IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

OBJECTION STAMP NO.2472/2020 IN CIVIL APPLICATION NO. 1527/2023 IN COMPANY PETITION NO.7/2001 (D)

In the matter of arbitration of M/s. Maharashtra Explosives Ltd. (In Liquidation)

Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders	Court's or Judge's orders

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Mrs. M. R. Chandurkar, Advocate for Recovery Officer.
Dr. Anjan De, Advocate for Official Liquidator.
Mr. M. N. Phadke, Advocate for Bank of Maharashtra.
Mr. S. V. Sohoni, Advocate for IFCI Bank and IDBI Bank.
Mr. N. A. Padhye, Advocate for Kotak Mahindra Bank/applicant in CAO No. 569/2020 and CAL No. 12/2024.
Ms. D. V. Sapkal, AGP for the State.
Mr. S. D. Malke, Advocate for applicants in CAO Nos. 245, 246 & 379 of 2013 and 959/2012

CORAM : ANIL L. PANSARE, J.
DATE : 09.05.2024.

Heard.

2. The Bank Of Maharashtra, one of the secured creditors, has filed objection to the report dated 06.02.2020 submitted by the Recovery Officer in pursuance to the order dated 12.07.2019 passed by this Court.

3. This Court, vide order dated 12.07.2019, directed the Recovery Officer to assess the entitlement of the secured creditors and the unsecured creditors, keeping in view the priorities as per section 529A of the Companies Act, 1956 (For short the, "Act of 1956") and section 31B of the Recovery of Debts and Bankruptcy Act, 1993 (For short the, "Act of 1993). The Court further directed the Recovery Officer to ascertain the

amount receivable by the secured creditors and unsecured creditors.

4. The Recovery Officer, accordingly filed report, stating therein that as per section 31B of the Act of 1993, the secured creditors will be entitled to have priority claim over the unsecured creditors. The Recovery Officer then noted that the claim of the secured creditors loan is amounting to Rs.39.36 Crores, whereas the amount available for disbursement, in terms of Court's order, was only Rs.20 Crores. Accordingly, the Recovery Officer opined that the unsecured creditors will be not entitled to any amount.

5. So far as *inter se* priority amongst the secured creditors is concerned, by relying upon Section 529A of the Act of 1956, the Recovery Officer decided to give priority to the entitlements of the first charge holding secured creditors i.e. ICICI Bank, Kotak Mahindra Bank and IFCI Bank, over the second charge holding secured creditors i.e. Bank of Maharashtra and Bank of India.

6. The Recovery Officer took a view that despite the fixed assets of the company under liquidation having been sold and converted into cash, the first charge holder will have the priority over the second charge holder for payment of the amount and disbursement. The Recovery Officer further noted that the claim of the first charge holding secured creditors alone is amounting to Rs.30.376 Crores, whereas the amount available for disbursement was only Rs.20 Crores and hence

opined that the second charge holding secured creditors will be not entitled to any amount.

7. The Recovery Officer has placed reliance upon the judgment of the Supreme Court in ***ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Ors. MANU/SC/2337/2006,*** to fix *inter se* priority amongst secured creditors. The Recovery Officer then tabulated the entitlement of the first charge holding secured creditors on *pro rata* basis.

8. Mr. Phadke, learned counsel appearing for the Bank Of Maharashtra-objector, submits that the Court, vide order dated 12.07.2019, has directed the Recovery Officer to only ascertain the amounts receivable by the secured creditors and the unsecured creditors. This Court has given no direction to decide priority of claim *inter se* between the secured creditors. He further submits that the Recovery Officer has entertained objection raised by Kotak Mahindra Bank, which was not within the scope of order. He submits that the Supreme Court, in the case of *ICICI Bank* supra, has held that once assets of the company are liquidated, the securities are converted into cash and all the secured creditors have equal right in the cash, which is realized on sale of assets. Thus, according to him, the Bank of Maharashtra was equally entitled for the amount available for disbursement.

9. I have gone through the order dated 12.07.2019 passed by this Court, report submitted by the Recovery Officer, the judgment passed by the Hon’ble Supreme Court in the case

of *ICICI Bank* supra as also the provisions of the Act of 1956 and the Act of 1993, to find that there is absolutely no substance in the submissions made by Mr. Phadke.

10. This Court has, in clear terms, directed the Recovery Officer to assess the entitlement of the secured and unsecured creditors, keeping in view the priorities in terms of section 529A of the Act of 1956, as also section 31B of the Act of 1993. Thus, the entitlement of the creditors was to be ascertained, keeping in mind the priorities. The Recovery Officer, in its report has, on the basis of the aforesaid provisions opined, and correctly so, that the secured creditors will have priority of claim over the unsecured creditors, and secondly, the first charge holding secured creditors will have priority over the second charge holding secured creditors. Even otherwise, unless entitlement of the creditors and their priorities are ascertained, the limited funds available with this Court could not be disbursed.

11. The Recovery Officer, therefore, has rightly prioritized the entitlement of the claims between the secured and unsecured creditors and also the secured creditors *inter se*. The sum available for disbursement was Rs.20 Crores, whereas the claim of first charge holding secured creditors was, at the relevant time, amounting to Rs.30.876 Crores and, therefore, the second charge holdings secured creditors will not be entitled to any sum.

12. There is no dispute that ICICI Bank, Kotak Mahindra Bank and IFCI Bank are the first charge holding secured creditors and the Bank of Maharashtra and Bank of India are the

second charge holding secured creditors. Accordingly, the Recovery Officer has tabulated the claim of the first charge holding secured creditors on *pro rata* basis and the amount of Rs.20 Crores, was disbursed with approval of this Court.

13. On the point of holding of priority charge on liquidation of company's assets, the Supreme Court in the case of ***ICICI Bank***, observed in paragraphs 20 and 21 as follows ;

> *"20. While enacting a statute, the Parliament cannot be presumed to have taken away a right in property. Right to property is a constitutional right. Right to recover the money lent by enforcing a mortgage would also be a right to enforce an interest in the property. The provisions of the Transfer of Property Act provide for different types of charges. In terms of Section 48 the Transfer of Property Act claim of the first charge holder shall prevail over the claim of the second charge holder and in a given case where the debts due to both, the first charge holder and the second charge holder, are to be realized from the property belonging to the mortgagor, the first charge holder will have to be repaid first. There is no dispute as regards the said legal position. Such a valuable right, having regard to the legal position as obtaining in common law as also under the provisions of the Transfer of Property Act must be deemed to have been known to the Parliament. Thus, while enacting the Companies Act, the Parliament cannot be held to have intended to deprive the first charge holder of the said right. Such a valuable right, therefore, must be held to have been kept preserved. [See Workmen of M/s Firestone Tyre and Rubber Co. of India (P.) Ltd. vs. Management & Ors. (1973) 1 SCC 813] If the Parliament while amending the provisions of the Companies Act intended to take away such a valuable right of the first*

charge holder, we see no reason why it could not have stated so explicitly. Deprivation of legal right existing in favour of a person cannot be presumed in construing the statute. It is in fact the other way round and thus, a contrary presumption shall have to be raised.

21. Section 529(1) (c) of the Companies Act speaks about the respective rights of the secured creditors which would mean the respective rights of secured creditors vis-a-vis unsecured creditors. It does not envisage respective rights amongst the secured creditors. Merely because Section 529 does not specifically provide for the rights of priorities over the mortgaged assets, that, in our opinion, would not mean that the provisions of Section 48 of the Transfer of Property Act in relation to a company, which has undergone liquidation, shall stand obliterated. If we were to accept that inter se priority of secured creditors gets obliterated by merely responding to a public notice wherein it is specifically stated that on his failure to do so, he will be excluded from the benefits of the Dividends that may be distributed by the Official Liquidator, the same would lead to deprivation of the secured creditor of his right over the security and would bring him at par with an unsecured creditor. The logical sequitur of such an inference would be that even unsecured creditors would be placed at par with the secured creditors. This could not have been the intendment of the legislation. The provisions of the Companies Act may be a special statute but if the special statute does not contain any specific provision dealing with the contractual and other statutory rights between different kinds of the secured creditors, the specific provisions contained in the general statute shall prevail."

14. Thus, the Supreme Court has, in clear terms, held that the right to property is a Constitutional right and, therefore, right to recover the money lent by enforcing a mortgage would also be a right to enforce an interest in the property. The Court further held that in terms of section 48 of the Transfer of Property Act, claim of the first charge holder shall prevail over the claim of the second charge holder. The Court then, by referring to section 529 of the Companies Act, has opined that merely because such a section does not specifically provide for rights or priorities over the mortgaged assets, would not mean that the provision of section 48 of the Transfer of Property Act, 1882 shall stand obliterated.

15. The Supreme Court has then referred to a judgment of the Gujarat High Court in ***Gujarat Steel Tube Employees Union and Ors. Vs. O.L. of Gujarat Steel Tubes Ltd. an ors., MANU/GJ/0258/2006,*** wherein the Supreme Court accepted the view taken by the Gujarat High Court, that as soon as the assets of the companies are sold and realization has taken place, the securities of the creditors are converted from the specified assets into cash and the creditors have equal right in cash, which is realized on sale of the assets of the company.

16. Mr. Phadke has emphasized on the expression "*and the creditors have equal right in cash.*" To my mind, he has misread the aforesaid judgment because he has read the aforesaid line in isolation. The principles of law laid down by the High Court would be clear once the entire paragraph is read, which reads thus :

> *"28. Considering the above referred legal position, the Court is of the view that the claim made by the unions in these applications with regard to their exclusive right of satisfaction of their claim out of the sale proceeds of the assets of the company in liquidation in priority of all other creditor secured as well as unsecured is not tenable. The court is also of the view that simply because the secured creditors participate in the sale proceedings undertaken by the court and they also became the members of the sale committee constituted pursuant to the directions issued by the court does not mean that they have (not) exercised their option of remaining outside the winding up and they have relinquished their security. As a matter of fact, relinquishment of security by the secured creditors requires a positive action on the part of the secured creditors. They have never stated in any of the proceedings that they are relinquishing their securities. On the contrary, they have made it clear that they remain outside the winding up and they participate in the sale proceeds only with a view to facilitate the sale proceeding so as to get the auction proceedings completed as expeditiously as possible. There is also substance in the say of the secured creditors that as soon as the assets of the companies are sold and realization takes place, their securities are converted from the specified assets into cash and they have equal right in cash which is realized on sale of the assets of the company in liquidation. In the above view of the matter, the ratio between the secured creditors and the workmen will have to be determined and the distribution will take place as per the ratio so decided or determined."*

17. The above observations were made in the light of the controversy where the workers' claimed priority in the claim over the secured creditors. The High Court held that the claim so made was not tenable. The Court noted the effect of the

secured creditors participating in the liquidation proceedings and their option to remain outside the winding up. It is held that the relinquishment of security by the secured creditors requires a positive action on their part. The secured creditors therein had made their intentions clear to remain outside the winding up. Accordingly, the High Court found substance in the say of the secured creditors that as soon as the assets of the companies are sold and realisation is taken place, their securities are converted from the specified assets into cash and they have equal right in the cash, which is realised on the sale of assets of the company in liquidation.

18. The Gujarat High Court held that the workmen have have no exclusive right of sale proceeds of the company in liquidation. Accordingly, the High Court has held that upon liquidation of the assets, the secured creditors will have equal rights in the cash, meaning thereby that they will have similar rights in the cash as were having on the securities. In other words, what has been observed by the High Court is that the rights available to the secured creditors on the secured assets prior to the liquidation will be similar or equal, even after securities are liquidated. This finding, by no stretch of imagination, indicate that the priorities of claims amongst the secured creditors *inter se* or amongst secured creditors and unsecured creditors would be at par once the securities are liquidated.

19. The acceptance of the Supreme Court to the view taken by the Gujarat High Court will have to be understood in

the light of what the Supreme Court observed in paragraphs 20 and 21 of its judgment. Mr. Phadke has thus misread the law laid by the Supreme Court.

20. His contention that since the securities in the present case were liquidated in the year 2001, all the secured creditors will have equal right in the cash available with the Official Liquidator, is devoid of merit.

21. The report filed by the recovery officer is in tune with the order passed by this Court. The objection is accordingly rejected.

<u>**Civil Application (CAO) No. 1527 of 2013**</u>

22. The recovery officer has made a request to direct the Official Liquidator to release amount for the purpose of distribution to the certificate holders in terms of recovery certificate after retaining the amount payable to the workers. The recovery certificate is granted by the Debt Recovery Tribunal, Nagpur in O.A. Nos. 476/2001 and 14/2003.

23. Learned counsel for the recovery officer submits by referring to the report dated 6-2-2020 that the claims of first charge holding secured creditors alone is amounting to Rs. 30.876 Crores. Out of the said amount, Rs. 20 Crores has been disbursed under the orders of the Apex Court which was a provisional distribution. The remaining amount of Rs. 10.876 Crores is yet to be paid.

24. The Official Liquidator states that amount available to the credit of company is Rs. 10,46,91,079/-. He further submits that workmens due to the tune of Rs. 55 Lakhs approximately is to be paid. In addition, the amount towards administrative charges and other incidental charges will be required to be deducted. Accordingly, he submits that for the time being, Rs. 9.5 Crores could be released to the recovery officer. He further submits that all the assets of the company have been sold.

25. In the light of above, it will be appropriate to direct the Official Liquidator to release Rs. 9.5 Crores in favour of the recovery officer in terms of the prayer made by him. The amount be released within fifteen working days. Order accordingly.

26. The civil application is disposed of in above terms.

27. At this stage, Mr. Phadke, learned Counsel for the Bank of Maharashtra made a request to stay the effect and operation of order passed by this Court for a period of eight weeks, to challenge this order.

28. The order shall take effect immediately after eight weeks.

Civil Application (CAO) No. 569/2020

29. In view of order passed in Civil Application (CAO) No. 1527/2013, the interest of applicant having been protected, nothing survives in the application. The application is disposed of accordingly.

<u>Company Application (CAL) NO. 12/2014 in Company Application (CAL) No. 84/2008</u>

30. In view of order passed in Civil Application (CAO) No. 1527/2013, the interest of applicant having been protected, nothing survives in the application. The application is disposed of accordingly.

<u>Civil Application (CAO) No. 245/2013</u>

31. Some of the workers have made a request to direct the Official Liquidator to pay their dues.

32. Learned counsel appearing for the workers submits that to the best of his knowledge, the dues have been paid by the Official Liquidator.

33. The Official Liquidator submits that dues are duly paid.

34. In the light of above, nothing survives in the application. The application is disposed of accordingly.

<u>Civil Application (CAO) Nos. 959/2012, 246/2013 and 379/2013</u>

35. In view of disposal of main application, civil applications are disposed of.

<u>Civil Application (CAO) No. 2060/2019</u>

36. None present for the applicant.

37. By present application, Central Excise and Customs Department is seeking permission to file its claim before the Recovery Officer of Debts Recovery Tribunal along with the other unsecured creditors.

38. Learned counsel appearing for the recovery officer submits that the Central Excise Department has not lodged any claim. The recovery officer has repudiated the claim of Central Excise in terms of Section 31B of the Recovery of Debts and Bankruptcy Act, 1993. The Central Excise Department has not challenged the said order. In view thereof, there is no merit in the application. The application is accordingly dismissed.

(Anil L. Pansare, J.)

Kahale/wasnik