on the company's fixed assets. The letter admitted that the aggregate principal amount due to the

four insurance companies is ₹ 200 lacs. This admission stands. It has never been contended that it was a mistake or made under a mistaken impression.

12. As we mentioned earlier, respondent Nos.1 and 2 do not state that the charge had not been registered. They merely state that the appellant has not been able to establish that the charge was registered. Absent any indication to the contrary, and there is none, it must be presumed that the charge was registered. Admittedly, the charge was created. In any event, it is clear beyond doubt from the above facts that it was. We have referred to the documents and specifically Form No. 8 which establishes that respondent No.1 had submitted the necessary documents for registration in accordance with Section 125 of the Act. We are inclined to presume that the authorities concerned in the Registrar of Companies fulfilled the statutory obligation of registering the charge. There was no legal bar to the charge being registered.

13. Faced with this, the learned counsel appearing on behalf of the respondents contended that the documents were submitted beyond the period prescribed under section 125 of the Companies Act and that is why it is possible that the charge was not registered.

14. This submission by respondent Nos.1 and 2 is totally unacceptable. The proviso to section 125 of the Act grants an additional time of 30 days. There is nothing to show that the benefit of the proviso was not extended to respondent Nos.1 and 2. As we have repeatedly mentioned, respondent Nos.1 and 2 have complete knowledge of the facts and the documentation. They have not stated that the Registrar of Companies had refused to register the charge. There is no such refusal on record. We are not inclined to speculate against the appellant which otherwise has an unanswerable and a just claim.

15. We were informed by the Official Liquidator that the appellant and the respondents are the only creditors. He made it clear that no claims have been made by the workers and in any event there are no outstanding claims for wages by any workman.

16. In the circumstances, the impugned order and judgment are set-aside. The Company Application No. 547 of 2009 is allowed. It is declared that the appellant holds a pari-passu charge as claimed by it and shall be entitled to a pro-rata distribution of the sale proceeds after making necessary deductions therefrom. The Official Liquidator shall re-calculate the amounts due to the secured creditors in accordance with this judgment to the effect that the appellant holds the first-charge in respect of the assets of the company pari-passu with the other first charge-holders. The Official Liquidator shall call upon the parties concerned to refund the excess amount with interest at 10% per annum from the date of receipt thereof by them and shall pay over the appellant's due in accordance with law by 31.08.2015. There shall however be no order as to costs.

(S.J.VAZIFDAR)
ACTING CHIEF JUSTICE

(G.S.SANDHAWALIA)
JUDGE

19th May, 2015
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Whether to be referred to the reporter or not.	Yes	No. ☒
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