(2001) 07 MAD CK 0117

Madras High Court

Case No: Application No''s. 2140 and 2406 of 2001

M/s. Sundaram Finance Ltd., No. 21, Pattulos Road,Chennai-600002 — APPELLANT

Vs

M/s BalurghatTransport Co. Ltd., Shamik Chambers 1st Floor, Devaji Ratansey Marg, Mumbai-9, M/s. Wimco Limited, No. 412,Chennai-600019 — RESPONDENT

Date of Decision: July 3, 2001

Acts Referred:

- Companies Act, 1956 - Section 123, 124(4)(f)
- Transfer of Property Act, 1882 - Section 48

Hon'ble Judges: A. Kulasekaran, J

Bench: Single Bench

Advocate: M.S. Krishnan for M/s. SarvabhaumansAssociates, for the Appellant; Arvind Subramanian, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

A. Kulasekaran, J.
Application No. 2140/2001 was filed by M/s. Sundaram Finance Limited against M/s. Balurghat Transport Corporation Ltd., and M/s. Wimco Limited for prohibitory order prohibiting the 2nd respondent-garnishee from disbursing the amounts due to the first respondent every month from out of the supply of vehicles to them and to deposit the same into this Court to the credit of the abovesaid application. Application No. 2406/2001 has been filed to suspend the interim order passed in O.A. No. 2140/2001 on 27.04.2001 in O.A. No. 2140/2001 prohibiting the second respondent from disbursing the amount payable to the first respondent. For

convenience, M/s. Sundaram Finance Ltd., is hereinafter referred to as the applicant, M/s. Balurghat Transport Corporation as the first respondent and Wimco Limited as the second respondent. The second respondent in this case has not appeared and the only contesting party is the first respondent herein.

2. The short facts of the case are as follows:

The applicant and the first respondent entered into 13 Hire purchase agreements in respect of 13 lorries. In the said transaction, five persons stood as guarantors. The statement of accounts are mentioned below:

Sl. No.	Contract Date	Less Rebate	Amount outstanding as on 16.03.99
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
			66,22,631.85

The above statement indicates the amount repayable by the first respondent, which was due and payable by them in respect of hire purchase agreement. In spite of several demands, the first respondent has not come forward to clear their outstanding. The applicant''s attempt to re-possess the said vehicles became vain since the first respondent has kept the vehicles out of their reach. The tenure of all the agreements expired. The said agreements also contain arbitration clause and the disputes also were referred to the arbitrator. The said proceedings are pending nearly for three years. The arbitrator could not dispose of the same due to the delaying tactics adopted by the first respondent herein. According to the applicants, the first respondent is liable to pay a number of creditors like the applicant herein and that the amounts payable to the applicant by the first respondent as on 16.03.1999 is Rs. 66,22,631.85 together with future interest. They felt that even when an award is passed, they cannot realize anything, hence they filed application No. 2140/2001 for prohibitory order restraining the second respondent herein from disbursing the amount payable to the first respondent and deposit into this Court.

This Court after considering the merit of the case passed an interim order dated 27.04.2001 not to disburse the amount. Aggrieved by the interim order, A. No. 2406/2001 was filed by the first respondent for suspending the said interim order. The first respondent has raised a number of defences questioning the territorial jurisdiction of this Court, denied the execution of the hire purchase agreements and their liability. It is also their case that they are prepared to co-operate with the applicant for the disposal of the matter pending before the arbitrator. It is also stated by them that there is a first charge created on all their book debts/receipts in favour of M/s. Vijaya Bank for the OD facility availed by them. As such, it is warranted to suspend the prohibitory order. This Court need not go into the other issue, except the issue relating to the alleged first charge in favour of Vijaya Bank and the territorial jurisdiction of this Court.

3. The point for consideration in these applications is whether the applicant is entitled to the Prohibitory order as prayed for and this Court is having territorial jurisdiction or not?

4. The learned Counsel for the applicant argued that this Court is having jurisdiction, since all the hire purchase agreements are entered into at Madras which is evident in the preamble of the agreements that the applicant''s place of business is at No. 21, Patullos Road, Chennai-600002 and also the notices were issued by the advocates of the applicant mentioning the said address and reply notices were sent by the first respondent to the said address and the claim petition is filed by this applicant mentioning the said address as their place of business. While so, the allegation that no cause of action arose at Madras is false and imaginary. The learned counsel appearing for the first respondent has not produced any documentary evidence to controvert the same.

5. On perusal of the documents and after hearing the arguments advanced by the counsel for both sides, this Court accept the submissions made by the Counsel for the applicant that this Court is having territorial jurisdiction and reject the plea of the first respondent.

6. The learned Counsel appearing for the first respondent argued that a first charge is already created on all their book debts, receipts, in favour of M/s. Vijaya Bank for the overdraft facility given to them. Hence another charge created by way of the prohibitory order is unsustainable.

7. The learned Counsel for the applicant has pointed out the plea raised in the counter and argued that the first respondent has merely produced some records where it appears that there is a hypothecation with regard to book debts and other movables in favour of M/s. Vijaya Bank. The learned Counsel also pointed out that the first respondent has not produced any hypothecation deed but only an extract from the register. It is also argued by the learned Counsel for the applicant that even assuming without admitting that the Bank has a valid hypothecation in their

favour, a hypothecation is not a pledge and there is no transfer of interest of property in the goods by the hypothecator to the hypothecatee; it only creates a notional and equitable charge in favour of the hypothecatee and the right of the hypothecatee is only to sue on the debt and proceed in execution against the hypothecated goods if they are available. Learned Counsel for the applicant also pointed out that it is for the hypothecatee i.e., Vijaya Bank to be vigilant and the law cannot be used by the first respondent as a means to wriggle out of his liability. Learned Counsel for the applicant relies on Sec. 124(4)(f) of the Companies Act, 1956 and argues that so long as the charge is floating, and has not become settled and fastened on the subject matter of the charge, the company may in the ordinary course of its business sell, let, mortgage, pledge and otherwise deal with its assets as if the floating charge had not been created. Learned Counsel for the applicant also relied upon the decision reported in Narendra Kumar v. Union of India, AIR 1989 S.C. 2138. Para 94 of the said decision reads thus:

"94. It therefore, follows that:-

i) A debenture is usually secured by floating charge only.

ii) A company which creates floating charges has a right to create future security which may rank superior in ranking

iii) However, this right of the company may be restricted by agreement

iv) Where no restriction is provided, any future specific charge will rank superior to the earlier floating charge (Sec. 123 of the Companies Act)

v) Again, where no specific provision is made in the earlier floating charge with respect to the ranking of future floating charge then any future floating charge will be inferior to the earlier floating charge. In this connection, reference may be made to Sec. 48 of the Transfer of Property Act. The risk of floating charges can be controlled by creating legal mortgage in favour of debenture trustees as has been explained in "All about Debentures"

8. Learned Counsel also placed reliance on the decision reported in Union of India v. Coorg Estates Ltd., AIR 1963 Kerala 301. In the above said Division Bench Judgment, the Kerala High Court had held thus:

"13. Secondly, we think that the institution of the suit by the plaintiff on 2.7.1955 claiming a charge on the movables, was an act sufficient in Law or to bring about a crystalisation of the security, as that would come expressly within the words of Vaughan Williams L.J., in 1910-2 K.B. 979, when he said that not only the appointment of a receiver, but also the bringing of an action to enforce security would work a crystalisation of the charge"

14. Therefore, our conclusion is that the plaintiff is entitled to recover the amount from the sale proceeds of the movables in the hands of the defendants. There was a

contention that the defendants 3 to 5 were entitled to a prior charge under Sec. 11 of the Provident Fund Contribution Act, but that was given up in the lower Court as the argument based upon Sec. 11 of the Act was not pressed before us and that rightly too. As we hold that the charge became crystalised before the sale of the movables properties by the Collector, the plaintiff is entitled to recover the amount realized by the Collector by the sale of the movables. We hold that the plaintiff is entitled to recover the amount of the movable properties specified in B Schedule of the Plaint."

9. The learned Counsel for the applicant relied upon the Judgment of a Division Bench of our High Court in Union of India v. C.T. Shentilnathan and another, (1977) 2 M.L.J. 499. In Paragraph No. 11 of the Judgment it is held as follows:

"Though the learned Counsel for the plaintiff referred to this decision, he was not able to satisfy us that under Exhibit A-1, there was any transfer of such interest or title of the hypothecator in the goods in favour of the hypothecatee. Excepting for the bare assertion that the plaintiff as hypothecatee could seek for possession of the goods in case of default of the hypothecator, no further right is thought of or claimed in and the recitals in Ex. A-1. It is therefore clear that there was no transfer of interest in movable property under Ex.A-1 so as to sustain the contention of the learned Counsel for the plaintiff that the case under consideration involves a mortgage of movable property. As we said, the best that can be claimed by the plaintiff in this action is an equitable charge. He could work out the equitable charge only after obtaining a decree on the private debt. After obtaining the decree he could seek execution as against the goods secured under the hypothecation deed, if available with the hypothecator at or about the time when he seeks execution. Under these circumstances, we are unable to accept the contention that this is a case of mortgage of movable property. This is a pure and simple case of hypothecation of goods under which no delivery of possession of the hypothecator was contemplated and the only right which the hypothecatee got under it was a right to seek for the sale of the hypothecated goods after obtaining a money decree on the debt."

10. It is clear from the above decisions that first respondent herein cannot take shelter under the alleged first charge in favour of M/s. Vijaya Bank to wriggle out of his liabilities. As rightly pointed out by the learned Counsel for the applicant, the claim of the hypothecatee is not crystalised nor they initiated any legal action. According to the Counsel for the applicant, a large sum of Rs. 66,22,631.85 is due and payable by the first respondent as on 16.03.1999 and the applicant could not re-possess the vehicles since they were kept of their reach and all the attempts made by them became vain. The first respondent in his letter dated 20.01.1999 admitted their liabilities and arbitrator is also appointed under the provisions of the agreement. As such, under Sec. 9(e) of the Act, the present application has been filed seeking an order of interim measure of protection prohibiting the second

respondent from paying the amount payable by them to the first respondent. This Court has already granted interim order to the extent of restraining the garnishee from disbursing the amount on 27.04.2001. The learned Counsel has also pointed out that the first respondent by using the lorries covered under the agreement is making huge profits but deliberately failed to discharge their admitted liabilities. The learned Counsel submitted that the prayer sought for in this application in entirety is absolutely necessary to protect the interest of the applicant herein pending disposal of the arbitration proceedings. Considering the overall merits of the case, I find that there is a force in the argument of the Counsel for the applicant and come to the conclusion that it is necessary to direct the garnishee namely second respondent herein not to disburse the amount to the first respondent herein and deposit the same into the Court to the credit of Application No. 2140/2001.

In the result, the application No. 2140/2001 is allowed as prayed for. Consequently, application No. 2406/2001 is dismissed. No costs.