

(2006) 06 AP CK 0014
In the Andhra Pradesh High Court
Case No : Writ Petition No. 3236 of 2006

Bharat Heavy Plate and Vessels Ltd.

APPELLANT

Vs

Assistant Commissioner of Central Excise, Division-II and
Another

RESPONDENT

Date of Decision : 09-06-2006

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 15(1), 16, 17, 17(2)

Citation : (2006) 133 CompCas 41 : (2006) 203 ELT 544 : (2008) 81 SCL 276 : (2006) 4 STR 394

Hon'ble Judges : G. Chandraiah, J; Bilal Nazki, J

Bench : Division Bench

Advocate : C. Kodanda Ram, for the Appellant; Asri A. Rajashekar Reddy, for the Respondent

Final Decision : Allowed

Judgement

Bilal Nazki, J.—This writ petition raises a question as to whether the respondents could attach the properties of the petitioner for the purpose of recovery of excise duty. In this writ petition, the petitioner has challenged the attachment proceedings initiated by the respondents vide C. No. V/30/80/2003 Misc. TI, dated January 27, 2006.

2. The petitioner-company is incorporated under the provisions of the Companies Act, 1956, and is engaged in manufacture of heavy engineering, equipment for oil refineries, steel plants, fertilizers, defence etc., which are the products listed in the First Schedule to the Industries (Development and Regulation) Act, 1951. The petitioner is also a subsidiary unit of M/s. Bharat Yantra Nigham Ltd., which is owned by the Government of India. It commenced its commercial production in the year 1971. The authorized capital of the petitioner-company is Rs. 3500 lakhs and the paid up capital is Rs. 3379.78 lakhs of equity shares of Rs. 1000 each.

3. The company ran into losses and ultimately on August 23, 2004, it approached the Board for Industrial and Financial Reconstruction (hereinafter referred to as "the Board") u/s 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985, (hereinafter referred to as "the Act") for a declaration that the company was sick and for grant of a scheme for rehabilitation. The company was declared a sick company within the meaning of the Act on October 6, 2005. Attachments were ordered by the respondents on January 16, 2006, and January 27, 2006. The State Bank of India was appointed as operating agency u/s 17(3) of the Act, with a direction to prepare a viability study report and revival scheme for the company.

4. These facts are not disputed. The only question is whether, after declaration of a company as a sick company and after appointment of an operating agency in terms of Section 17(3) of the Act, the respondents could use coercive methods in order to recover the dues on account of excise duty.

5. The contention of the petitioner is that after the declaration that the petitioner-company was a sick company, and after appointment of State Bank of India as operating agency, the respondents could not enforce their claims against the company, whereas the respondents claim that there is nothing in the Act, which would stop them from enforcing the claim of excise, which, in any case, become due at the time of production itself. It is further contended by the respondents that the petitioner has informed the Board in its reference, only the liability of excise arrears payable as on July 31, 2004, whereas the petitioner has defaulted huge amounts even after that date, i.e., July 31, 2004. In our view, these questions are not res integra and there are already judgments of the Supreme Court, which have laid down the principles and interpreted Section 22 of the Act.

6. Before going to those judgments, it is necessary to go through certain provisions of the Act.

7. u/s 3(o) of the Act, "sick industrial company" has been defined to mean, an industrial company (being a company registered for not less than five years) which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth.

8. u/s 4 of the Act, "Board" has been established, known as "Board for Industrial and Financial Reconstruction".

9. u/s 5, the "Appellate Authority" is constituted.

10. u/s 15(1), where an industrial company becomes sick, the board of directors of that company can make a reference to the Board.

11. u/s 16, an inquiry has to take place, which is to be conducted by the Board as to whether a company has become sick or not. On completion of inquiry, a suitable order can be passed by the Board u/s 17 of the Act.

12. u/s 17(3), the Board may direct the operating agency to prepare a scheme.

Section 22 of the Act, lays down.?

22. Suspension of legal proceedings, contracts, etc.?(1) Where in respect of an industrial company, an inquiry u/s 16 is pending or any scheme referred to u/s 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal u/s 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956, or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act, or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority. (2) Where the management of the sick industrial company is taken over or changed in pursuance of any scheme sanctioned u/s 18, notwithstanding anything contained in the Companies Act, 1956, or any other law or in the memorandum and articles of association of such company or any instrument having effect under the said Act, or other law?

(a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;

(b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.

(3) Where an inquiry u/s 16 is pending or any scheme referred to in Section 17 is under preparation or during the period of consideration of any scheme u/s 18 or when any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended to that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified by the Board:

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate.

(4) Any declaration made under Sub-section 3 with respect to a sick industrial company shall have effect notwithstanding anything contained in the Companies Act 1956, or any other law, the memorandum and articles of association of the

company or any instrument having effect under the said Act, or other law or any agreement or any decree or order of a court, tribunal, officer or other authority or of any submission, settlement or standing order and accordingly :?

(a) any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration and all proceedings relating thereto pending before any court, tribunal, officer or other authority shall remain stayed or be continued subject to such declaration ; and

(b) on the declaration ceasing to have effect:

(i) any right, privilege, obligation or liability so remaining suspended or modified, shall become revived and enforceable as if the declaration had never been made ; and

(ii) any proceeding so remaining stayed shall be proceeded with subject to the provisions of any law which may then be in force, from the stage which had been reached, when the proceedings became stayed.

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded.

13. This section lays down that without the consent of the Board or the Appellate Authority, as the case may be, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof, can be appointed. The requirements for this prohibition are that an inquiry contemplated u/s 16 of the Act, should be pending, or a scheme u/s 18 is under preparation, or a sanctioned scheme is under implementation, or an appeal u/s 25 of the Act, should be pending. Admittedly, in the present case, a scheme is under preparation and therefore, in our view, the respondents could have not attached the property belonging to the sick company.

14. There has been consistent view of the Supreme Court in this regard and 14 reference has been made to a judgment in the case of The Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and others, . This was a case where dues were sought to be recovered by the Gram Panchayat from a sick company. As in the present case, the company before the Supreme Court, i.e., M/s. Shree Vallabh Glass Works Ltd. was declared to be a sick industrial company within the meaning of Clause (o) of Sub-section (1) of Section 3 of the Act. The Gram Panchayat initiated coercive proceedings u/s 129 of the Bombay Village Panchayats Act to recover a sum of Rs. 9,47,539 stated to be the property tax and other amounts due from the company. The company approached the High Court, claiming protection u/s 22 of the Act. The High Court accepted the writ petition and destrained the petitioners from recovering the said amount without the consent of the Board and the matter landed in the Supreme Court. In paragraphs 7, 8 and 10, the Supreme Court laid down (page 172):

7. Section 22(1) provides that, in case the enquiry u/s 16 is pending or any scheme referred to u/s 17 is under preparation or consideration by the Board or any appeal u/s 25 is pending, then certain proceedings against the sick industrial company are to be suspended or presumed to be suspended. The nature of the proceedings which are automatically suspended are : (1) winding up of the industrial company, (2) proceedings for execution, distress or the like against the properties of the sick industrial company, and (3) proceedings for the appointment of a receiver. The proceedings in respect of these matters could, however, be continued against the sick industrial company with the consent or approval of the Board or of the Appellate Authority, as the case may be.

8. Section 16 authorises the Board to make such enquiry as it may deem fit for determining whether any industrial company has become a sick industrial company. Where the Board is satisfied that a company has become a sick industrial company, it could give a reasonable time to the company to make its net worth positive (section 17(2)). Where it is not practicable for a sick industrial company to make its net worth positive within a reasonable time, Section 17(3) steps in authorising the Board to direct any operating agency to prepare a scheme in relation to the company. The Board may specify the various measures to be considered by the operating agency. These measures are detailed out in Section 18. The operating agency has to prepare a scheme as per the order specified by the Board.

10. In the light of the steps taken by the Board under Sections 16 and 17 of the Act, no proceedings for execution, distress or the like proceedings against any of the properties of the company shall lie or be proceeded further except with the consent of the Board. Indeed, there would be automatic suspension of such proceedings against the company's properties. As soon as the inquiry u/s 16 is ordered by the Board, the various proceedings set out under Sub-section (1) of Section 22 would be deemed to have been suspended.

15. In the case of Real Value Appliances Ltd. Vs. Canara Bank and Others, the Supreme Court was essentially interpreting Section 16 of the Act along with Section 22. In para. 21 it said (page 36):

21. It is to be noticed that according to Section 22, in case an "inquiry u/s 16" is pending, then, notwithstanding anything in the Companies Act, or any other instrument, etc., no proceedings for the winding up of the company or for execution or distress or the like against the property of the company or for the appointment of a receiver and no suit for recovery of money or enforcement of any security or of any guarantee--shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, by the appellate authority. Section 22A permits the Board to pass certain conditional orders.

16. Again, in para 23, it stated (page 37):

... Whether the company seeks a declaration that it is sick or some other body seeks to have it declared as a sick company, it is, in our opinion, necessary that

the company be heard before any final decision is taken under the Act. It is also the legislative intention to see that no proceedings against the assets are taken before any such decision is given by the BIFR for in case the company's assets are sold, or the company wound up it may indeed become difficult later to restore the status quo ante...

17. Again in the case of *Rishab Agro Industries Ltd. v. P.N.B. Capital Services Ltd.* [2000] 101 Comp Cas 284 : AIR 2000 SC 1583 , the judgment in the case of *Real Value Appliances Ltd. Vs. Canara Bank and Others*, , was relied upon. In para. 9, it is stated (page 292):

9. It is true that for invoking the applicability of Section 22 it has to be established that an inquiry u/s 16 is pending or any scheme referred to u/s 17 is under preparation or sanctioned scheme is under implementation or an appeal u/s 25 to an industrial company is pending. But it cannot be said that despite existence of any of the aforesaid exigencies the provision of Section 22 would not be attracted after the order of winding up of the company is passed. The words "no proceeding for winding up of the industrial company or for execution distress or the like against any of the properties of the industrial company or for the appointment of receiver in respect thereof shall lie or be proceeded with further", leave no doubt in our mind that the effect of the section would be applicable even after the winding up order is passed as no proceeding even thereafter can be proceeded with further under the Companies Act. The High Court appears to have not taken note of the aforesaid words, i.e., to be proceeded with further. As the impugned judgment is based upon wrong assumption of the provision of law and completely ignoring the vital words noticed hereinabove, the same cannot be sustained.

18. The respondents, on the other hand, relied on a judgment of the Supreme Court in *Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others*, . In this case, the court held (page 10):

Any step for execution, distress or the like against the properties of the industrial company or other similar steps should not be pursued which will cause delay or impediment in the implementation of the sanctioned scheme. In order to safeguard such state of affairs, an embargo or bar is placed u/s 22 of the Act, against any step for execution, distress or the like or other similar proceedings against the company without the consent of the Board or, as the case may be, the appellate authority. The language of Section 22 of the Act, is certainly wide. But, in the totality of the circumstances, the safeguard is only against the impediment, that is likely to be caused in the implementation of the scheme. If that be so, only the liability or amounts covered by the scheme will be taken in by Section 22 of the Act. So, we are of the view that though the language of Section 22 of the Act is of wide import regarding suspension of legal proceedings from the moment an inquiry is started, till after the implementation of the scheme or the disposal of an appeal u/s 25 of the Act, it will be reasonable to hold that the bar or embargo envisaged in Section 22(1) of the Act, can apply

only to such of those dues reckoned or included in the sanctioned scheme. Such amounts like sales tax, etc., which the sick industrial company is enabled to collect after the date of the sanctioned scheme legitimately belonging to the Revenue, cannot be and could not have been intended to be covered within Section 22 of the Act. Any other construction will be unreasonable and unfair and will lead to a state of affairs enabling the sick industrial unit to collect amounts due to the Revenue and withhold it indefinitely and unreasonably. Such a construction which is unfair, unreasonable and against spirit of the statute in a business sense, should be avoided.

19. Though this judgment was distinguished in another judgment in the case of Tata Davy Ltd. Vs. State of Orissa and Others, , but in any case, this judgment would not come to the rescue of the respondents in this case, as even under this judgment, Section 22(1) of the Act can apply to such of those dues reckoned or included in the sanctioned scheme and in the present case, scheme is yet to be sanctioned.

20. For the reasons given hereinabove, we allow the writ petition and quash the impugned attachment order. However, the petitioner-company ? is at liberty to seek remedies available to it in law, after getting permission from the Board.