

(1995) 04 AP CK 0023

In the Andhra Pradesh High Court

Case No : Writ Appeal No. 128 of 1995 and Writ Petition No. 11632 of 1994

Haryana Telecom Ltd.

APPELLANT

Vs

Aluminium Industries Ltd. and Another
 Aluminium Industries Ltd. Vs Haryana Telecom Ltd. and Another

RESPONDENT

Date of Decision : 04-04-1995

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 17, 18, 21, 22

Citation : (1997) 88 CompCas 735

Hon'ble Judges : K.M. Agarwal, Acting C.J.;Avinash Somakant Bhate, J

Bench : Division Bench

Advocate : S. Ravi and V. Venkataramana, for the Appellant;

Judgement

K.M. Agarwal, Actg.C.J.

1. This writ appeal is by the first respondent in the writ petition, and is directed against an interim order made in W.P.M.P. No. 14131 of 1994 made absolute by the learned single judge by his impugned order. As learned counsel for the writ petitioner (i.e., first respondent herein) submitted that a case that writ appeal was allowed and the stay granted by the learned single judge was vacated the writ petition would become infructuous, we decided to hear the writ petition itself on the merits with the consent of learned counsel for the parties.

2. The first respondent herein is a public limited company, having its factory at Hyderabad also. It is engaged in the business of manufacturing cables and conductors and also undertakes to manufacture machinery required in cable industry. The appellant is in the business of manufacturing telecommunication equipment and in particular jelly-filled telephone cables. It is also a public limited company. The appellant gave to the first respondent herein its purchase order dated October 14, 1991, for supply of certain mentioned therein subject to the terms and conditions therein printed. In pursuance of one of the terms and conditions of the said purchase order the first respondent herein furnished bank guarantee No. 27 of 1993, dated July 9, 1993, issued by the second respondent

herein. It appears that some dispute arose between the parties and, therefore, treating the first respondent herein as liable for the claim raised by the appellant, the latter tried to invoke the said bank guarantee on June 24, 1994. The first respondent herein, thereafter, rushed to this court with its Writ Petition No. 632 of 1994 and made a prayer to direct the appellant herein or refrain from encashing the aforesaid bank guarantee No. 27 of 1993 by issuing an appropriate writ in that regard. It also filed an application for interim direction against the appellant and the bankers not to encash the said bank guarantee. As the interim relief was granted and the vacation application was rejected, the appellant, which was the first respondent in the writ petition, filed this writ appeal.

3. It was not disputed before us, nor disputed before the learned single judge, that somewhere in the 80s the first respondent herein, became a sick industry under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (in short, "the Act"), and it was so declared by the Board for Industrial and Financial Reconstruction (in short, "the BIFR") in Case No. 93 of 1987 in the year 1987. It was also not disputed that the scheme u/s 18 of the Act was framed by the BIFR and has been put in implementation with effect from November 1, 1989, and is said to be for a period of ten years. In view of the fact that the first respondent herein is a sick industry, it was urged on behalf of the writ petitioner (i.e., the first respondent herein) that in view of the provisions of section 22(1) of the Act, the appellant herein could not take out proceedings for enforcing the bank guarantee, because it was in the nature of an execution or distress. The argument prevailed before the learned single judge and, accordingly, the appellant herein was restrained from encashing the bank guarantee pending disposal of the writ petition on the merits.

4. Out of the various arguments made before us by learned counsel for the parties, the following three questions fall for consideration :

(i) whether the provisions of section 22(1) of the Act only apply to liabilities arising out of past and present transactions till the date of enquiry u/s 16, or when any scheme referred to u/s 17 is under preparation or consideration, or a sanctioned scheme is under implementation, or even to liabilities arising out of transactions entered into subsequent to the date of framing of the scheme contemplated u/s 22 of the Act;

(ii) whether invoking or taking steps to enforce any bank guarantee amounts to proceedings for execution, distress or the like, against any of the properties of the sick industrial company; and

(iii) whether the writ petitioner (i.e., the first respondent herein) could be allowed to urge that the conditions for enforcement of the bank guarantee were not fulfilled by the appellant and, therefore, the same could not be enforced.

There are authorities to support the contention of learned counsel for the appellant that the provisions of section 22(1) of the Act cannot be applied to

liabilities arising out of transactions subsequent to the date of declaration of any industry as a sick industry, or subsequent to the date of framing of a scheme as contemplated u/s 21 of the Act. One such authority is the judgment delivered by a Division Bench of this court in Andhra Cement Company Ltd. v. Government of Andhra Pradesh (W.P. No. 12701 of 1991, decided on 5-11-1991). A similar view was expressed by a learned single judge of this court in Aluminium Industries Ltd. v. Hindustan Cables Ltd. (W.P. No. 9420 of 1992 decided on 11-9-1992), which was based on the decision of this court in The Andhra Cement Company Ltd., Secunderabad Vs. A.P. State Electricity Board and others, . However, as it was argued that these decisions are not binding on us because no reasons are given for taking the said view, we will not base our decision in this writ petition and writ appeal only solely on the said decisions. We also do not propose to give out own reasons either for supporting or opposing the aforesaid view, because we think that the writ petition and the writ appeal may be disposed of even without deciding the aforesaid questions.

5. The bank guarantee cannot be said to be the property of the first respondent herein simply because it is indirectly going to be affected by enforcement of the said bank guarantee by the writ appellant. Similarly, proceedings to encash the bank guarantee cannot be said to be covered by the phrase "execution, distress or the like", contemplated u/s 22(1) of the Act. A similar question came up for consideration before the learned single judge in Aluminium Industries Ltd. v. Hindustan Cables Ltd. (W.P. No. 9420 of 1992 dated 11-9-1992), which was rejected by the learned single judge by observing as follows :

"I will now dispose of the legal contention raised by the learned counsel for the petitioner that by virtue of section 22 of the Sick Industrial companies (Special Provisions) Act, 1985, the invocation of bank guarantees is barred. Learned counsel submits that the encashment of bank guarantees amounts to proceedings against the properties of the petitioner company and, therefore, it is prohibited by section 22. Learned counsel reinforces his argument by stating that the word "property" bears a wide connotation in legal parlance and the word "property" occurring in section 22 would encompass within its sweep the bank guarantees as well. It is difficult to accept this contention of learned counsel. In fact, the argument advanced on behalf of the petitioner-company that section 22 applies to a case of encashment of bank guarantees was negated by the Division Bench in the writ appeal afore-mentioned. The Division Bench observed :

"Learned counsel placed reliance on section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. The same, however, has no application to the instant case. Invoking the bank guarantee by the second respondent does not come within the meaning of the words "execution, distress or the like against any of the properties of the industrial company" in sub-section (1) of section 22 of the Act.

I also share the same view. In elaborating further, I would add that the invocation of the bank guarantee by the beneficiary under the guarantee does

not put in motion any proceedings for execution, distress or the like against the properties of the company. It is difficult to accept the contention of learned counsel that the bank guarantees constitute property of the petitioner. The mere fact that the petitioner had deposited some money with the bank as a prelude to obtaining the bank guarantees or that the petitioner is exposed to a future pecuniary liability as a consequences of encashment of bank guarantee, does not mean that the petitioner has some sort of proprietary right or interest in the bank guarantees as such and that a proceeding analogous to execution or distress is being taken against the properties of the company. It may be that as a result of the encashment of bank guarantee by the first respondent, the bank may proceed to recover the amount from the petitioner. But that is only an indirect though inevitable consequences of invoking the bank guarantee. In fact that stage has not yet reached....".

We entirely agree with the reasons and the views expressed by the learned single judge in the above case and, therefore, we do not think it necessary to repeat the same or to give separate reasons.

6. So far as the last question is concerned, the Supreme Court has said in *Svenska Handelsbanken v. Indian Charge Chrome* [1994] 79 Comp Cas 589 that pleas are not open to any party resisting the enforcement of a bank guarantee on the ground that conditions for enforcement of such bank guarantee were not fulfilled. It was also held by a learned single judge of this court in the aforesaid Writ Petition No. 9420 of 1992, dated September 11, 1992, that no such challenge to the enforcement of any bank guarantee would be allowed to be made by any party. To quote the learned single judge :

"Under the bank guarantees, the second respondent undertook to pay the first respondent the sum specified therein "on demand and without demur in the event of supplier failure or neglecting to perform and discharge the several duties and obligations on its part to be observed and performed in due execution of the job entrusted to it by the purchaser". It has also stipulated that the decision of the company was as to whether the supplied has failed or neglected to perform or discharge the several duties and obligations on its part and as to the amount payable to the purchaser by the bank under the guarantee shall be final and binding on the bank. The Supreme court in *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.*, held that no temporary injunction could be granted to restrain the bank from performing the bank guarantee or to restrain the beneficiary under the bank guarantee from invoking the guarantee "except in case of fraud or special equities in the form of preventing irretrievable injustice". A Division Bench of this court in the case of very petitioner reiterated the same principle (vide judgment in Writ Appeal No. 846 of 1989, dated 19-12-1991)."

For the foregoing reasons, we are of the view that the writ petition filed by the first respondent herein deserves to be dismissed. The writ appeal although deserves to be allowed for the reasons aforesaid, it is not necessary to pass any

order in the appeal because the writ petition itself is finally disposed of by this judgment. In the result, the writ petition filed by the first respondent herein is hereby dismissed. Though the writ appeal deserves to be allowed, it hereby dismissed as having become infructuous, as the writ petition itself is hereby finally disposed of. No costs either in the writ petition or in this writ appeal.

7. Immediately after pronouncing the judgment, learned counsel for the first respondent herein, i.e., writ petitioner, made an oral request for a certificate of fitness to file appeal before the Supreme Court.

8. We are of the view that no substantial question of law of general importance is involved in the case. Therefore, the leave prayed for is rejected.

9. It was further requested by learned counsel for the writ petitioner that at least for a period of two weeks from today the operation of the present judgment of this court may be stayed so as to enable the writ petitioner to move a SLP in the Supreme Court and to obtain appropriate interim relief.

10. The prayer is allowed with the clear understanding that this period shall not be extended in future.