
(1975) 08 AHC CK 0014

Allahabad High Court

Case No: Company Petition No. 10 of 1971

Official Liquidator

APPELLANT

Vs

Swarup Cold Storage

RESPONDENT

Date of Decision: Aug. 5, 1975

Acts Referred:

- Companies Act, 1956 - Section 125
- Contract Act, 1872 - Section 148, 172, 221

Citation: AIR 1976 All 88

Hon'ble Judges: Satish Chandra, J

Bench: Single Bench

Advocate: B.N. Asthana, for the Appellant; Probodh Gaur, B.C. Dev, R.R. Agarwal and Bharatji Agarwal, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Satish Chandra, J.

This is an application by the Official Liquidator for a direction to Inder Raj Swarup to hand over possession of certain assets of the Morada-bad Flour Milling and Refrigeration Co. Ltd. in liquidation).

2. According to the Official Liquidator the assets mentioned in the application belong to the Company in liquidation and are being illegally withheld by Sri Inder Raj Swarup.

3. The Company aforesaid went in creditors voluntary liquidation on 29th September, 1962. On 20th December, 1971, this Court passed an order placing the Company under compulsory winding up. Thereupon the Official Liquidator made the application mentioned above.

4. Sri Inder Rai Swarup opposed the prayer. He set up a partnership agreement between him and the Company (in liquidation) and claimed that in virtue of the aforesaid agreement he was the owner in possession of the assets and was entitled to retain possession thereof till his dues were paid off. The learned Company Judge held that the agreement did not transfer the title of the assets in question from the Company to the partnership firm. Sri Inder Rai Swarup was hence not entitled to retain possession on the ground that he was the owner of the assets. The learned Company Judge directed the Official Liquidator to take possession over the assets in question.

5. Sri Inder Rai Swarup went up in appeal. A Division Bench of this Court by its judgment dated 18th April, 1972 affirmed the finding that on a construction of the various terms and conditions mentioned in the agreement dated 24th April, 1958, it was clear that the assets which originally belonged to the Company continued to remain with the Company and their ownership did not stand transferred to Sri Inder Rai Swarup.

6. The Division Bench further repelled the submission made on behalf of Sri Inder Rai Swarup that he was entitled to remain in possession so long as the agreement continued. The Bench held that the agreement was for ten years. That period came to an end in 1968. Further, the effect of the Company going into liquidation was the same as if the Company had met with a Civil death, and that with the death of partnership the partnership agreement came to an end. Sri Inder Raj Swarup was therefore, not entitled to retain possession under the clause which entitled him to continue to remain in possession for the duration of the agreement.

7. Before the Division Bench it was urged on behalf of Sri Inder Raj Swarup that in view of Clauses (3) and (18) of the agreement he had a charge or a lien over the assets of the Company and in enforcement of that lien he was entitled to remain in possession even against the liquidator so long as the money due to him under the agreement was not paid up. It was also argued that the status of the appellant was that of a partner and in circumstances like the present the appellant was entitled to invoke the lien contemplated by Section 221 of the Contract Act and thereunder to retain possession till his dues were paid off. The Division Bench felt that these aspects though raised before him were not dealt with by the learned company Judge. It therefore, while affirming the finding that the assets remained under the ownership of the Company, set aside the ultimate order and sent the case back for consideration of these various aspects.

8. Thus the two principal questions which require consideration are, first, whether Sri Inder Rai Swarup had a charge or a lien in enforcement of which he could remain in possession even against the Liquidator, and secondly, whether he was entitled to invoke the lien u/s 221 of the Contract Act.

9. Section 125 of the Companies Act provides that a "charge created on or after the 1st day of April, 1914 by a Company and being a charge to which this section applies shall, as far as 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 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."

10. The section applies to a charge, inter alia, on any immovable property as well as moveable property of the Company, provided that in the latter case it is not a pledge. The charge in question was claimed against the moveable as well as immovable properties of the Company. Section 125 was, therefore, clearly attracted to it.

11. After the case came back on remand from the Division Bench Sri Inder Raj Swarup, through his counsel, made an application that the files be called from the office of the Registrar of Companies relating to the filing of return u/s 125 of the Companies Act in respect of the charge created by the deed dated 24th April, 1958. This Court on 21st February, 1974 directed the Registrar of Companies. U. P. Kanpur, to send the file to this Court. The Registrar of Companies on 15th March, 1974. addressed a letter to the Deputy Registrar of this Court stating that "Form No. 8 regarding a floating charge for Rs. 41,247.22 on the assets of the Company under a partnership deed between M/s. Moradabad Flour Milling and Refrigeration Co. Ltd. and Sri Inder Raj Swarup was filed with this office in 1960. Since the amount of Rupees 41,247,22 (mentioned in Form No. (8) for which the charge was created was not specifically mentioned in the partnership deed, the Company was advised to amend the partnership deed by inclusion therein of the specific amount of charge created and furnish the same to this Office", The letter continued to state-

"From a perusal of this office records it appears that the Form No. 8 in regard thereto had been returned to the Company and the charge in question could not be registered u/s 125 of the Companies Act, 1956 due to non-compliance of the above requirement by the Company."

After the receipt of this letter the matter was listed in Court before the learned Company Judge, on 29th March. 1974. The contents of the letter of the Registrar were not disputed on behalf of Sri Inder Raj Swarup. Accordingly on that date the learned Company Judge dismissed the application moved on behalf of Sri Inder Raj Swarup on the view that evidently the charge had not been registered u/s 125.

12. u/s 125 of the Companies Act any such charge is void against the Liquidator if it had not been properly registered as required by part V of the Companies Act. Since the charge was not registered and the provisions in that regard had not been followed by the Company, Sri Inder Raj Swarup is not entitled to enforce the charge, if any created by the agreement dated 24th April. 1958, as against the Official Liquidator. Since the charge is void against the Official Liquidator, Sri Inder Raj Swamp is not entitled to retain possession of the assets of the Company on the ground that he had a charge over them.

13. Section 221 of the Contract Act provides-

"In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether moveable or immovable, of the principal received by him. until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him."

14. The lien, if any created by a contract between a principal and his agent mentioned in Section 221 is enforceable between the parties to the agreement. In the first place after the passing of the order for compulsory winding the Company (in liquidation) met with a civil death. The Official Liquidator is not a representative of the Company (in liquidation) for purposes of Section 221. There was hence no occasion to enforce the lien as against the Official Liquidator. Furthermore, Section 221, in so far as one may seek to bring the Official Liquidator within its purview, being contrary to Section 125, which expressly declares such a charge to be void as against the liquidator will be subservient to it. Section 221 cannot, in my opinion, be enforced against the Official Liquidator.

15. Further, Section 221 of the Contract Act applies to an agent qua his principal. The position of partners under a partnership agreement is not that of principal and agent. In between themselves they are principals as against the other. For this reason also Section 221 of the Contract Act is not applicable.

16. It was then urged that the agreement in question created in law a pledge of the specific moveable properties of which possession was delivered by the Company to Sri Inder Raj Swarup. The latter was, u/s 173 read with Section 176 of the Contract Act entitled to retain possession of the goods pledged to him and also to sell them after giving reasonable notice of the sale to the pawnor.

17. Section 172 of the Contract Act defines a pledge to be the bailment of goods as security for payment of debt or performance of a promise. Section 148 provides that a bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering, them. Thus a bailment relates to specific moveable property, of which delivery has been given by one person to another for a specific purpose with a direction that it shall be returned or disposed of according to the directions of the person delivering the goods, that is, the bailor.

18. Under the agreement in Question, the Company delivered possession of land, buildings, machineries, stores etc., to Sri Inder Raj Swarup upon the condition that the latter will spend as much money as is required for bringing the plants into working condition or repairing or purchasing new machinery and other material etc., Sri Inder Raj Swarup was to work the Cold Storage plant and the earnings were to be divided half and half between the parties. Clause 9 of the agreement provided that the profits of the first party shall first liquidate the amount spent by the second party in repairs and for bringing

the plant in working order etc.. as stated in Clause 3 in ten equal yearly instalments or by the sale of the cold storage, ice plant, land, buildings etc. belonging to the Company, first party. Clause 3 of the agreement provided that the money spent by Sri Inder Raj Swarup on repairs and purchase of new machinery etc.. shall be the first charge on the first party company's assets. He was entitled to recover the amount with 6 per cent interest from the income of the first party company's share in profit or by sale of machineries, buildings, premises etc. This was in tune with the provisions of Clause 9 of the agreement. Under Clause 18 Sri Inder Raj Swarup was entitled to get his full amount with interest remaining due as stated in clause 3 from the property and assets of the first party company.

19. These various provisions in the agreement show that although specific movable properties along with, immovable properties were given in the possession of Sri Inder Raj Swamp, yet the security was the Company's assets. Sri Inder Raj Swamp was entitled to realise his dues in the stated situations by sale of machineries, buildings, premises etc., as mentioned in Clause 3, or from the Cold Storage ice plant and land, buildings etc.. belonging to the Company as mentioned in Clause 9, and from the property and assets of the first party Company, as mentioned in. Clause 18. None of these clauses confined the right of realisation to the specific moveable properties mentioned in the Schedule of the agreement of which delivery of possession was given to Sri Inder Rai Swarup. The right of sale was not confined to such specific moveable properties. It extended to the Company's assets, including machineries, buildings, premises, cold storage and ice plant and lands, buildings etc. The word "etc.," in each of these clauses clearly brings out the intention that the entire assets of the Company were the security of Sri Inder Raj Swarup's dues. Since possession of any specific moveable property was not delivered to Sri Inder Rai Swamp upon a contract that the same shall be held as security for the debts of Sri Inder Raj Swarup. it cannot be said that the transaction in question was a bailment, much less a pledge, as defined by the Contract Act.

29. In this view. Sri Inder Raj Swarup was not entitled to retain possession of the goods given to him in virtue of Section 173 of the Contract Act.

21. It is noticeable that the properties mentioned in the Schedule constituted parts of the Cold Storage and ice plant. They were given to Sri Inder Raj Swarup with a view to enable him to run the cold storage and ice plant as a working unit after proper repairs etc. The cold storage, including the land and buildings were the subject-matter of the agreement. The agreement was in respect of immovable as well as moveable property. In this view also it cannot be said that any specific moveable property was given in the possession of Sri Inder Raj Swarup as security for the debts that may in future be payable by the Company to the latter. I am not satisfied that the transaction in Question could, under law. be a pledge under the Indian Contract Act. In my opinion the transaction created a floating charge on the general assets of the Company. Such a floating charge requires registration u/s 125 of the Companies Act, which admittedly was not done because of the default of the Company in complying with the provisions of that section.

Since I have held that the transaction was not in law a pledge, it is not necessary to refer to the various decisions cited on behalf of the parties as to the rights, of a pawnee, or as to the rights of an official liquidator as a representative of the general body of creditors of the Company qua a creditor who claims to be in possession as a pawnee.

22. Under the Companies Act the position of Sri Inder Rai Swarup is that of an ordinary creditor who is, in law, entitled to file his claim and prove it before the official liquidator. He will be entitled to receive what amounts the official liquidator finds to be due to him in accordance with the provisions of the Companies Act. In my opinion Section 173 or 221 of the Contract Act cannot entitle Sri Inder Raj Swarup to retain possession of the assets of the company. He is, in law, duty-bound to hand over possession of such assets to the official liquidator.

23. In the result Sri Inder Rai Swarup is hereby directed to hand over possession of the properties and assets in question to the Official Liquidator within a month from today.

24. A copy of this order may be supplied to the Official Liquidator within three days.