

(1998) 02 MP CK 0035

In the Madhya Pradesh High Court

Case No : Letters Patent Appeal No. 45 of 1998

Keshari Steels and Another

APPELLANT

Vs

M.P. Electricity Board and Others

RESPONDENT

Date of Decision : 27-02-1998

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22

Citation : AIR 1999 MP 83 : (1999) 98 CompCas 180 : (2000) 3 MPLJ 263 : (1998) 1 MPLJ 32

Hon'ble Judges : Shambhoo Singh, J;B.A. Khan, J

Bench : Division Bench

Advocate : P.M. Choudhary, for the Appellant; P.B.S. Nair, for the Respondent

Final Decision : Dismissed

Judgement

Khan, J.

The million -- dollar question that falls for determination is whether the Bank guarantees executed at the behest of appellants in favour of M.P. Electricity Board fall under the protective umbrella of Section 22 of Sick Industrial Companies (Special Provisions) Act, 1985 (for short the Act).

Appellants set up a mini steel plant and Rolling mill and applied for supply of high tension electricity. Respondent Board agreed to supply them 15,000/- KVA power for two years from 1-2-95. An agreement was executed between the parties Clause 27 (a) whereof required a consumer to furnish security by cash deposit or in some other form. Appellants were asked to give five bank guarantees through State Bank of India, Dewas. The terms and conditions also envisaged that the Board shall be competent to enhance the security amount and to apply it towards payments or arrears of any money which may become due by the consumer.

It appears that appellants fell in red and could not clear their electricity bills in time. Meanwhile they moved the Board for industrial and financial reconstruction (BFIR) u/s 15 of the Act which recommended winding up of their

company. They took appeal against this before the appellate Authority which is pending. They thereafter embarked on a litigation spree and filed series of writ petitions. The first filed M.P. No. 93/94 to assail the recovery of arrears of electricity charges and obtained interim stay dated 8-5-96 and then filed W.P. No. 1331/96 to resist the disconnection of electricity supply. They lastly filed W.P. No. 348/97 to assail respondent Board's letter of invocation of five Bank guarantees addressed to S.B.I., Dewas (respondent No. 5) on the plea that the action amounted to recovery of arrears of electricity charges which was barred u/s 22 of the Act. The writ Court rejected their plea holding that payment of dues for consumed electricity was neither a loan nor advance to attract the bar u/s 22. Hence this appeal.

Appellant's case as craftly articulated by their counsel, Mr. Choudhary is that reallocation of the amount covered by bank guarantees amounted to recovery of arrears of electricity charges and was a coercive proceeding barred u/s 22. According to him contract of guarantee was not an isolated or independent contract but the one related to payment of arrears and to secure payment of electricity charges and once the Board action to encash these guarantees was aimed at recovering the arrears, it was prohibited by Section 22 save with the consent of BEIR or the Appellate Authority. He lastly urged that the disputed bank guarantees continued to be the property of appellants and no proceeding would He to realise these by the Board which had no right of appropriation. Any such action tantamounted to a distress proceeding against Appellant's property which was hit by provisions of Section 22. He heavily relied upon Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another, ; The Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and others, and Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others, .

The Board counsel Mr. Nair submitted that the matter involved a contractual obligation which fell out side the ambit of Section 22. He referred to the Supreme Court judgment in Indian Maize and Chemicals Ltd., (1997) 89 Comp Cas 420, to show that enforcement of a contractual obligation or of regulations of electric energy supply could not constitute a proceeding for execution, distress, or the like as contemplated by Section 22. He also pointed to Clause 30-A of the agreement to show that the electricity Board had reserved the right to apply and appropriate any security furnished by the consumer. He cited AIR 1997 1644 (SC) and Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another, along with (1997) 89 Com Cas 420 (SC) and (1992) 74 Com Cas 256 (Kant) in support.

Section 22 which assumes crucial importance reads under:--

"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 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) shall lie or be proceeded with further, except with the consent of the Board or, the case may be, the appellate Authority."

This provision has attracted much attention and repeated interpretation by the Supreme Court and various High Courts and it would only be a repeat exercise to examine its angles and contours in detail. Suffice it to say that it bars a coercive proceeding for winding up, for appointment of receiver or for execution, distress or the like against the property of an industrial company in respect of which an enquiry is pending u/s 16 or any scheme is under preparation u/s 17 or an appeal is pending u/s 35 of the Act. The term proceeding was held to include all types of proceeding and not merely legal proceeding. It also bars a suit for recovery of money or for enforcement of any security against such industrial company. However, it does not impose an absolute bar and the requisite proceeding could be taken and the suit filed with the consent of the BFIR or the Appellate Authority. The Supreme Court lately analysed the provision in *Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another*, thus (Para 14 of AIR) :--

"We are, therefore, of this opinion that where an inquiry is pending Under Section. 16/17 or an appeal is pending u/s 25 of the Act, there should be cessation of the coercive activities of the type mentioned in Section 22(1) to enable BFIR to consider what remedial measures could be taken with respect to sick industrial company. The expression proceeding in the Section, therefore, cannot be confined to legal proceeding understood in the narrow sense of proceeding in Court of law or a legal Tribunal for attachment and sale of the debtor's property."

As is well known, the Act in general and its Section 22 in particular aims at end contemplates formulation of schemes for rehabilitation of sick units/undertakings by providing financial assistance through loans, advances, guaranteed or by providing reliefs, concessions etc. by the Banks and other financial institutions. The rational behind is first to revive and rehabilitate the sick company or to wind it up where it failed to respond. Accordingly Section 22 carved out a protective umbrella to provide breathing time to such companies and to stall any such action that would precipitate their sudden death.

In this backdrop all that remained to be seen was whether encashment of the disputed bank guarantees in the present case could constitute a coercive proceeding of the type contemplated by Section 22 against the properties of the appellants and would attract the lethal bar.

The answer has to be straightaway in the negative because realisation of the bank guarantees by the beneficiary Board was not even a proceeding simpliciter, least of all a coercive proceeding directed against the properties of the appellant. These guarantees had come into existence upon special independent and separate contract between the Board and the bank and as long as these were absolute and unconditional and not vitiated by any fraud etc. the beneficiary Board was within its rights to invoke and the Bank under corresponding obligation to satisfy and encash these on demand. All that the Bank could do was to verify whether the amount claimed was within the term of the guarantee. It was not concerned with any dispute between the beneficiary Board and the appellants at whose instance the guarantee was furnished and who were as good as strangers to the contract which had nothing to do with the underlying transaction and was not dependent upon the validity of the primary contract. How could the bank dilly-dally or sit over the enactment save otherwise, in exceptional circumstances where such guarantee was vitiated by fraud or where an irretrievable harm would result. Otherwise if the Bank was granted liberty to back out in connivance with the customer it would destroy the credibility on the banking system and shake public confidence and faith in it.

This position is supported by the recent judgment of the Supreme Court in *Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd.* and Another, relevant portion whereof is reproduced here-under :--

"Bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. The underlying object is that an irrevocable commitment either in the form of bank guarantee or letters of credit solemnly given by the bank must be honoured. The Court exercising its power cannot interfere with enforcement of bank guarantee/letter of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties. Otherwise the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The trading operation would not be jettisoned and faith of the people in the efficiency of banking transactions would not be eroded or brought to disbelief. The question, therefore, is whether the petitioner had made out any case of irreparable injury by proof of special equity or fraud so as to invoke the jurisdiction of the Court by way of injunction to restrain the respondent from encashing the bank guarantee."

We are also at a loss to understand how the impugned action could be brought within the term "proceeding", not to speak of a coercive proceeding like execution, distress or the like u/s 22. A proceeding postulates some kind of

action against the party. An encashment of bank guarantee does not entail any such action against the person at whose instance it was given. It is a matter between the bank and the beneficiary and had nothing to do with the third party who was instrumental initially in its making. Even assuming it could be stretched to include some type of a proceeding, still it was required to be directed against the property of the claimant sick company u/s 22. A bank guarantee ordinarily cannot be said to be the property of the person who had a hand in furnishing it. He washes his hands off the transaction once the Bank has taken it upon itself to stand guarantee and from here on its value is in trust for the beneficiary. Thus looking at it from this angle also, the disputed bank guarantees could not be treated property of the Appellants to attract the bar u/s 22.

Mr. Choudhary's contention that realisation of the Bank guarantees amounted to recovery of arrears of electricity charges was grossly misconceiving. Because these guarantees, when seen in correct prospective, were furnished to pave the way for execution of contract for supply of electricity and were in the nature of predeposit security to cover payment for bills for one and a half month. These were by way of a launching pad and constituted a term of the contract. Consequently their enactment was only to enforce a contractual obligation and not to recover arrears of electricity charges which had reportedly piled up to crores of rupees against appellants. It cannot be anybody's case that enforcement of a contractual obligation against a claimant sick company was barred by Section 22 and therefore encashment of guarantees clearly fell outside the prohibited zone. This finds support from the judgment of Supreme Court in Indian Maize and Chemicals Ltd., (1997 (89) Com Cas 420) in the following terms :--

"Enforcement of compliance with the obligation under the contract or under regulation for supply of electricity by ordering payment could not be termed execution of a decree to involve the bar u/s 22."

All things considered we hold that a Bank guarantee was the product of a special contract between the bank and the beneficiary and the person/party at whose instance it was furnished was not a party to it. The enactment of the guarantee did not tantamount to any coercive proceeding directed against the property of the sick company as contemplated by Section 22 of the Act and would not thus attract the bar contained therein. The disputed guarantees were otherwise a part of the contract for supply of electricity and their encashment was not directed towards arrears of electricity charges and as such fell outside the prohibited zone. Having said so the impugned letter of invocation by the M.P. Electricity Board cannot be faulted. Nor can any restraint order be passed against the realisation of bank guarantees by the Board. The judgment of the writ Court is accordingly affirmed though on a different reasoning and the appeal dismissed.