(2007) 09 BOM CK 0004

In the Bombay High Court

Case No : Criminal W.P. No. 1119 of 2007

Aefloat Textiles (India) Ltd. and Another — APPELLANT

Vs

Boghara Polyfab Pvt. Ltd. — RESPONDENT

Date of Decision : 13-09-2007

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16(2), 22, 22A

Citation : (2008) 4 BC 62 : (2007) 6 BomCR 425 : (2008) 3 CivCC 358 : (2009) 149 CompCas 237 : (2008) CriLJ 1494 : (2008) 2 RCR(Criminal) 925

Hon'ble Judges : B.H. Marlapalle, J

Bench : Single Bench

Advocate : R.D. Soni., instructed by Ram and Co, for the Appellant; Pravina Kanani, (for No. 1) and D.P. Adsule, APP for State, for the Respondent

Final Decision : Dismissed

Judgement

B.H. Marlapalle, J.—Heard Mr. Soni the learned Counsel for the petitioners who are impleaded as accused in C.C. No. 462/SS/ 2006, presently pending before the learned Metropolitan Magistrate, 26th Court, Esplanade, Mumbai u/s 138 of the Negotiable Instruments Act, 1881 (for short N.I. Act). Order of process was issued by the learned Magistrate on 4-5-2006 against the present petitioners and the said order was carried in Criminal Revision Application No. 959 of 2006 before the Sessions Court. The said revision application has been dismissed by the learned Additional Sessions Judge for Gr. Mumbai and hence this petition under Article 227 of the Constitution read with Section 482 of Cr. P. C.

2. The main argument advanced before this Court, like before the Sessions Court, is that the accused No. 1-company M/s. Aefloat Textiles (India) Ltd. is declared a sick company by the BIFR as per its order dated 4-9-2003 and in view of the scheme of Sections 22 and 22A of the Sick Industrial Companies (Special Provisions) Act, 1986 (for short SICA) the complaint filed under N.I. Act is

required to be quashed and set aside. Mr. Soni the learned Counsel for the petitioners placed reliance in support of these contentions on the decision in the case of Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, .

3. In the instant case, there is no dispute that the order passed u/s 22 of the SICA is dated 4-9-2003 and the dishonoured cheques in the total sum of Rs. 24,00,000/- were dated 7-2-2006 i.e. after about two and half years from the date of BIFR''s order. The BIFR has appointed ICICI Bank Ltd. as the operating agency u/s 16(2) of the SICA. Mr. Soni relied upon the Direction No. (vii) in the said order dated 4-9-2003 and it reads as under:

(vii) The company/promoters are directed u/s 22A of the Act not to dispose of any fixed or current assets of the company without the consent of the secured creditor and the BIFR. In case the company is running, the current assets can be drawn to the extent required for day to day operations, proper accounts of which would be maintained.

As per Mr. Soni above condition clearly implies that the complaint filed against the petitioners u/s 138 of the N.I. Act cannot be continued any further and till the scheme is outdated.

The cut off date fixed in the scheme is 31-12-2003.

4. Coming to the judgment of the Apex Court in the case of M/s. Kusum Ingots and Alloys Ltd. (Supra), in para 18 their Lordships held as under:

In our considered view Section 22 of SICA does not create any legal impediment for instituting and proceeding with a criminal case on the allegations of an offence u/s 138 of the NI Act against a company or its Directors. The section as we read it only creates an embargo against disposal of assets of the company for recovery of its debts. The purpose of such an embargo is to preserve the assets of the company from being attached or sold for realisation of dues of the creditors. The section does not bar payment of money by the company or its directors to other persons for satisfaction of their legally enforceable dues.

Mr. Soni relied upon the observations made in para 19 of the said decision. It has been stated in the said para that in a given case, before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order of the BIFR u/s 22A was passed against the company then it cannot be said that the offence u/s 138 of the NI Act was completed. In the instant case, the restraint put by the BIFR, as per the condition reproduced hereinabove, is against the disposal of the property of the sick company and that too the disposal is permissible if the consent of BIFR is obtained. The dishonoured cheques have been drawn much after the order dated 4-9-2003 passed by the BIFR, whereas the contentions of the petitioners that the cheques dishonoured were blank cheques handed over to the complainant on much before the order was passed. In any case, as held by the Apex Court, Section 22 of

SICA does not create any legal impediment for instituting and proceeding with a criminal case u/s 138 of NI Act against a company or its Directors. At the end of the trial of such a case, if the accused are held guilty and they are directed to pay compensation and also sentenced to suffer imprisonment, they have the remedy of submitting an application immediately before the learned Metropolitan Magistrate and pray for either being released on bail by staying the order of sentence or a blanket stay to the order of conviction and sentence as well as payment of compensation based on the BIFR order and it is for the trial Court or for that matter for the Lower Appellate Court to consider to stay the order of conviction and sentence. The mere passing of the order by BIFR u/s 22 of the SICA cannot be a reason to quash the proceedings in the criminal case filed u/s 138 of the NI Act.

5. Mr. Soni has referred to a Division Bench decision of this Court in the case of Omesh Keshav Karnik v. The Board for Industrial and Financial Reconstruction, Ministry of Finance, Delhi and Ors. 2006 (5) AIR Bom R 812 (DB) and prayed for liberty to place before the learned Metropolitan Magistrate appropriate material. The Division Bench has clarified that it has not considered the question whether in the facts and circumstances of a particular case Section 138 of NI Act is attracted or not and that is question to be considered by the trial Court at the appropriate stage of the trial in the light of the evidence on record. The right of placing material on record before the learned Metropolitan Magistrate has not been taken away.

Hence, the petition fails at the threshold and the same is hereby rejected summarily. Trial is expedited.