

that the colony has not been sanctioned by the Town and Country Planning Department and the colony is being developed in violation of the Punjab Scheduled Roads and Controlled Areas (Restriction of Unregulated Development) Act, 1963 cannot be legally sustained having regard to the provisions of Section 17 of the Act.

(16) Since the Municipal Committee, Kharar, respondent No. 3, has not been able to show that the petitioner has violated any of the terms of the Act, therefore, the impugned Notice appeared in the Punjabi Tribune dated 23rd July, 1990, copy Annexure P-9, is quashed with the direction to respondents No. 3 to 5 not to interfere in the development of the colony. It is further directed that the Director, Housing and Urban Development, Punjab, Chandigarh, respondent No. 2 shall extend the period of licence for another six months from the receipt of this judgment enabling the petitioner to complete the development works which could not be completed within the stipulated period of licence being valid upto 1st March, 1991 due to the present litigation.

(17) In this case, I would not hesitate to say that if there was any dispute between the official respondents, the proper course for them was that it should have been resolved at their own level and in case it was not possible, then they should have sought the legal advice in the matter and for this lapse on their part, the petitioner should not have been made to suffer and forced to resort to the recourse under Article 226 of the Constitution of India. No costs.

R.N.R.

Before A. L. Bahri & H. S. Bedi, JJ.

HINDUSTAN FOREST COMPANY (PVT.) LIMITED,—*Petitioner.*

versus

UNITED COMMERCIAL BANK,—*Respondent.*

Company Appeal No. 5 of 1989

October 29, 1991

Companies Act, 1956—Section 125—Bank holding ex parte decree with direction to recover decretal amount by sale of mortgaged property, hypothecated property and hypothecated goods—Bank a secured creditor—Under S. 125 any charge created by company on its property to be registered—No register produced to show that claim of Bank not registered—If Bank attached property other than hypothecated or mortgaged it would cease to be a secured creditor.
(Para 5)

Held, that on passing of *ex parte* decree with direction to recover the decretal amount by sale of the mortgaged property and the hypothecated property and the hypothecated goods, the Bank is in position of a secured creditor. When any charge is created by a Company on its property, it is got to be registered as required under section 125 of the Companies Act. Register of such charge is maintained in Form 8. No such register has been produced to show that claim of the Bank is not so registered. If the Bank has attached property/goods other than mortgaged or hypothecated, the Bank would cease to be a secured creditor, the other amount of sale proceeds of such property or goods would be available to the liquidator or the Court for distribution proportionately according to law among the creditors after meeting out the other necessary obligations.

Appeal under Section 483 of Indian Companies Act praying that the appeal be accepted, the order dated 3rd March, 1989 passed by Hon'ble Company Judge be set aside with costs.

Munishwar Puri, Advocate with Miss Deepali Puri, Advocate,
for the Appellant.

J. S. Narang, Advocate with P. D. Mehta, Advocate, for the
Respondent.

JUDGMENT

A. L. Bahri, J.

(1) This appeal has been filed by M/s Hindustan Forest Company (Private) Limited in liquidation (hereinafter called 'the Company') through the Liquidator Shri B. K. Kapur and Smt. Lalita Kapur, against order dated March 3, 1989, passed by Company Judge in C.P. No. 33 of 1986, whereby leave was granted to United Commercial Bank, a decree-holder, to continue with the execution proceedings pending in the Court of Subordinate Judge I Class, Pathankot and declining the request of the Bank for transfer of the execution file to this Court. The Bank filed the petition under section 446 (3) of the Companies Act. A decree was passed in favour of the Bank on July 31, 1974 by Senior Sub Judge, Jalandhar. The Judgment-debtor, the Company, was represented but no written statement was filed inspite of three opportunities having been obtained subject to payment of costs. An execution application was filed in the Court at Jalandhar which was subsequently transferred to the Court of Sub Judge I Class, Pathankot. Company Petition No. 31 of 1975 was filed by the Bank for recovery of the decretal amount by way of sale/auction of the property of the judgment-debtor. On April 4, 1975 the Company Judge passed the order that execution could proceed and the Bank was to keep the money in a separate account. The executing Court passed an order

of attachment. Smt. Lalita Kapur, one of the guarantors, filed Company Petition No. 36 of 1975 on which the Company Judge passed order on May 17, 1975, observing that order dated April 4, 1975 was not called for and further staying execution of the decree. The attachment was to continue. The executing Court in view of the aforesaid order directed the property to remain under attachment. The details of such properties are given in the petition. Apprehending that such property would be damaged due to vagaries of nature that the present petition was filed for transfer of the execution application from Pathankot to this Court and for any other order which the Court may deem fit to pass. A written statement was filed to this petition on behalf of the Company *inter alia* alleging that the *ex parte* decree obtained by the Bank was held to be void by the Liquidator under sections 528 and 529 of the Companies Act. The execution of the aforesaid decree had become time barred under section 136 of the Limitation Act. The application for leave to execute the decree was filed on October 24, 1986 which is barred by time. On merits also certain pleas were raised which are not considered necessary to repeat for disposal of this appeal.

(2) Shri Munishwar Puri, Advocate for the appellants, has argued that no specific prayer was made in the petition filed by the Bank for the grant of leave to proceed with execution of the *ex parte* decree which was pending in the Court at Pathankot and the learned Single Judge thus erred in granting this relief. Reliance has been placed on the decision of the Privy Council in *Siddik Mahomed Shah v. Mt. Saran and others* (1), wherein it was observed that where a claim was never made in the defence presented no amount of evidence could be looked into upon a plea which was never put forward. The ratio of the decision aforesaid cannot be applied to the case in hand. There is no defect in the pleadings of the parties. The pendency of the execution of the decree at Pathankot was not at all in dispute. The prayer made was for transfer of the execution to the High Court in view of the fact that the Company (judgment-debtor) had gone into liquidation Under section 446 of the Companies Act either the execution was to be transferred to the High Court or if the same was to continue, leave of the Court was necessary. This is a case where on the facts alleged and admitted to be so, the necessary relief was to be allowed. Such a question was considered by this Court in *Karam Dass*

(1) A.I.R. 1930 P.C. 57 (1).

and others v. Som Parkash (2). In para 7 of the judgment it was observed as under :—

“No doubt, as a general rule no plaintiff is entitled to a relief for which there is no foundation in the plaint but when on the pleadings and the issues and the evidence adduced the relief is clear, this general rule does not apply because it is the duty of the Court to grant relief as the circumstances of the case would warrant even though it may not be asked for.”

(3) Leave of the Court was required to proceed with the execution of the decree which is pending in the Executing Court at Pathankot in view of the provisions of sections 446 (1) and 537 of the Act.

(4) It has further been argued that the Liquidator having declared the *ex parte* decree to be void the execution cannot proceed. It has been held in Company Appeal No. 2 of 1988 decided today between the parties, that *ex parte* decree could not be declared as void by the Liquidator and the bank's name could not be deleted from the list of creditors. The Bank is held to be a secured creditor on the basis of *ex parte* decree. Learned counsel for the appellant has further argued that by attaching property of the judgment-debtor the Bank has ceased to be a secured creditor and the execution cannot proceed on that score also. In support of these contentions reliance has been placed on two decisions of the Bombay High Court; *Goverdhandas Vallabhdas v. Official Liquidator, Electro Metal Refining Co. Ltd.* (3) and *Ovation International (India) P. Ltd. Grey Steel Casting & Finishing Co. P. Ltd. v. Adverts (Private) Ltd. and another* (4).

(5) The decisions aforesaid are distinguishable. In these cases attachment orders were passed before the decrees were passed. By merely getting orders of attachment of properties of the Companies, the decree-holders could not be held to be secured creditors. The position in the present case is different on passing of *ex parte* decree with direction to recover the decretal amount by sale of the mortgaged property and the hypothecated property and the hypothecated goods, the Bank is in position of a secured creditor. Wher

(2) A.I.R. 1986 P & H 89.

(3) A.I.R. 1930 Bombay 16.

(4) 1969 (3) Company Cases 595.

any charge is created by a Company on its property, it is got to be registered as required under section 125 of the Companies Act. Register of such charge is maintained in Form 8. No such register has been produced to show that claim of the Bank is not so registered. If the Bank has attached property/goods other than mortgaged or hypothecated, the Bank would cease to be a secured creditor, the other amount of sale proceeds of such property or goods would be available to the Liquidator or the Court for distribution proportionately according to law among the creditors after meeting out the other necessary obligations.

(6) The position of a secured creditor has been fully discussed by the Supreme Court in *M. K. Ranganathan and other v. Government of Madras and others* (5). The secured creditor can choose to recover the amount by selling property mortgaged or goods hypothecated and thus remain outside the winding up proceedings. In case such a creditor wants to recover the decretal amount by taking assistance of the Court by filing execution and attaching other properties of the Company, he would cease to be a secured creditor and would rank with other creditors of the Company.

(7) In view of what has been stated above, directions of Single Judge in the impugned order for disposal of objections to the execution on merits by the Executing Court are appropriate. This appeal is dismissed. There will be no order as to costs. The parties are directed to appear in the Executing Court on 25th November, 1991.

J.S.T.

Before A. L. Bahri & H. S. Bedi, JJ.

JASWANT SINGH,—Petitioner.

versus

CHANDIGARH ADMINISTRATION AND OTHERS,—Respondents.

Civil Writ Petition No. 7534 of 1991

November 14, 1991

Capital of Punjab (Development & Regulation) Act—1952 Section 8A—Resumption—Delayed payment of due instalment—Lease cancelled and 10 per cent forfeiture imposed—Appeal against cancellation order—Site restored on appeal but forfeiture amount raised to 25 per

(5) A.I.R. 1955 S.C. 604.