

SUPREME COURT OF INDIA

Oil and Natural Gas Corporation Ltd.

Vs.

Official Liquidator of M/s. Ambica Mills Company Ltd.

C.A.No.1746 of 2006

(Surinder Singh Nijjar and A.K.Sikri JJ.)

17.04.2014

JUDGMENT

SURINDER SINGH NIJJAR, J.

1. The appellant, Oil and Natural Gas Corporation Ltd. is a statutory corporation constituted by and under the Oil and Natural Gas Commission Act, (Central Act, 43 of 1959). In 1967, the appellant commenced supply of natural gas to the industries in and around Vadodra. The Federation of Gujarat Mills and Industries agreed to purchase the gas supplied by ONGC at Rs.100/- per unit.

2. The industries subscribing to the gas supplied by the appellant formed an association in 1978 called The Association of Natural Gas Consuming Industries of Gujarat (hereinafter referred to as Association). Respondent- Ambica Mills Co. Ltd. is one among the members of the said Association. The supply of gas to the member industries was based on individual contracts entered into with each of the concerns. The appellant and the members of the said Association entered into an agreement for supply of natural gas. The agreement provided the price payable for supply of gas and the rate of interest in the event of failure to pay the stipulated prices.

3. On 30th March, 1979, the contractual period of the aforesaid contract expired. After the expiry of the contract, a new contract stipulated prices for supply that were prevalent at the time of the respective contracts. The then levied price for supply of

gas was Rs.504/- per unit.

4. The Association formed a Society registered under the Cooperative Societies Act. The Association filed Special Civil Application No. 833 of 1979, before the Gujarat High Court praying to issue appropriate writ directing the Respondent therein (Appellant herein) to supply the break up and data on the basis of which price structure was arrived at by ONGC, for supply of the gas etc.

5. The Gujarat High Court by an interim order dated 30th March, 1979 in the said Application, directed the Appellant herein to continue supply of gas at the old rate, i.e., Rs.504/- per 1000 cubic meter. On 29th December, 1982, the High Court modified the aforesaid interim order and directed the Appellant to supply gas to the member industries of the Association at Rs.1000/- per 1000 cubic meter.

6. On 30th July, 1983 the said Civil Application was partly allowed by the Division Bench setting aside the price demanded by the Appellant herein, leaving it open to deal with the question of price fixation in any one of the three modes suggested in Para 36 of the judgment in the case of Association of Natural Gas Consuming Industries of Gujarat & Ors. Vs. ONGC & Anr. reported in 24 (2) GLR 1437.

7. The Appellant preferred an appeal being C.A. No. 8530-8540 of 1983 against the aforesaid order. On 15th April, 1987, this Court passed an interim order directing that the members of the Association including the Respondent shall be supplied gas at the rate of Rs.1000/- per 1000 cubic metres subject to an undertaking that the respondent shall not charge, encumber or alienate except with the leave of this Court any of the immovable assets.

8. Pursuant to the order dated 15th April, 1987, an undertaking was given by Ambica Mills Co. Ltd. thereby making available their immovable assets for discharge of its respective liability on 27th May, 1987.

9. Appellant filed Company Petition No. 66 of 1983 seeking winding up of Respondent No. 1- Ambica Mills Co. Ltd.

10. C.A. No. 8530-8540 of 1983 was finally decided by this Court and the judgment was delivered in the same matter on 4th May, 1990 (reported in 1990 Suppl. SCC

397). This Court, as regards the price fixation, had set aside the direction given by the High Court in Para 36 of the judgment dated 30th July, 1983. It was observed that the ONGC would be at liberty to take immediate steps to recover the charges due from the respondents therein, in the light of this judgment.

11. Soon after the aforesaid judgment, ONGC filed an application for certain directions and modifications of the aforesaid judgment. When the matter was taken up for hearing on 8th December, 1992, learned senior counsel appearing on behalf of the Association submitted that the members of the Association will make some more substantial payments to ONGC by the end of the month, and particulars of payment so made would be submitted in the Court on or before 8th January, 1993. On 6th April, 1993, when the matter was taken up again on an application filed by the ONGC complaining of non-payment by the members of the Association, this Court observed that the liability of the members of the Association to make the payment of amounts due from them to the ONGC was beyond controversy and cannot be disputed. In the aforesaid order, it was further observed that the principal amount due from Ambica Mills Co. Ltd. as on 31st March, 1993 in respect of period 1st April, 1979 to 21st January, 1987, as shown in the statement furnished by ONGC, is Rs. 1.58 crores and interest thereon amounted to Rs.4.96 crores. Ambica Mills Co. Ltd. admitted the principal amount. The interest calculated would be accepted subject to verification. At the relevant time, reference relating to Ambica Mills Co. Ltd. under the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) was already pending before the Board for Industrial and Financial Reconstruction (BIFR). Upon consideration of the matter, this Court on 29th April, 1993 granted the prayer of ONGC that it would be entitled to take steps for disconnecting the supply of gas in case of non payment of the amounts due. This Court directed that the principal amount must be paid within a period of 5 years latest by 31st March, 1998. So far as Ambica Mills is concerned, the statement was made by the learned senior counsel appearing for them that the respondent is prepared to sell the vacant land at Vatwa in Ahmedabad in order to discharge the due of ONGC in the present case. Ambica Mills was granted liberty by this Court to make prayer to that effect before the BIFR and to obtain suitable directions. It was also observed that the entire dues of the ONGC shall be first paid out of the total sale price and the balance, if any, remaining thereafter shall be available for utilisation in any other manner directed by the BIFR. It appears that in the meantime BIFR recommended that Ambica Mills be put into liquidation. This recommendation of the BIFR came up before the Gujarat High Court along with

other winding up on 17th October, 1997, when the High Court appointed a provisional liquidator.

12. Soon thereafter, it appears that the Company Application No.445 of 2000 in official liquidator report No. 44 of 1999 in Company Petition No.121 of 1995 was filed in the Gujarat High Court seeking directions for payment of the amounts due to ONGC by the Ambica Mills (company in liquidation). On 17th January, 1997, the High Court ordered winding up of M/s. Ambica Mills Co. Ltd. and the official liquidator was appointed as the liquidator of the company. Thereafter the official liquidator filed an application before this Court in respect of the disposal of the properties of the company in liquidation and disbursement of the amounts realised. This Court by order dated 17th October, 1997 directed as follows :-

That out of the assets of the company under liquidation, the dues of ONGC Limited are required to be paid off first and the question of making any payment to any other creditor can realise only out of the surplus if any remaining after the full dues of the ONGC Limited have been paid off. The High Court is therefore, to proceed with the matter in this manner. I.As stand disposed off.

13. It is the case of the ONGC that it is in receipt of a letter dated 28th September, 1999 from the official liquidator wherein it has been stated that Plot No.307IPS-16 of Ambica Mills (in liquidation) property was disposed of for Rs.90.11 lakhs and the initial instalment of Rs.22.52 lakhs had already been deposited by the purchaser of the said plot. A prayer was made for release of the aforesaid amount to ONGC.

14. It appears that respondent No.10-Textile Labour Association, Bhadra sought review of the order dated 17th October, 1997 by filing Review Petition Nos.1193-1203 of 2001 in I.A.No.168-178/1997 in C.A.No.8530- 40 of 1983. The aforesaid review petitions were decided by this Court on 12th April, 2004 and it was directed that claims of ONGC will have to be worked out in accordance with Sections 529 and 529A of the Companies Act as well. The submissions made on behalf of ONGC that the mandamus issued by this Court earlier that ONGC must be paid up first from any sale of the assets of the company in liquidation, would prevail even if the statutory provisions contained in Sections 529 and 529A of the Companies Act, were rejected. The aforesaid judgment of this Court is reported at 2004 (9) SCC 741.

15. The record also shows that ONGC moved Company Application No.445 of 2000 in Company Petition No.121 of 1995 by way of judges summons, in which directions were sought that outstanding amounts of the ONGC be paid by the company in liquidation. Further, an injunction be issued restraining the company in liquidation its agents, officers and servants from making any payment/disbursement in any manner, of any of the sale proceeds that are available from the sale of assets of the company in liquidation. Further an injunction was sought restraining Ambica Mills from creating any charge alienation and discharging of the immovable assets of the company in liquidation. This application was heard at length by the learned Single Judge and dismissed with the following observations:-

2.16A ONGC therefore cannot claim any preferential right on the basis of the order of 17.10.1997 in priority to the secured creditors and the workmen taking into consideration the provisions of Sections 529 and 529A of the Act. Such preferential claim, if falling under Section 530 of the Act would follow the claims of Secured Creditors and the Workmen under Sections 529 & 529A of the Act. In case the claim of ONGC is not proved to be preferential under Section 530 of the Act they would therefore fall for consideration along with all other claims of other creditors as ONGC, on its own saying, is a decree holder.

2.16B In view of what is stated hereinbefore this application cannot be granted at this stage, i.e. before claims of Secured Creditors and workmen are processed under Sections 529 and 529A of the Act. Despite categorical statement at the Bar, under instructions, that ONGC did not want to lodge any claim before the Official Liquidator, it will be open to ONGC to lodge its claim in accordance with law and seek its satisfaction when claims of other Creditors of the Company in liquidation are taken up for consideration for distribution of the funds which may be available at that time. The application is accordingly rejected. Notice is discharged.

16. Aggrieved by the aforesaid directions, ONGC filed O.J. Appeal No.51 of 2004. On 18th October, 2004, the Division Bench stayed the judgment of the learned Single Judge subject to disbursement of the workers at the rate of Rs.2500/- each worker as agreed by the parties. The aforesaid appeal has been dismissed by the High Court by the judgment dated 16th January, 2006 giving rise to the present appeal.

17. We have perused the entire record and heard the learned senior counsel for the parties at length.

18. Mr. Paras Kuhad, appearing for the appellant submitted that the High Court had committed an error in concluding that the appellant cannot claim any preferential right on the basis of the order passed on 17th October, 1997. According to Mr. Kuhad, the second error committed by the High Court is that it has wrongly concluded that no security was created in favour of the appellant on the basis of the interim order passed by this Court on 15th April, 1987 and the undertaking furnished by the company in liquidation Ambica Mills Co. Ltd. pursuant to the order of this Court. The third error committed by the High Court, according to Mr. Kuhad, is in holding that no security has been created in favour of the appellant as no charges have been registered under Section 125 of the Companies Act, 1956. Mr. Kuhad has submitted that the undertaking dated 27th May, 1987 is a superimposition on the priorities as given in Sections 529 and 529A of the Companies Act. In support of his submission, learned senior counsel has relied on a number of judgments which we shall notice presently.

19. Learned counsel for the respondents has submitted that the genesis of the civil appeal is the interim order dated 15th April, 1987. It is submitted that the aforesaid order is in the nature of an injunctive order whereby the company in liquidation was directed, not to charge encumber or alienate any of its assets except with the leave of this Court, including the assets listed in the respective undertakings. The second part of the injunction was that the respondents will make their immovable assets available for discharging the respective liabilities to the ONGC. The undertaking filed by Ambica Mills Co. Ltd. was that none of immovable assets of the company will be further charged and encumbered hereinafter with effect from 15th April, 1987, except with the leave of this Court. It is the submission of the respondents that in the aforesaid undertaking no specific details and particulars of any immovable assets were given or provided. Therefore, the aforesaid undertaking does not make the appellant a secured creditor of Ambica Mills Co. Ltd. It is pointed out by the learned counsel that even in the judgment dated 4th May, 1990 of this Court in Oil and Natural Gas Commission & Anr. Vs. Association of Natural Gas Consuming Industries of Gujarat & Ors. reported at 1990 (Supp) SCC 397 did not hold that the order dated 15th April, 1987 or the undertaking dated 27th May, 1987 have conferred upon the appellant status of a secured creditor. This Court only directed that the ONGC will be at liberty

to take immediate steps to recover the dues from the respondent in the light of the judgment. Similarly no charge was created by this Court while passing the order dated 6th April, 1993. Explaining the order dated 17th October, 1987, it is submitted by the learned counsel for the respondent that the order only directed that in case of sale of the assets of the company in liquidation, the dues of the ONGC shall be paid off first. But this order was subsequently reviewed on 12th April, 2004 directing that the order dated 17th October, 1997 would have to be read subject to the provisions of Sections 529 and 529A of the Companies Act. Therefore, the secured creditors had two options, either to realise its securities outside the winding up proceedings or to relinquish its security for the general benefit of all and prove its claim by participating in the liquidation proceedings. The appellant never gave any option knowing perfectly well it was not a secured creditor. The judgments relied upon by the appellants have been sought to be distinguished by the learned counsel for the respondents.

20. We have considered the submissions made by the learned counsel for the parties. In our opinion, the appellant cannot claim that the order dated 15th April, 1987 created an enforceable charge on the assets of the company in liquidation. We are of the opinion that the learned counsel for the respondents are quite right in their submissions that an injunction was issued only to ensure that the company in liquidation does not further encumber or create charges in favour of third parties over the assets of the company in liquidation. In our opinion, neither the interim order dated 15th April, 1987 nor the undertaking given pursuant thereto can be said to be a charge on the assets of the company in liquidation. This Court in the case of *Indian Bank Vs. Official Liquidator, Chemmeens Exports (P) Ltd. & Ors.*[1] whilst considering the provisions contained in Section 125 of the Companies Act has observed as follows:-

6. Since the preliminary decree is assailed as being void under Section 125 of the Act, it would be useful to read here the said provision, insofar as it is relevant for our purposes. It reads:

125. Certain charges to be void against liquidator or creditors unless registered.”(1) Subject to the provisions of this Part, every charge created on or after the 1st day of April, 1914, by a company and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with

the instrument, if any, by which the charge is created or evidenced, or a copy thereof verified in the prescribed manner, are filed with the Registrar for registration in the manner required by this Act within thirty days after the date of its creation:

Provided that the Registrar may allow the particulars and instrument or copy as aforesaid to be filed within thirty days next following the expiry of the said period of thirty days on payment of such additional fee not exceeding ten times the amount of fee specified in Schedule X as the Registrar may determine, if the company satisfies the Registrar that it had sufficient cause for not filing the particulars and instrument or copy within that period.

(2) Nothing in sub-section (1) shall prejudice any contract or obligation for the repayment of the money secured by the charge.

(3) When a charge becomes void under this section, the money secured thereby shall immediately become payable.

(4) This section applies to the following charges:

(a) a charge for the purpose of securing any issue of debentures;

(b) a charge on uncalled share capital of the company; (c) a charge on any immovable property, wherever situate, or any interest therein;

(d) a charge on any book debts of the company;

(e) a charge, not being a pledge, on any moveable property of the company;

(f) a floating charge on the undertaking or any property of the company including stock-in-trade;

(g) a charge on calls made but not paid;

(h) a charge on a ship or any share in a ship;

(i) a charge on goodwill, on a patent or a licence under a patent, on a trade mark, or on a copyright or a licence under a copyright.

(5) to (8) * * *

7. On a plain reading of sub-section (1) it becomes clear that if a company creates a charge of the nature enumerated in sub-section (4), after 1-4-1914 on its properties, and fails to have the charge together with instrument, if any, by which the charge is created, registered with the Registrar of the Companies within thirty days, it shall be void against the liquidator and any creditor of the company. This, however, is subject to the provisions of Part V of the Act. The proviso enables the Registrar to relax the period of limitation of thirty days on payment of specified additional fees, on being satisfied that there has been sufficient cause for not filing the particulars and instrument or a copy thereof within the specified period. Sub-sections (2) and (3) deal with repayment of money secured by the charge. Sub-section (2) provides that the provision of sub-section (1) shall not prejudice the contract or obligation for repayment of money secured by the charge and sub-section (3) says that when a charge becomes void under that section, the money secured shall become payable immediately. Though as a consequence of non-registration of charge under Part V of the Act, a creditor may not be able to enforce the charge against the properties of the company as a secured creditor in the event of liquidation of the company as the charge becomes void against the liquidator and the creditor, yet he will be entitled to recover the debt due by the company on a par with other unsecured creditors. It is also evident that Section 125 applies to every charge created by the company on or after 1-4-1914. But where the charge is by operation of law or is created by an order or decree of the court, Section 125 has no application.

21. The observations made in paragraph 7, in our opinion, is a complete answer to the submission made by Mr. Paras Kuhad. Clearly the appellant is only entitled to recover the dues at par with other unsecured creditors. In our opinion, the order dated 15th April, 1987, was only in the nature of restraint on the Company in liquidation not to further encumber any of its assets. It did not have the effect of creating a charge. Mr. Kuhad in support of his submission that the interim order dated 15th April, 1987 has to be treated as a mandate of the Court, has relied on J.K. (Bombay) (P) Ltd. Vs. New

Kaiser-I-Hind Spinning and Weaving Co. Ltd.[2] In the aforesaid judgment, undoubtedly it is held that no particular form of words is necessary to create a charge and all that is necessary is that there must be a clear intention to make a property security for payment of money in praesenti. The aforesaid observations of this Court ought not to be read out of context. The judgments of this Court are not to be read as statutory instruments. The ratio of the judgment has to be culled out, keeping in view the facts and circumstances involved in a particular case. The facts in that case are noticed in paragraph 26 from wherein the aforesaid three lines have been extracted by Mr. Kuhad in support of his submission. We quote the relevant part of paragraph 26 of the aforesaid judgment which is as under:

26. It was argued that where an agreement specifies a property out of which a debt is to be payable and is coupled with an intention to subject such property to a charge, the property becomes subject to a charge in praesenti even though a regular mortgage is to be executed at some future date. Such an intention, the learned Attorney-General argued, was demonstrated by the agreement that (1) the debts were to be paid out of profits and (2) the engagement by the company not to deal with its assets. The distinction between a charge and a mortgage is clear. While in the case of a charge there is no transfer of property or any interest therein, but only the creation of a right of payment out of the specified property, a mortgage effectuates transfer of property or an interest therein. No particular form of words is necessary to create a charge and all that is necessary is that there must be a clear intention to make a property security for payment of money in praesenti. In *Jewan Lal Daga v. Nilmani Chaudhuri*, a case relied on by him, the question was one relating to an agreement to mortgage. Following on the agreement, a draft mortgage was prepared which was approved by the respondent's solicitors, the mortgage deed was engrossed and even the stamp for it was paid by the respondent. The question was whether specific performance of the agreement compelling the respondent to execute the mortgage could be granted before accounts between the parties were made up and the amount due thereunder was ascertained. The Privy Council disagreeing with the High Court held that that could be done and observed that " there was a valid agreement charging the property with whatever sum was actually due.....and that a proper mortgage ought to be executed to carry out these terms." In *Khajeh Suleman Quadir v. Salimullah* certain deeds were executed purporting to make wakfs of certain properties in favour of the members of a Mahomedan family and then for charitable purposes. Later on, agreements were executed, under one of which the members of the family agreed that allowances fixed

under the wakfs should be paid out of the income to named persons of the family and upon their death to their heirs, and under the other agreement the mutawalli agreed that he and the future mutawallis would pay the said allowances. The wakfs were held invalid as creating a perpetual succession of estates. The question was whether the agreements to pay allowances also fell along with them. The Privy Council held that they did not, that they were valid and enforceable and that the direction in the agreements to pay the allowances out of the income of the settled properties showed an intention to create a charge. In both these decisions the Board came to the conclusion that there was a clear intention on the part of the parties to create a charge in praesenti. The argument of the learned Attorney- General was that if an agreement indicated a property out of which a debt is to be paid and an intention to subject it to a charge in praesenti, the court must find the charge. Certain other decisions were also brought to our notice but it is not necessary to burden this judgment with them because in each case the question which the court would have to decide would be whether the agreement in question creates a charge in praesenti.:

22. The aforesaid observations would indicate that the court was examining the submissions made by the learned Attorney General. The effort of the Attorney General was to persuade this Court, on the cases mentioned in the aforesaid paragraph that there was an agreement which established an intention to create a charge. A reading of the order dated 15th April, 1987 clearly shows that it firstly gives the direction to the ONGC to continue the supply of gas at the rate of Rs.1000/- for 1000 cubic meter. Such a direction would be implemented only upon an undertaking given by the respondents that they will not charge encumber or alienate any asset except with the leave of this Court. A further direction was that the immoveable assets included in the respective undertaking will be made available for discharging the respective liabilities of the respondent company. The undertaking given by the company in liquidation in this case was as under:

3. I state that Respondent No.10 Company undertakes that none of immovable assets of the company will be further charged and encumbered hereafter with effect from 15.04.1987, i.e. from the date of order of this Honble Court except with the leave of this Honble Court.

4. I state that Respondent NO.10 Company further undertakes not to alienate any of its immovable assets hereinafter with effect from 15.04.1987 except with

the leave of this Honble Court. The Respondent No.10 Company further undertakes to make available all its immovable assets in the event of discharging the liabilities which may arise on account of the difference between the price at which all the Gas being supplied to the company during the pendency of the proceedings in this connection and the price which may be determined by this Honble court while disposing of the present Appeals finally.

23. A perusal of the aforesaid undertaking shows that Ambica Mills has not identified any particular immovable assets which would be made available in discharging the liabilities in favour of the appellant. Therefore, we have no hesitation in rejecting the submission of Mr.Kuhad that the interim order read with the undertaking expressed an intention to create an enforceable charge of any particular asset of the company in liquidation.

24. We are of the opinion that the judgment in the case of Praga Tools Ltd. Vs. Official Liquidator of Bengal Engineering Company (P) Ltd. (1984) 56 Comp. Cas.214 (Cal) would also not be applicable to the facts and circumstances of this case. Mr. Kuhad has relied on the following observations:

The fallacy in the argument of Mr. Mookherjee, in my view, is that after the passing of the order of S.K. Roy Chowdhury J. (as his Lordship then was), dated August 1, 1978, the position with regard to the security assumed a completely different complexion. By that order, as I have already indicated, the claim of the petitioning-creditor was settled at a certain amount. A mode for payment of that money was indicated. Then there is a default clause. That default clause contained a twin option either of initiating a fresh winding up proceeding or of executing the balance as a decree of court. It is only in the event of an option being exercised in favour of the last contingency, viz., in the event of the execution as a decree of court, that the security which was furnished pursuant to the order of R.M. Dutta J. would be a security for the applicant company for the satisfaction of the decree and would be the security for the decree until the decretal dues were paid. Thus, the benefit of the security in so far as the applicant company is concerned is entirely the creature of the order of Roy Chowdhury J. dated August 1, 1978. This can, in my view, by no stretch of imagination, be called a charge created "by a company" within the meaning of Section 125 of the Companies Act, 1956, requiring registration

under the above section.

It would follow, therefore, from what I have said that the question as to whether the security as originally furnished was registered under Section 125 of the Companies Act, 1956, or not, would be totally irrelevant for the purpose of determining the right of the applicant company after the order of Roy Chowdhury J., dated August 1, 1978.

25. The aforesaid observations, in our opinion, would not be applicable on the facts and circumstances of this case, as no charge have been created in favour of ONGC by any of the orders passed by this Court.

26. Mr. Kuhad has submitted that the respondents have specifically agreed to make the assets available for discharging the liability of the ONGC, this, according to Mr. Paras Kuhad, was tantamount to creating an enforceable charge. We are unable to accept the aforesaid submission. In the face of the directions given by this Court in the case of Oil and Natural Gas (supra) wherein this Court had directed that the ONGC is at liberty to take immediate steps to recover the charges due from the respondents in the light of the judgment. This Court did not direct that in view of the undertaking dated 27th May, 1987 the respondents have created enforceable charge in favour of ONGC. Furthermore, it is a matter of record that even the ONGC did not consider itself to be a secured creditor. At the time when the Ambica Mills Co. Ltd. came under the jurisdiction of the Official Liquidator, none of the two options adverted to earlier was exercised by ONGC. The plea of being a secured creditor is clearly an afterthought. Therefore, in our opinion, the judgments rendered by the learned Single Judge and the Division Bench of the Gujarat High Court do not call for any interference. The civil appeals are accordingly dismissed.

[1] (1998) 5 SCC 401

[2] (1969) 2 SCR 866