

(2001) 04 BOM CK 0030

In the Bombay High Court

Case No : Notice of Motion No. 2714 of 1999 in Suit No. 4125 of 1999

Garden Finance Ltd.

APPELLANT

Vs

Prakash Inds. Ltd. and Another

RESPONDENT

Date of Decision : 24-04-2001

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(4), 2, 42, 5
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 17, 22, 25

Citation : AIR 2002 Bom 8 : (2002) 1 BomCR 641 : (2001) 4 BOMLR 310 :
(2002) 1 CivCC 163 : (2003) 115 CompCas 116 : (2001) 4 MhLj 425

Hon'ble Judges : D.K. Deshmukh, J

Bench : Single Bench

Advocate : Farzana Zuben Behramkamdin and Pankaj Rajmachikar, instructed by Wadia Ghandy and Co, for the Appellant; Dinesh Purandare, instructed by Reslima Ruparel, for the Respondent

Judgement

D.K. Deshmukh, J.—This Notice of Motion is taken out by the Plaintiffs. The Plaintiffs have filed a suit contending therein that the Defendant No. 1, which is a Company incorporated under the Companies Act, entered into an agreement with the Plaintiffs dated 29th December, 1994 for giving some equipments on lease to the Defendants. The lease money of the equipments was also decided by that agreement. It is further contended that the Defendant No. 2 also entered into an agreement to give personal guarantee for due and punctual payment of all and every sum payable by the Defendant No. 1/Company under the lease agreement to the tune of Rs. 2,31,76,800/-. According to the Plaintiffs, as the Defendant No. 1 committed default in payment of lease money, the agreement was terminated and the present suit has been filed by the Plaintiffs for recovery of the possession of the lease equipments as also for recovery of arrears of lease money from the Defendant No. 1/Company. So far as the money part of the decree, that is claimed by the Plaintiffs in the suit, it is claimed by the Plaintiffs that it is joint and several liability of the Defendant Nos. 1 & 2 and therefore they are jointly and severally liable.

2. By this Notice of Motion, the Plaintiffs pray for appointment of Receiver of the lease equipments and also pray for temporary injunction. It appears that at the ad interim stage, by order dated 6th August, 1999, ad interim order in terms of prayer clauses (e) & (f) of the Notice of Motion was granted and the appeal was carried against the ad interim order. The Appeal Court by ad interim order vacated the ad interim order passed by the learned Single Judge. Against the order of the Appeal Court vacating the ad interim order, petition for special leave to appeal was preferred before the Supreme Court, which the Supreme Court disposed of by directing the Appellate Court to decide the appeal as expeditiously as possible. The Supreme Court also passed an order of temporary injunction restraining Defendant No. 1/Company from creating any third party interest over the lease equipments. I am told that the appeal preferred against the ad interim order is still pending before the Division Bench.

3. Two preliminary objections have been raised to the jurisdiction of this Court to entertain this Notice of Motion. First objection on behalf of the Defendants is that the lease agreement between the Plaintiff and the Defendant No. 1/Company contains an arbitration clause. The Defendant No. 1/Company by a notice dated 14th August, 1997 invoked that arbitration clause and as the Plaintiffs did not take any action, an application u/s 11 of the Arbitration and Conciliation Act, 1996 has been filed before the Delhi High Court for appointment of an Arbitrator. That application is still pending before the Delhi High Court. The submission is that in terms of the provisions of Section 42 of the Arbitration Act, as the proceedings are pending before the Chief Justice of the Delhi High Court u/s 11, this Court cannot entertain the present suit. The second objection that has been raised is that the subject matter of this suit is covered by an arbitration agreement and as an oral application has been made to this Court for referring the parties to the Arbitrator u/s 8 of the Act, in terms of the provisions of Section 5 of the Arbitration Act, this Court will not have the jurisdiction to entertain the suit. A further objection to the jurisdiction of this Court is raised. It is urged that a reference of the Defendant No. 1 Company has been registered before the B.I.F.R. and therefore, in terms of the provisions of Section 22 of the S.I.C.A. Act this suit, which is also a suit for recovery of money from the Defendant No. 1/Industrial Company, is not maintainable. It is further urged that the Defendant No. 2 is the guarantor of the liability of the Defendant No. 1/Industrial Company and therefore, in terms of the judgment of the Supreme Court in the case of Patheja Bros. Forgings & Stamping and Anr. v. I.C.I.C.I. Ltd. & others, this suit cannot proceed further. It may be pointed out here that the Defendants have not filed any reply on merits of the matter.

4. Refuting these objections, it is submitted on behalf of the Plaintiffs that so far as Section 8 of the Act is concerned, it contemplates an application being made to the Court. The application contemplated is a written application. No such application has been made to this date. It is further submitted that even If it is assumed that an oral application can be made u/s 8, then as the subject matter of the suit is not same as a subject matter of the arbitration agreement, an

application u/s 8 cannot be granted. It is submitted that the arbitration clause is contained only in the lease agreement between the Plaintiffs and the Defendant No. 1. The Suit is not only to enforce the lease agreement, but it is also for enforcement of the guarantee agreement between the Plaintiffs and the Defendant No. 2, in which there is no arbitration agreement. Therefore, the subject matter of the suit is the lease agreement as also the guarantee agreement and as there is no arbitration clause in the guarantee agreement, it cannot be said that the subject matter of the suit is the same as the proceedings before the Arbitrator which may be started pursuant to the arbitration agreement and therefore, as an application u/s 8 itself is not tenable, section 5 will not operate. In so far as the pendency of the application u/s 11(4) of the Arbitration Act before the Delhi High Court and the provisions of Section 42 of the Arbitration Act is concerned, relying on the judgment of the Supreme Court in the case of Ador Samta Pvt. Ltd. v. Peekay Holdings Ltd. and others, 2 it is submitted that the power of the Chief Justice of the High Court u/s 11 had been held to be an administrative power. The Chief Justice while exercising powers u/s 11 cannot be said to be a Court and therefore in the submission of the learned Counsel, provisions of Section 42, which contemplates pendency of an application before the Court will not take into its compass an application u/s 11 before the Chief Justice and therefore according to the Plaintiffs, provisions of Section 42 will not operate in relation to an application made u/s 11 of the Act. In so far as the provisions of Section 22 of the S.I.C.A. Act are concerned, relying on the judgment of the Supreme Court in the case of M/s. Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association, as also the judgment of this Court in the case of 20th Century Finance & Consultancy Services Ltd. v. Khanna Rayon Industries Ltd., It is submitted that as the suit has been filed for recovery of the lease assets, which is the property of the Plaintiffs/ Company, bar created by Section 22 of the S.I.C.A. Act would not operate.

In so far as the objection regarding maintainability of the suit against the Defendant No. 2 is concerned, it is pointed out that by the provisions of Section 22 of the Act, the suit for enforcement of any guarantee in respect of any loan or advance granted to the Industrial Company is barred. The present suit is not a suit filed against the Defendant No. 2 for enforcement of any guarantee in respect of any loan or advance granted to the Industrial Company. It is further urged that the Supreme Court has held by its judgment in the case of Patheja Bros, referred to above that a suit against the guarantor of loan to the Industrial Company is barred for the reason that if the suit against the Industrial Company is barred, the suit against the guarantor cannot be continued. But if the suit against the Industrial Company is not barred u/s 22, then the suit against the guarantor only cannot be said to be barred. It is further urged that what is barred u/s 22 is the suit for recovery of money. It is submitted that the present suit cannot be said to be a suit for recover of money. The principal relief that is claimed in the suit is of recovery of possession of machinery. What will be barred by the provisions of Section 22 is the suit simplicitor for recovery of money or for

enforcement of any security against the Industrial Company. This is, basically, a suit for recovery of lease machinery and incidentally a money decree for the arrears of the lease money has been claimed and therefore, according to the Plaintiffs, this suit would not be barred. Reliance has been placed on several decisions of the learned Single Judges of this Court, both reported as also unreported. One of them being judgment of the learned Single Judge of this Court in the case of M/s. Kotak Mahendra Finance Ltd. v. M/s. Deve Paints Ltd.,.

5. Now, in the light of these rival submissions if the objections are to be considered, in so far as the objection that in view of the pendency of the proceedings before the Chief Justice of the Delhi High Court u/s 11 of the Arbitration Act this suit cannot proceed, the provisions of section 42 are to be considered. Section 42 of the Act reads as under :-

"42. Jurisdiction. -

Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."

6. It is clear from the perusal of the provisions of Section 42 quoted above that in order to activate provisions of Section 42, it has to be shown that an application in respect of an arbitration agreement has been made in the Court. The term Court is defined by Section 2(e) of the Act to mean the principal Civil Court of original jurisdiction in a district. The Supreme Court by its judgment in Ador Samia's case referred to above has categorically held that the powers of the Chief Justice u/s 11 are administrative powers and therefore the Chief Justice while exercising powers u/s 11 does not act as a Court.

It is true that the judgment of the Supreme Court in Ador Samia's case has been referred to a Larger Bench by the Supreme Court by its judgment in the case of Konkan Railway Corpn., Ltd. and Anr. v. Rani Construction Pvt Ltd,. However, till that reference is answered and the judgment of the Supreme Court in Ador Samia's case is overruled, the law laid down by the Supreme Court in Ador Samia's case would be binding on this Court and therefore, presently the Chief Justice exercising powers u/s 11 cannot be termed as a Court and if the Chief Justice of the Delhi High Court before whom an application u/s 11 has been made by the Defendant No. 1, cannot be termed as a Court for the purpose of the provisions of Section 42 of the Act, in my opinion, it would not bar the jurisdiction of this Court to entertain the present suit.

7. So far as the submissions and objections based on the provisions of Section 8 and Section 5 of the Arbitration Act are concerned. Section 8 of the Arbitration Act reads as under :-

"8. Power to refer parties to arbitration where there is an arbitration agreement .-

(1) A Judicial Authority before which an action is brought in a matter which is the subject of an arbitration agreement shall. If a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the Judicial Authority, an arbitration may be commenced or continued and an arbitral award made."

8. It is clear from the perusal of section 8 that a party who claims that the suit which is pending before the Court is the subject of an arbitration agreement, has to make an application to the Court not later than when submitting his first statement on the substance of the dispute for referring the parties to arbitration. Sub-section (2) of Section 8 further lays down that an application under sub-section 1 for referring the parties to arbitration shall not be entertained unless it is accompanied by the original arbitration agreement or duly certified copy thereof. In my opinion, the provisions of sub-section 2 of section 8 indicate that the application that is contemplated by sub-section 1 is a written application and not merely an oral application. The Supreme Court by its judgment in the case of P. Anand Gajapathi Raju v. P.V.G. Raju (Dead) & Ors., has laid down the requirements that have to be satisfied before the Court. Paragraph 5 of the judgment of the Supreme Court in P. Anand's case reads as under :-

The conditions which are required to be satisfied under sub-sections (1) and (2) of Section 8 before the Court can exercise its powers are :

- (1) there is an arbitration agreement;
- (2) a party to the agreement brings an action in the Court against the other party;
- (3) subject-matter of the action is the same as the subject-matter of the arbitration agreement;
- (4) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.

9. It is clear from these observations that one of the aspect to be considered by the Court while considering the application for referring the parties to arbitration is that the subject matter of the action is the same as the subject matter of the arbitration agreement. Now, this requirement will involve reference to the contents of the plaint as also to the arbitration agreement and the manner in which the applicant wants the Court to read the averments made in the plaint as also the recital in the arbitration agreement. It is obvious that the Plaintiff who

has brought the action would also have the right of audience on such an application. In order to afford the Plaintiff a complete opportunity of being heard on an application u/s 8 of the Arbitration Act. In my opinion, it would have to be held that the party which seeks to refer the dispute to the Arbitrator has to make a written application for that purpose, so that the Plaintiff, who has instituted the suit, knows exactly the grounds on which the reference is sought. In the present case, though the Defendant has been served with this suit long back, there is no written application made. During the course of hearing, yesterday, when this aspect was pointed out, the learned Counsel stated that he should be given one day's time to make an application. Though the hearing of the matter did not conclude yesterday, and the Defendant got time which he was seeking to make an application, even today no such application has been made. Thus, there is no application made u/s 8 for referring the dispute to the arbitration and therefore as there is no application made for referring the dispute to the arbitration, provisions of Section 5 do not come into play and do not operate. It is further to be seen that even if it is assumed that an oral application for referring the parties to Arbitrator can be entertained, it is clear from the observations of the Supreme Court quoted above in its judgment in P. Anand's case that one of the essential requirement is that the subject matter of the action is the same as the subject matter of the arbitration agreement. Thus, according to the Supreme Court in order that u/s 8 matter can be referred to arbitration, there has to be identity of the subject matter of the suit and the arbitration agreement. As pointed out above, the subject matter of the suit is two agreements namely the agreement of lease of equipment between the Plaintiff and the Defendant No. 1 as also the agreement of guarantee between the Plaintiff and the Defendant No. 2, whereas, the subject matter of the arbitration agreement is only the lease agreement and not the guarantee agreement. Therefore, it cannot be said that there is an identity of subject matter of the suit and the arbitration agreement. In this view of the matter, in my opinion, section 5 of the Arbitration Act would also not come in the way of this Court entertaining the present suit.

10. Now, turning to the objection raised with reference to the provisions of Section 22 of the S.I.C.A. Act is concerned, the provisions of Section 22, which are relevant for the purpose of considering the objection, reads as under :-

"22. Suspension of legal proceedings, contract etc.- (1) Where in respect of an Industrial Company, an inquiry u/s 16 is pending or an 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 (an no suit for 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.

11. It is to be seen that the portion beginning with "And" and ending with "Industrial Company" was added by Sick Industrial Companies (Special Provisions) Amendment Act, 1993. Before that portion was inserted by amendment in Section 22, proceedings for winding up of the Industrial Company for execution, dispose of or like against any of the properties of the Industrial Company or for the appointment of the Receiver in respect of the property of the Industrial Company was barred. The Judgment of the Supreme Court in the case of M/s. Shree Chamundi Mopeds Ltd., as also the judgment of the learned Single Judge of this Court in 20th Century Finance's case, referred to above considered the provisions of Section 22 before amendment in 1994. However, provisions of Section 22, on which the Defendant is relying are the provisions, which are incorporated by an amendment. It is true that the judgment of the learned Single Judge of this Court in Kotak Mahendra Finance's case referred to above considered the provisions of Section 22 as amended in 1994, as also the nature of the agreement as also the relief claimed in that suit. However, in that judgment the Court has not considered the provisions of Section 22 introduced by amendment separately and independently. Still, " it can be said that the Court while deciding M/s. Kotak Mahendra's case was alive to the provisions of Section 22 as amended in 1994 and the learned Single Judge has held that the suit instituted for recovery of the property which is leased to the Industrial Company, which is before B.I.F.R. as also for recovery of the arrears of the lease money is maintainable and that the bar of Section 22 of S.I.C.A. Act does not operate. In my opinion, the provisions incorporated by amendment in the year 1994 will not apply to a suit which is a suit basically filed for recovery of the property of the Plaintiff itself, which is in possession of the Defendant/Industrial Company, which is before B.I.F.R. The words that are used in Section 22 are "no suit for the recovery of money or for the enforcement of any security against the Industrial Company." in my opinion, unless the suit answers this description and can be said to be a suit for recovery of money, or for the enforcement of any security against the Industrial Company, the suit will not be barred. So far as the present suit is concerned, frame of the suit shows that it is basically a suit for recovery of the lease equipment of the Company, and incidentally a decree for the arrears of lease money has been claimed and therefore, in my opinion, such a suit which is composite suit and which is basically a suit for recovery of the lease equipment will not be barred by provisions of Section 22 of the S.I.C.A. Act.

11. Now, so far as the objection about the maintainability of the suit against the guarantor is concerned, in my opinion, the objection is misconceived, in as much as, what is barred by the provisions of Section 22 of the Act is a suit for enforcement of any guarantee in respect of any loan or advance granted to the Industrial Company. Therefore, a guarantee contemplated by section 22 is a guarantee in respect of any loan or advance granted to the Industrial Company.

The present guarantee agreement is not in respect of any loan or advance granted to the Industrial Company and therefore, a bar of Section 22 would not operate in relation to a suit which is filed for enforcement of a guarantee, which is in relation to a payment of lease money, which becomes due from the Industrial Company to the Plaintiff, as a result of the lease agreement. The Supreme Court in its judgment in Patheja Bros, case has considered this aspect of matter and has held that a suit for enforcement of a guarantee in respect of loan or advance granted to the Industrial Company can not be proceeded with. The relevant observations of the Supreme Court are to be found in paragraphs 7 & 8 are read as under :-

"7. The words in the square brackets above were inserted into Section 22 by Act 12 of 1994 and it is these words which are relevant for our purposes. As we read them, they provide that no suit.

(a) for the recovery of money, or

(b) for the enforcement

(i) of any security against the Industrial Company, or

(ii) of any guarantee in respect of any loans or advance granted to the Industrial Company shall lie or be proceeded with except with the consent of the Board or the Appellate Authority under the said Act. For our purposes, therefore, the relevant words are : "no suit for the enforcement ... of any guarantee in respect of any loans or advance granted to the Industrial Company" shall lie without the consent of the Board or the Appellate Authority. The words are crystal clear. There is no ambiguity therein. It must, therefore, be held that no suit for the enforcement of a guarantee in respect of a loan or advance granted to the Industrial Company concerned will lie or can be proceeded with, without the sanction of the Board or the Appellate Authority under the said Act.

8. It is not possible to read the relevant words in Section 22 as meaning that only a suit against the Industrial Company will not lie without such consent. There is no requirement in section 22, as analysed above, that, to be covered thereby, 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."

12. It is clear from the above observations that the Supreme Court has held that if a suit in relation to a loan or advance granted to the Industrial Company cannot be proceeded with against the Industrial Company, then, the same suit or any other action in relation to the same agreement cannot be proceeded with against the guarantor. The intention of the Legislature, it appears, was to extend the protection which is granted to the Company and to the guarantor also. But, if a suit against the Company is not barred, then, in my opinion, the suit only against the guarantor cannot be said to be barred. Thus, in my opinion, there is no substance in these objections.

13. So far as merits of the matter are concerned, there is no affidavit in reply

filed and therefore, averments made in the affidavit filed in support of the motion have to be taken to have been admitted. In this view of the matter, therefore, this Notice of Motion is granted in terms of prayer clause (e) excluding bracketed portion. It is directed that the Receiver shall take symbolic possession of the machinery and make an offer to the Defendant No. 1 for being appointed as an agent of the Receiver to be in possession of the machinery on usual terms and conditions including payment of royalty. While determining the amount of royalty, the Receiver shall take into consideration the amount of arrears or lease money. In case, the Defendant No. 1 does not execute the agency agreement within a period of eight weeks from the date on which offer is made by the Receiver to the Defendant No. 1, then the Receiver shall take actual possession of the machinery and hand the same over to the Plaintiffs, Till the Receiver takes possession, ad interim order in terms of prayer clause (f) shall operate.

Notice of Motion disposed of.

Receiver to act on simple copy of the order duly authenticated by the Associate/ Personal Secretary of the Court.

Certified Copy expedited.

14. At the request of the learned counsel appearing for the Defendants, it is directed that the Receiver shall not take possession of the machinery for a period of six weeks from today.