

(2007) 07 CAL CK 0050
In the Calcutta High Court

Case No : A.C.O. No. 106 of 2007, A.P.O.T. No. 322 of 2007 and C.P. No. 196 of 2005

Indian Steel and Wire Products Limited

APPELLANT

Vs

Kothari Metals Ltd.

RESPONDENT

Date of Decision : 17-07-2007

Acts Referred:

Companies Act, 1956 — Section 18

Income Tax Act, 1961 — Section 72A

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 17, 18(8), 22, 22(1)

Citation : (2008) 1 CHN 65

Hon'ble Judges : Sankar Prasad Mitra, J; Pinaki Chandra Ghose, J

Bench : Division Bench

Advocate : P.C. Sen, Debashis Kundu, M.C. Ghosh, R.R. Sen, Jaydeb Ghorai and Dilip Kr. Ghosh, for the Appellant; S.B. Mookherjee, Abhrajit Mitra, A. Agarwal, D.N. Sharma, Nilay Sen Gupta and Reetobrota Mitra, for the Respondent

Judgement

Pinaki Chandra Ghose, J.—This appeal is directed against an order passed by the Hon"ble First Court on 26th April, 2007 whereby the Hon"ble First Court held as follows:

The petitioners have relied on unimpeachable documents in support of their individual claims. The company has indicated that it is in no position to question them. The claims are free from doubt, yet the honourable stand taken by the company is deserving of a further contest on merits, except in the case of the petitioner in C.P. No. 197 of 2005. The petitions in the eight other cases are admitted for the principal sums claimed in the respective statutory notices together with interest at the rate of eight per cent per annum from the respective dates of the statutory notice.

If the company secures each of the eight claims, inclusive of interest, by furnishing cash security to the satisfaction of the Registrar, Original side, of this Court within a period of eight weeks from date, such eight petitions will remain

permanently stayed. If the company chooses not to furnish security in any case, such petition will be advertised once in "The Statesman" and once in "Jansatta". Publication on the Official Gazette will stand dispensed with. The advertisements should indicate that each petition would be returnable on the next available Court day four weeks from the date of the relevant publication.

In the event the company chooses to furnish security, the claims of the petitioners in such of the petitions for which security is furnished, will stand relegated to a suit and the security will remain to the credit of such suit that may be instituted by the relevant petitioner within six weeks from the date of the furnishing of the relevant security. In the event of petitioners, or some of them, do not file the suit within time stipulated, the company will be at liberty to seek refund of the security and all the interest accrued thereon, less the Registrar's commission.

In C.P. No. 197 of 2005, the petition is admitted in the principal sum of Rs. 2,93,104/- together with interest at the rate of eight per cent per annum from the date of the statutory notice (September 23, 2004). In the event the company tenders such sum, inclusive of interest, to the petitioner within eight weeks from date, C.P. No. 197 of 2005 shall remain permanently stayed. In default of such payment, that petition will be advertised once in "The Statesman" and once in "Jansatta". Publication in the Official Gazette will stand dispensed with. The advertisements should indicate that such petition would be returnable on the next available Court day four weeks after the date of the relevant publication.

2. By the said decision, the Hon''ble First Court, disposed of all the nine winding up petitions filed by the petitioning creditors against the company/appellant herein. By the said common judgment and/or order on 26th April, 2007 the matter was disposed of by His Lordship.

3. The facts are brief and not much in dispute.

4. Mr. P.C. Sen, learned Senior Advocate appearing in support of the appeal refers to various provisions of Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as the said Act). According to Mr. Sen, the company made a reference to the Board for Industrial and Financial Reconstruction (hereinafter referred to as BIFR) upon it becoming a sick industrial company within the meaning of Section 3(1)(o) of the said Act. The Scheme of rehabilitation was placed before the BIFR and the said Scheme was sanctioned on October 22, 2003, but could not be given effect to since the proceedings were pending before the Hon''ble Delhi High Court at the instance of the erstwhile management of the company, which was subsequently dismissed. There is no dispute that the present management took over the running of the company on December 20, 2003.

5. Each of the petitioners in the nine sets of proceedings claimed to have effected supplies to the company during the financial years 2002-03 and 2003-04, which is prior to the present management coming at the helm of the

company. Each of the petitioners relied on uncontroverted bills and part payments received and claims balance-price of goods sold and delivered. All part payments, save in the case of C.P. No. 197 of 2005, appear to have been made by the company prior to the present management taking over. The additional fact in support of the petitioner's case in C.P. No. 197 of 2005 is that a cheque for Rs. 2,93,104/- was issued to it by the company on December 14, 2003 and such cheque drawn on Punjab National Bank bears the additional stamp of IDBI which is the monitoring agency appointed by the BIFR to oversee the working of the sanctioned scheme of rehabilitation.

6. Shortly upon the new management taking over, the company issued a similarly-worded letter to most of the petitioners conveying the new management's decision to scrutinize the transactions carried out by the company prior to December 20, 2003 and to freeze payments of the debts appearing in the company's books till such exercise was completed. Such letter of January 15, 2004, relied upon by the petitioner in the lead matter, C.P. No. 196 of 2005, signs off with the following promise:

...We once again assure you payment of your earlier bills after the audit.

7. The written demands for payment made by the petitioners were all subsequent to February, 2004, as the new management had sought time till then to set its house in order. Such subsequent demands for payment and requests for copies of the BIFR order and list of creditors included in such order, were ultimately directed to the company's advocates. The advocates informed the petitioners that the new promoters were required to pay such creditors as had been directed by the BIFR and feigned ignorance of the transactions on which petitioners founded their demands. The statutory notices were greeted with a similar response.

8. It appears from the affidavits filed by the company wherefrom it appears that the company went before the BIFR and the order of the BIFR became effective on November 21, 2003. It further appears that the sanctioned scheme was disclosed in a supplementary affidavit filed by the company. There is no dispute that the cut-off date fixed for the implementation of the sanctioned scheme is March 31, 2002. It is also admitted that the petitioners' alleged dues are not reflected in the said sanctioned scheme. The said sanctioned scheme recognizes that of the two units of the company, one lay closed for the four years immediately preceding the scheme and the other unit, namely, Jemco division, was marginally operating. The stand taken by the company that the present management cannot be held responsible for such transactions and the merits of the petitioners claims cannot be urged or heard in view of the bar u/s 22(1) of the said Act of 1985. It is further contended that the sanctioned scheme is now under implementation. Therefore, the embargo u/s 22(1) of the said Act would operate.

9. It is further urged by Mr. Sen that Section 32 of the said Act also stands in the

way since the very word of implementation is specifically thought fit by the Legislators to insert in the said Scheme so that no difficulty arises at the time of giving effect to the said Scheme. It is further urged that the construction of Section 22(1) of the said Act has to be read plainly and it would not be wise to travel beyond the ordinary meaning of the words used in the said section.

10. Mr. Sen also drew our attention to Section 22 of the said Act which is reproduced hereunder:

22. Suspension of legal proceedings, contracts, etc. - (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.

(2) Where the management of the sick industrial company is taken over or changed in pursuance of any scheme sanctioned u/s 18, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or in the memorandum and articles of association of such company or any instrument having effect under the said Act or other law-

(a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;

(b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.

(3) Where an inquiry u/s 16 is pending or any scheme referred to in Section 17 is under preparation or during the period of consideration of any scheme u/s 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain

suspended or shall be enforceable with such adoptions and in such manner as may be specified by the Board:

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate.

(4) Any declaration made under Sub-section (3) with respect to a sick industrial company shall have effect notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law, the memorandum and articles of association of the company or any instrument having effect under the said Act or other law or any agreement or any decree or order of a Court, Tribunal, officer or other authority or of any submission, settlement or standing order and accordingly.-

(a) any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration, and all proceedings relating thereto pending before any Court, Tribunal, officer or other authority shall remain stayed or be continued subject to such declaration; and

On the declaration ceasing to have effect-

(i) any right, privilege, obligation or liability so remaining suspended or modified, shall become revived and enforceable as if the declaration had never been made; and

(ii) any proceeding so remaining stayed shall be proceeded with, subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded.

And contended that of the four cases covered by the disjunctive conjunctions in the opening words of Sub-section (1), it is only the third which is relevant for the matters at hand. The petitioners suggest that such third case has to be differently viewed from the three other cases. It is argued that if a company implementing a scheme of rehabilitation was immune to any claim of a creditor, no supplier would venture to effect supplies and, thereby, leave the company gasping even while a scheme was under implementation for its resuscitation.

11. He also drew our attention to Section 32 of the said Act which is reproduced hereunder:

32. Effect of the Act on the other laws.-(1) The provisions of this Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976) for the time being in force or in the

Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act.

(2) Where there has been under any scheme under this Act an amalgamation of a sick industrial company with another company, the provisions of Section 72A of the Income Tax Act, 1961 (43 of 1961), shall, subject to the modifications that the power of the Central Government under that section may be exercised by the Board without any recommendation by the specified authority referred to in that section, apply in relation to such amalgamation as they apply in relation to the amalgamation of a company owning an industrial undertaking with another company.

And also submitted that in view of Section 32 of the said Act when effect is being given to implementation of the scheme sanctioned by the BIFR/AAIFR, at this stage no order can be passed by the Court which would interfere with the sanctioned scheme and furthermore, he submitted that the petitioners will not be prejudiced if they have a scheme that have approached before the BIFR and could have got the leave to proceed with their claims. But without having such leave from the BIFR, in his opinion, the Court should not proceed with the matter at all.

12. He further pointed out that the BIFR being satisfied after making an enquiry into the matter, proceeded with the matter and after being satisfied the scheme has been sanctioned; at this stage, if any orders are being passed by the Court, it would affect the scheme and thereby the whole purpose of sanctioning the said scheme would be negated by such action.

13. On the strength of the Hon''ble Supreme Court he relied upon the decisions reported in *The Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and others*, ; *M/s. Rishabh Agro Industries Ltd. Vs. P.N.B. Capital Services Ltd.*, ; *Jay Engineering Works Ltd. Vs. Industry Facilitation Council and Another*, *Jay Engineering Works Ltd. v. Industry Facilitation Council and Anr.* He also submitted that the bar u/s 22(1) of the said Act has been upheld by the Hon''ble Court.

14. On the contrary, Mr. Mookherjee submitted that none of the petitioners claims is mentioned in the scheme for rehabilitation of the company sanctioned by the BIFR. The claims being the subject-matter of the nine petitions are all for the period beyond that covered by the sanctioned scheme. Therefore, the embargo of Section 22(1) of the said Act of 1985 has no application to any of the claims of the said petitioners.

14.1 Mr. Mookherjee further relied upon a decision of the "Deputy Commercial Tax Officer and Ors. v. Corromandal Pharmaceuticals and Ors. 89 Company Cases and contended that the Hon''ble Supreme Court held that though the language of Section 22 of the Act is wide import, regarding suspension of legal proceedings from the moment an inquiry is started till after the implementation of the scheme or the disposal of an appeal u/s 25 of the Act, the bar or embargo envisaged in Section 22(1) of the Act can apply only to such of those dues

reckoned or included in the sanctioned scheme. Therefore, in the instant case, none of the claims of the petitioning creditors were included in the sanctioned scheme. Therefore, the company cannot get any benefit by application of Section 22 in the facts and circumstances of this case.

14.2 He also relied upon a decision reported in 93 Company Cases 407 Vibgyar Ink Chem (Pvt.) Ltd. v. Safe Pack Polymers Ltd. where the Hon''ble Division Bench of the Hon''ble Andhra Pradesh High Court pointed out that the Hon''ble Division Bench of the Andhra Pradesh High Court following the decision of the Hon''ble Supreme Court held that the scheme as framed also had no reference to the claim of the petitioner, a creditor. It was an independent transaction de hors the scheme and could not thus be covered within the ambit of Section 22 of the 1985 Act.

14.3 He also relied upon the decisions reported in 103 Company Cases 122 Unilab Chemicals and Pharmaceuticals v. Smith Stainstreet Pharmaceuticals Ltd. and 108 Company Cases 176 Fort William Industries Ltd. v. Usha Beltron Ltd. where the Hon''ble Division Bench of this High Court held that the word "creditor" in the context of Sub-section (8) of Section 18 of the SICA Act of 1985 must mean creditors who were before the BIFR, i.e., at the time when the said scheme was prepared and does not embrace within its fold such creditors who had entered into contract with the sick industrial company. Sub-section (3) of Section 22 which suspends proceedings and further forbids enforceability of any rights, privileges, obligations and liabilities accruing or arising thereunder before the said date refers to a declaration in respect of matters which were existing immediately before the date thereof. The provision, therefore, cannot embrace within its fold any right, privileges, obligations and liabilities accruing after the preparation of the scheme. Therefore, a claim against the company arising after the scheme was presented would not come within the bar envisaged u/s 22 of the said Act.

14.4. He also relied upon the decisions reported in 2002 (1) CLJ 315 (Bom) Gargi Huttenes Albertus (P) Ltd. v. New Standard Engineering Co. Ltd. and 1994 (1) CHN 409 Dunlop India Ltd. v. Anamiha Udyog and SRC Steel (P) Ltd. Vs. Bharat Industrial Corporation Ltd., . and submitted that it is the duty of the Company Court to admit the winding up petition when the Company has no defence. The Hon''ble Division Bench in those cases regarding furnishing of security came to the conclusion that there is an extremely important distinction between the Suit Court passing a summary decree and the Company Court receiving the winding up petition. In passing a summary decree or refusing to pass it, the Court has express power under Order 37 of the Code of Civil Procedure, and also usually express power given in other provisions for passing of a summary decree, so as to allow the defendant to defend the suit on terms and if the Company Court comes to the conclusion that the company is merely amusing itself by weaving some cobwebs then the winding up petition will be admitted. The case of the company must not be all nonsense but it must have some reasonable ground.

14.5. Mr. Mookherjee submitted that the Hon''ble First Court had failed to consider the said position and in fact even after admitting that claims are free from doubt, the Hon''ble Company Court has passed an order directing the Company to furnish security and relegating the claims of the petitioning creditors to a suit. Therefore, he submitted that he has already filed a cross-objection in respect of the order passed by the Hon''ble First Court and on those grounds the said cross-objection has to be allowed by the Court and the winding up petition should be admitted by the Hon''ble Court.

15. After considering the submissions made on behalf of the parties and after analyzing the cases cited at the Bar we must come to the conclusion that in the instant case the claim of the petitioning creditors cannot come within the purview of the sanctioned scheme and not covered under the said sanctioned scheme. Therefore, the immunity granted to the sick companies under the said Act of 1985, is not available to the company in the instant case. Accordingly, all the appeals which have been filed by the company, must be dismissed.

16. In respect of the cross-objection, we have perused the petitions and affidavits filed before the Hon''ble Company Court. On the basis of the affidavit evidence, in our opinion, when the Hon''ble Company Court came to the conclusion that the claims are free from doubt after examining the affidavit filed before the Court, then, in our opinion, the Court has no other thing to do than to apply the discretion in favour of the petitioning creditor and shall pass an order admitting the winding up petition in respect of the claim mentioned therein. Admittedly, the company admitted their liability to pay the respondent company''s claim which would be evident from the letter dated January 15, 2004 where the Company has unequivocally admitted their liability to pay the respondent company''s claim after taking necessary steps for audit of the appellant company''s accounts. In these circumstances, with utmost respect to His Lordship we do not find any reason on the part of the Hon''ble First Court to relegate the claim of Kothari Metals Ltd. to suit. Accordingly, we allow the cross-objection filed by Mr. Mookherjee''s client and admit the winding up petition to the extent of Rs. 23,62,573/- and interest thereon at the rate of 8% per annum from the date of statutory notice dated 9th August, 2004 until the payments are being made. However, we grant a chance to the company to pay off the dues along with interest thereon in 12 equal monthly instalments excepting the last. First of such instalments to be paid on or before 16th August, 2007 and thereafter on the 16th day of each succeeding month. In default of payment of two instalments, advertisements to be published once in "The Statesman" and once in "Jansatta". Publication in the Calcutta Gazette is dispensed with. Returnable 4 weeks after publication of Advertisements.

Sankar Prasad Mitra, J.

I agree.