

CAPP No. 11 of 2016 (O&M)

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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CAPP No. 11 of 2016 (O&M)

Date of Decision : 19.04.2017

Kotak Mahindra Bank Ltd. and another

...Appellants

Versus

M/s Bhiwani Denim and Apparels Ltd. and others

...Respondents

CORAM: ***HON'BLE MR. JUSTICE S.J. VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE ANUPINDER SINGH GREWAL***

Present: Mr. Manish Jain, Advocate with
 Mr. Mayur Kanwar, Advocate
 for the appellants.

 Mr. Rakesh Gupta, Advocate for respondent No. 3.

S.J. VAZIFDAR, C.J.(Oral)

1. This is an appeal against the orders and judgments passed by the learned Company Judge dated 27.03.2009 (Annexure A-3), 10.03.2014 (Annexure A-2) and 30.09.2015 (Annexure A-1). We will refer to the orders after setting out some of the facts.

2. The impugned orders were passed in Company applications, which in turn were filed in Company Petition No. 248 of 2002. The petition for winding up was filed under Sections 433 and 434 of the Companies Act, 1956, *inter alia*, on the ground that the company was unable to pay its debts.

The petition was finally disposed of by an order and judgment dated 17.09.2004, inter alia, directing the company to be wound up. The date of winding up, however, would, in view of Section 441, relate back to the date of presentation of the petition. The orders admitting the company petition and winding up the company are not under challenge. They have attained finality. The winding up proceedings are still going on.

3. An affidavit filed by the Official Liquidator in CA No. 923 of 2014 states that there are seven secured creditors of the company. This appeal concerns four of them, namely, Kotak Mahindra Bank Ltd., Canara Bank, IFCI Ltd. and IDBI Bank Ltd.

4. The impugned orders are dated 27.03.2009, 10.03.2014 and 30.09.2015. It must be noted at the outset that the observations in all the impugned orders were on the basis of the report of the Official Liquidator and during the process of winding up. The same, therefore, are not and cannot be final especially as regards the entitlement of the creditors mentioned therein. The factual aspects regarding the amounts due to any creditor, secured or unsecured, are open and would be decided finally upon the conclusion of the winding up of the company.

5. The impugned order dated 27.03.2009 was passed in CA Nos. 917 of 2008, 294 of 2008 and 124 of 2009 filed in the Company Petition by Kotak Mahindra Bank Ltd., Canara Bank and IFCI Bank Ltd. respectively, seeking interim disbursement of amounts from out of the sale proceeds of the assets of the company lying with the Official Liquidator. The order states that there were only three secured creditors but that appears to be

contrary to the said affidavit of the Official Liquidator, which as we mentioned earlier, states that there were seven secured creditors. The learned Judge noted that three applicants/secured creditors were entitled to 64%, 21% and 15% respectively on the amounts available but the report of the official liquidator indicates the receipt of a letter dated 06.03.2009 from the State Bank of Patiala claiming that it held a second charge on the assets.

6. The Learned Judge to protect the interest of the parties as well as to enable the secured creditors to realise the amounts due to them, directed an amount of ₹8 crores, ₹2 crores and ₹2 crores to be disbursed to IFCI Limited, Kotak Mahindra Bank Limited and Canara Bank respectively. The excess amounts were to be retained by the Official Liquidator. It is important to note that the learned Judge fixed these amounts as per the suggestion of the applicants. The learned Judge directed the official liquidator to disburse the amount on or before 31.03.2009 after taking an undertaking from the applicants that they would refund “any amount” if on a final reckoning, it was found that the amounts had been paid in excess. It is obvious that the learned Judge consciously used the words “any amount”, for the accounts are yet to be settled. The amounts due to and/or due by the parties are yet to be finalized as the winding up proceedings have not concluded. At the conclusion of the winding up proceedings, the amount due to a creditor, secured or unsecured, is not necessarily the amount legally due to the creditor but the amount proportionately due to him under the provisions of the Companies Act. If the funds of the company are sufficient, the creditors would be paid the entire amount due to them. If the funds

available are less than the total dues of the company each creditor would be entitled to be paid only to the extent determined after ascertaining, inter alia, the priority of the creditor and the proportionate amount due to him.

7. By the impugned order dated 10.03.2014 learned Company Judge disposed of CA No. 243 of 2012 and CA No. 244 of 2012 also filed in CP No. 248 of 2002. The company applications were filed by the Canara Bank raising objections to certain calculations made by the Chartered Accountant regarding the amounts due and payable to the secured creditors. The order dated 10.03.2014 reads as under :-

“Mr. Jagga has disputed the report of the Chartered Accountant dated 31.03.2012 read with the earlier report dated 02.12.2011.

Heard at length.

The objections filed by the Canara Bank are rejected as frivolous.

Now ₹1.10 crores together with interest at the rate of 11.5% per annum with effect from 20.11.2013 be deposited within 14 days before the official liquidator, which shall be disbursed to the secured creditors within 14 days thereafter.”

8. The appellants' objection to this order is to the extent that it directs the Canara Bank to return the excess amounts with interest only from 20.11.2013 instead of from the date on which the amounts were received, namely, 31.03.2009. As we have indicated in this judgment, these are only interim orders and would be subject to the final accounts at the time of distribution of the assets of the company. Even this order does not crystalize the amounts actually due and payable to and/or recoverable from

Canara Bank.

9. This brings us to the last impugned order dated 30.09.2015. This order was passed in CA No. 923 of 2014 which was also filed in CP No. 248 of 2002. It was filed by the appellant No. 1 for a clarification of the order dated 10.03.2014 as the order indicates the rival contentions between the secured creditors as to the amount due and payable to them. The learned Judge observed that the orders were passed by consent. The learned Judge dealt with the appellants' contention that Canara Bank ought to be directed to refund the amount with interest from 31.03.2009 and not 20.11.2013 as directed by the order dated 10.03.2014. The learned Judge observed that the order dated 27.03.2009 did not provide for any interest and that it was, therefore, not permissible to read interest into the order dated 27.03.2009. The learned Judge observed that the right of the parties was foreclosed in the order dated 10.03.2014 and could only be questioned by way of appeal but not by way of clarification. The application was rejected on the ground of the principle of estoppel by conduct, waiver and acquiescence as well as on the ground of delay and laches.

10. We are, with respect, unable to agree with the order dated 30.09.2015 insofar as it was held that the rights of the parties were crystalized by the orders dated 27.03.2009 and 10.03.2014. Nor do we agree with the learned Judge that the principle of estoppel by conduct and delay and laches would come to the assistance of the parties to the earlier orders which have also been impugned in this appeal. These are proceedings for winding up. Proceedings for winding up are not limited to

disputes between any particular creditors. The assets of the company that is ordered to be wound up enure to the benefit of the general body of creditors. Priority between the creditors is undoubtedly to be determined. There is no question of any particular creditor consenting to orders. Select creditors cannot by consent agree to orders for disbursement of amounts during the winding up proceedings and claim any rights on the basis thereof to the exclusion of the other creditors. In fact the company cannot even represent itself. It is the official liquidator that represents the company upon the company being wound up as also when a provisional liquidator is appointed. A view to the contrary would lead to enormous injustice to the other creditors, secured and unsecured. It would enable some creditors to agree to orders in their favour, which would prejudice the rights of all the other creditors including the workers.

11. Even the interim payments made pursuant to the impugned order dated 27.03.2009 cannot by any stretch of imagination crystalize the rights of the secured creditors, who are directed to be paid interim amounts. In any event the consent of all the creditors was not obtained. The amounts are paid during the pendency of the winding up proceedings upon a fair assessment by the Company Court. The assessment is always made keeping in mind the amounts that are available or that are reasonably expected to be available for distribution and the claims of the creditor/applicant for such interim payment. If for an instance the Company Court finds on an assessment that the amount available at the given point of time is sufficient to meet the claims of any creditor and that the claim of the creditor is well

founded, it would be justified in ordering an interim payment of the amounts due or a part thereof. The interest of the general body of creditors is almost always secured by requiring an undertaking to bring back the amount with interest or subject to such creditor's furnishing security for the amount with interest. Even if an undertaking to return the amount is not furnished, it must be implied in every such order. The liability to return the amount arises even by operation of law. All amounts due to the company in liquidation are bound to be brought in and to be made available for distribution in accordance with the provisions of the Act.

12. This brings us to the question of the rate of interest as well as the period for which it was liable to be paid. The appellants contend that the creditors who received the amounts of interim payment pursuant to the order dated 27.03.2009 must return any excess amount with interest from the date on which they received the amounts i.e. 31.03.2009. We entirely agree with the submission. The order dated 27.03.2009 cannot be construed as directing otherwise. In fact the order dated 27.03.2009 concludes by directing the official liquidator to make the disbursement after taking an undertaking from the applicants “that they shall refund any amount, if on a final reckoned, it is found that the amounts have been paid in excess.” The words “any amount” would include the principal as well as interest. The words 'on a final reckoned' refer to the amounts due and payable to or by the creditors at the final distribution. The final distribution would be in accordance, inter alia, with Rule 154. In the ultimate analysis, each of the creditors would have to be paid the amounts that were due to them on the

relevant date together with interest proportionate to their claim and subject to the determination of priorities. In the case of secured creditors, the amount due would be proportionate not only qua the other secured creditors but also qua for instance the workers, under Section 529A of the Act. The final determination, therefore, is not dependent upon the interim orders including the orders for interim payment. The final determination must be made in accordance with the provisions of the Act and the other provisions of law.

13. Thus, while determining the dues of the creditors finally, the interim amounts paid to the parties would have to be reckoned for the purpose of debiting them to the extent of the benefit derived by the parties on account of the use of the money. A view to the contrary would again lead to enormous injustice to the creditors who were not paid any amount in the interim.

14. Normally, the money of the company would remain with the official liquidator/company pool fund account earning interest and would be distributed finally together with the accretions thereto. The longer the money is placed in that account the more the interest that would accrue to the company. If interim payments are made, the creditors on final accounts being taken must be debited to the extent of the value of the benefit received by them on account of the out of turn payment. If the amount available for distribution is sufficient to pay the entire dues of all the creditors it would pose no difficulty for the amount could be adjusted by payment of interest to the creditor who did not have the benefit of an interim payment for the

entire period. If, however, the amount is insufficient to pay all the dues of all the creditors, the creditor, who had the benefit of an interim payment, must bring back the same with interest and the entire sum must then be distributed after determining the priorities and the proportionate amount due to each creditor. The inequity in a view to the contrary is illustrated by comparing two creditors of the same priority and equal value, one of whom gets an interim payment and the other who does not. The creditor who gets the interim payment has the use of the money, which translates into interest whereas the creditor who does not get an interim payment does not have the use of the money. When accounts are finally taken the creditor to whom interim payment is made if not ordered to pay interest for the use of the money during the period would have the benefit of retaining the interest for this period whereas the other creditor equally placed would not get the benefit of interest for this period.

15. If excess amounts had been paid in the interim to any creditor, the same must be returned with interest from the date on which the excess amount was paid. There is no reason why such excess amount ought to be retained free of interest for any period whatsoever. Moreover, in the facts of this case there is no basis for directing the secured creditors to pay different rates of interest.

16. In the circumstances, all the parties who were paid amounts in excess of their dues shall refund the excess amounts together with interest from the date on which the amounts were paid to them i.e. 31.03.2009 till payment and/or realization. It is clarified yet again that the same does not

crystalize the amount that would be due to each of the creditors. The amounts due to each of them would be finalized only subsequently while determining the amounts due to all the creditors. The official liquidator shall accordingly call in the excess amounts together with interest at an ad hoc rate of 11.5% per annum from the date of receipt of the amounts till payment and/or realization. The parties are at liberty to seek directions for finalizing the amounts due from the Company Court. The official liquidator shall complete the process of restitution of excess amount in accordance with this judgment by 31.07.2017.

(S.J. VAZIFDAR)
CHIEF JUSTICE

(ANUPINDER SINGH GREWAL)
JUDGE

19.04.2017
kanchan

Whether speaking/reasoned?	Yes
Whether reportable?	Yes