

Board of Trustee, Port of Mumbai

Vs

Indian Oil Corporation

(Sujata V. Manohar, D. P. Wadhwa JJ)

16.04.1998

JUDGMENT

1. Leave granted.

2. This appeal is filed by the Board of Trustee of the Port of Mumbai in respect of an order passed by the Patna High Court in Company Petition No. 5 of 1990 for winding up M/s. Thakur Shipping Co. Ltd.

3. A vessel belonging to M/s. Thakur Shipping Co. Ltd. M.V. Varuna Kachhapi arrived at the Port of Mumbai in May 1985 and was laid up at anchorage. It became liable to pay anchorage and other charges leviable under the provisions of the Major Port Trusts Act, 1963 as amended by the Major Port Trust (Amendment) Act of 1974, and the Dock Scale of Rates framed thereunder by the appellant. In view of the Port Trust charges which remained unpaid, the appellant-Port Trust arrested the said vessel in exercise of its rights under Section 64 of the Major Port Trust Act, 1963. It issued a public notice on 14th of August, 1987 for the auction sale of the said vessel.

4. M/s.Thakur Shipping Co.Ltd. challenged the proposed auction sale by filing a writ petition in the Bombay High Court which was summarily dismissed. In appeal, however, as M/s.Thakur Shipping Co.Ltd. undertook to pay all the charges due and payable to the appellant, the auction was stayed. The charges, however, were not paid by M/s.Thakur Shipping Co. Ltd. Thereafter, further attempts were made by the appellant to sell the vessel which were again held up on account of the litigation initiated at the instance of M/s.Thakur Shipping Co. Ltd. While the said ship remained under arrest by the appellant, in 1990 a Company Petition No.5 of 1990 was filed by the 1st respondent, petitioning creditor, in the Patna High Court against M/s.Thakur Shipping Co.Ltd. In the company petition, Official Liquidator was appointed. An order of winding up was passed in respect of M/s.Thakur Shipping Co.Ltd. in the said company petition on 5th of August, 1995.

5. In the meanwhile, the Official Liquidator directed the appellant to maintain status quo in respect of the said vessel and further directed that if the vessel was proposed to be sold, leave of the High Court under Section 446 of the Companies Act should be taken.

6. On 11th of April, 1996, the appellant made an application in the Patna High Court in the said company petition setting out that up to 30.6.1995, Port Trust charges amounting to Rs.1,20,71,307 had become due and payable and the amount continued to grow at the rate of Rs.9,003 per day. The appellant, therefore, prayed, inter alia, that it be permitted to recover its charges from the sale proceeds of the said vessel and claimed that the appellant had a right superior to that of others, in respect of the said vessel. This was the purport of the application though it was not clearly so

worded. By an order dated 16th of August, 1996, a learned Single Judge of the Patna High Court held that an order had already been passed to permit the sale of the said vessel. It would be just and proper that the vessel is sold jointly by the appellant and the Official Liquidator. He directed that the sale proceeds be deposited with the Official Liquidator. Thereafter, the appellant made an application for modification of the order of 16th of August, 1996, praying that the appellant alone be allowed to sell the vessel and retain the sale proceeds towards its dues. They would remit the balance amount, if any, to the Official Liquidator. The High Court has passed the impugned order of 26th of November, 1996 disallowing such modification. The High Court has directed that the vessel be sold after issuing a global advertisement. The High Court has further directed that since M/s.Thakur Shipping Co.Ltd. do not have any money which could be utilised to meet the cost of advertisement or sale, the appellant shall meet the costs of such advertisement and sale and all incidental charges thereto which amounts, the appellant would be entitled to recover as a first charge on the sale proceeds. This order is being challenged in the present appeal.

7. Under Section 529 of the Companies Act, in the winding up of an insolvent company, the same rules shall prevail and be observed with regard, inter alia, to the debts provable and the respective rights of secured and unsecured creditors as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent. The proviso to Section 529(1) sets out that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workman's portion therein, in the manner set out in that section and Section 529A. The position, however, of the appellant-Port Trust is somewhat different from the position of a secured creditor in winding up. The vessel which is one of the properties of the company in winding up, has been arrested by the appellant in the exercise of its statutory right to arrest the vessel for recovery of its rates and charges under the Major Port Trusts Act, 1963 and the rules framed thereunder. Section 64 of the Major Port Trusts Act, 1963 provides as follows:

"Section 64: Recovery of rates and charges by distraint of vessel.

(1) If the master of any vessel in respect of which any rates or penalties are payable under this Act, or under any regulations or orders made in pursuance thereof, refuses or neglects to pay the same or any part thereof on demand, the Board may distrain or arrest such vessel and the tackle, apparel and furniture belonging thereto, or any part thereof, and detain the same until the amount so due to the Board, together with such further amount as may accrue for any period during which the vessel is under distraint or arrest, is paid.

(2) In case any part of the said rates or penalties, or of the cost of the distress or arrest, or of the keeping of the same, remains unpaid for the space of five days next after any such distress or arrest has been so made, the Board may cause the vessel or other thing so distrained or arrested to be sold, and, with the proceeds of such sale, shall satisfy such rates or penalties and costs, including the costs of sale remaining unpaid, rendering the surplus (if any) to the master of such vessel on demand."

8. The Port authorities have a paramount right to arrest a vessel and detain the same until the amounts due to it in respect of extending the port facilities and services to the vessel are paid. Under sub-section (2), in case any part of the said rates, charges, penalties or the cost of the distress or arrest or of the keeping of the same remain unpaid for a space of five days next after any such distress or arrest has been made, the Board may cause the vessel so distrained or arrested to be sold.

The proceeds of such sale shall satisfy such rates or penalties and costs including the costs of sale remaining unpaid. The surplus, if any, is to be rendered to the master of such vessel on demand.

9. The statutory right under Section 64 embodies this overriding right of the harbour authority over the vessel for the recovery of its dues. This right stands above the rights of secured and unsecured creditors of a company in winding up - in the present case, the shipping company which owns the vessel. The harbour authorities allow ships - national or foreign to anchor and avail of the services provided by them. For payment they look to the vessel. The owner may be foreign or even unknown to the harbour authority. The latter's right to recover its dues is not affected by any pending proceedings against the owner in any court - whether in winding up or otherwise. The harbour authority can arrest the vessel while it is anchored in the harbour and recover its dues in respect of that vessel by sale of the vessel if the dues are not paid. This lien of the harbour authority over the vessel is paramount. The lien cannot be extinguished or the vessel sold by any other authority under the directions of the court or otherwise, unless the harbour authority consents to such sale. Thus, in the case of *Ashok Arya Vs. M.V. Kapitan Mitsos*, (AIR 1988 Bom 329), the Bombay High Court relied upon the decision in *The Emilie Millon* (infra) and held that the lien given by statute to a dock or harbour authority cannot be extinguished by court unless it be done with the authority's express or implied consent.

10. In *British Shipping Laws series Vol.14*, on "Maritime Liens" by Dr.D.R.Thomas, Paragraph 414 states:

"414: By a public or private Act of Parliament an undertaking such as a port, dock or harbour authority may expressly be given a power to detain and sell a ship and possibly also her cargo. Such a power is customarily created so as to provide a security for unpaid dues and charges, or for damage done by a vessel or necessary services rendered to a vessel and her cargo. It is now well established that such a statutory right of detention and sale stands in priority to all other claims against the vessel for, in creating the power, this is presumed to have been the intention of the legislature. Such is the distinctiveness and superiority of these statutory rights that they cannot properly be considered as falling within the province of priorities. Questions of priority only fall to be considered after the statutory claim has been satisfied. The superiority of the statutory right means that a dock or similar body may, if it chooses, exercise its statutory rights notwithstanding that the vessel is under the arrest of the Admiralty Marshal, although it has no power to interfere directly with the Marshal's custody; or alternatively, it may apply to the Court to seek the release of the vessel from arrest. In the words of Collins M.R. '.....nobody can against the will of the board, undo or annul the statutory provision.' Despite the clear recognition of the primacy of the statutory rights the Court may nonetheless in the interest of other claims which may be involved, make the dock or other authority accountable to the Court in the exercise of its statutory powers or, when possible, direct the available securities to be marshalled." [underlining ours]

11. The Bombay High Court in the case of *Forwarding Pvt. Ltd. and Anr. Vs. Trustees, Port of Vizagapatnam and Anr.* (1987 [61] company cases 513) has held that the power of arrest and sale of a vessel belonging to a company in winding up, by the port authorities emanates from Section 64 of the Major Port Trusts Act, 1963, and there is no question of the port authorities resorting to a legal proceeding for that purpose. Hence the question of their obtaining leave under Section 446 of the Companies Act, 1957 does not arise when exercising the statutory rights under Section 64.

12. In *M. K. Ranganathan and Anr. Vs. Government of Madras and Ors.* (1955 [2] SCR 374 at 383, 387), this Court considered the position of a secured creditor in a winding up proceeding as also of a person entitled to attach and sell any property without the intervention of the court. It said that a secured creditor stands outside the winding up and can realise his security without the leave of the court; though if he files a suit or takes legal proceedings he will require the leave of the winding up court. Attachment or distraint without the intervention of the court are not under the purview of winding up proceedings (see also [1996] 4 SCC 165).

13. Therefore, the lien of a harbour authority over the vessel is a paramount lien and realization of its dues by the harbour authority by the sale of the vessel is above the priorities of secured creditors. In other words, the statutory lien of a harbour authority has paramountry even over the claims of secured creditors in a winding up. In exercise of its right under Section 64 the appellant is, therefore, entitled to sell the vessel without the intervention of the court. In exercise of that paramount right which overrides the claims of all other creditors including secured creditors, the appellant has a right to arrest the vessel and sell it. Without the consent of the appellant, this right cannot be transferred to the sale proceeds of the vessel.

14. In the case of *The Emilie Million* (1905 [2] K.B. 817) the court of appeal in England considered a similar provision under Section 253 of the *Mersey Dock Acts Consolidation Act, of 1858*. It held that the right of the Harbour Board to cause such vessel to be detained until all such rates have been paid, gives the Board a paramount right to detain a vessel until the dock tonnage and rates due in respect of her are paid, notwithstanding that the master and crew of the vessel have a maritime lien upon her for wages due before she entered the dock. But the right will remain so long as the vessel is arrested and sold by it.

15. In the *Mersey Docks and Harbour Board Vs. Hay, Re the Countess* (1923 Appeal cases 345), the House of Lords extended the right of the Harbour Board to recover its dues in priority over all other claims to a limitation fund. It held that the exercise by the Harbour Board of the statutory power to detain the ship conferred on them a possessory lien. This lien was not affected by the provisions of Section 504 of the *Merchant Shipping Act* relating to limitation of liability of an owner of a vessel, either expressly or by implication. However, it said that the court, in distributing the statutory amount of a ship-owner's liability (limitation fund) ought to have regard to the priorities as well as to the amounts of the claims. The House of Lords directed that the whole of the fund should be paid out to the Harbour Board.

16. In a later decision in *re the Queen of the South* (1968(1) AER 1163) the court held that where it would be beneficial for all concerned that the admiralty marshal should sell the ship and pay the claim of the dock authority out of the proceeds of the sale, the court may so authorise the marshal to sell the ship free from the statutory possessory lien of the Harbour Board and authorise the marshal to pay the Harbour Board's dues provided the Harbour Board gives a written undertaking to the court not to exercise its rights of detention and sale. Therefore, without the consent of the Harbour Board their right of detention and sale cannot be transferred from the ship itself to the fund in the court constituted from the proceed of the sale of a ship.

17. In the present case the appellant is objecting to the directions given by the court in winding up directing the Official Liquidator to sell the vessel along with the appellant and to bring the sale proceeds into court. The appellant has a supervening priority in respect of its claims against the vessel. It has a right to sell that vessel and realise the sale proceeds. The appellant cannot be divested of this statutory right without its consent or be subjected to other priorities under the

Companies Act. The appellant has also objected to any global advertisement being issued in respect of the said vessel since the vessel is lying at anchorage since 1987 and is in a very dilapidated condition. It is unlikely to attract international bidding. The sale proceeds are not likely to cover even the full statutory charges of the appellant. The appellant has also objected to its being equated to other secured creditors in winding up.

18. Looking to the overriding priority statutorily given to the appellant, the impugned order passed by the High Court is set aside. The appellant shall be entitled to sell the vessel by auction in accordance with the procedure prescribed by its rules and regulations. Since the appellant has no objection to the Official Liquidator and/or a representative of the first-respondent (petitioning creditor) remaining present at the sale, it will be open to the Official Liquidator to depute its representative to remain present at the sale and the same right is given to the first-respondent as well.

19. The appellant shall be entitled to realise its statutory dues as per law from the sale proceeds of the said vessel and the balance, if any, of the sale proceeds shall be deposited by the appellant with the Official Liquidator in winding up. The appellant shall also file an account of its dues and the realisation of the same from the sale proceeds of the vessel in the winding up proceedings before the Official Liquidator. The appellant has no objection to doing so. In respect of any shortfall in the realisation of dues, the appellant may file its claim for the balance in winding up proceedings in accordance with law.

20. The appeal is accordingly allowed. There will, however, be no order as to costs.