(2008) 07 MAD CK 0057

In the Madras High Court

Case No : Writ Petition (MD) No''s. 1522 and 1523 of 2004 and W.P.M.P. (MD) No''s. 1509 and 1511 of 2004

B.V.V. Paper Industries Ltd. APPELLANT

Vs

Commercial Tax Officer RESPONDENT

Date of Decision : 18-07-2008

Acts Referred:

Madras Revenue Recovery Act, 1864 — Section 8
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1), 16, 17, 17(3), 18

Citation : (2008) 145 CompCas 815 : (2008) 18 VST 262

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : K. Hema Karthikeyan, for the Appellant; V. Rajasekaran, Special Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

P. Jyothimani J.

1. Heard K. Hema Karthikeyan, learned Counsel appearing for the petitioner and V. Rajasekaran, learned Special Government Pleader appearing

for the respondents.

2. The writ petitioner-company is a public limited company operating from the year 1989 onwards, engaged in the manufacture and sale of finished

paper, newsprint and other ancillary products. The petitioner-company has also registered under the Tamil Nadu General Sales Tax Act, 1959 and

Central Sales Tax Act, 1956. The petitioner-company has become sick, since it could not meet out the statutory requirements, a reference was

filed before the Board for Industrial and Financial Reconstruction (hereinafter called as ""the BIFR""), u/s 15(1) of the Sick Industrial Companies

(Special Provisions) Act, 1985 (hereinafter referred to as ""the SICA"") for declaring the company as a ""sick company"" and also for effecting

rehabilitation. It is stated that the BIFR by an order dated May 9, 2001, has declared the petitioner-company as a ""sick company"" and appointed

IDBI as its operational agency as per Section 17(3) of the SICA, to examine the viability of settlement of the scheme as a rehabilitatory measure.

There was also an order passed u/s 22A of the SICA, restraining the petitioner''s-company from disposing of any assets without getting consent

from the BIFR. In respect of the due regarding the sales tax amount payable, which is to the extent of Rs. 5,05,30,050, the respondent in W.P.

(MD) No. 1522 of 2004, viz., the Commercial Tax Officer-II, Palani, has issued a distraint order by exercising the powers u/s 8 of the Tamil

Nadu Revenue Recovery Act, 1864.

3. Likewise, in respect of the due amount of Rs. 49,34,032 regarding drawing of water from Amaravathi river, after obtaining due permission from

the Public Works Department, the respondent in W. P. (MD) No. 1523 of 2004, viz., the Executive Engineer, Public Works Department, has

issued an impugned order dated May 20, 2004, directing the petitioner-company to pay Rs. 49,34,032, being the amount for having drawn water

from Amaravathi river. The amount not having been paid from the year 1997 to till date, the respondent/Public Works Department, has directed

the petitioner to pay the said amount of Rs. 49,34,032 before May 31, 2004, failing which, the company will be restrained from taking water.

Admittedly, the process of the company has come to an end and the matter is pending before the BIFR and the scheme is yet to be formulated.

In such circumstances, the question has to be decided in this case is as to whether the respondents are entitled to proceed to recover the amounts

from the assets of the company without resorting to the provisions of the SICA, namely, by obtaining necessary permission from the BIFR,

wherein the matter is pending.

4. Section 22 of the SICA, suspends the operation of any legal proceedings or contract entered with such sick companies, which is declared as

sick company"" under the SICA, till the proceedings under the SICA are completed. The proceedings under the SICA, is by reference to the

BIFR. Section 22 of the SICA reads as follows:

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 (1 of 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 (1 of 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 where 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 or 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 (1 of 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.

5. The hon''ble Supreme Court, in similar circumstances, regarding the conduct of the State of Orissa, to proceed to recover the tax amount due

under Orissa Sales Tax Act, 1949, against a company, which is pending rehabilitatory measure under the SICA in Tata Davy Ltd. Vs. State of

Orissa and Others, , while considering the contention raised on behalf of the

Government, namely, the Commercial Tax Department that the taxing

power conferred on the State in List II, entry 54 of Schedule 7 of the Constitution of India, is an exclusive power of the State, and therefore, the

term used u/s 22(1) of the SICA ""any other law"" should exclude the power of the State Government in recovery of the tax amount, has rejected

the said contentions and ultimately held that u/s 22(1) of the SICA, which is a Central Act, unless and until the permission is obtained from the

BIFR, no coercive steps to be taken against the sick industries in respect of recovery of arrears of tax. The hon''ble Supreme Court in Tata Davy

Ltd. Vs. State of Orissa and Others, , has held as follows (page 5 of 93 Comp Cas):

10. Learned Counsel for the respondents submitted that Section 22(1) of the Central Act should be so read as not to interfere with the exclusive

power of the States to legislate under entry 54 of List II of the Seventh Schedule to the Constitution in respect of sales tax. In his submission, the

words ''any other law'' in Section 22(1) of the Central Act must be so read as to exclude all laws on List II subjects, for Parliament must be

assumed to know its limitations. Learned Counsel cited the judgment of this Court in Deputy Commercial Tax Officer and Others Vs.

Corromandal Pharmaceuticals and Others, , as supporting his case.

11. Shree Vallabh Glass Works Ltd. [1991] 71 Comp Cas 169, judgment covers these appeals. Arrears of taxes and the like due from sick

industrial companies that satisfy the conditions set out in Section 22(1) of the Central Act cannot be recovered by coercive process unless the said

Board gives its consent thereto.

6. In fact, that was the view taken by the hon''ble Supreme Court, even prior to the said judgment. That judgment was in The Gram Panchayat and

another Vs. Shree Vallabh Glass Works Ltd. and others, . That was a case regarding the panchayat in taking steps to recover the property tax

arrears against the company declared as ""sick company"", under the SICA. The State Government has proceeded to recover by virtue of the

powers conferred u/s 129 of the Bombay Village Panchayats Act, 1958.

7. There also, a similar contention was raised that it is a constitutional obligation of the Government to recover the tax amount and that should not

be curtailed by the provisions of Section 22(1) of the SICA. Rejecting the said contention, the Supreme Court has held that when once a company

is subject to the proceedings under Sections 16 and 17 of the SICA, not only that winding up of the industrial company is put to an end but also

any proceedings in execution or any distress proceedings taken against the properties of the sick industrial company, including the appointment of

any receivers in respect of any claim are also put an end to, however, subject to the consent and order obtained from the BIFR. In fact, the

Supreme Court has held that it may be against the principles of equity, if the creditor is not allowed to recover the amount due, especially, when the

creditor happens to be the Government, to drive them to go to the BIFR for getting a sanction in respect of the statutory amount due but

nevertheless, the Supreme Court has held that the Board has got discretionary power, since the concept and basis of the SICA, is not merely to

take a supervisory role regarding the sick industries but also to give a solution by way of rehabilitatory measures. In view of the said matter, the

Supreme Court has ultimately held that such proceedings can be continued only with the approval and consent of the BIFR. The relevant portion is

as follows (pages 172 and 173 of 71 Comp Cas):

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 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 ...

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.

11. It may be against the principles of equity if the creditors are not allowed to recover their dues from the company, but such creditors may

approach the Board for permission to proceed against the company for the recovery of their dues/outstandings/overdues or arrears by whatever

name they are called. The Board at its discretion may accord its approval for proceeding against the company. If the approval is not granted, the

remedy is not extinguished. It is only postponed. Sub-section (5) of Section 22 provides for exclusion of the period during which the remedy is

suspended while computing the period of limitation for recovering the dues.

8. In the light of the abovesaid decisions of the Supreme Court, having laid down the law in this regard, the first Bench of this Court in Artson

Engineering Limited Vs. Mr. Deendayal Ashok Kumar Goidani, Proprietor of Ashok Agencies and Chennai Petroleum Corporation Limited, ,

after analysing the various case laws on this subject, has held that in the light of the provisions of the SICA, the proceedings for recovery have to

be suspended. The operative portion of the order of the first Bench of this Court, presided over by the hon''ble Chief Justice Mr. A. P. Shah, as he

then was, in paragraph 8 is as follows:

8. In the instant case, proceedings are pending before the BIFR in case No. 152 of 2004. By order dated May 17, 2006, the Board has

appointed Bank of India, as operating agency (OA) with a direction to prepare a revival scheme for it, if feasible. The OA has been directed to

keep in view the provisions of Section 18 of the Act and the enclosed guidelines while carrying out this exercise. 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. In the light of the above provisions, there would be deeming

suspension of such proceedings against the company properties, viz., The Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and

others, and Tata Davy Ltd. Vs. State of Orissa and Others, . The judgment of the learned single judge relied upon by learned Counsel for the respondent in Onida Savak Ltd. Vs. Muthumeera Agencies, , turns round on the peculiar facts of the case. In that case, washing machines were

supplied by the defendant company and they were found to be defective and they were once again returned to the defendant-company. In our

opinion, the above judgment is not applicable to the facts of the present case. In view of the steps taken by the BIFR, the proceedings for

execution, distress or the like proceedings against any of the properties of the company are clearly not maintainable.

9. By applying the legal principles laid down to the facts and circumstances of the case, the necessary corollary to conclude is that the respondents

cannot proceed with either distress action as it is seen in respect of the Commercial Tax Department or for recovery of amount by the Public

Works Department unless consent is obtained from the BIFR. It is always open to the respondents in these cases to take necessary steps to

implead themselves before the BIFR and seek permission for the purpose of recovery of the amount from the assets of the petitioner''s-company,

which has been declared as ""sick company"", in which event, it is for the BIFR to decide on merit and based on the scheme that may be formulated

as per the provisions of the SICA.

10. In view of the above, the writ petitions are allowed and the impugned orders are set aside. No costs. Consequently, the connected

miscellaneous petitions are closed.