

(2008) 01 CAL CK 0083
In the Calcutta High Court
Case No : Writ Petition No. 4473 (W) of 2006

Jenson Nicholson (I) Ltd.

APPELLANT

Vs

Controlling Authority under The Payment of Gratuity Act,
1972 and Others

RESPONDENT

Date of Decision : 21-01-2008

Acts Referred:

Bengal Public Demands Recovery Act, 1913 — Section 11, 14, 5, 7
Constitution of India, 1950 — Article 21, 300A
Industrial Disputes Act, 1947 — Section 10(3), 10(8), 33C(2)
Negotiable Instruments Act, 1881 (NI) — Section 138
Payment of Gratuity Act, 1972 — Section 8
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 16(1), 17,
17(2), 17(3)
State Financial Corporations Act, 1951 — Section 29

Citation : (2008) 2 CALLT 350 : (2008) 2 CHN 954

Hon'ble Judges : Aniruddha Bose, J

Bench : Single Bench

Advocate : Sandip Ghosh, for the Appellant; Sukla Kabir Sinha, Susanta Pal, for the Respondent

Final Decision : Dismissed

Judgement

Aniruddha Bose, J.—The petitioners, an existing company within the meaning of Companies Act 1956 in this petition challenge three notices issued under the provisions of Section 7 of the Bengal Public Demand Recovery Act, 1913 requiring the petitioners to show cause as to why the certificates should not be executed within a period of 30 days from the date of issuance thereof. Also under challenge in this writ petition are three notices issued by the Certificate Officer, copies of which have been annexed and collectively marked "p11" to the writ petition requiring the petitioners to pay certificate demand including interest and cost. The petitioners have also applied for stay of all further proceeding in connection with the three certificate cases initiated against them. All the notices issued u/s 7 of the 1913 Act are dated 14th December 2005, and have been

issued in pursuance of requisition made by the Controlling Authority (respondent No. 1 herein) under the Payment of Gratuity Act 1972 (the said Act in short). Three retired employees of the petitioners, being the respondent No. 4, 5 & 6 had represented to the Controlling Authority that their gratuity dues were not being released and on the basis of such complain at the initial stage the first respondent had issued independent notices under the relevant Rules framed under the said act to the petitioners.

2. Thereafter, it appears that a tripartite settlement was arrived at on intervention of the respondent No. 1, in pursuance of which the petitioners had agreed to settle the dues of the three private respondents by paying 30% of the gratuity amount by 31st July 2004 and the rest of the amount in 10 equal installments commencing from the month of August 2004. The petitioners, however, failed to fulfil their commitment, which prompted the three superannuated persons to approach the Controlling Authority. The Controlling Authority thereafter by three separate orders, all dated 16th November 2004 allowed the applications of the private respondents, recording their individual entitlement and directed the petitioners to pay the said dues within one month.

3. In the meantime it appears that the petitioners had become a sick unit and had been registered with the Board for Industrial and Financial reconstruction (BIFR) under the Sick Industrial Companies (Special Provisions) Act 1985. I shall refer to this statute henceforth as the 1985 Act. The case of the petitioners was registered with the BIFR in the year 2003, and the same was numbered as Case No. 395 of 2003.

4. The petitioners had started their operation far back, in the year 1922 and thereafter continued with the manufacturing activities of paint at three units in Naihati in the State of West Bengal, Sikanderabad in the State of Uttar Pradesh and Panvel in the State of Maharashtra. The immediate cause for their sickness, as pleaded in the writ petition, was that their unit at Naihati being the biggest manufacturing unit had to stop activities because of a severe flood sometime in the year 2000 and the factory had remained inundated by the floodwater which did not recede for a period of about 10 days. The company could not be revived thereafter due to paucity of funds and suspension of work was declared in respect of this factory with effect from 18th December 2004. It appears that the unit at Panvel was also closed in May 2002.

5. As regards clearing the gratuity dues of the private respondents, the petitioners had failed to comply with the directives issued by the respondent No. 1. On such default being made, three independent notices were issued by the respondent No. 1, requiring the petitioners to show cause as to why certificates be issued against them to the Collectorate u/s 8 of the 1972 Act for recovery of the gratuity dues.

6. The ground on which the petitioners resist the attempt on the part of Respondent No. 1 in recovering the gratuity dues of the three private

respondents is that upon the case of the petitioners being referred to the BIFR, in view of the provisions of Section 22 of the 1985 Act, without the consent of the BIFR, such steps could not be taken by the Certificate Officer or the Respondent No. 1. The petitioners had responded to the said notices, apprising the Respondent No. 1 about the pendency of the proceeding before the BIFR. The Respondent No. 1 was requested to drop the proceeding for this reason. The certificates, however, were filed in the office of the Certificate Officer in terms of Section 5 of the 1913 Act and notices were issued by the Certificate Officer requiring the petitioners to show cause as to why such certificates shall not be executed. The fact about pendency of the proceeding was brought to the notice of the Certificate Officer, North 24-Parganas, Barasat, who had issued these notices. In the petitioners' reply to the show cause notice, plea was taken that in view of the embargo contained in Sub-section 1 of Section 22 of the 1985 Act, proceeding u/s 8 of the 1972 Act could not be continued without the consent of BIFR. At that point of time, an enquiry against the petitioners was pending u/s 16 of the 1985 Act. It is the admitted position that consent of BIFR was not obtained by the Respondent No. 1 or the Certificate Officer.

7. The Certificate Officer, however, chose to continue from continuing with the proceeding. On 6th February 2006, he issued three fresh communications of identical text, covering the cases of three individual complainants, who are private respondents herein. These notices have been captioned as "Ultimatum Notice for early payment of demand dues". The text of one of these notices are reproduced below:

From the Certificate Case as mentioned above, the Certified Demand including interest and cost appears to have been due for a pretty long time and as such, you are hereby directed to pay the demand amount including interest and cost as due thereon within 10 days from the date of receipt of this notice failing of which appropriate action will be taken against you, for provision of the Bengal Public Demand Recovery Act, 1913.

8. It appears that it was this "ultimatum notice" which prompted the petitioners to approach this Court with the plea, which I have described in the earlier part of this judgment. To the writ petition has been annexed as part of "P12" copy of an information slip, which appears to have been obtained on 31st October 2005 recording the status of the petitioners' case with the BIFR and the information slip discloses "Pending determination for sickness."

9. In course of hearing, however, on 27th February 2007 the learned Counsel for the petitioners had produced before this Court a document purporting to be a true copy of a summary record of the proceedings of the hearing held on 28th April 2006 before the Board. It is recorded in this document:

Considering the facts on records and the submissions made at today's hearing, the Bench observed that there were no valid objections to the company's sickness from the parties present today and considering that the company had

fulfilled the various criteria for sickness under the Act, the Bench was satisfied that the company had become a sick industrial company in terms of Section 3(1) (O) of the Act and accordingly declared it sick. On a query from the Bench, the representative of the company indicated that it would not be possible for them to work out a scheme u/s 17(2) of the Act on their own. In view of this, the Bench noted that the provisions of Section 18 of the Act would have to be explored in public interest in relation to the company. Accordingly, in terms of the powers vested with it u/s 17(3) of the Act, the Bench appointed IDBI as the Operating Agency (OA) with directions to advertise for change of management keeping in view the enclosed guidelines. The present promoters are also allowed to participate in response to the advertisement to be issued by OA and they would be given preference if their offer equalled the offer of others. The OA shall ensure wide publicity in this regard by providing the text of the offer to industry associations, federations of industrialists etc. in order to endeavour to get maximum response to the advertisement. OA shall ensure publication of advertisement within 15 days from today and in further period of 6 weeks it shall submit a DRS keeping in view the offers received and after holding a joint meeting of all involved agencies, together with its recommendations. The company shall comply with provisions of the enclosed guidelines in letter and spirit in so far as they relate to them.

9.1 The learned Counsel for the petitioners also relied on Clause "X" of the "Enclosed Guideline" as referred to in the order of the Board, which is reproduced below:

The company should not dispose of or alienate in any other way any of its fixed assets or current assets without specific prior approval of B1FR and the charge holders u/s 22A of the Act. However, in case the unit was working the current assets could be utilized for running the day to day operations of the company, subject to keeping proper records thereof and routing all transactions through the company's account with its financing bank(s) only.

10. In this matter the petitioners have been represented by Mr. Sandip Ghosh, whereas Ms. Sukla Kabir Sinha appeared on behalf of the State Respondents and Mr. Susanta Pal appeared for the private respondents. Various authorities have been cited by the learned Counsels appearing for the parties to which I shall refer to and deal with in the subsequent paragraphs. The main legal question in this writ petition which emerges from the rival submissions is as to whether the protective cover of Section 22 of the 1985 Act can shelter a company from an action of recovery of the legitimate dues of its employees emanating from an employee welfare statute.

11. Mr. Ghosh, has taken me through the provision of Section 22(1) of the Act which is reproduced below:

Where in respect of an industrial company, an enquiry 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 of 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 loan 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.

12. His case is that a certificate proceeding arising out of default in clearing dues to employees under the 1972 Act comes within the ambit of the prohibitions contemplated in Section 22(1) of the Act. Thus, in the event of non-payment of dues, the provisions relating execution under Sections 11 and 14 of the Bengal Public Demand Recovery Act 1913 would follow. The mode of execution as contemplated in this Act is inter-alia by attachment and sale of the property of the certificate debtor or by arresting a certificate debtor and detaining him in civil person.

13. Learned Counsel for the petitioners further submitted that such methods of execution would constitute distress proceeding which is brought under the provisions of the Section 22(1). He has also relied on Clause "X" of the guideline, which has been reproduced above, in support of his submissions that the company could not dispose of or alienate in any way fixed assets or current assets without consent of the BIFR. The authorities relied upon by him in support of his submissions are:

- (i) Real Value Appliances Ltd. Vs. Canara Bank and Others,
- (ii) Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another,
- (iii) Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others,
- (iv) In the matter of Nirlon Synthetic Fibres and Chemicals Ltd. v. Bakulbala Das Cal. LT 1994(1) HC 36 and
- (v) Tyre Corporation of India Limited Vs. Debendra Nath Bhattacharjee and Another,

14. Appearing for the State respondents Ms. Sukla Kabir Sinha has advanced arguments in support of the legality of the action of the certificate officer. Her case is that the provisions of 1985 Act cannot immunize the company from action for recovery of the statutory dues of their employees. She argued that the respondent authorities have acted in accordance with law for recovery of the

statutory dues, and the Payment of Gratuity Act 1972 being a social welfare legislation, the same should be outside the scope of the embargo envisaged under the provision of Section 22 of the 1985 Act. Right to receive gratuity, she argued, is not a charity an employer dispenses towards his employees but the money due on account of gratuity is an entitlement, and acquires the character of property under Article 300A of the Constitution of India. Relying on a decision of an Hon'ble single Judge of this Court in the case of *Rabindranath Banerjee v. The Certificate Officer and Ors.* reported in 2005(1) CLT 525, she has submitted that any law permitting withholding of the gratuity of superannuated employees would constitute deprivation of the Constitutional Right of an employee to enjoy his property, and since gratuity dues of a retired employee is directly linked with his survival, imposing restriction on such recovery would offend the Fundamental Right of the private respondents for having a decent livelihood, which is protected under Article 21 of the Constitution. Thus the provision of Section 22 of the 1985 Act cannot be construed in such manner which would result in placing an embargo of such nature, as is sought to be contended by the petitioners.

15. Ms. Kabir Sinha analysed in detail the provisions of the 1972 Act as also the 1985 Act and took me through the objects of both these statutes to buttress her argument that the stay of proceeding contemplated in the latter statute cannot operate in the field of legislations like the Payment of Gratuity Act, 1972. The other authorities relied upon by her is another judgment of this Court delivered in the case of *Bengal Immunity Limited Vs. Mukul Kumar Kar and Others*, as also a decision of Hon'ble High Court of Gujarat in the case of *Rajnagar Textile Mill No. 1 v. Textile Labour Association* reported in 1998(79) F.L.R. 722.

16. Mr. Pal, appearing for the three superannuated employees of the petitioners has supported the arguments of Ms. Kabir Sinha, and submitted that the restrictions contemplated in Section 22 of the Act could not be extended to proceeding initiated to recover dues under the 1912 Act. His submission is that a restricted interpretation ought to be given to the expression "proceedings" in relation to "execution, distress or the like" as used in Sub-section (1) of Section 22 of the said Act. His case is that the nature of the proceeding on which the legislature intended to impose restriction can be ascertained by relating the same to provision of Sub-section (3) of the said section. As per the provision of Section 22(3) of the Act the BIFR is empowered to declare suspension of "all or any of the contracts, assurances of property, agreements, settlements, awards or other instruments in force", to which the sick industrial company is a party or which may be applicable to such Sick Company. He also has relied on the decision of the Hon'ble Supreme Court in the case of *Kusum Ingots & Alloys Ltd.* (supra) as also a decision of the Hon'ble High Court of Andhra Pradesh in the case of *Andhra Sinters Ltd. v. the Provident Fund Inspector* 1993 Lab IC 2346. The other authorities relied on by the learned Counsels for the respondents are (i) *Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others*, , (ii) *T.K. Samaddar v. Tyre Corporation of India and Ors.* 2001IIIILJ (suppl) 86, (iii) *Indian Plywood Mfg. Co. Ltd. v. Commissioners and Ors.* (1999)1

LLJ (Kar) 411. (iv) N.T.C. (South Maharashtra) Ltd. v. B.N. Jalgaonkar 1999 (81) FLR 234, (v) Metal Box India Ltd. and Anr. v. State of Tamil Nadu and Ors. 1996 (1) LLJ 763, and (vi) Modi Industries Ltd., Modi Nagar v. Addl. Labour Commr. 1994 Lab IC 1609.

17. The fact that the nature of the proceedings contemplated in Section 22 of the 1985 Act is wide enough is apparent from various authorities cited by the learned Counsel for the petitioners. In the case of Real Value Appliances Ltd. (supra) a proceeding by the bank for recovery of its mortgaged assets was held to come within the prohibitory cover of that section, as also the creditors' action for winding up. In the case of Maharashtra Tubes Ltd. (supra), a State Financial Corporation was prevented from exercising their power u/s 29 of the State Financial Corporation Act, 1951 under which such corporations are empowered to take over the management and/or possession of an industrial concern if such concern fails to discharge their liability towards the corporation. Analysing the field of operation of both these statutes the Hon'ble Supreme Court came to a conclusion in this case the 1985 Act would prevail. Again in the case of Deputy Commercial Tax Officer v. Corromandal Pharmaceuticals (supra), the proceeding for recovery of sales tax prior to the sanction of the scheme for rehabilitation was found to have been covered by the protective umbrella of Section 22. This Court took similar view in two cases being *Nirlon v. Bakul Bala* (1994) 1 Cal LT 36 and in the case of *Tyre Corporation of India* reported in AIR 1988 Cal 218. In the case of *Real Value Appliances Ltd.* (supra), however, the main question which was decided was that the inquiry u/s 16(1) of the 1985 Act shall be deemed to have commenced once the reference is registered for the purpose of Section 22 of the Act. The *Nirlon* case arose out of an eviction proceeding whereas the case of *Tyre Corporation* (supra) arose out of a commercial suit. In the case of *Deputy Commercial Tax Officer* (supra) the dispute was regarding recovery of sales tax dues.

18. The argument of the petitioners, however, has been that a certificate proceeding initiated for default of the petitioners in paying the gratuity dues of the private respondents came well within the expression "distress or execution" and hence in the absence of consent from the BIFR, the proceeding could not continue.

19. The root of the certificate proceeding, as I have observed in the earlier part of this judgment lies in a proceeding for recovery of dues under the head of gratuity. In the case of *M/s. Kusum Ingot* (supra), action against a sick industrial unit under the provisions of Section 138 of the Negotiable Instruments Act, 1881 was allowed to continue. The defence of the company that in the event the appellants were convicted, fine would have to be realised from the assets of the company was rejected as premature and far fetched. In the case of *T.K. Samaddar* (supra), the petitioner company challenged inter-alia a proceeding initiated under the 1972 Act, and a point was taken that as reference has been made to the BIFR, the Writ Court could not direct the company to make payment

of any money. An Hon''ble Division Bench of this Court was pleased to observe inter-alia:

It is made clear that any proceeding for recovery of money due to him may be taken by the appellant subject to the consent of the BIFR as provided u/s 22 of the 1985 Act. This observation, however, will not apply to the mere continuation of the proceedings under the Payment of Gratuity Act, 1972, nor to the transfer of the Provident Fund dues as fairly offered by the "respondent corporation.

20. In the case of Indian Plywood Mfg. Co. Ltd. (supra) the Hon''ble Karnataka High Court had found a proceeding u/s 33C(2) of the Industrial Disputes Act, 1947 for closure compensation to be valid, and the embargo contemplated in Section 22 of the 1985 Act not applicable in such a case. The same view was taken by an Hon''ble single Judge of the High Court of Bombay in the case of N.T.C. (South Maharashtra Ltd.) v. B.N. Jalgaonkar reported in 1999(81) FLR 234. In this case, it was held:

...Language of Section 22 in no way would stand in the way of workers making recovery of wages much in the same way as has been laid down in the case of Deputy Commercial Tax Officer and Ors. (vide supra).

20.1 The decision which was referred to in this case was the judgment of the Hon''ble Supreme Court in the case of Deputy Commercial Tax Officer and Ors. v. Coromandel Fertilizers and Ors. to which I have referred to in the earlier part of this judgment. In this case, the Hon''ble Supreme Court held that recovery proceeding for sales tax dues was not barred when such dues were not included in the sanctioned scheme for rehabilitation of the sick industrial company.

21. The scope of the embargo contemplated in Section 22 of the 1985 Act was also considered by the Hon''ble High Court of Madras in the case of Metal Box India Ltd. and Another Vs. State of Tamil Nadu and Others, in which under examination was the power of the appropriate government to pass an order u/s 10(8) of the Industrial Disputes Act, 1947 read with Section 10(3) of the same statute prohibiting the continuance of suspension of operation of the factory. The company concerned was a sick "industrial company" within the meaning of Section 3(1)(O) of the 1985 Act and the preparation of the scheme u/s 22 was pending. On this count, the petitioner company had challenged the order of the Government but were unsuccessful before the high Court. The Hon''ble High Court held:

The dispute between workmen and management clearly beyond the orbit of and have specific place in the scheme of SICA and whenever there is such a dispute between employer and workmen the provisions of Industrial Disputes Act have to be resorted to.

22. In the case of Bengal Immunity Ltd. v. Mukul Kumar Kar 2004 (101) FLR 34, an Hon''ble single Judge of this Court considered the legality of, application of the provisions of Section 33C(2) of the Industrial Disputes Act 1974 vis-a-vis a

company in respect of which the provisions of Section 22(1) of the 1985 Act was operating. This Court found that nothing prevented proceeding for recovery of dues of a workman u/s 22(1) of the 1985 Act. Similar view has been taken by the Hon"ble Allahabad High Court in the case of Modi Industries Ltd. v. Addl Labour Commissioner, Ghaziabad 1994 Lab IC 1609 and also Andhra Sinters Ltd. v. P.F. Inspector 1993 Lab IC 2346.

23. The authorities thus are uniform on the principle that 1985 Act cannot come into operation in the case of recovery proceedings in the event of breach of the obligation of the company towards the payment of dues of workmen. The last decision in this series of judgment is the case of Gowri Spinning Mills Pvt. Ltd. reported in 2007(1) LLJ 140 Mad; in which a Full Bench of the Hon"ble Madras High Court held:

In our opinion, the provision of Section 22(1) of the SICA has no application to the provident fund dues and the provisions of the EPF Act would not come within the purview thereof. The provident fund and other dues payable under the EPF Act are part of the legitimate statutory settlements of the workers. The employer is obligated to pay the contribution of the employees as well as his contribution to the Fund, which is set up under the Act, and the scheme framed thereunder. The employees' contribution together with the employer's contribution is required to be paid into the fund by the employer within the stipulated period. These amounts whether by way of contribution of the employee or the contribution of the employer, are moneys which belong to the employee. An account which is required to be maintained in the name of each member of the provident fund, contains contribution of the employee, the employer as well as the interest which has been credited. Provident fund is the foundation of an important measure of social security provided to employees of those establishments to whom the Act applies. In the aforesaid situation, an employer cannot refuse to comply with the statutory mandate to pay the contribution made by the employees as also his share, which was by way of social security scheme. Although the object of the SICA is laudable, but, in our view, the same should not deprive the hard earning of the employees. It does not and cannot stay the recovery proceedings for recovery of money to which employees are entitled by way of social security scheme. The money does not belong to the company it belongs to the employees. These moneys can be withdrawn by the employees in certain eventualities even prior to the attainment of age of superannuation. The scheme makes provision for withdrawal from the fund and for the grant of advances from the fund in special cases.

24. The case of Rabindranath Banerjee (supra) is a direct authority of this Court in which it was held, dealing with dues arising out of non payment of gratuity:

Having regard to such the question as raised by respondents in the writ application that the recovery proceedings under Bengal Public Demands Recovery Act is initiated for realization of gratuity amount could be resisted by application of Section 22 of SICA, 1985, is answered negatively by holding that Section 22 of

SICA, 1985 cannot resist any proceeding for realisation of gratuity amount payable of which is in the domain of emanated fundamental right of retired employee. Writ application accordingly is allowed in terms of prayer (a), (b), (c) and (d). Respondent No. 1 is directed to realise the amount as mentioned in the said prayers along with the interest with effect from the date is allowed by initiating the recovery proceeding and/or certificate proceeding under the concerned Public Demands Recovery Act within two months from this date and thereby to disburse the amounts in accordance with law in favour of the petitioner. Controlling Authority is directed to take all steps by production of the records etc. to implement the judgment.

25. I respectfully concur with the view taken by the Hon'ble single Judge of this Court and the Full Bench decision of the Hon'ble Madras High Court. The legislative intention of Section 22 of the 1985 Act as it appears from the consistent views taken by the judicial authorities, is to protect the assets of the company in their commercial dealings. But what is directed to be recovered by the Controlling Authority under the Payment of Gratuity Act is the property of the employees. The authorities cited by the petitioners mostly relate to disputes of recovery of dues of the company arising out of commercial transactions or fiscal disputes. But in my opinion the proceedings for recovery of dues of workmen or employees are to be treated as a separate category of proceedings, as the disputes relating to workmen's dues are regulated by special legislations like the 1972 Act.

26. In my opinion, the expressions "execution" and "distress" as used in Section 22(1) of the Act has to be read in relation to a winding-up proceeding or a 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 and advances granted to the industrial company. The restricted immunity which is sought to be provided for a sick industrial unit under the provisions of Section 22(1) of the 1985 Act are claims against the Company mainly arising out of commercial transactions or contracts. This provision cannot protect such undertaking from a claim of legitimate dues of a workmen or employees which accrue in their favour under statutory provisions. Such dues of the workmen or employees crystallize into "property" of the workmen and/or employees. Since special statutes, in this case being the Payment of Gratuity Act has prescribed specific procedure for recovery of such property of the employees, the embargo contemplated u/s 22(1) of the 1985 Act cannot apply in such cases. So far as the provisions of Section 22(3) is concerned, a specific order of the BIFR is necessary to suspend the operation of any contract, assurances of property agreements, settlements, awards, standing orders in force. In the present case, this sub-clause is not attracted. As regards the guideline X to which reliance was placed on in course hearing, the prohibition of BIFR is only on the company restraining them from disposing or alienating any assets of the company without prior approval of the Board. This prohibition cannot operate against statutory authorities from initiating steps for recovering statutory dues of the employees.

Under these circumstances, the instant writ petition is dismissed and all interim orders stand vacated.

There shall, however, no order as to cost.