THE HIGH COURT OF SINDH AT KARACHI

J.C.M. No.33 of 1998

DATE | ORDER WITH SIGNATURE OF JUDGE

M/s. Soneri Bank Limited
& others ..... **Petitioners**

Versus

Prince Glasses Work Private Limited ..... **Respondent**

1. For hearing of CMA No.206/2009
2. For hearing of O/As Reference dated 01.11.2001.

Mr. Mansoor-ul-Arfin, Advocate for the Petitioner.
Mr. Abid Naseem, Advocate for Applicant, Askari Leasing Limited.
Mr. Dr. Ch. Muhammad Waseem Iqbal, Official Assignee.
Mr. Shahzaib, Advocate.

Dates of Hearing : 17.10.2018 & 07.11.2018

ORDER

Muhammad Junaid Ghaffar, J. This matter is coming up for hearing of CMA No.206 of 2009 and for Official Assignee's Reference dated 01.11.2001. The case of the applicant i.e. Askari Leasing Limited through this application is that the applicant is a Secured Creditor, whereas, through Reference dated 1.11.2001, the learned Official Assignee also supports their case.

Learned Counsel for the petitioner has opposed the application as well Reference and submits that the order for liquidation was passed on 10.03.1999, whereafter, vide order dated 16.4.1999 claims were called as per Rules and the learned Official Assignee filed his Affidavit under Rule 863 of the Sindh Chief Court Rules, Original Side ("**SCCR**"] on 16.10.1999, whereby this very claim of the applicant was determined as "Unsecured Creditor". He submits that thereafter, vide order dated 02.12.1999, the said Affidavit of the learned Official Assignee was approved with the

consent of the parties. According to learned Counsel, neither any objection was filed, nor was the said order challenged in appeal as provided under Rule 142 of the Companies (Court) Rules 1997, hence, it attained finality. He further submits that thereafter, various properties have been sold and possession has been handed over, whereas, sale proceeds have been distributed amongst the Secured Creditors pro rata and therefore, no case is made out on behalf of applicant at such a belated stage when the order has attained finality. He has also read out Rule 858 to 863 of SCCR and submits that every procedure has been followed before passing of order dated 2.12.1999, and therefore the application as well Reference are liable to be dismissed. In support of his contention, he has relied upon the case reported as ***Mirza Munawwar Ahmed v Official Liquidator*** **PLD 1980 Lahore 86** and ***Pakistan Industrial Credit and Investment Corporation Limited v Ajma Corporation Limited*** (**2014 CLD 1097***)*.

On the other hand, learned Counsel for the applicant submits that claim in this case is a secured claim on account of lease facility provided to the Company under liquidation, whereas, in Suit No.03 of 1998, after permission of this Court vide order dated 10.4.2000, the applicant has obtained Judgment and Decree on 20.01.2001, therefore, the applicant is fully entitled to be declared as a Secured Creditor. According to him the assets sold by the Official Assignee also included the assets leased by the Applicant.

The learned Official Assignee submits that Affidavit of the then Official Assignee was placed on the record after carrying out a proper exercise as per Rules and at the relevant time, when the Applicant was termed as and Unsecured Creditor, there was no objection and the said Affidavit was approved by the Court. Therefore, either the

said order ought to have been appealed, or a review should have been sought. He further submits that claim of the applicant is only in respect of rents against leased assets, whereas, the properties including machinery in question was sold and this fact was in their knowledge, therefore, they cannot again come to the Court to overturn an earlier order, whereby, they have been declared and approved and Unsecured Creditors. He further submits that in terms of Section 404 of the Companies Ordinance, 1984, the Rules for Insolvency are applicable in respect of secured and unsecured creditors, whereas, pursuant to Section 48 thereof, vide Second Schedule, a complete procedure has been provided, which in this case was applied and an Affidavit was filed by the then learned Official Assignee, whereby, the Applicant has been declared as an Unsecured Creditor. He finally submits that though, if some mistake is committed by the office of Official Assignee, Reference could be made; however, in this matter, the subsequent Reference was perhaps not justified. He has also relied upon the judgment in the case of ***PICIC (Supra)***, and submits the conduct of the Applicant is of waiver, as they never objected to the Sale of the assets at the relevant time.

I have heard both the learned Counsel as well as learned Official Assignee and perused the record. There is no dispute that after passing of the liquidation order, claims were called and all Creditors, be it Secured or Unsecured, approached the Official Liquidator, filed their claims and after scrutinizing all such claims, the then learned Official Assignee filed his Affidavit on 16.10.1999 and in that Affidavit, claim of the present applicant was held to be of an Unsecured claim at serial No.49 of the table of total claims filed before him. Such claim was though admitted to the extent of amount

in question, but it is not in dispute that at the relevant time it was recognized as an unsecured claim. This Affidavit was approved vide order dated 02.12.1999 without any objection, rather by consent of all present. Neither any review was sought nor the said order was appealed, and subsequently, from nowhere, Reference dated 01.11.2001 was placed before the Court, wherein the same learned Official Assignee, submitted that the Applicant took up the matter with his office and agitated that they had leased out certain equipment's and machineries and that their Suit also stands decreed on 20.01.2001, therefore, they are to be treated as secured creditors. The then Official Assignee, through listed Reference has requested the Court that the Applicant be treated as a Secured Creditor. Counsel for Applicant at this stage was confronted as to how this Reference of the then learned Official Assignee was placed before the Court, to which he had no answer. Similarly, learned Official Assignee was also confronted as to how this Reference was filed, to which his response was that in the record, nothing is available, except copy of this Reference. This is very strange as well as surprising for the Court, that as to how this Reference has been placed before the Court. Once an order has been passed by the Court on the Affidavit of the then learned Official Assignee, how come, thereafter, he has requested the Court to accept his subsequent stance, in absence of any directions to do so; or at least in absence of any review application on behalf of the Applicant. The only inference the Court can draw is, that perhaps the Applicant approached the learned Official Assignee verbally and agitated its claim; which has then been forwarded to the Court for orders. It is quite surprising that neither any application was filed before the Court nor any order was sought so as to seeking directions to the learned Official Assignee for considering the stance once again and

learned Official Assignee by himself has taken up the matter through this Reference. He has not even called the petitioner and other secured creditors who after passing of order dated 2.12.1999, had accrued valuable rights viz.a.viz unsecured creditors. This is not at all appropriate, nor can be appreciated by the Court. The office and conduct of the Official Assignee is a matter of trust between the Court and the parties. And is not that I-do-what-feels-right-when-it-feels-right. Since the said Official Assignee, is no more in office and not before the Court at this moment of time, therefore, this Court has reluctantly restrained itself from any further observations. However, the office of the learned Official Assignee is directed that in future all such care must be taken, and his office as well as the staff assigned to him shall be responsible for such conduct, as once a Reference has already been approved, office of the learned Official Assignee becomes functions officio and can only entertain any claim after seeking leave of the Court. This conduct on the part of the then Official Assignee has not only caused delay in this matter, but is an attempt to disturb the proceedings of the Court and the finality attached to the orders of the Court.

Coming to the merits, it is not in dispute that the applicant was well aware of the fact that their claim has been held to be as an unsecured claim through Affidavit of the Official Assignee, and after passing of order dated 02.12.1999, they never challenged the said order, nor sought any review. Instead the Applicant kept on proceeding with the recovery Suit, and also sought permission of the Court under Section 316 of the Companies Ordinance, 1984, to proceed in that matter, which was granted vide order dated 10.4.2000. However, Court while passing such order specifically observed, that "…..*subject to the condition that execution will not be carried*

out without prior permission of the Official Liquidator. The Official Liquidator, however, will not take cognizance of the claim which has been filed with him by the applicant." This condition was perhaps ordered for the reason that Court was conscious, that their claim has already been declared as and unsecured claim; hence, must not be entertained by the Official Assignee; however, with regret once again it is observed, that despite such clear orders, thereafter, once the decree has been passed in the Banking Suit, the Official Assignee, entertained their claim. Even, at the time of filing CMA 823/2000, while seeking permission to pursue the Banking Suit, no such stance was taken, nor the Court was approached with any such Application. It further appears that once again the Official Assignee after auction of the properties in question, filed his Reference dated 4.4.2000, which allowed on 10.4.2000, whereby, he sought permission to make payments to the secured creditors, which also included Askari Bank Limited, of which the Applicant is the sister concern or the affiliate company. Hence, it is a matter of record that all along it was within the knowledge of the Applicant that they have been declared and approved as an unsecured creditor, and after passing of a decree in their Banking Suit, they have approached the office of the Official Assignee. It is also not on the record that as to how applicant approached the learned Official Assignee and persuaded him to place his above Reference before the Court, whereby earlier stance and reasoning has been changed. It is to be appreciated that firstly in the earlier round, Official Assignee had filed his personal Affidavit duly sworn on Oath in terms of Rule 863 of SCCR, whereas, subsequently, he has filed a Reference on his own, and has changed his earlier stance which through an Affidavit duly sworn on oath. This is again not supportive to the case of the applicant in any manner.

It is also matter of record that Applicant's claim was to the effect (at least until filing of Reference dated 1.11.2001) that it was that of an unsecured creditor, whereas, now their case is that since there was a lease agreement and the machinery and equipment, which was sold in liquidation, was owned / leased by the applicant, therefore, it was a Secured claim. Now for the present purposes, this Court need not delve upon this issue, as if otherwise for a moment it is assumed that Applicant was a secured creditor, even then the claim as of today is not to be entertained. It is a matter of record and fact that the proceedings before the Court are to be governed in terms of the Companies Ordinance, 1984, as rightly pointed out by the learned Official Assignee and the present dispute is to be more specifically dealt with in accordance with Section 404 ibid, which reads as under;

> 404. Application of insolvency rules in winding up of insolvent companies.- In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent; and all persons who in any such case would be entitled to prove for and receive dividend out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section.

To my understanding for such purposes, it will be the Insolvency (Karachi Division) Act, 1909, which will apply and by virtue of Section 48 of the said Act, in Second Schedule, proper rules and procedure has been provided for the claims of secured as well unsecured creditors. It may be noted that these rules are analogous to the provisions of section 47 of the Provincial Insolvency Act, 1920, which applies to the exclusion of Karachi Division. Rule 1 to 8 provide the mode and manner of proving the claim by the creditor, whereas, Rule 9 pertains to a situation where the security has been realized by the secured creditor, who is then required to prove its case for the balance amount due. Rule 10 relates to proof where

security is surrendered and sates that if a secured creditor surrenders his security to the Official Assignee for the general benefit of the creditors, he may prove his whole debt. This provision(s) being identical in nature as that of s.47 of the 1920, Act, came for discussion before a learned Single Judge of this Court in the case of ***PICIC (Supra)***, and the Court came to the conclusion that this situation is to be dealt with on the basis of special provisions applicable thereto, and not on the basis of general concept of a secured creditor or a mortgagee. The secured creditor no doubt has a preferential treatment and right, but once such right is surrendered (as in this case), then the position of that secured creditor is no better and is just like any other ordinary creditor. As in this case his positon is altered, and then the option earlier available nor more remains available. More specially in this case when the claims of secured creditors have not been even settled fully. The relevant finding of the learned Jude is as under at Para 9 and 16;

> 10…….As I understand it, the foregoing passage encapsulates the submissions made by learned counsel as to the petitioner's position in law with respect to the property, on account of its interest therein as mortgagee. As James, LJ made clear, the mortgagee can proceed in relation to his interest unaffected by the factum of the winding up. This remains equally true even when the company is in liquidation on account of insolvency. This result obtains by reason of section 404 of the Companies Ordinance read with section 28(6) of the 1920 Act. Subsection (2) of the latter section vests "the whole of the property of the insolvent in the Court or in a receiver", but subsection (6) makes clear that: "Nothing in this section shall affect the power of any secured creditor to realize or otherwise deal with his security, in the same manner as he would have been entitled to realize or deal with it if this section had not been passed." There can obviously be no cavil with the foregoing. However, with respect, this does not address the issue at hand. It is not the existence of the security or the interest that it created in the property that is in question. Rather, the question is whether that security has been relinquished? This question must be addressed not on the basis of the general rules that apply to secured creditors such as mortgagees, but rather with reference to the special provisions that apply to insolvents and in particular, to an insolvent company that is in the process of being wound up. As section 404 of the Companies Ordinance read with section 47 of the 1920 Act make clear, the secured creditor is free to relinquish his security. He may choose not to do so. But if, and once, he does then his position alters. The option that was earlier available to him (i.e., to realize his security by standing outside the winding up) is no longer at hand. His

> position is relegated to that of any other creditor who has proved his debt before the official liquidator, in accordance with the relevant provisions.
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> 17……..I need however to address one point noted by the learned Singe Judge. With reference to section 47(3) of the 1920 Act, the learned Single Judge held that there could not be any "implied" surrender of security. (With respect, it seems that the reference should be to subsection (2).) It was further observed as follows: "Any relinquishment or surrender of MCB's rights in the mortgaged property, could only have been effected by a properly executed instrument setting out the clear and unambiguous intent of the bank to relinquish its security". With the utmost respect, I am unable to agree with these observations. They do not, with respect, accord with the position that has been accepted since Moor v. Anglo-Italian Bank (1879) 10 Ch D 681. As explained there, relinquishment in the present context (i.e., by a secured creditor of the security in insolvency/winding up proceedings) is a matter of election and not forfeiture. It is a relinquishment only in this context and not in any other sense as can, for example, happen when a mortgage-debt on a registered mortgage deed has been satisfied. Whether the secured creditor has elected to relinquish his security is a question of fact, to be determined in the circumstances of each case. In my view, the facts referred to in Moor v. Anglo-Italian Bank, if found to exist, ought to be regarded as raising a rebuttable presumption that the secured creditor has relinquished his security. (Of course, the election can be established on the basis of other facts as well, and those listed by Jessel, MR ought to be regarded only as illustrative. However, they do reflect the situation usually found.) The presumption is rebuttable in that it may be that other facts are found or shown to exist such that, in the totality of the circumstances, the only conclusion possible is that the security was not relinquished. The decision of the Lahore High Court must therefore be regarded as turning on its own facts, which facts in effect established that the presumption had been displaced. That however, is not the situation at hand. No facts to the contrary have been shown. The facts and circumstances of the present case in my view establish that the petitioner elected to relinquish the security.

The facts of the issue in hand very clearly establish that the act and conduct of the Applicant was nothing but surrendering and relinquishing its claim, if any, as a secured creditor, to that of an unsecured creditor. It amounts to acquiescence, waiver or with whatever name it is called. All along the Applicant never came forward to be treated as a Secured Creditor.

While concluding and as a passing remark, it may further be noted that if assets in question were leased by the Applicant, then proper recourse was that on default, first they ought to have been repossessed. This has not been done, whereas, presumption is that those leased assets were handed over to the Official Assignee. In fact,

the Applicant has consented to all proceedings taken in this liquidation matter, including sale of all assets which were purportedly leased by the applicant. This consenting attitude of the applicant by itself falls within surrender and relinquishment of its claim as a Secured Creditor as already stated hereinabove. Lastly, now it is only a claim of rental(s), which can be pursued as an unsecured creditor, which will be decided in accordance with applicable law and rules.

In view of the fact as discussed hereinabove, it appears that no case is made out on behalf of applicant, therefore, Official Assignee's Reference dated 01.11.2001 is dismissed, whereas, listed application being CMA No.206 of 2009 is also dismissed.

J U D G E

Faizan/P.A.