
(1999) 04 BOM CK 0024
In the Bombay High Court
Case No : Suit No. 5501 of 1998

ICICI Limited

APPELLANT

Vs

Alpine Industries Ltd. and others

RESPONDENT

Date of Decision : 05-04-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1, Order 41 Rule 1
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 17, 22, 25

Citation : AIR 1999 Bom 304 : (1999) 3 BomCR 771 : (1999) 3 CivCC 103 :
(2001) 106 CompCas 14 : (1999) 2 MhLj 683

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : Ms. Rajni Iyer, Birendra Saraf and Sunil Tilokchandani, instructed by Manilal Kher Ambalal and Co, for the Appellant; Lalit Jain, instructed by M. Dhruva and CO. and Girish Desai, for the Respondent

Judgement

F.I. Rebello, J.—The plaintiffs have moved this Court for a Judge's Order. It is the contention of the plaintiffs that this Court by order dated 11th December, 1998 at the ad-interim stage granted the following prayer:-

"That pending the hearing and final disposal of the suit, Court Receiver, High Court , Bombay, be appointed Receiver of all the Immovable properties of Defendant No. 1 including properties situate at Pithampur, District Dhar in the State of Madhya Pradesh and more particularly described in Exhibit "A" to the plaint, the movable properties described in Exhibit "B" to the plaint, with all powers under Order XL, Rule 1 of the Civil Procedure Code, 1908."

Pursuant to the said order, the Court Receiver, High Court, Bombay, by letter dated 22nd February, 1999 fixed 9th March, 1999 as the date for taking possession of the suit securities. The Advocate for the plaintiffs received a letter dated 22nd February, 1999 wherein they were informed that the proceedings have been registered before B.I.F.R. under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. The defendants have received the

communication dated 12th March, 1999 intimating that the reference dated 19th February, 1999 was registered as Case No. 58 of 1999. It is also clear that this Court by Order dated 11th December, 1998 had granted ad-interim injunction in terms of prayer Clause (b) till the Court Receiver takes possession. Admittedly, it is the defendant who is in possession of the property. In affidavit in support of the Judge's Order, the plaintiffs have set out that when the Court Receiver pursuant to the communication dated 22nd February, 1999 went to take possession on 9th March, 1999 the defendants declined to hand over possession on the ground that proceedings have been registered before B.I.F.R. By the present Judge's Order, the plaintiffs seek an Order that the Court Receiver be directed to take forcible physical possession of the suit property from the 1st defendant or any other person found in possession and/or occupation thereof by breaking open the lock and if necessary with the help of the Police. It is contended on behalf of the plaintiffs that the property being custodia legis, the subsequent act of proceedings being registered against the Company is of no consequence. It is also pointed out that the bar of section 22 of Sick Industrial Companies (Special Provisions) Act, 1985 would not apply on the facts of this case. Once a Receiver is appointed in so far as the parties are concerned, the property vests in the Receiver. At the highest only third parties who have taken steps in respect of the property before taking possession by the Receiver could in law have taken steps against the property. Learned Counsel has relied on various authorities which will be referred to hereinafter.

2. On the other hand on behalf of the defendant No. 1, it is contended that once proceedings are registered under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985, all further proceedings stand suspended and this Court would not have jurisdiction to pass any order. It is further pointed out that the property would be custodia legis only on the Receiver taking possession. In the instant case, possession had not been taken and consequently it cannot be said that the property was custodia legis. This is apparent it is pointed out in view of the interim injunction granted pending the Receiver taking possession.

3. With the above background, the present Judge's Order can now be disposed of. Order dated 11th December, 1999 is clear. This Court by ad-interim relief granted the prayer appointing Court Receiver with all powers under Order XL, Rule 1 of Civil Procedure Code, 1908. It is further clear that pending possession by the Receiver there was an ad-interim injunction in terms of prayer clause (b). Prayer clause (b) was to restrain the defendants from alienating, encumbering, parting with possession, creating third party rights, title, interest and claim of any nature whatsoever in the property as set out therein. It is thus clear that this Court itself until the Receiver had taken possession had restrained the defendants from alienating, encumbering or parting with possession or creating third party rights and/or other interest as set out in prayer clause (b).

The law regarding jurisdiction of this Court to proceed with matters after proceedings have been registered before B.I.F.R. under the Sick Industrial

Companies (Special Provisions) Act, 1985 is no longer res integra having been settled in the case of Real Value Appliances Ltd. Vs. Canara Bank and Others, . The Apex Court in paragraph 30 (Bom.C.R. para 29) has observed as under :-

"Once the reference is registered and when once it is mandatory simultaneously to call for information/documents from the informant and such a direction is given, then inquiry u/s 16(1) must - for the purposes of section 22 be deemed to have commenced. Section 22 and the prohibitions contained in it shall immediately come into play."

The Apex Court has also explained the objectives behind the Act in the following words :-

"It is also the legislative intention to see that no proceedings against the assets are taken before any such decision is given by the B.I.F.R. for in case the Company's assets are sold or the Company wound up it may indeed become difficult later to restore the status quo ante."

For that purpose section 22(1) of the Act may also be referred to for deciding the issue in controversy, which reads as under :-

"22(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."

From a reading of the sub-section, it is clear that once an inquiry u/s 16 is pending then notwithstanding anything contained in the Companies Act or any other law or the memorandum and articles of association of the Industrial Company or any other association of the Industrial Company or any other sic, no proceeding for the winding up or for execution, distress or the like against any of the property or for the appointment of the Receiver in respect thereof and no suit for the recovery of the money or for the enforcement of any security against the Company or of any guarantee in respect of the 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. Simply stated, once an inquiry is commenced further steps in pending proceedings cannot be proceeded with. In the instant case this is a suit by the plaintiffs wherein they

prayed for amongst others recovery of monies and some other reliefs in respect of the properties belonging to the defendant No. 1. The suit therefore would clearly be covered by section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985. Once it is so covered all proceedings stand stayed as they cannot be proceeded with further. There is, however, a rider. The proceedings can be proceeded with, with the consent of the Board or as the case may be the Appellate Authority.

It is, however, the case of the plaintiffs that what they are seeking is merely administrative directions and consequently the Judge's Order prayed by them can still be proceeded with. They seek to make a distinction between an Order inter parties and an order of appointment of a Receiver qua third party. In so far as inter parties is concerned, it is pointed out that the order takes effect immediately and the property vests in the Receiver and consequently the property is custodia legis. Considering the above, the various judgments cited can now be referred to advantageously.

4. When can the property be said to be custodia legis. For that purpose it will be necessary to consider the provisions of Order XL, Rule (1). The said Rule reads as under:-

"Order XL, Rule (1) :

(1) Where it appears to the Court to be just and convenient, the Court may by Order -

- a) appoint a Receiver of any property, whether before or after decree;
- b) remove any person from the possession or custody of the property;
- c) commit the same to the possession, custody or management of the Receiver; and
- d) confer upon the Receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit."

Normally a Receiver is appointed where the property is in medio. In the present case, Receiver is being appointed as these were securities in favour of the plaintiffs, who fall within the description of a "public financial institution" and consequently following the Full Bench decision of this Court the properties charged or secured in favour of public financial institution, a Receiver can be appointed even at an interim stage with power to sell the property. From a perusal of Rule (1) it is therefore clear that the Court has power to remove any person in possession or custody and commit the same to the possession, custody or management of the Receiver. Therefore, it contemplates the removal of a person from possession. Let me then examine the judgments cited in support

and in opposition. In Everest Coal Company (P) Ltd. Vs. State of Bihar and Others, , the Apex Court was concerned with proceedings, where a suit had been instituted and proceeded with without leave of the Court. The party after the suit has been instituted sought leave to proceed against the Receiver. The party was unsuccessful till the High court. That is how the matter reached the Apex Court. While discussing why permission was required, the Apex Court observed as under :-

"When a Court puts a Receiver in possession of property, the property comes under Court's custody, the Receiver being merely an officer or agent of the Court. Any obstruction or interference with the Court's possession sounds in contempt of that Court. Any legal action in respect of that property is in a sense such an interference and invites the contempt penalty of likely invalidation of the suit or other proceedings."

In Ramakrishna alias Baputi v. Ganpati AIR 1923 Nag 6, a learned Single Judge has observed as after considering the provisions of Order XL, as to when Receiver can be said to be vested with the property:

"It is however very clear from the terms of that rule that mere appointment does not immediately vest the property in the Receiver. The transfer of the property to his possession, actual or constructive, and the conferral of special powers on him require specific orders under Clause (b), (c) and (d) of the same Rule and no such order was passed at that time."

In Raja Jagadish Chandra Deo Dhabal Deb v. Bhubaneswar Mitra and others AIR 1923 Cal 121, the Division Bench again in the matter of appointment of Receiver observed as under :-

"Until the appointment has been perfected and the Receiver is actually in possession, a creditor is not debarred from proceeding to execution. The order appointing a Receiver is for the benefit of the parties to the action. It does not affect third persons until the appointment is completed and perfected. An execution creditor may therefore seize chattels after an order has been made appointing a Receiver on his giving security but before the security has been given or possession taken."

In Nilkantha Narayan Singh Vs. M.S. Zoha, Official Receiver and Another, , a Division Bench of the Patna High Court was considering the contention on behalf of the petitioners before it, that mere appointment of the Official Receiver as Receiver of the Judgment Debtor's estate would not transfer the possession of the colliery and the movables to the Official Receiver. On the other hand it was contended on behalf of the respondents that the moment the Official Receiver was appointed he was the person in possession. In that case the order of appointment of Receiver was made by the Calcutta High Court whereas the property was situated in Bihar. The Division Bench referred to various authorities and then observed as under :-

The possession must be the possession as a Receiver. Merely the appointment of a Receiver does not give him possession. On behalf of the respondent, it was strongly contended that by mere appointment possession at once passes to the Receiver. It is true that when a Receiver is appointed the actual appointment operates as an injunction restraining the parties to the suit from interfering with the property, but it does not affect outsiders. It was argued that under Order 40, Rule 1 of C.P.C., the Court actually gives possession to the Receiver. But in my view that is not so, and, in any event, I find it difficult to understand how a Court in Bengal could vest or transfer the possession of property in Bihar from A to B."

Thereafter the Division Bench proceeded as under :-

"In my Judgment the mere appointment of the Official Receiver of the Calcutta High Court, as a Receiver of the Judgment Debtor's estate did not place him in possession of this colliery."

In *N. Abdul Rahim Vs. Lingappa Vaijappa Angol*, , a learned Single Judge of this Court was considering the effect of the appointment of Receiver on a third party. In that context after relying on certain Judgments, the learned Judge observed that no decree-holder or creditor can proceed against property for which a Receiver is appointed by a Court and of which he has taken possession, without leave of that Court. If he does so, he will be guilty of contempt of Court. The rule that possession of the Receiver may not be disturbed without leave, does not apply, so far as third parties are concerned, until Receiver has been actually appointed and is in actual possession. The mere order of the appointment of a Receiver may not affect third parties until the appointment is perfected and possession has been actually taken by the Receiver. In *Rebati Ranjan Chakravarty and Others Vs. Umaprasanna Mukherjee and Others*, , the question was when a Receiver can be said to have taken possession. Commenting on the Order of the subordinate Court which held that on giving security the property would vest in the Receiver, the Division Bench observed as under :

"It is contrary to the general rule that the Receiver has to take possession and assume charge of the estate in respect of which he is appointed Receiver and that he cannot be deemed to be in possession merely because he furnishes security."

In *Mohamed Hanif Abdul Hamid and Others and B. Sahib Dittamal and Sons Pvt. Ltd. Vs. Chunilal Ukabhai Padia and Others*, , the learned Single Judge referred to the case of *A.L.V.R.S.T. Veerappa Chettiar and Another Vs. Mohamed Mytheen Mana Pillai*, , wherein it was observed that the property is custodia legis on the property coming into possession of the Receiver. Thereafter, the learned Single Judge referred to the case of *Kanhaiyalal Vs. D.R. Banaji and Others*, in para 10 of its Judgment for the observation that "Of Course, any Court which is holding the property in custodia legis through a Receiver or otherwise is moved to grant permission for taking legal proceedings in respect of that property, the Court ordinarily would grant such permission if considerations of justice require." In

that case the question was whether post facto sanction could be granted to sue the Court Receiver.

From the above Judgments what emerges is that the mere appointment of Receiver by itself does not vest the property in him. Possession has to be taken. Apart from that the Court passing an order must comply with the requirement of Order XL of the Civil Procedure Code. However, even if possession is not taken the defendants would be prohibited from dealing with property but in so far as third parties are concerned until possession is taken they are free to move against the property in law.

5. It was, however, contended on behalf of the plaintiffs that this Court had taken a view that once the property is custodia legis the bar of section 22 would not operate. For that purpose reliance is placed on the Judgment of the Division Bench of this Court in Krimpex Synthetics and others Vs. Industrial Credit and Investment Corporation of India Ltd. and others, . In that case the Court Receiver was appointed on 23rd October, 1989. The Court Receiver had taken possession on 15th January, 1991. The respondent had only applied for reference u/s 16 on 12th October, 1993. During the pendency of the application for reference they had sought stay of the proceedings. The Division Bench of this Court had rejected the application. To my mind the facts are self speaking. Possession was with the Court Receiver and no proceedings had been registered u/s 16 of B.I.F.R.

Next reliance was placed on the unreported Judgment in the case of J.K. Synthetics Ltd. Vs. The Industrial Credit and Investment Corporation of India and others, . There also the issue was the same as above. In that case Receiver was appointed on 7th January, 1998. The petitioners were appointed as agents on 7th January, 1998. Possession was taken on 20th/22nd January, 1998 and proceedings were registered before B.I.F.R. on 10th February, 1998. It is clear, therefore, that the Receiver was already in possession before the proceedings were registered. From the facts of that case, it is, therefore, clear that the Receiver was already in possession, unlike the facts in the present case. The next Judgment referred to in the case of The Industrial Development Bank of India Vs. Nira Pulp and Paper Mills Ltd. and others, . There also the Receiver was appointed on 13th February, 1990. Possession was taken on the same date. Proceedings under B.I.F.R. were registered on 3rd June, 1991. It is, therefore, clear that the Receiver was in possession and consequently the reference to that Judgment would be of no assistance in so far as the present case is concerned. Learned Counsel for the defendants, however, has drawn my attention to the following sentences namely "The appointment of the Court Receiver, High Court, Bombay as the Receiver of the suit property was made on 13th February, 1990. Receiver had taken possession of the suit properties on 23rd February, 1990. The suit properties became custodia legis through its duly appointed Receiver on 23rd February, 1990." This was for the purpose of pointing out that the expression custodia legis could only be after the Receiver takes possession .

On behalf of the defendants heavy reliance was placed on the Judgment in the case of Maharashtra Tubes Limited v. State Industrial and Investment Corporation of Maharashtra Ltd. and others 1995 Bank. J. 52(S.C.) : 1993(78) Comp.Cas. 803. To my mind the said Judgment would be of no assistance for the proposition canvassed as what the Apex Court was considering was the expression "proceedings" considering the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 and the provisions of the State Financial Corporations Act. The Apex Court after dismissing the matter held that the proceedings taken under the State Financial Corporations Act, 1951 would also be proceedings u/s 22 of the Sick Industrial Companies (Special Provisions) Act, 1985. However, the following observations may be relevant :-

"We are, therefore, of the opinion that where an inquiry is pending u/s 16/17 or an appeal is pending u/s 25 of the 1985 Act, there should be cessation of the coercive activities of the type mentioned in section 22(1) to permit the B.I.F.R. to consider what remedial measures it should take with respect to the Sick Industrial Company."

6. Therefore, considering the law as discussed in the various Judgments and considering the expression *custodia legis* it will be difficult to hold that in law the Court is in custody of the property without the Receiver being actually in possession. Take an example. During the period the Court appoints a Receiver and the property is in possession of a party, who will be responsible for waste, damage or the like, not occasioned by the fault of the party in possession. Is the party if the possession vests in the Court bound to protect and maintain the property. If the Court is deemed to be in possession, how can then third parties proceed against the property. The answer is clear. The property to be in custody of the Court, the Receiver must take possession. Once the Receiver takes possession, the property is *custodia legis*.

7. Section 22 of Sick Industrial Companies (Special Provisions) Act, 1985 as interpreted by the Apex Court in Real Value Appliances (*supra*) and also in Maharashtra Tubes Ltd. (*supra*) is clear. Once proceedings are registered all proceedings covered by section 22 must be stand stayed and or not proceeded with. This is in order to enable B.I.F.R. or the Appellate Authority to find out whether the Unit can be rehabilitated. Apart from staying the proceedings, no coercive process against the assets of the Company can also be proceeded. By the present Judge's Order what the plaintiffs are seeking is an Order from this Court to permit the Receiver to take possession by force in another words a coercive step. By virtue of section 22, this Court would be prohibited from so doing. By a Judge's Order the Court is not merely passing an administrative Order, the Court is judicially deciding an issue before it. In order to decide that issue, it will have to continue the proceedings before it, which jurisdiction is ousted by the language of section 22 as now interpreted. The effect of operation of section 22 is not as if the plaintiffs are barred from taking any steps. All that the law requires is for the plaintiffs to move B.I.F.R. and seek permission to

proceed with the proceedings. It is for the B.I.F.R. then to decide whether the plaintiffs should be permitted to proceed with the proceedings or not.

Even if the argument that the property is custodia legis is to be accepted which to my mind it is not, a property to be custodia legis in a case where the defendant is in possession would require dispossession of the defendants and taking over possession by the Receiver. The Order of this Court is clear that pending the Receiver taking possession, the defendant has been restrained by an injunction with dealing with the property. If the property vested in the Receiver by his appointment, there would have been no need or necessity for this Court to grant the ad-interim relief in terms of prayer clause (b). Therefore alternatively on the facts of the present case, it is the defendant who is in possession, until possession is legally taken by the Court Receiver. The properties in Schedule "A" to the plaint are situated outside the jurisdiction of this Court.

8. In the light of that I find no merits in this matter, which is accordingly dismissed.

9. Suit dismissed.