

Before R. N. Mittal, J.

HARYANA FINANCIAL CORPORATION,—*Petitioner.*

versus

DEPRO FOODS LTD. (in liquidation),—*Respondent.*

Company Petition No. 35 of 1981.

December 3, 1981.

Companies Act (1 of 1956)—Section 125—State Financial Corporations Act (LXIII of 1951)—Sections 31(1), 32(10) and 46-B—Proceedings for the winding-up of a company initiated—Application by the Financial Corporation under section 31(1) for the recovery of loan from the company made during the pendency of such proceedings—Charge created on the property of the company not registered under section 125—Financial Corporation—Whether a preferential creditor—Prescribed particulars of the charge and the documents filed with the Registrar within time—However charge not registered by Registrar—Provisions of section 125—Whether deemed to be complied with—Provisions of section 125—Whether in conflict with section 32(10) of the Financial Corporations Act—Section 46-B of the Financial Corporations Act—Whether attracted.

Held, that if before filing an application under sub-section (1) of section 31 of the State Financial Corporations Act, 1951 the proceedings for liquidation in respect of a company have been initiated, the Financial Corporation will not have any preference over the other creditors of the company unless such preference is conferred by some other law. The words 'not conferred on it by any other law' in sub-section (10) of section 32 of the Act clearly lay down that if, according to any other law, preference should be given to the Financial Corporation over the other creditors, in that eventually the same should be given to it. It is a settled law that a chargeholder has a preference over other creditors. However, an exception has been made in that regard in the case of a company by sub-section (1) of section 125 of the Companies Act wherein it is provided that a charge is void against a liquidator unless particulars of the charge and the instrument creating it or its copy are filed with the Registrar for registration within thirty days of the creation of the charge. For all secured creditors, the compliance with section 125 of the Companies Act is necessary and in case they have not complied with the provisions of the said section, they cannot be treated as secured creditors of the company. Therefore, in view of section 32(10), the Financial Corporation can get preference over other creditors of the company if it has complied with the provisions of section 125 of the Companies Act and not otherwise. It is also

clear from the above provisions that section 32(10) saves section 125 of the Companies Act in case the proceedings for liquidation in respect of the company have commenced before filing of the application under section 31(1) of the Act. (Paras 6 & 9).

Held, that it is evident from a perusal of section 125(1) of the Companies Act that the filing of the particulars of the charge together with the instrument or a copy thereof within thirty days after the date of creation of the charge is necessary and not registration of the charge with the Registrar. The reason is that the registration of the charge is within the jurisdiction of the Registrar and in case he makes delay in doing so, the charge-holder cannot be held responsible. The Registrar has also been given power to allow the charge-holder to submit the particulars etc. within seven days after the expiry of the above-said period if he satisfies him that he could not file the same for a sufficient cause within the prescribed period. After the particulars etc. have been filed, the responsibility of registration of the charge shifts on the Registrar. Thus, the charge-holder is absolved of his duty as soon as he filed particulars of the charge etc. with the Registrar.

(Para 7).

Held, that section 46-B of the Financial Corporations Act, 1951 *inter alia* provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. This section will apply in those cases where the provisions of any other Act are in conflict with the provisions of the Financial Corporations Act. In case the latter Act adopts any of the provisions of any other Act, it cannot be said that that provision will be hit by section 46-B. Thus, it cannot be said that the provisions of section 125 of the Companies Act are in conflict with section 32(10) of the Financial Corporation Act and, therefore, section 46-B of the latter is not attracted.

(Para 8).

Application under Rule 9 of the Companies (Court) Rules 1959 read with Section 446 of the Companies Act, 1956 and Section 151 of the Code of Civil Procedure praying that :—

- (i) the plaintiff Corporation may be directed to move the Court to implead the official Liquidator of the company in the said suits as a respondent.
- (ii) notice of the suits may be formally given to the Official Liquidator and copies of the plaints with all the enclosures thereto, on which the suits are based, may be ordered to be supplied to him ;

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(iii) *the suits may be reopened to enable the official Liquidator to make his submission as to whether the plaintiff Corporation is to be treated as a secured creditor and, if so, to what extent, before the claim of the plaintiff for sale of the properties of the company is entertained.*

K. L. Kapur, Advocate, for the Petitioner.

Krishan Kumar, Deputy Official Liquidator, for the Respondent.

JUDGMENT

Rajendra Nath Mittal, J.

(1) This judgement will dispose of C.P. Nos. 34 and 35 of 1981 which contain similar questions of law and fact. The facts in the judgment are being given from C.P. No. 35 of 1981.

(2) The petitioner is a Corporation and its business includes grant of loans to the industrial concerns on the security of movable and immovable properties. The respondent industrial concern was carrying on the business of food processing. On the application of the respondent, the petitioner gave three loans of Rs. 12 lakhs (loan account No. I), Rs. 4.5 lakhs (loan account No. II) and Rs. 3 lakhs (loan account No. III) on 9th September, 1971, 9th March, 1973, and 12th November, 1974, respectively, on the basis of registered mortgage-deeds of even dates. The amount was repayable by the respondent in instalments with interest mentioned therein. It is alleged that the respondent made defaults in payment of the instalments of principal and of interest in loans account Nos. I and II, and did not pay any amount either of principal or of interest in loan account No. III. On account of the defaults committed by it, all the three loans were recalled and it was called upon by the petitioner—*vide* notice dated 29th July, 1976, to repay the sum of Rs. 23,62,232 then due by the 15th August, 1976, but it did not make any payment. It is alleged that on the date of the application, an amount of Rs. 30,07,621.82 was due with further interest on Rs. 17,37,016.24 at the rate of 9.25 per cent per annum from 1st September, 1978, in loan account No. I, on Rs. 7,98,578.55 at the rate of 10.25 per cent per annum from 1st September, 1978, in loan account No. II and on Rs. 4,72,027.07 at the rate of Rs. 13.5 per cent per annum from 1st May, 1978, in loan account

No. III, together with incidental and miscellaneous expenses that might be debited to the loan account of the respondent in accordance with the terms of the mortgage-deeds. Consequently, the petitioner filed an application under section 31 of the State Financial Corporation Act, 1951 (hereinafter referred to as the Act), for the recovery of the aforesaid amounts and for sale of immovable property, the plant and the machinery, as detailed in Annexure 'A' attached to the plaint, in the Court of the Additional District Judge, Sonapat, on 18th September, 1978.

(3) The application was contested by the respondents who *inter alia* pleaded that the petition was not signed and verified by a duly authorised person, that the mortgage deeds were executed by the respondent under undue influence, coercion and pressure and that the provisions of the Act were against public policy. On the pleas of the parties, various issues were framed but it is not necessary to reproduce them as the Official Liquidator has not pressed any of them.

(4) C.P. No. 234 of 1977 for winding up the respondent-company was filed in this Court. In view of that petition, the present petitions were transferred to this Court,—*vide* order dated 26th February, 1981. In C.P. No. 234 of 1977, it is relevant to point out that the company was ordered to be wound up,—*vide* order, dated 21st August, 1980. Consequently, the Official Liquidator is defending the present petitions.

(5) The first question that has been raised by the Official Liquidator, is, where proceedings for liquidation in respect of a company have commenced before an application under sub-section (1) of section 31 of the Act is made, whether a Financial Corporation has any preference over the creditors of the Company in case its charge is not registered under section 125 of the Companies Act. The learned counsel for the petitioner has vehemently urged that even if the charge is not registered under section 125 of the Companies Act, the Corporation has got preference over other creditors in such an eventuality.

(6) I have given due consideration to the argument of the learned counsel but regret my inability to accept it. Sub-section (10) of

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section 32 of the Act deals with the matter and it reads as follows:—

“Where proceedings for liquidation in respect of an industrial concern have commenced before an application is made under sub-section (1) of section 31, nothing in this section shall be construed as giving to the Financial Corporation any preference over the other creditors of the industrial concern *not conferred on it by any other law.*”

From a bare reading of the sub-section, it is clear that if before filing an application under sub-section (1) of section 31 of the Act, the proceedings for liquidation in respect of a company have been initiated, the Financial Corporation will not have any preference over the other creditors of the company unless such preference is conferred by some other law. The words ‘not conferred on it by any other law’ in the above section are important. These words clearly lay down that if, according to any other law, a preference should be given to the Financial Corporation over the other creditors, in that eventuality the same should be given to it. It is a settled law that a charge-holder has a preference over other creditors. However, an exception has been made in that regard in the case of a company by sub-section (1) of section 125 of the Companies Act wherein it is provided that a charge is void against a liquidator unless particulars of the charge and the instrument creating it or its copy are filed with the Registrar for registration within thirty days of the creation of the charge.

(7) Now, it is to be seen whether the validity of the charge depends on actual registration of the charge by the Registrar. In order to determine the question it is beneficial to read section 125(1) of the Companies Act, which is as follows:—

“125. (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 evidences, 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 seven days next following the expiry of the said period of thirty days if the company satisfies the Registrar that it had sufficient cause for not filing the particulars and instrument or copy with that period."

It is evident from a perusal of the section that the filing of the particulars of the charge together with the instrument or a copy thereof within thirty days after the date of creation of the charge, is necessary and not registration of the charge with the Registrar. The reason is that the registration of the charge is within the jurisdiction of the Registrar and in case he makes delay in doing so, the charge-holder cannot be held responsible. The Registrar has also been given power to allow the charge-holder to submit the particulars etc. within seven days after the expiry of the above-said period, if he satisfies him that he could not file the same for a sufficient cause within the prescribed period. After the particulars, etc., have been filed, then the responsibility of registration of the charge shifts on the Registrar. Thus, the charge-holder is absolved of his duty as soon as he files particulars of the charge etc., with the Registrar. In the above view, I am fortified by the observations of a Division Bench in *Benaras Bank Ltd. v. Bank of Bihar Ltd., and others* (1), wherein section 199 of the Companies Act, 1913, which is *pari materia* with section 125 of the Companies Act, 1956, has been interpreted. It is observed by the Bench that what avoids the charge is not back of registration under section 109 but the neglect to send any particulars. The validity of the charge does not depend on the date on which the Registrar chooses to make the necessary entry in the Register. The section is complied with if the particulars of the charge are finally submitted within twenty-one days from the execution of the charge. It has been further held that where this has been done the mere fact that the registration was allowed to stand over for a period of over two years owing to some outstanding dispute about the fees would

(1) AIR (34) 1947 Allahabad 117.

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not destroy security. It may be highlighted that the period of twenty-one days provided in section 109 has been increased to that of thirty days in section 125. I am in respectful agreement with the above observations.

(8) The learned counsel for the petitioner has argued that in view of section 46-B of the Act, the charge of the Financial Corporation shall have preference even if proceedings for liquidation in respect of the company have been started before an application is made under section 31(1) and the particulars of the charge have not been furnished under section 125 of the Companies Act. In order to support his contention, he made a reference to *Kerala Financial Corporation Trivandrum v. C. K. Sivasankera Panicker and others* (2).

(9) I have given due consideration to the argument but regret my inability to accept it. The provisions of section 32(10) of the Act specifically provide that in case the proceedings for liquidation have started before filing an application under section 31(1), the financial Corporation shall have preference over other creditors if it is specifically provided in any other law. For all secured creditors, the compliance with section 125 of the Companies Act is necessary and in case they have not complied with the provisions of the said section, they cannot be treated as secured creditors of the company. Therefore, in view of section 32(10), the Financial Corporation can get preference over other creditors of the Company if it has complied with the provisions of section 125 of the Companies Act and not otherwise. It is also clear from the above provisions that section 32(10) saves section 125 of the Companies Act in case the proceedings for liquidation in respect of the company have commenced before filing of the application under section 31(1) of the Act. Section 46-B *inter alia* provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. This section will apply in those cases where the provisions of any other Act are in conflict with the provisions of the Financial Corporations Act. In case the latter Act adopts any of the provisions of any other Act, it cannot be said that that provision will be hit by section 46-B. Therefore, the learned

counsel cannot derive any benefit from that section in the present case.

(10) *Kerala Financial Corporation's case* (supra), is distinguishable. In that case, the proceedings for recovery of the amount the Act had been decreed and the execution was going on. The proceedings for liquidation against the company were initiated subsequently. Thus, the provisions of section 32(10) were not attracted. In my view, the ratio in that case is not applicable to the facts of the present case.

(11) From the above discussion, it emerges that where liquidation proceedings against a company have commenced before an application under section 31(1) of the Act has been made, the Financial Corporation can claim preference over other creditors in case it has filed the particulars of the charge along with the instrument creating it or its copy with the Registrar for registration within the prescribed period. Actual registration of the charge by the Registrar is not necessary.

(12) The next argument by the Official Liquidator is that the proceedings for liquidation against the company were initiated prior to the filing of the application under section 31(1) of the Act. He urges that the Corporation has not complied with the provisions of section 125 of the Companies Act regarding loan Nos. II and III and, therefore, these charges are void against him. The learned counsel for the petitioner has admitted that the provisions of section 125 were not complied with regarding the second loan but the forms regarding loan No. III he says, were duly filed with the Registrar of Companies and no intimation was received from the Registrar about registration of the charge. According to him, in that situation the third loan will be deemed to have been registered.

(13) I have duly considered the argument of the learned counsel. Regarding the first loan, that is, of Rs. 12 lakhs, it is not disputed that it has been registered. Regarding the second loan, that is, of Rs. 5 lakhs, is again undisputed that the provisions of section 125 of the Companies Act have not been complied with. There is, however, controversy regarding the third loan, that is, of Rs. 3 lakhs. Mr. Parshant Kohli, Deputy Senior Manager, Haryana Financial Corporation, Chandigarh, P.W. 2, has stated that the loan on account No. I was registered with the Registrar of Companies but no other charge

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was registered with him. The Official Liquidator in rebuttal produced Mr, Lalit Mohan, Senior Technical Assistant, Office of the Registrar of Companies, Delhi and Haryana. D.W. 1, who made a similar statement as has been made by Mr, Parshant Kohli, P.W. 2. In cross-examination, he stated that the Registrar did not register the claim of Rs. 3 lakhs in his books. The company filed Form No. 14 regarding the said loan which was defective and a letter to that effect was sent to the company. The form filed by the company is Exhibited P. 17. The form bears the signature of the Managing Director of the Company. The petitioner did not ask the witness to produce the letter pointing out the defects. The petitioner being a mortgagee was duty bound to pursue the matter and to get the defects removed. The nature of defects on account of which the charge could not be registered has not been brought on the record by the petitioner. In the absence of the defects, it cannot be said whether they were of a material nature or not. The counsel for the petitioner has said that the defects were of formal nature and the charge should have been registered with the Registrar. It was the duty of the petitioner to have proved the defects pointed out by the Registrar in the application. In the absence of the defects, it cannot be held as to whether they were of formal nature or not. The fact remains that the Registrar has not accepted the application form submitted by the company for registration of the charge. In that eventuality, it is the petitioner who is to suffer. In the aforesaid situation, it cannot be held that the formalities mentioned in section 125 of the Companies Act regarding loan No. III have been fulfilled.

(14) In view of the aforesaid discussion, the petitioner is entitled to claim charge against the Official Liquidator regarding loan No. 1 and not regarding the other two loans.

(15) Now, I advert to C.P. No. 34 of 1981. The allegation of the petitioner in that case is that on the application of the respondent, it advanced a loan of Rs. 84,000 to it on the terms and conditions mentioned in hypothecation deed dated 26th November, 1974. The amount was repayable by the respondent in instalments with interest mentioned therein. It is alleged that the respondent did not pay instalment of principal and interest and consequently the petitioner recalled the loan. An amount of Rs. 1,33,812.28 with further interest from 15th May, 1979, till realisation at the rate of 10.5 per cent per annum together with such incidental and miscellaneous expenses that might

be debited to the loan account of the respondent in accordance with the terms of the hypothecated deed was due to it. Consequently, it filed an application under Section 31 of the Act for recovery of the aforesaid amounts and for sale of the hypothecated property.

(16) The only argument of the Official Liquidator appearing for the respondent in this case too is that the provisions of section 125 of the Act were not complied with by the petitioner. Mr. B. M. Bharadwaj, Assistant Manager, Haryana Financial Corporation, PW. 1, stated that the charge of the Corporation on the generating set (property hypothecated) had to be registered with the Registrar of the Companies. He went to that office and filed Form No. 8 along with a copy of the hypothecated deed. In view of the circumstance, the counsel for the petitioner asserted that the charge had been registered with the Registrar of Companies. The Official Liquidator produced Mr. Lalit Mohan, Technical Assistant, Office of the Registrar of Companies, Delhi and Haryana, D.W, 1, He stated that the respondent filed before the Registrar of companies form No. 8, dated 26th November, 1974, for Rs. 84,000 under section 125 of the Companies Act, It was examined in the office and was found to be defective. The respondent-company was informed accordingly. No reply was received by the Registrar to that letter and the defects pointed out were also not removed by the company. He further deposed that, therefore, the charge was not registered. The copy of the letter pointing out defects is Exhibit D. 1. Various defects were pointed out in it. One of the defects is that the stamp duty paid on the original agreement be mentioned in the copy under proper signatures; full particulars of the property as mentioned in the schedule be stated in column No. 3 and the date of further modification be stated in column No. 2 of the form. It was the duty of the company to have mentioned the stamp duty paid on the original hypothecation deed, in the copy. If the hypothecation deed was not properly stamped, the Registrar could refuse to register the same. The defect cannot be said to be of a formal nature. In view of the aforesaid circumstance, it is not necessary to deal with the other defects pointed out by the Registrar. The clerk had specifically said that the company was intimated about the defects. It was the duty of the Corporation to get the defects removed and then file the application form. Accordingly, it cannot be said that the provision of section 125 of the Companies Act had been complied with.

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(17) For the aforesaid reasons, the petitioner is not entitled to claim charge against the Official Liquidator regarding the loan of Rs. 84,000.

(18) The learned counsel for the petitioner has not brought to my notice any provision in the Act under which the Corporation can be allowed to claim incidental and miscellaneous expenses debited to the loan account of the respondent after the filing of the petition out of the sale proceeds of the hypothecated/mortgaged property. He also did not file an application before arguments stating as to what amount on account of incidental and miscellaneous expenses had been debited to the account of the respondent. In this situation, the petitioner cannot be allowed to claim incidental and miscellaneous expenses out of the sale proceeds of the hypothecated/mortgaged property. The petitioner may take appropriate proceedings regarding the incidental charges.

(19) I, therefore, partly accept the petition with costs and hold that the petitioner is entitled to the following reliefs:—

(i) *In C.P. No. 35 of 1981 :*

(a) To recover Rs. 30,07,621.86 with further interest on Rs 17,37,016.24 at 9.25 per cent per annum from 1st September, 1978, in loan account No. I; on Rs. 7,98,578.55 at 10.25 per cent per annum from 1st September, 1978, in loan account No. II; and on Rs. 4,72,027.07 at 13.5 per cent per annum from 1st May, 1978, in loan account No. III, until realization.

(b) To rank as secured creditor regarding loan No. I and sale of property, subject-matter of the mortgage, for recovery of the amount of Rs. 17,37,016.24 and future interest thereon at the rate of Rs 9.25 per cent per annum from 1st September, 1978.

(c) To rank as an ordinary creditor with respect to loans Nos. II and III.

(ii) *In C.P. No. 34 of 1981.*

(a) To recover Rs 1,33,812.28 with further interest at the rate of 10.5 per cent per annum from 15th May, 1979, till realization.

(3) To rank as an ordinary creditor regarding the loan.
