IDBI Bank Limited Vs The Administrator Kothari Orient Finance Limited, The Official Liquidator and S. Ramaiah

Court: Madras High Court

Date of Decision: Aug. 17, 2009

Acts Referred: Companies Act, 1956 â€" Section 293, 293(1), 431, 441, 446(2)
Transfer of Property Act, 1882 â€" Section 53A, 54

Citation: (2009) 152 CompCas 282 : (2009) 4 LW 725 : (2009) 8 MLJ 209

Hon'ble Judges: R. Subbiah, J; M. Chockalingam, J

Bench: Division Bench

Advocate: T.K. Seshadri, for Shivakumar and Suresh, for the Appellant; AR.L. Sundaresan, for S.R. Sundar, for R2, for the Respondent

Final Decision: Dismissed

Judgement

M. Chockalingam, J.
This appeal challenges an order of the learned Single Judge of this Court made in Company Application No. 1208 of

2002 an application seeking a direction to the respondents to execute and register a sale deed in respect of the petition mentioned property

pending the winding up proceedings in C.P. No. 179 of 2001 in respect of Kothari Orient Finance Limited.

2. The appellant/petitioner bank made an application u/s 446(2)(b) of the Companies Act seeking the said direction with the averments that

Kothari Orient Finance Limited was a constituent of the petitioner, which was provided with certain facilities during the year 1992; that the liability

became irregular; that the company owed to the petitioner a sum of Rs. 60,55,055/- as on 31.3.1999; that the company approached the petitioner

for one time settlement and offered the property in question in respect of which execution of sale deed is sought for at the market value; that the

petitioner was constrained under the circumstances to enter into an agreement for sale dated 17.2.2000; that the consideration was fixed at Rs.

105 lakhs; that a sum of Rs. 41 lakhs was paid by the petitioner as advance at the time of agreement itself; that the balance was entirely settled out

of the amounts owed by the company to the petitioner; that no objection certificate from the Income Tax Department dated 18.4.2000, was

received; that on 6.11.2000, the petitioner had taken possession of the said property; that as such the petitioner had rights to compel the winding

up company to execute and register a sale deed; that on 6.11.2000, the transfer was complete; that the petitioner was also put in possession of the

said property; that only there was an obligation on the part of the vendor to execute and register the sale deed; that the sale deed could not be

registered since there was an income tax attachment which the petitioner had taken up; that the company petition was filed only recently; that

however the transaction between the petitioner and the company was pursuant to the agreement dated 17.2.2000; that the entire advance was also

paid and the balance was also adjusted; that the petitioner had not paid any other amount to the said company; that apart from that, the petitioner

was neither aware of the income tax attachment which came to its light only at the time of the company having applied for the income tax clearance

certificate at the instance of the petitioner; that the petitioner had no knowledge about the financial crunch of the above company; that the petitioner

was a bonafide purchaser who was never aware of the arrears and claims of the other creditors if any of the said company or the interest of the

other creditors; that under the circumstances, there was no option than to approach this Court for suitable direction, and hence the application was

to be ordered.

3. The Administrator appointed by this Court filed his report inter alia stating that the alleged agreement for sale dated 17.2.2000 relied on by the

petitioner, was a fraudulent preference in favour of the petitioner; that the petitioner is just as any other creditor of the company; that when the

company was in a financial crunch, the petitioner appeared to have prevailed upon persons in the management of the company; that at that point of

time, the petitioner entered into an agreement for purchase of the property at Rs. 1.05 crores and upon the said process had conveniently

attempted to adjust the outstanding receivable from the company while thousands of creditors of the company whose moneys have been utilised

for the purpose of acquisition of the assets of the company, and who are entitled to due payments of the deposits, have been deprived of their right

to receive the deposits by due share of the proceeds in the said company; that it appears a sum of Rs. 41 lakhs had been paid by the petitioner as

advance which was to be verified from the records; that even at the time when the agreement was alleged to have been entered into the company

was in default of payment to its depositors and several other creditors; that even to the petitioner company there was a due of nearly Rs. 60 lakhs

at that time and now the petitioner company should not be allowed to state that they had no knowledge about the financial crunch of the company

under winding up; that the mere fact of recording that the possession was delivered in favour of the petitioner would not in any way improve the

case of the petitioner; that it was nothing but a fraudulent preference done by the persons in management of the company in favour of the petitioner;

that from the records of the company, it would be quite clear that only a board resolution has been passed on 31.3.1999 authorising the directors

of the Company to negotiate the business transaction and execute the sale agreement and other documents; that no resolution of the general body

of members of the company was passed; that under such circumstances, the very agreement for sale is null and void which cannot be given any

legal effect; that as any other creditor the remedy open to the petitioner was against the company in the manner known to law for the recovery of

the said dues and not in the company petition for winding up; that it should not be allowed since the agreement was a fraudulent preference and

also collusive and apart from that, it would defeat the interest of thousands of creditors who have made deposits with the company under winding

up, and under the circumstances the application was to be dismissed.

4. The learned Single Judge after raising the question for determination, rejected the request of the appellant. Under the circumstances, this appeal

has arisen before this Court.

5. Advancing arguments on behalf of the appellant, the learned Senior Counsel Mr. T.K. Seshadri would submit that the order of the learned

Single Judge dismissing the application is erroneous and contrary to the factual and legal position; that in the instant case, Kothari Orient Finance

Limited who availed credit facilities from the appellant bank, was liable to pay Rs. 60 lakhs and odd; but it was unable to pay the same; that at that

time, they came forward to make one time settlement; that on 31.3.1999, a board resolution was also passed to sell the property pursuant to

which it was Kothari Orient Finance Limited which sent a letter addressed to the appellant on 2.2.2000, informing its intention to sell the property;

that pursuant to the same, the agreement for sale was entered into on 17.2.2000 wherein the total sale consideration is fixed at Rs. 105 lakhs; and

that an advance of Rs. 41 lakhs was paid by the bank.

6. The learned Senior Counsel pointing to the agreement for sale entered into between the parties, would submit that out of Rs. 105 lakhs, Rs. 41

lakhs was paid as advance, and the rest of the amount namely Rs. 64 lakhs, was to be paid by the appellant bank to Kothari Orient Finance

Limited; that originally they could not; that thereafter, no objection certificate from the Income Tax Department was also sought for and issued on

18.4.2000; that it was Kothari Orient Finance Limited which came forward with another letter dated 30.10.2000, asking for the adjustment of the

balance of Rs. 64 lakhs which amount it owed to the appellant; that the same was agreed pursuant to which on 6.11.2000, the possession of the

property was handed over to the bank for adjustment of the loan amount towards the balance of sale consideration; that all the documents

pertaining to the property were also handed over on the very day when possession was delivered in respect of which a letter was also given by

Kothari Orient Finance Limited to the appellant; that the petition for winding up has been filed only on 2.7.2001; that it would be quite clear that in

the instant case, there was no need for the shareholders of the company to pass any resolution; and that the resolution made by the Board of

Directors would be sufficient for the parties.

7. The learned Senior Counsel taking the Court to Section 293 of the Companies Act, would point out that a resolution by the shareholders of the

company is necessary in a case where the whole or substantial assets of the company were to be transferred; that in the instant case only a meagre

part was to be transferred, and under the circumstances, the contention put forth by the other side before the learned Single Judge that the

resolution of the company was not made was erroneous.

8. Pointing to Section 431 of the Companies Act, the learned Senior Counsel would submit that in the instant case, the sale agreement was entered

into on 17.2.2000 itself; that the company petition was filed on 2.7.2001, and thus the agreement was entered into one year and four months

before the presentation of the winding up proceedings as contemplated u/s 441 of the Companies Act; that under such circumstances, at no stretch

of imagination, it could be called as a fraudulent transfer; that even the learned Single Judge has not determined a question as to whether there was

any collusion or not; but has raised the question as to whether the transaction was a fraudulent preference or not; that in the instant case, all would

clearly indicate that there was no fraudulent preference at all; and that the learned Single Judge has erred in coming to the conclusion that it was a

fraudulent preference.

9. Added further the learned Senior Counsel that the appellant had no knowledge about the financial crisis or crunch of Kothari Orient Finance

Limited at the relevant time; that apart from this, so long as it is not a fraudulent preference, it cannot be stated that it was intended to defeat the

interest of the depositors; that in the case on hand, it cannot in any way affect the interest of the depositors since the company is having all assets

both movable and immovable which were very well available; that under the circumstances, it cannot be termed as fraudulent preference, and

hence the order of the learned Single Judge has got to be set aside and a direction be issued for registration of the sale deed.

10. Contrary to the above contentions, it is contended by the learned Senior Counsel for the second respondent that in the instant case, Kothari

Orient Finance Limited actually availed loan from the appellant bank; that as on 31.3.1999 the balance was actually Rs. 60,55,055/-; that apart

from that, the appellant bank should have gone into the auditor''s report and financial situation; that under the circumstances, the appellant cannot

be allowed to state that they did not know about the financial crunch under which it was put; that in the case on hand, the agreement was entered

into on 17.2.2000; that as per the agreement, the sale consideration was fixed at Rs. 105 lakhs; that advance is also shown as Rs. 41 lakhs; that

the agreement would clearly indicate that the possession and documents were to be handed over only at the time of execution of the sale deed; but

in the instant case, no sale deed was executed at all; that it is pertinent to point out that the bank was actually in possession of the property already,

and therefore it was only a creation of records; and that once it was clearly stipulated that handing over of documents and possession should take

place at the time of execution of the sale deed, there was no need for the management of the company to hand over either the possession or the

documents or give a letter therefore on 6.11.2000.

11. Added further the learned Senior Counsel pointing to Section 54 of the Transfer of Property Act, that in a given case like this, entering into an

agreement for sale will not create any right in favour of the appellant; and that the agreement for sale available in the hands of the appellant would

not clothe or create any right on the appellant. The learned Senior Counsel would further add that it is the only immovable property available in the

hands of Kothari Orient Finance Limited and all others are liquid assets; that the entire balance as on 31.3.1999 is Rs. 60,55,055/-; that Kothari

Orient Finance Limited was not only liable to meet the demands of the creditors who have made deposits, but also other banks such as State Bank

of India, Small Industrial Development Bank, Bank of Madura and other Banks and they are liable to make payment in crores; that if the appellant

bank is allowed to snatch away the property pursuant to the agreement which was collusive and fraudulent preference, the interest of the

depositors and banks would be defeated; that it would be against the public interest; that in appraisement of the above circumstances and legal

position, the learned Single Judge has made the order, and hence it has got to be sustained.

12. The Court paid its anxious consideration on the submissions made and also looked into the materials and in particular the order under

challenge.

13. As could be seen above, the case of the appellant was that Kothari Orient Finance Limited, the company under winding up, owed Rs.

60,55,055/- to the appellant as on 31.3.1999; that pursuant to a board resolution made on 31.3.1999, they sent a letter on 2.2.2000 expressing

its willingness to sell the property in question and entered into an agreement on 17.2.2000 whereby the consideration for sale was fixed at Rs. 105

lakhs; that an advance of Rs. 41 lakhs was paid by the bank; that after obtaining the no objection certificate from the Income Tax Department, a

letter has also emanated from the winding up company that the balance could be adjusted in the sale consideration and also handed over

possession and also the documents of title on 6.11.2000; that the contract of sale was partly performed; that it was also nearly about one year and

four months prior to the winding up proceedings and under the circumstances, the Administrator should be compelled to execute a sale deed. The

counter plea put forth by the Administrator was that the agreement itself was collusive and a fraudulent preference and was violative of the

provisions of the Companies Act. On consideration of the factual and legal position and the contentions put forth on either side, this Court is afraid

whether it can order for execution of the sale deed as asked for by the appellant.

14. The appellant was a bank from whom the company under winding up availed credit facilities and owed a sum of Rs. 60,55,055/- as on

31.3.1999, and hence as a responsible banking institution, the appellant cannot be allowed to state that it had no idea about the financial crisis of

the company under winding up since the winding up petition has arisen in the year 2001. The entire case of the appellant rests on the agreement

dated 17.2.2000, which was executed by the Director of Kothari Orient Finance Limited on the one side and the appellant bank on the other

whereby consideration was fixed at Rs. 105 lakhs, and a letter dated 6.11.2000, on which date the possession of the property was handed over

along with the documents of title. At this juncture it would be more apt and appropriate to look into the alleged agreement for sale. Clauses 1 and

6 of the alleged agreement for sale read as follows:

1. That the PURCHASER has paid a sum of Rs. 41 lakhs (Rupees forty one lakhs only) vide pay order No. 177674, dated 17th February 2000

drawn on The United Western Bank Ltd., Broadway Branch, to the VENDOR as and by way of advance towards sale consideration on signing

of this Agreement and the balance of the purchase money amounting to Rs. 64 lakhs (Rupees sixty four lakhs only) shall be paid at the time of

completion of the transaction.

...

6. The VENDOR has further agreed to produce necessary documents, title deeds, Resolutions as required by the Companies Act 1956 to prove

its clear, marketable title and its powers to execute Sale Deed in respect of Schedule property more fully described hereunder to the

PURCHASER to enable them to get necessary legal opinion to prepare the Sale Deed.

15. From the above, it is quite clear that the purchaser has paid a sum of Rs. 41 lakhs, and Rs. 64 lakhs shall be paid at the time of completion of

transaction. The learned Senior Counsel pointing to these two clauses, would submit that it was originally agreed that the balance of consideration

of Rs. 64 lakhs excepting the advance of Rs. 41 lakhs, was to be paid at the time of completion of the transaction. On the contrary, it was averred

in paragraph 4 of the application; ""A sum of Rs. 41 lakhs was paid by the Applicant as advance at the time of entering into the agreement. The

balance was entirely settled out of the amounts owed by the company to the Applicant."" Nowhere it was stated in the application that the balance

of Rs. 64 lakhs was liable to be paid at the time of execution of the sale deed. Thus the contention put forth by the appellant''s side that after the

agreement was entered into, there was a letter emanated from the company on 30.10.2000 seeking adjustment of the liabilities to the balance of

sale consideration.

16. Now at this juncture, it is pertinent to point out that even according to the appellant, the company under winding up owed a sum of Rs.

60,55,055/- as on 31.3.1999. The agreement was entered into on 17.2.2000. In such circumstances, after getting an advance of Rs. 41 lakhs, the

liabilities owed by the winding up company could have been adjusted with the balance of consideration at that time itself. There was no need for

making such a clause in the agreement as if the balance of consideration of Rs. 64 lakhs was liable to be paid by the appellant to Kothari Orient

Finance Limited, company under winding up, who was actually under financial crisis. The learned Senior Counsel for the appellant brought to the

notice of the Court that even this Rs. 41 lakhs of advance had not gone to the company, and out of this amount, Rs. 25 lakhs the major part, had

actually gone to the Directors and not to the Company.

17. The contention put forth by the learned Senior Counsel for the appellant that it is not a case where the resolution of the company was

necessary; but, the board resolution which was made on 31.3.1999 for sale of the property was sufficient cannot be countenanced in view of the

settled legal position. Section 293(1) of the Companies Act speaking of the restrictions on powers of Board reads thus:

293.(1) The Board of directors of a public company, or of a private company which is a subsidiary of a public company, shall not, except with the

consent of such public company or subsidiary in general meeting,:

(a) sell, lease or otherwise dispose of the whole, or substantially the whole, of the undertaking of the company, or where the company owns more

than one undertaking, of the whole, or substantially the whole, of any such undertaking;

18. The very reading of the above provision would clearly place a restriction on the powers of the Board that the Board of Directors of the public

company should not sell, lease or otherwise dispose of the whole, or substantially the whole, of the undertaking of the company, or where the

company owns more than one undertaking, of the whole, or substantially the whole, of any such undertaking without the consent of the public

company. In the instant case, it is an admitted position that there was no resolution made by the company. The Board of Directors of the winding

up company had made a resolution on 31.3.1999 authorising one of the directors to negotiate for sale of the property. The learned Senior Counsel

for the second respondent brought to the notice of the Court that this was the only immovable asset in the hands of the winding up company and all

others are only liquid assets. When a question was raised to the appellant bank, the appellant bank on the contrary could not assert whether the

company under winding up had got any other immovable property at all. In such circumstances, the contention put forth by the learned Senior

Counsel for the appellant that the property which is covered under the agreement for sale is neither whole nor substantial asset cannot be

countenanced. If it was the only immovable asset available in the hands of the winding up company which was under financial crisis, and it was to

meet the demand of number of banks referred to above and also thousands of creditors, it would not be just or worthwhile to allow the sale

transaction in question.

19. Apart from the above, what was all available in the hands of the appellant is only an agreement for sale dated 17.2.2000, and this agreement

by itself will not clothe the right. Needless to say that an agreement for sale does not by itself create any interest in or charge on the immovable

property covered under the agreement for sale. It was also further contended by the appellant''s side that there was a part performance of the

agreement u/s 53-A of the Transfer of Property Act, and under such circumstances, it became necessary to issue a direction to the Administrator

to execute a sale deed. This contention cannot be countenanced in view of the agreement entered into between the parties and also the conduct of

the parties to the agreement. Clauses 8 and 10 of the agreement entered into on 17.2.2000 read as follows:

8. The VENDOR has agreed to deliver all original title deeds and vacant possession of the schedule mentioned property on the date of registration

of Sale Deed to the PURCHASER.

...

10. If the PURCHASER fails to complete the purchase of the said property within the time aforesaid, the VENDOR will have the option to

exercise either to refund to the PURCHASER, the advance of Rs. 41 lakhs (Rupees forty one lakhs only) without any interest, or exercise its right

to enforce specific performance of the agreement by instituting legal proceedings.

20. The very reading of the above clauses would clearly indicate that the Director of the company under winding up has agreed to deliver the

original title deeds and also the vacant possession of the property only at the time of the registration of the sale deed to the purchaser. In the instant

case, it is contended that on 6.11.2000, the possession of the property was handed over with all the documents of title. Thus it would clearly

indicate the intention of the management of the company under winding up to make an unjust and preferential treatment in favour of the appellant.

21. Finally, the learned Senior Counsel for the appellant placing reliance on Section 531 of the Companies Act, would submit that it cannot be

termed as a fraudulent transfer since the petition for winding up was filed six months after the transaction in question was entered into between the

parties; that the winding up proceedings would commence at the time of presentation of the petition as per Section 441 of the Companies Act; that

in the instant case, CP No. 179 of 2001 for winding up was presented on 2.7.2001; and that the agreement was entered into even as early as

17.2.2000 nearly about one year and four months earlier. Placing reliance on Section 531 of the Companies Act, it is further contended by the

appellant"s side that the transaction cannot be termed as a fraudulent preference since it was done six months prior to the presentation of the

petition for winding up, and under the circumstances it cannot be stated that the transaction was invalid because it was a fraudulent preference. This

contention cannot be countenanced. Section 531(1) of the Companies Act speaking of the fraudulent preference reads as follows:

531. (1) Any transfer of property, movable or immovable, delivery of goods, by or against a company within six months before the

commencement of its winding up which, had it been made, taken or done by or against an individual within three months before the presentation of

an insolvency petition on which he is adjudged insolvent, would be deemed in his insolvency a fraudulent preference, shall in the event of the

company being wound up, be deemed a fraudulent preference of its creditors and be invalid accordingly:

22. From the above provision, it is clear that if any transfer of property is effected six months prior to the presentation of the winding up

proceedings, it cannot be termed as a fraudulent transfer. In the instant case, what was available in the hands of the appellant was only an

agreement for sale dated 17.2.2000, as referred to above. u/s 54 of the Transfer of Property Act, it would not clothe him any right or interest over

the said property. So long as registration of sale deed is not done, it cannot be said to be a transfer of property in the eye of law. Merely because

the possession and the documents were handed over, it cannot also clothe him any right to have the benefit u/s 531 of the Companies Act. Had it

been true that the handing over of documents and possession was made on 6.11.2000, and a letter therefore was also made that day itself as

contended by the appellant''s side, the long and unexplained delay in filing the company petition could not have occasioned. Admittedly, the

company petition was filed on 2.7.2001. This would be indicative of the fact that the said letter has been created pending the proceedings and also

in order to avoid the transaction being called as a fraudulent preference. Thus, all the above facts and circumstances and also the conduct of the

parties would clearly indicate that in appraisement of the financial crisis, a resolution came to be passed by the board of directors authorising one of

the directors who entered into an agreement for sale of the only one immovable property in favour of the appellant bank which, in the considered

opinion of the Court, cannot but be termed as a fraudulent preference, and that too when there are number of banks and depositors in thousands

to whom the company under winding up owed crores of money. This Court is unable to notice any infirmity either factually or legally, and hence the

order of the learned Single Judge has got to be sustained.

23. In the result, this original side appeal is dismissed confirming the order of the learned Single Judge. The parties are directed to bear their costs.