

(1998) 01 MP CK 0030

In the Madhya Pradesh High Court

Case No : Writ Petition No. 348 of 1997

Keshri Steels and Another

APPELLANT

Vs

M.P. Electricity Board and Others

RESPONDENT

Date of Decision : 06-01-1998

Acts Referred:

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

Citation : AIR 1998 MP 315 : (1998) 2 MPLJ 535

Hon'ble Judges : Deepak Verma, J

Bench : Single Bench

Advocate : Piyush Mathur, Govt., Pradeep Choudhary, for the Appellant; P.B.S. Nair, for the Respondent

Final Decision : Dismissed

Judgement

Deepak Verma, J.

By filing this petition under Art 226 of the Constitution, Petitioners are praying for quashment of letter dt. 24-2-1997 (Annexure P-1), issued by the Senior Accounts Officer, M, P. Electricity Board to State Bank of Indore/ Dewas, for encashment of five Bank Guarantees mentioned in the said letter.

Facts material for deciding the said petition are mentioned hereinbelow;

Petitioners Nos. 1 & 2 are Mini Steel Plant and Rolling Mill respectively, situated at Dewas. Both the Units are divisions of Reliance Ispat Industries Ltd., a duly registered Company under the provisions of Companies Act. For the purposes of manufacturing their products, the Petitioners need electrical energy, which constitute about 20% of the raw material cost of the plants of the Petitioners,"which are intensively power based industries. Respondent No. 1/M.P. Electricity Board (for short referred to as "Board") has been constituted by State Government u/s 5 of the Electricity Supply Act, 1948.

Petitioners have furnished five Bank Guarantees in favour of Respondent/Board

for a sum of Rs. 55,39,000/-. Since the Respondents are taking steps to encash the bank guarantees, for non payment of arrears of electrical charges, consumed by Petitioners, they have approached this Court for quashment of the same. Petitioners' submission is, that they have been declared as Sick Industrial Units, under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 (for short the "Act"), thus, no recovery towards arrears of electrical charges, or, steps for encashment of the bank guarantees can be made by the Respondent/ Board,

According to them, the Board for Industrial and Financial Reconstruction (for short, hereinafter referred to as "BIFR") is now seized of the matter and, is, in process of considering financing of the Scheme submitted by operating Agency, ICICI. The matter relating to the said Sick Industrial Units is still pending before the BIFR, thus, no recovery proceedings can be initiated against the Petitioners. They are taking shelter u/s 22 of the Act.

Petitioners have also made reference to a circular issued by Government of Madhya Pradesh dt. 29-6-1988. In the light of the same, their submission is, that as per the package policy of the Government of Madhya Pradesh, Petitioners' Units are entitled to all the benefits under the provisions of M.P. Sahayata Upkram (Vishesh Upbandh) Adhiniyam, 1978 (for short the "Adhiniyam"). It has further been averred, that Board was sufficiently represented through the State Government in the proceedings before BIFR, which, includes implementation of the Scheme for revival of the Sick Industrial Units. Thus, according to them, the only option open to the Board is to approach the BIFR for redressal of its grievances. Petitioners have placed reliance on the orders passed by BIFR on 11-5-1996 and on 3-6-1996. They have further submitted, that Petitioners have also filed M.P. No. 93/1994 and W.P. No. 1331 /1996 in the High Court of Madhya Pradesh at Indore Bench, which, would go to show that Petitioners having been declared as Sick Industrial Undertakings by the Authority, would be covered under the provisions of the Act, consequently shall be protected u/s 22 of the Act. Their thrust of the matter is, that in this view of the legal position. Respondents should be restrained from invoking Bank Guarantees furnished to the Board.

Show cause notice against admission was directed to be issued by this Court on 5-3-1997. On the said date, by way of interim measure, it was further directed that Respondents shall not encash the Bank Guarantees in question till Bi-parte hearing.

Respondents Nos. 1 to 3 have filed their Reply in opposition. Other Respondents have not filed any reply to the petition.

Respondents Nos. 1 to 3 have submitted, that Board had entered into an agreement dt. 13-2-1995 with the Petitioners for supply of High Tension Electricity to them. Under this, Board agreed to supply to the Petitioners, electrical energy upto 15000KVA with effect from 1-2-1995. The agreement was

for a period of two years, commencing from 1-2-1995. Under Clause 27 (a) of the said Agreement, Consumer is required to deposit in cash, or, any other form, as may be prescribed by the Board, a sum, not less than 1 1/2 months consumption, as security for the purpose of payment of electricity charges. The Board has reserved its right to enhance the amount of Security Deposit at any time, during the period of Agreement. Under sub-clause D of Clause 27 of the said Agreement, if the Consumer fails to pay within 30 days, or such other period of notice, as may be specified in writing, any security or to review or replenish any security mentioned in Sub-clause (a), the Board, may, without prejudice to any other remedies, to which, the Board may be entitled, revise, or, discontinue to supply electricity so long, as such, failure continues.

The Board is holding a Security Deposit of Rs. 54,10,400/- by way of cash and Rupees 55,39,000/- by way of Bank Guarantees. On account of the Policy of Board, Petitioners were required to deposit an additional security amount of Rs. 29,64,029/-, which, the Petitioners failed to do. This demand for additional security amount, is, subject matter of challenge in Petitioners' W.P. No, 1331 of 1996, pending at Indore Bench of High Court of Madhya Pradesh.

Petitioners' other petition, W.P. No. 93 of 1994, also pending, challenges the recovery of electricity charges, outstanding against the Petitioners. They have, therefore, submitted, that all the Petitions are different in character, nature and have nothing to do with the facts of each case. It has also been mentioned, that the interim order of stay, passed by this Court, on 8-5-1996 in W.P. No. 93 of 1994, was not complied with. Thus, the Board had disconnected Electrical Supply to the Petitioners' factory, with effect from 20-12-1996. Since the Petitioners had fallen in arrears, with regard to Electricity Charges, the Board has sought to encash the Bank Guarantees, so. furnished by the Petitioners.

Respondents have further submitted, that u/s 22(i) of the Act, Respondents are not prohibited from enforcing the contractual obligation under the Agreement entered into between the Petitioners and the Board for supply of energy. According to them, under this section, no proceedings for winding-up, 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, can be taken out, but, there is no bar in recovering the amount of electrical charges or to take steps to get the Bank Guarantees encashed. They have submitted, that Section 22 of the Act, does not create any bar from demanding such dues for the electricity consumed by the Petitioners, which, are payable under the terms of the Agreement entered into between the parties.

Further reference is made to Sub-section 3 of Section 22 of the Act to contend, that BIFR has not passed any order in favour of the Petitioners, restraining recovery of such arrears of electrical charges.

Respondents have, then, submitted, that u/s 3 of the Adhinyam, Petitioners' Units have not been declared as Relief Undertakings by the State Government,

as required u/s 4 of the said Adhiniyam. Thus, the advantage of the Adhiniyam, in absence of necessary Notifications, cannot be taken by the Petitioners. All other adverse allegations of the Petitioners have been denied.

In the light of aforesaid pleadings of the parties, I have heard, learned counsel and perused the record.

The question, that arises for consideration in this petition is, whether in view of pendency of proceedings before BIFR, initiated under Sections 15 and 16 of the Act, Respondent/Board can be restrained from invoking Bank Guarantees, for encashment for recovery of electrical dues, admittedly, not paid by the Petitioners.

The relevant provisions of the Act, with, which, I am required to deal in this petition, are mentioned hereinbelow;

"Section. 15. Reference to Board-- (1) When an industrial company has become a sick industrial company, the Board of Directors of the company, shall, within sixty days from the date of finalisation of the duly audited accounts of the company for the financial year as at the end of which the company has become a sick industrial company, make a reference to the Board for determination of the measures which shall be adopted with respect to the company;

Provided that if the Board of Directors had sufficient reasons even before such finalisation to form the opinion that the company had become a sick industrial company, the Board of Directors shall, within sixty days, after it has formed such opinion, make a reference to the Board for the determination of the measures which shall be adopted with respect to the company;

(2) Without prejudice to the provisions of Sub-section (1), the Central Government or the Reserve Bank or a State Government or a public financial institution or a State Level Institution or a scheduled bank may, if it has sufficient reasons to believe that any industrial company has become, for the purposes of this Act, a sick industrial company, make a reference in respect of such company to the Board for determination of the measures which may be adopted with respect to such company;

Provided that a reference shall not be made under this sub-section in respect of any industrial company by--

(a) the Government of any State unless all or any of the industrial undertakings belonging to such company are situated in such State;

(b) a public financial institution or a State Level institution or a scheduled bank unless it has, by reason of any financial assistance, or obligation rendered by it, or undertaken by it, with respect to, such company, an interest in such company,

"Section 16. Inquiry into working of sick industrial companies--

(I) The Board may make such inquiry as it may deem fit for determining whether

any industrial company has become a sick industrial company--

(a) upon receipt of a reference with respect to such company u/s 15; or;

(b) upon information received with respect to such company or upon its own knowledge as to the financial condition of the company;

(2) The Board may, if it deems necessary or expedient so to do for the expeditious disposal of an inquiry under Sub-section (1), require by order any operating agency to enquire into and make a report with respect to such matters as may be specified in the order.

(3) The Board or, as the case may be, the operating agency shall complete its inquiry as expeditiously as possible and endeavour shall be made to complete the inquiry within sixty days from the commencement of the inquiry.

(Explanation -- For the purpose of this subsection, an inquiry shall be deemed to have commenced upon the receipt by the Board of any reference or information or upon its own knowledge reduced to writing by the Board.)

(4) Whether the Board deems it fit to make an inquiry or to cause an inquiry to be made into any industrial company under Sub-section (1), or, as the case may be, under Sub-section (2) (it may appoint) one or more persons to be a special director or special directors of the company for safeguarding the financial and other interests of the company (or in the public interest).

(4-A) The Board may issue such directions to a special director appointed under sub-section (4) as it may deem necessary or expedient for proper discharge of his duties.)

(5) The appointment of a special director referred to in Sub-section (4) shall be valid and effective notwithstanding anything to the contrary, contained in the Companies Act, 1956, or in any other law for the time being or in the memorandum and articles of association or any other instrument relating to the industrial company, and any provision regarding share qualification, age limit, number of directorships, removal from office of directors and such like conditions contained in any such law or instrument aforesaid, shall not apply to any director appointed by the Board.

(6) Any special director appointed under Subsection (4) shall--

(a) hold office during the pleasure of the Board and may be removed or substituted by any person by order in writing by the Board;

(b) not incur any obligation or liability by reason only of his being a director or for anything done or omitted to be done in good faith in the discharge of his duties as a director or anything in relation thereto;

(c) not be liable to retirement by rotation and shall not be taken into account for computing the number of directors liable to such retirement;

(d) not be liable to be prosecuted under any law for anything done or omitted to be done in good faith in the discharge of his duties in relation to the sick industrial company,

Under Section 15, a reference has to be made to the BIFR and Section 16 of the Act, gives power to, BIFR to hold an enquiry into working of the Sick Industrial Company Section 22 of the Act, which is most relevant for the said petition, is reproduced hereinbelow;

"Section 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 like or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority."

Perusal of the orders of BIFR, clearly show that it has been held that Petitioners" Company cannot be rehabilitated and BIFR has found an opinion for winding-up of Petitioners" Company.

It is not in dispute, that against the orders of BIFR, Petitioners have preferred Appeals before Appellate Authority for Industrial and Financial Reconstruction (In short hereinafter referred to as "A.A.I.F.R.") which are still pending disposal on merits. In this view of the matter. Respondents" contention is, that Petition deserves dismissal.

Against this reply. Petitioners have submitted their Rejoinder.

Section 22 of the Act clearly stipulates, that recovery proceedings, or, for enforcement of any security against the said Industrial Company, shall be maintainable in respect of any loans, or, advance granted to the Industrial Company.

In the considered opinion of this Court, arrears of electrical dues would neither be loan, nor an advance, granted to the Industrial Company. Electrical charges are payable by an undertaking as per the Agreement entered into between the parties. By no stretch of imagination, it will fall in the category of either loan or advance, granted to the said Undertaking.

Shri P. M. Choudhary, learned Counsel for Petitioners has placed reliance on

various judgments of the Supreme Court and High Courts, reported in The Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and others, ; (1997) 7 JT(SC)216: (AIR 1998 SCW 2352) rTata Deyy Ltd. v. State of Orissa); (1993) 88 STC 47, (Himalaya Rubber Products v. Board (Calcutta High Court); Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others, and (1993) 91 STC 521, (Reliance I spat Industries Ltd. v. Commr. of Sales Tax), (M.P. High Court).

In view of the aforesaid judgments, cited by learned counsel for Petitioners, his contention is, that Board is neither legally competent, nor justified in getting the Bank Guarantees encashed.

Shri P.B.S. Nair, learned counsel for Respondent/Board, has placed reliance on the judgments reported in The Andhra Cement Company Ltd., Secunderabad Vs. A.P. State Electricity Board and others, ; (1992) 74 Comp Cas 256 (Karnataka High Court) (Assistant Executive "Engineer (Electrical), Karnataka Electricity Board v. Reyhan Minerals and Chemicals (Pvt. Ltd.); Modi Spinning and Weaving Mills Co. Limited Vs. U.P. State Electricity Board and others, ; Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another, , (Maharashtra Tubes Ltd. v. State Industrial & Investment Corporation of Maharashtra Ltd.; Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another, and AIR 1997 1644 (SC) .

The ratio of the aforesaid judgments of High Courts and Supreme Court, in the authorities, cited by respective parties, is not in dispute.

The basic and foremost question, that arises for consideration of this Court, is, whether arrears of electrical dues can be said to fall in the category of loan or advance as appearing in Section 22 of the Act. Petitioners have failed to satisfy this Court, that the arrears of electrical charges can be said to be either a loan or advance.

It is also not in dispute, that, as contemplated under Sub-section 3 of Section 22 of the Act, there is no order passed in favour of Petitioners by BIFR, restraining recovery of the amounts due and outstanding against the Petitioners, towards electrical charges. The said amounts became due and payable on account of Agreement, entered into between the parties. Under the umbrella of Section 22 of the Act, Petitioners have no right to claim, that even, such an amount cannot be recovered on the ground, that Petitioners' Units are :-- Sick Industrial Units.

Apart from this, it may also be mentioned here, that Petitioners have themselves preferred Appeals against the orders of BIFR, which are pending before A. A.I.F.R. But in the said Appeals, Petitioners have taken no steps to challenge the recovery, as made by Respondent/Board. It has not been brought to my notice, the Appellate Authority competent to hear the Petitioners' Appeals, has no such power to consider the Petitioners' prayer for grant of appropriate relief toil.

The consistent view of the Supreme Court and different High Courts, have been

that under the umbrella of Section 22 of the Act, no such relief with regard to restraining the Respondent/Board from encashment of the Bank Guarantees can be granted. Invocation of Bank Guarantee cannot amount to initiation, or, continuation of legal proceedings, such as execution, distress or like against the properties of the Company.

Supreme Court has held eloquently in the matter of Indian Maize and Chemicals Ltd. v. State of U.P. (1997) 89 Comp Cas 420 as under;

"A reading of the above section would indicate that when the proceedings are pending before the Board for Industrial and Financial Reconstruction in respect of any matter referred to therein for inquiry by the Board, the proceedings or order of execution, distress or the like would be stayed until the proceedings get concluded before the Board for Industrial and Financial Reconstruction or would not be proceeded without the leave of the Board or the Appellate Authority. It is seen that under the Indian Electricity Act, 1910, one of the conditions is that continued payment of the , price of electrical energy supplied by the Board is a condition for the continued supply and the default committed in the payment thereof entails disconnection of supply of electrical energy, except in accordance with the procedure prescribed under the contract or the regulation issued under the Indian Electricity Act, 1910. Execution connotes pre-existing decree. It is true that any action for realisation, etc., pending decision by the Board for Industrial and Financial Reconstruction or without its permission is prohibited. Enforcement of compliance with the obligation under the contract or regulation for supply of electrical energy by ordering payment of electrical energy is not and cannot be considered to be execution of a decree. Execution of the decree presupposes existence of a decree of a competent Court and the decree-holder should take steps to have it executed pending proceeding before the Board for Industrial and Financial Reconstruction. There is no decree of Court."

In the matter of AIR 1997 1644 (SC) . Supreme Court has held in para 18 as noted below;

" 18. u/s 22 on which the respondent relies, where in respect of an industrial company, an inquiry u/s 16 is pending, or any scheme u/s 17 is under preparation or a sanctioned scheme is under implementation or when an appeal u/s 25 is pending, then, 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 the appointment of a receiver in respect thereof can be proceeded with, and no suit for the recovery of money or for the enforcement of any security against the industrial company shall lie or be proceeded except with the consent of the Board or, as the case may be. the Appellate Authority. The respondent contends that its right to realise its claim, if established, would be affected by reason of Section 22 of the said Act. There is no material before us to show that the appellant-company cannot make its net worth positive. No scheme has been framed under the said Act so far. Even u/s 22 there is no absolute bar against any suit for the recovery of money. The suit cannot be proceeded with

except with the consent of the Board or the Appellate Authority. Therefore, in an appropriate case, the Board or the Appellate Authority is entitled to give its consent to such a claim being proceeded with."

32A. Supreme Court has also repeatedly held that Courts should be slow in granting an injunction to restrain the realisation of an unconditional Bank Guarantee. The Courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence, if, there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases, where allowing the encashment of an unconditional bank guarantee would result in its irretrievable harm or injustice to one of the Parties concerned.

The petitioners have neither pleaded nor submitted, that Bank Guarantees were obtained by Board by any fraud. They have also failed to prove to the satisfaction of this Court that encashment of Bank Guarantees would put them to an irretrievable harm.

As has been held above, that payment of dues for the electrical energy consumed by petitioners cannot be said to be loan or an advance granted to the Units. Thus, I find no reason to quash the impugned Notice Annexure P. I.

Thus, on overall consideration of the whole matter, I find, that no case is made out for any interference. The petition being devoid of any merit and substance, i,s, hereby dismissed, but, with no order as to costs.