

(2003) 05 CAL CK 0015
In the Calcutta High Court

Case No : G.A. No's. 3952 and 4347 of 2002 and C.S. No. 82 of 1999

Magma Leasing Limited

APPELLANT

Vs

S and S Industries and Enterprises Limited

RESPONDENT

Date of Decision : 23-05-2003

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 17, 22, 25

Citation : (2004) 1 BC 440 : (2003) 3 CALLT 171 : (2005) 127 CompCas 521 : (2004) 54 SCL 413

Hon'ble Judges : Pinaki Chandra Ghose, J

Bench : Single Bench

Judgement

1. This application has been filed by the defendant for recalling and/or modification of the orders dated August 19, 2002 and September 16, 2002 in G.A. No. 4936 of 1999.

2. Facts pleaded by the defendant briefly are as follows:

The petitioner filed an application before the Board for Industrial and Financial Reconstruction (hereinafter referred to as BIFR) and the BIFR has rejected their prayer to declare the defendant company as a sick company. Hence an appeal has been filed by the defendant before the AAIFR, which is pending. Therefore, no proceeding can be initiated and/or continued in this Hon'ble Court until the matter is disposed of by the said AAIFR.

3. Mr. P.K. Das, learned senior counsel appearing on behalf of the petitioner contended that the plaintiff instituted a suit against the defendant for a declaration that the plaintiff is the owner of the equipments mentioned in the Hire Purchase Agreement (hereinafter referred to as the said agreement) and further a decree that the plaintiff is the owner of the said equipments. According to him, no suit can be proceeded at this stage.

4. Receiver was appointed in the application of the plaintiff and took symbolic possession of the plaint and machinery of the defendant. Thereafter, Receiver

was directed to take physical possession of the said plant and machinery and to keep the same in separate place to be provided by the plaintiff.

5. He further contended that this Hon"ble Court has no jurisdiction since the matter is pending before the AAIFR. The defendant/petitioner is the owner of the said plant and machinery. The said plant and machinery were purchased by the defendant for obtaining an accommodation of loan from the plaintiff. He further drew my attention to Clause 1 of the said Agreement and submitted that the company shall provide those for acquisition of the hired articles set out in Schedule I and there is no option to purchase the said plant and machinery by the plaintiff. Therefore, it is nothing but an agreement for providing an accommodation of loan to the defendant. He further relied upon a judgment reported in AIR 1965 SC 1982 (K.L. Johar & Co. v. The Deputy Commercial Tax Officer, Coimbatore III) and submitted that the distinction between the sale of the said agreement is that in case of a sale in which the price is to be paid by installments and the property passes to the buyer even though the price has not been fully paid, whereas in a Hire Purchase Agreement the title does not transfer to the buyer when the agreement is executed, but the title passes when the option is finally exercised after complying with all the terms and conditions of the agreement.

6. In the instant case, the plant and machinery was purchased by the defendant, and there is no question to call the agreement entered into between the parties as the Hire Purchase Agreement. He further contended that the essence of sale of a property would mean that the property is transferred from the seller to the buyer for a consideration, whether paid at a time or later in installments. The said agreement has two aspects, the first aspect is bailment of the goods subjects to the said agreement and there is next an element of sale which fractifies when the option to purchase is exercised by the intending purchaser. Thus the intending purchaser is known as the hirer so long as the option to purchase is not exercised and the essence of the said agreement properly so called is that the property in the goods does not pass at the time of the agreement but remains in the intending seller, and only passes later when the option is exercised by the intending purchaser.

7. In the instant case, it is not the case of the plaintiff that the plaintiff is the seller in respect of the said plant and machinery. Therefore, according to him, although the agreement is called as a Hire Purchase Agreement, even then, it is nothing but a loan agreement for accommodation of funds.

8. He relied upon a judgment reported in Sundaram Finance Ltd. Vs. State of Kerala and Another, and contended that the object of the Hire Purchase system was to help to finance the customer in order that he might purchase the property. Though that was the object, the transaction took place in the form of Hire Purchase Agreement. The main feature of the agreement, apart from small variations, was that the dealer or the financier continued to be the owner till the terms of the agreement were fully complied with by the customer and the option

to purchase the same was exercised by him. If the terms were not complied with, the dealer or the financier, as the case may be, could terminate the agreement and take back the goods. In such a transaction, the common intention of the dealer, the financier and the customer was that the transaction should be made in the form of a Hire Purchase Agreement which would become a sale on the compliance of the terms of that agreement.

9. He further relied upon a judgment reported in M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, and submitted that the Hon"ble Supreme Court has held that no suit can be proceeded with/ without the leave from BIFR when the matter is pending before the BIFR.

10. Mr. Pratap Chatterjee, learned senior counsel appearing on behalf of the plaintiff/respondent contended that by the said agreement, the petitioner herein specifically been described as the hirer and after perusal of the clauses mentioned in the said Hire Purchase Agreement, there is an option to purchase. He also drew my attention to Clause 8 of the agreement which deals with transfer of property and submitted that until full payment is made, the hirer shall be deemed to be a bailee of the hired articles. Therefore, according to him, until and unless full payment is being made, the hirer shall act as a bailee in respect of the same.

11. Mr. Chatterjee further drew my attention to Clause 19 of the said agreement, the plaintiff has a right to enter into the premises of the hirer and to take possession of the hired article after determining the agreement/ contract. According to him, the case the defendant is not covered u/s 22 of the Sick Industrial Companies (Special Provision) Act, 1985 (hereinafter referred to as SICA Act) since it is not the property of the defendant.

12. Under the Hire Purchase Agreement until full payment is being made, the title of the goods cannot be passed to the defendant/petitioner. He further drew my attention to the invoice which was issued by the seller showing the plaintiff as the consignee in respect of the goods in question. Payment has been made by the plaintiff to the seller and the delivery made at the defendant's place of business, as hirer of the articles. Accordingly, he submitted that the plaintiff is still the owner of the said hired article. The title in the property has not yet passed to the defendant. Therefore, the defendant cannot claim it as its property. Therefore, the defendant cannot come within the purview of the said Section 22 of the said Act or can ask for stay of the orders passed by this Hon"ble Court. Therefore, the judgment cited by Mr. Das has no application in the facts and circumstances of this case.

13. After analysing the facts and circumstances of this case and the judgments cited before me by the parties it appears to me that the plaintiff has claimed a decree in the suit for declaration that the plaintiff is the owner of all the equipments mentioned in each of the Hire Purchase Agreement. Admittedly, the suit is still pending and the decree has not yet been passed in favour of the

plaintiff, declaring as the owner of the property in question. Therefore, in my opinion, apart from the facts stated before me, it would not be proper for me to construe the said Hire Purchase Agreement at this stage since that has to be decided at the time of the hearing of the suit in question. After analysing the judgment cited before me admittedly the appeal is pending before the AAIFR and under the Act it is true that when an enquiry u/s 16 of the said Act is pending or any claim u/s 17 is under preparation and/or under consideration before the BIFR or where the appeal u/s 25 of the said Act is pending before the AAIFR, no proceeding can be proceeded before the Hon''ble Court without obtaining prior permission from the said authorities. Ownership is in dispute. Prima facie it appears that the goods are lying with the defendant. At this stage it would also not be proper for me to construe the said Hire Purchase Agreement whether the same can be treated as a Hire Purchase Agreement or should be treated as an agreement for accommodation of loan, at this interlocutory stage and my observation on the said point and which would be decided at the time of the trial.

14. Therefore, on these facts stated hereinabove, the defendant would get a benefit of Section 22 of the said Act and the order passed by this Hon''ble Court should be modified to the extent that the Receiver shall continue to retain the symbolic possession only which is mentioned in Schedule "A" to this application.

15. There will be further an order restraining the defendant from alienating, encumbering and/or disposing of the said plant and machinery or to deal with the same excepting in usual course of their business until the suit is disposed of.

16. For the reasons stated hereinabove, this application is thus disposed of on the above terms.

In view of the order passed in G.A. No. 4347 of 2002, no further order need be passed on the application being G.A. No. 3952 of 2002.