

**THE HONBLE SRI JUSTICE V. RAMASUBRAMANIAN  
AND  
THE HONBLE SRI JUSTICE A.SHANKAR NARAYANA**

**O.S.A.Nos.23 and 24 of 2012**

**Common Judgment: (Per the Hon'ble Sri Justice V Ramasubramanian)**

Both these Original Side Appeals arise out of two independent orders passed by the learned Company Judge, dismissing an application taken out by the Andhra Pradesh State Financial Corporation seeking a direction to the Official Liquidator to disclose the statement of affairs filed under Section 454 of the Companies Act, 1956 (for short 'the Act') and allowing an application taken out by the Official Liquidator directing the State Financial Corporation to deposit a sum of Rs.2,00,000/- with the Official Liquidator for the purpose of making an advertisement inviting claims from workmen for adjudication.

Heard Mr. Vivekananda, learned counsel for the appellant in both the appeals and Mr. M. Anil Kumar, learned counsel representing the Official Liquidator.

The company in liquidation, formerly known as Annapurna Organics Private Limited and later came to be known as Sporolac Labs Limited, borrowed finance from the State Financial Corporation, but committed default in repayment of the dues. Therefore, the State Financial Corporation issued a Recall-cum-Sale Notice on 09.11.1995 in terms of Section 29 of the State Financial Corporations Act and took physical possession of the unit on 21.03.1996. The properties of the company were also sold later on 30.04.1997.

But during this interregnum period, an unsecured creditor of the company in liquidation filed a petition in C.P.No.22 of 1996 seeking winding up of the company. By a final order dated 23.07.1998, the company was directed to be wound up and the Official Liquidator attached to this Court was appointed as the Official Liquidator.

Finding that all the assets of the company have already been

taken possession of and sold by the State Financial Corporation, the Official Liquidator came up with an application in C.A.No.124 of 1999 for setting aside the sale made by the State Financial Corporation. But the said application was dismissed by an order dated 24.03.2000, however, making it clear that the sale proceeds should be kept by the State Financial Corporation and made available for the claims of the workmen, as per Section 529A of the Act. This order has attained finality.

Thereafter, the Official Liquidator took out an application in C.A.No.12 of 2011 praying for several reliefs including a direction to the State Financial Corporation to deposit Rs.2,00,000/- towards advertisement expenses. In the said application, the learned Company Judge passed an order dated 06.06.2011 directing the State Financial Corporation to deposit Rs.2,00,000/- with the Official Liquidator towards the expenses for inviting the claims of the workmen. Aggrieved by the said order, the State Financial Corporation has come up with the appeal in O.S.A.No.24 of 2012.

When the application in C.A.No.12 of 2011 was pending, the State Financial Corporation took out an application in C.A.No.779 of 2011 seeking a direction to the Official Liquidator to disclose the statement of affairs made by the former Directors of the company in liquidation under Section 454 of the Act, for the purpose of finding out whether there were any workmen dues at all and whether it was necessary to go through the process of issuing advertisement and incurring expenses. This application was dismissed by an independent order dated 03.01.2012, as against which, the State Financial Corporation has come up with the appeal in O.S.A.No.23 of 2012.

Out of the two appeals on hand, the substantial issue arises only in the second O.S.A, namely, O.S.A.No.24 of 2012, since it is in that appeal that the order of the learned Company Judge directing the Financial Corporation to deposit Rs.2,00,000/- is in question.

Therefore, we shall take up that appeal for consideration first.

It appears that as a matter of routine, whenever the secured creditors seek to stand outside the winding up proceedings, orders are passed directing them to bear the expenses of inviting the claims of workmen.

Mr. M. Anil Kumar, learned counsel appearing for the Official Liquidator produced copies of several such orders where directions have been issued to all secured creditors including the State Financial Corporation to deposit an amount representing the expenses to be incurred by the Official Liquidator for inviting the claims of workmen.

But unfortunately, the expenses incurred by the Official Liquidator for inviting the claims from workmen, do not form part of Section 529A of the Act, and the question as to who should bear the expenses of inviting the claims of workmen is not answered by any provision in the Act.

Though the proviso under sub-Section (2) of Section 529 of the Act indicates that whenever a secured creditor chooses not to relinquish his security but to stand out side the winding up proceedings, he shall be liable to pay a portion of the expenses incurred by the liquidator, the liability under the said proviso is restricted only to the preservation of the security before it is realised by the secured creditor.

Sub-section (2) of Section 529 of the Act and the proviso thereunder may be usefully extracted hereunder:

“(2) All persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up, and make such claims against the company as they respectively are entitled to make by virtue of this section,

Provided that if a secured creditor instead of relinquishing his security and proving for his debt proceeds to realise his security, he shall be liable to pay his portion of the expenses incurred by the liquidator (including a provisional liquidator, if any) for the preservation of the security before its realization by the secured creditor.”

Unfortunately for the Official Liquidator, the State Financial Corporation took actual physical possession of the property on 21.03.1996. The Company Petition was filed in 1996. By the time the Company Petition was admitted, the unit was already in possession of the State Financial Corporation. Therefore, the question of preservation of the security by the Official Liquidator did not arise in this case so as to enable him to invoke the proviso to sub-section (2) of Section 529 of the Act.

Mr. M. Anil Kumar, learned counsel appearing for the Official Liquidator sought to rely upon Rule 338 of the Companies (Court) Rules, 1959 (for short 'the Rules'). It reads as follows:

**“R.338. Cost and expenses payable out of the assets in a winding-up by the Court. –**

- (1) The assets of a company in a winding-up by the Court remaining after payment of the fees and expenses properly incurred in preserving, realising or getting in the assets including, where the company has previously commenced to be wound-up voluntarily, such remuneration, cost and expenses as the Court may allow to the liquidator in such voluntary winding-up, shall, subject to any order of the Court and to the rights of secured creditors if any, be liable to be following payments which shall be made in the following order of priority, namely:-
- First.- the taxed costs of the petition including the taxed costs of any person appearing on the petition, whose costs are allowed by the Court.
  - Next.-the costs and expenses of any person who makes, or concurs in making, the Company's statement of affairs;
  - Next.- the necessary disbursement of the Official Liquidator other than expenses properly incurred in preserving, realising or getting in the properties of the company;
  - Next.- the cost of any person properly employed by the Official Liquidators;
  - Next.- the fees to be credited to Government under Section 451(2);
  - Next.- the actual out of pocket expenses

necessarily incurred by the members of the Committee of Inspection, and sanctioned by the Court.

(2) Save as otherwise ordered by the Court no payments in respect of bills of advocates, shall be allowed out of the assets of the company without proof that the same have been considered and allowed by the taxing officer of the Court. The taxing officer shall before passing the Bills or charges of an advocate, satisfy himself that the appointment of an advocate to assist the liquidator in the performance of his duties has been duly sanctioned.

(3) Nothing contained in this Rule shall apply to or affect costs which, in the course of legal proceedings by or against the company which is being wound-up by the Court, are ordered by the Court in which such proceedings are pending, to be paid by the company or the liquidator, or the rights of the person to whom such costs are payable.”

But none of the contingencies covered by sub rule (1) of Rule 338 of the Rules has arisen in this case. The contingencies contemplated under sub-rule (1) of Rule 338 of the Rules are the preservation, realisation or getting of the assets. Even this is made subject to the rights of the secured creditors. In this case, the Official Liquidator did not have an opportunity to preserve the secured assets either for the benefits of State Financial Corporation or for the benefit of the workmen. Therefore, the claim for expenses made by the Official Liquidator upon a secured creditor, who chose to stand out side the winding up proceedings, is not based upon any provision contained in the Act or the Rules.

As to what an Official Liquidator is to do in such cases, is to be traced only to Rule 292 of the Rules. Therefore, the Official Liquidator should only take recourse to Rule 292 of the Rules in cases of this nature and not demand the expenses in inviting claims and determining the workmen dues, from the secured creditor who chose to stand out side the winding up proceedings and for whose benefits the

Official Liquidator did not have an opportunity to preserve the properties.

Therefore, O.S.A.No.24 of 2012 is allowed and the order of the learned Company Judge is set aside.

Once O.S.A.No.24 of 2012 is allowed, the State Financial Corporation has no stakes in pursuing the next appeal, namely, O.S.A.No.23 of 2012. The next appeal arises out of an application that is only a counter blast to the claim made by the Official Liquidator. Therefore, O.S.A.No.23 of 2012 is dismissed as unnecessary.

Pending Miscellaneous Petitions shall also stand dismissed.  
No order as to costs.

---

**V. RAMASUBRAMANIAN, J**

---

**A. SHANKAR NARAYANA, J**

Date: 24.06.2016

*va*

**LR copy to be marked**