(2001) 02 BOM CK 0032

In the Bombay High Court

Case No : Summons For Judgment No. 10/8 of 1998 in Summary Suit No. 3162 of 1998

Century Textiles and Industries Ltd. APPELLANT

Vs

Shri Avinash Goel and Another RESPONDENT

Date of Decision : 05-02-2001

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 22, 22(1)

Citation : (2001) 02 BOM CK 0032

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : D.H. Mehta, instructed by S.V. Snejit, for the Appellant; D.D. Madon and B. Colabawala, instructed by Madekar and Co., for the Respondent

Judgement

P.C.

D.Y. Chandrachud, J.—The summary suit in the present case has been instituted against the First Defendant and the Second Defendant in their personal capacity as guarantors. The First Defendant is the Managing Director and the Second Defendant is the chairman of the Company by the name of HMG Industries Limited. In paragraph I or the Plaint, in which the aforesaid averments have been set out, it has also been staged that an enquiry in respect of the aforesaid company is pending under the provisions of the Sick industrial Companies (Special Provisions) Act, 1985.

2. The Plaintiffs had granted to the aforesaid Company, HMG Industries Limited, two intercorporate deposits each in the amount of Rs. 50 lacs aggregating to a total of Rs. 1 Crore and in respect thereof two deposit receipts came to be issued by the Company on 1st June, 1995 and on 4th June, 1996. The Defendants executed a personal guarantee dated 10th June, 1997 in favour of the Plaintiffs. In paragraph 8 of the Plaint, it has been stated that this guarantee was Issued by the Defendants in consideration of the Plaintiffs forbearing to sue the Company

and keeping legal proceedings against the Company in abeyance for a period of three months.

3. When the Summons for Judgment was heard, the learned counsel appearing on behalf of the Defendants stated that the suit itself is liable to be dismissed, since the Defendants as guarantors are entitled to the benefit of the provisions of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, and in view thereof, the suit itself would not lie. The learned counsel for the Plaintiffs and the Defendants have been heard at length on the preliminary objection.

4. At the outset, it must be stated that in view of the Judgment of the Supreme Court in M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, , it is now beyond the pale of controversy that no suit for the enforcement of a guarantee in respect of a loan or advance granted to the concerned sick industrial company can lie or be proceeded with, without the sanction of the Board for Industrial and Financial Reconstruction or as the case may be, the Appellate Authority under the said Act. The Judgment of the Supreme Court in the aforesaid case has now laid down authoritatively the principle of law that it is no part of the requirement of Section 22 that to be covered by its provisions a suit for the enforcement of a guarantee in respect of a loan or advance to the industrial company should be against the industrial company. That being the position, there can be no dispute about the fact that the suit in the instant case which has been filed against the Defendants in their capacity as guarantors would fall within the purview of Section 22 of the Act.

5. The next important thing to be noticed is that the provisions of Section 22 enunciate that the suit interalia for the enforcement of any security against the industrial company or any guarantee in respect of any loans or advance granted to the industrial company shall not lie or be proceeded with further except with the consent of the Appellate Authority. In the present case, the suit was instituted after the proceedings had been registered before the B.I.F.R. and there is, a reference to the pendency of those proceedings in paragraph 1 of the Plaint itself. That being the position, the suit would not lie in the first instance. In two decisions, in relation to proceedings for winding up under the provisions of the Companies Act, 1956, learned Single Judges of this Court have held that as a result of Section 22 of the Act, no proceedings for the winding up of a Company could have been entertained without the consent of the B.I.F.R. or as the case may be, the Appellate Authority and in view of the absolute embargo imposed by Section 22, the proceedings instituted without the sanction of the aforesaid authorities would be liable to be rejected. This view was taken by Mr. Justice Jhunjhunuwala in the matter of C.J. Gelatine Products Ltd. reported in 1992 Mh.L.J. 800. The learned Single Judge held as follows :

"The starting point of suspension is the commencement of the inquiry u/s 16 and the terminal point is the implementation of the scheme or, as the case may be, the disposal of the appeal by the Appellate Authority. The words "shall lie" mean "shall be entertained". Therefore, in respect of a Company against which an inquiry u/s 16 has commenced, unless prior consent of the BIFR or, as the case may be, the Appellate Authority has been obtained, no proceedings for winding up of such Company shall be entertained. In want of requisite prior consent of the BIFR or, as the case may be, the Appellate Authority, the section imposes absolute embargo on entertainment itself or winding up proceedings by the Court. In the instant case, after the inquiry against the Company u/s 16 had commenced, the petition has been filed without the consent of the BIFR and as such is not maintainable since the filing itself is void ab initio, the court having no jurisdiction to entertain the same."

A similar view was taken by Mr. Justice Rane in the case of Gear Enterprises Vs. Mafatlal Engineering Industries Ltd., , where the learned Single Judge held in paragraphs a and 9 of the Judgment as follows :

"The expressions appearing "shall lie or be proceeded with further" are most crucial and of vital significance. Undoubtedly expression "no proceeding shall lie" clearly envisages the initial institution of the proceedings for winding up. Whereas, expression "be proceeded with further", it clearly provide and means that the same refers to the reference made later on or at subsequent stages of institution of the petition in the Court as is clearly spelt out from the first part of Sub-section (1) of Section 22 of the SIC Act. To put it clearly it talks of, in the first instance, proceedings filed before the reference to BIFR when it speaks of "shall lie". The second category or the proceedings contemplated are those where reference to the BIFR is made after the filing of the proceedings and therefore expression used is "be proceeded with further"."

"It thus clearly means, that, if in a given case as in the instant case, where the reference was already made to the BIFR and declaration made as a sick Company by the Board, then the prior consent of the Board for the institution is imperative and mandatory in view of expression "shall lie" appearing in the statute."

6. In the present case, the suit was instituted after the reference came to be registered before the BIFR. The suit in view of the express language of Section 22 would, not lie without the consent of the BIFR. Since it could not lie without the consent of the BIFR, the suit cannot be entertained in the absence of such consent. The suit is, therefore, liable to be dismissed under the provisions of Order 7 Rule 11 (d) of the CPC 1908. Order 7 Rule 11 (d) mandates that the plaint shall be rejected where the suit appears from the statement of the Plaint to be barred by any law. Such is the case in the present proceedings.

7. The learned counsel appearing on behalf of the Plaintiffs adverted to Clause 5 of the Guarantee executed by the Defendants, which provides as follows

"5. Though as between the BORROWER and ourselves we are sureties only, we agree that as between CENTURY and ourselves we are the principal debtors jointly with the BORROWER and accordingly we understand that we are not entitled to any rights conferred as sureties by Section 133, 134, 135, 139 and

141 or any other relevant provisions of the Contract Act. "

The learned counsel, therefore, submitted that the guarantee independently constitutes a relationship between the Plaintiffs and the Defendants by which the Defendants assumed the character of principal debtors quite apart from their position as guarantors. In the circumstances it was sought to be submitted that though the Defendants cannot be sued in their capacity as guarantors in view of the provisions of Section 22, it would be open to the Plaintiffs to sue them in their capacity as principal debtors. As the averments in the Plaint stand, both the Defendants have been sued in their personal capacity as guarantors. That being the position, it would not be necessary in the present case to consider whether despite the provisions of Section 22, it was open to the Plaintiffs to sue the Defendants de horse their capacity as guarantors, because evidently that has not been done in the instant case.

8. In view of the aforesaid circumstances, and having regard to the well settled position in law as aforesaid, the learned counsel appearing on behalf of the Plaintiffs, on instructions, seeks leave to withdraw the suit. Permission to withdraw the suit is accordingly granted. In view of the above, Summons for Judgment is also disposed of. Refund as per Rules. The Prothonotary & Senior Master to act on an ordinary copy of this order duly authenticated by the Associate of this Court.

