

(2015) 10 BOM CK 0064

In the Bombay High Court

Case No : Company Application No. 121 of 2015 in Company Petition No. 148 of 2015

DBS Bank Ltd.

APPELLANT

Vs

Innovative Industries Ltd.

RESPONDENT

Date of Decision : 13-10-2015

Acts Referred:

Bombay General Clauses Act, 1904 — Section 21
Bombay Relief Undertakings (Special Provisions) Act, 1958 — Section 3, 4
Civil Procedure Code, 1908 (CPC) — Section 10, 40, 42

Citation : (2016) 1 BomCR 397

Hon'ble Judges : S.C. Gupte, J.

Bench : Single Bench

Advocate : Huzefa Nasitwala, Freddy Daruwala and Raman Misra i/b. Nasikwala Law Office, for the Appellant; Ashish Kamat, Kunal Mehta and Shivani Parekh i/b. Crawford Bayley and Co., for the Respondent

Final Decision : Disposed Off

Judgement

S.C. Gupte, J.—The company application seeks appointment of provisional liquidator of the Respondent company and an interim restraint order concerning the disposal of the company's assets pending such appointment.

2. The company is said to be indebted to the Applicant (who is the original Petitioner in the Company Petition) in the sum of over Rs. 24.91 Crores. The Company has been referred to the Corporate Debt Restructuring (CDR) cell and a consortium of lenders led by Central Bank of India has proposed a CDR scheme for the company. The Applicant herein is not part of CDR lenders, but its debt of Rs. 24.91 Crores has been acknowledged in the debt profile of the company under the caption "Non CDR lenders" in the report of the reference made to the CDR cell. It is the case of the Applicant that the company has not proposed any scheme for discharge of its outstanding claim. It is submitted that the company inter alia proposes to dispose of its assets in pursuance of the CDR scheme and also otherwise without making any payment to the Applicant and with a view to

defeat the legitimate claim of the Applicant. It is submitted that the financials of the company present a dismal picture of the financial standing of the company and its ability to continue as a going concern. The Applicant has, in the premises, sought an order of provisional liquidator or at any rate, protective relief concerning the company's property and assets.

3. This court has held in a number of matters that mere existence of a CDR scheme, which is under implementation, is no answer by itself to a winding up petition. In any event, even in the face of a CDR scheme, though this Court may defer the admission of a winding up petition, nothing prevents this court from passing appropriate protective orders concerning the property of the company. In the premises, this Court, in its order dated 31 July 2015, noted the statement of the company's counsel that certain assets specified in the order shall not be dealt with by the company until further orders.

4. It is, however, submitted on behalf of the Respondent company that on 22 July 2015, it has been declared as a relief undertaking under the Bombay Relief Undertakings Act, 1958 ("B.R.U. Act"). It is submitted that in view of Sections 3 and 4 of that Act, on and from 22 July 2015, the Company Court would have no jurisdiction to either continue its order of protective relief qua the property of the company or pass any order or direction in that behalf. It is submitted by learned Counsel that the protection granted by the BRU Act is greater than the one afforded by the Sick Industrial Companies (Special Provisions) Act, 1985 ("S.I.C.A."). Learned Counsel relies on the judgment of the Supreme Court in *Binod Mills Co. Ltd. Vs. Suresh Chandra Mahaveer Prasad Mantri*, and of this Court in *Baroda Rayon Corporation Ltd. Vs. ICICI Ltd. (Debenture Trustees) and Others*, in support of his submissions.

5. Sections 3 and 4 of the B.R.U. Act, which is an enactment making temporary provisions for industrial relations and other matters as a measure of preventing unemployment or of unemployment relief, provide as follows :-

"3. Declaration of relief undertaking. (1) If at any time it appears to the State Government necessary to do so, the State Government may, by notification in the Official Gazette, declare that an industrial undertaking specified in the notification, whether started, acquired or otherwise taken over by the State Government, and carried on or proposed to be carried on by itself or under its authority, or to which any loan, guarantee or other financial assistance has been provided by the State Government shall, with effect from the date specified for the purpose in the notification, be conducted to serve as a measure of preventing unemployment or of unemployment relief and the undertaking shall accordingly be deemed to be a relief undertaking for the purposes of this Act.

(2) A notification under sub-section (1) shall have effect for such period not exceeding twelve months as may be specified in the notification; but it shall be renewable by like notifications from time to time for further periods not exceeding twelve months at a time, so however that all the periods in the

aggregate do not exceed fifteen years.

4. Power to prescribe Industrial relations and other facilities temporarily for relief undertaking. (1) Notwithstanding any law, usage, custom, contract, instrument, decree, order, award, submission, settlement, standing order or other provision whatsoever, the State Government may, by notification in the Official Gazette, direct that -

(i) in relation to any relief undertaking and in respect of the period for which the relief undertaking continues as such under subsection (2) of section 3 -

(a) all or any of the laws in the Schedule to this Act or any provisions thereof shall not apply (and such relief undertaking shall be exempt therefrom), or shall, if so directed by the State Government, be applied with such modifications (which do not however affect the policy of the said laws) as may be specified in the notification;

(b) all or any of the agreements, settlements, awards or standing orders made under any of the laws in the Schedule to this Act, which may be applicable to the undertaking immediately before it was acquired or taken over by the State Government or before any loan, guarantee or other financial assistance was provided to it by, or with the approval of, the State Government, for being run as a relief undertaking, shall be suspended in operation or shall, if so directed by the State Government, be applied with such modifications as may be specified in the notification;

(iii) rights, privileges, obligations and liabilities shall be determined and be enforceable in accordance with clauses (i) and (ii) and the notification;

(iv) any right, privilege, obligation or liability accrued or incurred before the undertaking was declared a relief undertaking and any remedy for the enforcement thereof shall be suspended and all proceedings relative thereto pending before any court, tribunal, officer or authority shall be stayed;

(b) the right, privilege, obligation or liability referred to in clause (a) (iv) shall, on the notification ceasing to have force, revive and be enforceable and the proceedings referred to therein shall be continued :

Provided that, in computing the period of limitation for the enforcement of such right, privilege, obligation or liability, the period during which it was suspended under clause (a) (iv) shall be excluded notwithstanding anything contained in any law for the time being in force.

(2) A notification under sub-section (1) shall have effect from such date, not being earlier than the date referred to in sub-section (1) of section 3 , as may be specified therein, and the provisions of section 21 of the Bombay General Clauses Act, 1904, shall apply to the power to issue such notification."

If the conditions prescribed in Sub-Section (1) of Section 3 are satisfied, the State Government is empowered to declare an industrial undertaking specified in

the notification as a relief undertaking. This power exists as a temporary measure of preventing unemployment or as an unemployment relief. One of the conditions so prescribed includes acquisition or taking over of or, provision of a loan, guarantee or other financial assistance to, the undertaking by the State Government. The notification remains effective for such period not exceeding twelve months as may be specified in the notification subject to further renewals of maximum twelve months at a time, but not so as to exceed fifteen years in the aggregate. The effect of such declaration is provided for in Section 4 . In the first place, laws specified in the Schedule to the B.R.U. Act do not apply or apply with such modifications as may be specified in the notification. Secondly, agreements, awards etc. made under the laws specified in the schedule applicable to such undertaking immediately before its acquisition or take-over by the State Government or provision of loan, financial assistance, etc. to it by the Government, stand suspended in operation or are applied to it with such modifications as specified. In the result, the rights, liabilities, etc. vis-a-vis such undertaking are determined or are enforceable in accordance with the above two consequences and the notification. Thirdly, rights, privileges or liabilities, etc. accrued or incurred by the undertaking before its declaration as a relief undertaking remain suspended and proceedings in connection therewith stayed. These rights, liabilities, etc. revive on the notification ceasing to have force and proceedings which were stayed can then continue.

6. The submission of learned counsel for the Respondent is that this protection is even larger than SICA, since not only the proceedings, but even underlying contracts are suspended. That is not quite correct. Only those contracts, settlements, etc. which are made under the laws specified in the schedule remain suspended. (The present contract, with which we are concerned, is not under any of those laws.) Generally, however, what remain suspended are the rights, privileges, liabilities, etc. accrued or incurred by the relief undertaking before the declaration and remedies in connection therewith. That does not mean that no interim relief can be granted in a proceeding, which is filed for enforcement of any previously accrued right or liability of the undertaking, during the time the proceeding remains suspended. An interim order granted in a proceeding filed for enforcement of any right or liability is not in itself an enforcement of such right or liability. The purpose of granting an interim order is to preserve the property, which is the subject matter of a proceeding or which is necessary to be preserved, pending adjudication of the rights or liabilities so as not to deny the fruits of the final order to the successful party. Even when a suit is stayed under the provisions of the Code of Civil Procedure, say, under Section 10 thereof, the Court can always grant interim relief on this basis. By its very nature, a declaration of relief undertaking is for a short period as an unemployment relief. No party can take advantage of this temporary measure and deal with the property of the relief undertaking to the prejudice of the other party during the period the proceeding remains stayed. If there is any such possibility, the Court is duty bound to protect the property during the period of stay.

7. Binod Mills case (supra) was a case, where a decree was brought before a District Judge in Ujjain, M.P. for execution. This decree was passed by Bombay High Court against an undertaking declared to be a relief undertaking under the State law of M.P. The undertaking objected to the execution citing Section 5 of the M.P. Act. The Section is quoted below :-

"5. Suspension of suits or other legal proceedings against relief undertakings. - As from the date specified in the notification under sub-section (1) of section 3 , no suit or other legal proceedings shall be instituted or commenced or, if pending, shall be proceeded with against the industrial undertaking during the period in which it remains a relief undertaking any law, usage, custom, contract, instrument, decree, order, award, settlement or other provisions whatsoever notwithstanding."

The question in that case was, whether on a true construction of Section 5 of that Act (which was in pari materia with Section 4 of the B.R.U. Act), execution of the decree could be proceeded with against the undertaking. The M.P. Court rejected the contentions of the undertaking and allowed the execution to continue. The M.P. High Court upheld the trial Court order, holding that the determination of rights between the parties had to be in accordance with the substantive law applicable to the State of Maharashtra and once such rights were adjudicated upon as per that law, such rights could not again be subjected to and/or regulated by any law in the State of M.P. to which the decree was sent only for execution. The Supreme Court reversed the M.P. High Court order, holding that the execution in the M.P. Court had to remain stayed. This is what the Supreme Court had to say :

"A close scrutiny of the above section reveals that Section 5 has a free field of operation unfettered by any limitation. The section is not happily worded. What the section intends to convey, according to us, if the words are re-arranged, would be as follows: "Notwithstanding any law, usage, custom, contract, instrument, decree, order, award, settlement or other provisions, no suit or other legal proceedings shall be instituted or commenced or if pending shall be proceeded against the industrial undertaking as from the date specified in the notification under sub- section (1) of Section 3 during the period in which it remains a relief undertaking."

So read, the object of the section becomes clear. The section seeks to confer benefit to the relief undertakings from the ravages of litigation during the period it remains a relief undertaking. The expression "decree" is very material for our purpose. Inclusion of "decrees" in the section shows that the fact that decrees were validly obtained against a relief undertaking will not pose any danger to it during the period the declaration is in force. In other words, the section prevents execution of a decree validly obtained against the undertaking during the period mentioned above. That takes us to the question as to whether the words "other legal proceedings" in the section would take in execution proceedings. It is not disputed that the Section bars institution of suits and starting of other

proceedings. What is disputed is that expression "other legal proceedings" will not take in execution proceedings. The contention is grounded on the general principle that the execution court cannot go behind a valid decree and that the execution court cannot, therefore, refuse to execute it. It is admitted that the decree obtained from the Bombay High Court is a valid decree. That being so, law should take its course and execution should proceed. It is by virtue of the enabling provisions contained in Sections 40 & 42 of the Civil Procedure Code that this validly obtained decree got transferred to the Court in Madhya Pradesh. It is contended that by the mere transfer of this decree in accordance with the procedural law, its validity does not disappear nor its binding force cease to exist. We find difficulty in accepting this contention. If we are to accept this submission, it would be rendering section 5 of the Act nugatory and to 258 destroy the benefits sought to be conferred by that section. Nobody questions the validity of the decree. All that is sought to be done is to suspend its animation for the period mentioned in the notification. No Court in Madhya Pradesh can question its validity, nor can refuse to execute it after the period is over. To direct execution of the decree in the teeth of Section 5 would be to encourage filing of suits in Courts outside Madhya Pradesh, secure decrees and defeat the purpose of the Act. We do not think that such an abuse is permissible in the face of Section 5 of the Act. We have, therefore, to answer this question in favour of the appellant."

As the Supreme Court held in Binod Mills" case till the notification of relief undertaking operates, the proceedings for execution remain in suspended animation for the period mentioned in the notification and can continue only after such period.

8. Relying on the judgment in Binod Mills" case, our Court in Baroda Rayon Corporation"s case (supra) held that State legislation of Gujarat declaring an undertaking as a relief undertaking would cover properties of the undertaking within the State of Gujarat and execution against such properties could not be proceeded with.

9. These judgments do not lay down that as long as proceedings remain stayed, no interim relief can be granted to a creditor or claimant against the undertaking declared as a relief undertaking. Even if the proceedings remain stayed, appropriate interim relief, which is merely in aid of the final relief that can be granted once the stay expires and the proceedings are taken up for hearing, can always be granted. Surely, the relief undertaking cannot deal with its property otherwise than in the course of its business to the detriment of the creditor or the claimant except by showing cause to the Court in support of its purposed dealing.

10. In fact, the interim relief sought in the present petition is to protect the company"s property from being dissipated. Such relief does not run counter to the purpose of a notification of relief undertaking or objective behind it, which is to preserve and perpetuate the undertaking, untrammelled by ravages of litigation,

during the period it remains a relief undertaking so as to prevent, or give relief from, unemployment. If, on the other hand, a genuine need arises for any disposal of the property and such disposal is in keeping with the purpose or objective behind the declaration as a relief undertaking, the Respondent Company could always approach this Court and seek a leave.

11. Accordingly, the following order is passed :-

(a) Pending admission of the petition and until further orders, the Respondent shall not dispose of any of its assets or create any third party rights therein otherwise than in usual course of its business, without leave of this Court.

(b) The Respondent shall keep the Petitioner informed from time to time about the progress and status of the implementation of the C.D.R. Scheme and important developments thereunder as also of the declaration of relief undertaking.

(c) The Petitioner shall be at liberty to press for admission of the petition and further relief in the matter as and when the notification of relief undertaking ceases to apply to the Respondent.

(d) The petition is adjourned sine die till then.

(e) Company Application is disposed of accordingly.

(f) Liberty to apply.