
(2004) 10 AHC CK 0052

In the Allahabad High Court

Case No : Writ Petition No's. 2194, 2447 and 3719 (M/B) of 1993

Modi Industries Ltd.

APPELLANT

Vs

U.P. State Electricity Board

RESPONDENT

Date of Decision : 14-10-2004

Acts Referred:

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

Citation : (2005) 5 AWC 4113 : (2005) 62 SCL 11

Hon'ble Judges : Rajiv Sharma, J; Pradeep Kant, J

Bench : Division Bench

Advocate : J.N. Mathur and Syad Haseen, for the Appellant; S.M.K. Chaudhary and A. Sinha, for the Respondent

Final Decision : Dismissed

Judgement

1. In these three writ petitions, filed by M/s. Modi Industries Limited, the petitioner challenges the demand notices issued by the then U.P. State Electricity Board (now known as U.P. Power Corporation Limited) for payment of dues towards the electricity charges for the period mentioned in respective demand notices.

2. The main thrust of the learned counsel for the petitioner Sri J.N. Mathur is that the petitioner industry has already been declared sick industry under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, by the BIFR on 14-3-1991 and, therefore, unless permission is taken from the Board, no coercive steps could have been taken by the petitioner for realization of electricity dues in view of Section 22(1) of the aforesaid Act. In support of the argument learned counsel further urged that as per the provisions of Section 22(1) of the Sick Industrial Companies Act, 1985 (hereinafter referred to as the Sick Companies Act) no proceedings for the winding up of the sick industrial company or for execution, distress or the like against any of the properties of the Industrial Company can be taken where 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.

3. Reliance has also been placed upon the case of *Rishabh Agro Industries Ltd v. P.N.B. Capital Services Ltd.* [2000] 25 SCL 461 (SC) wherein the question involved before the Apex Court was as to whether in a case wherein winding up orders have been passed, further action can be taken in pursuance of the said order in view of the provisions of Section 22 of the Act. Hon"ble Supreme Court in the aforesaid case, has observed as under:-

"It is true that for invoking the applicability of Section 22 it has to be established that an inquiry u/s 16 is pending or any scheme referred to u/s 17 is under preparation or a sanctioned scheme is under implementation or an appeal u/s 25 relating to an industrial company is pending. But it cannot be said that despite the existence of any of the aforesaid exigencies the provision of Section 22 would not be attracted after the order of winding up of the company is passed. The words "no proceeding for winding up of the industrial company or for execution, distress or the like against any of the properties company or for the appointment of receiver in respect thereof shall lie or be proceeded with further", "leave no doubt in our mind that the effect of the section would be applicable even after the winding-up order is passed as no proceeding even thereafter can be proceeded with further under the Companies Act. The High Court appears to have not taken note of the aforesaid words ie. to be proceeded with further. As the impugned judgment is based upon wrong assumption of the provision of law and completely ignoring the vital words noticed hereinabove, the same cannot be sustained." (p. 463)

4. Learned counsel for the respondents ie., Power Corporation, Shri S.M.K. Chaudhary and Sri Abhishek Sinha, holding brief of Sri K.B. Sinha, Senior Advocate, responded to the aforesaid argument by asserting that the petitioner industry is not entitled to any protection of the provisions of Section 22 of the Sick Industrial Companies Act and that the petitioner company having entered into an agreement with respect to the payment of electricity minimum consumption guarantee charges and some dues being for the period after the date of passing of the order by BIFR, cannot take shelter under the said provisions, for not making the payment. Relying upon the counter affidavit filed in one of the Writ Petition No. 2447 (M/B) of 1993, it has been submitted that in all 8 recovery demand notices [three in W.P. No. 2194 (M/B) of 1993, one in W.P. No. 2447 (M/B) of 1993 and four in W.P. No. 3719 (M/B) of 1993] have been issued in which the period disclosed leaves no room for doubt that the same have been issued with respect to the period commencing from December, 1992 to the year 1993. It is being clarified by the learned counsel that these demand notices also include the amount, which relates to the period when the petitioner had filed Writ Petition No. 7056 of 1986, challenging the imposition of minimum consumption guarantee charges in which they were depositing certain amount of instalment as per the interim orders. Not only this, with respect to the arrears,

the petitioner Industry kept on making payment in instalment as agreed even after the order was passed by BIFR in year 1991 but after 3-3-1993 they stopped making payment of the instalments, the submission therefore, is that the petitioner Industry being under an obligation to make the payment of electric charges (including minimum consumption guarantee charges) under an agreement which agreement has not been suspended cannot take the shelter of the provisions of Section 22(1) for not making the payment which has become due under the agreement and also for the instalments which they agreed to pay and were being paid even after the passing of the orders of the BIFR.

5. The other plea is that so far as the amount which had accrued after passing of the order by the BIFR they cannot take any objection for the payment of the same and even if it is taken as correct that from some point of time the petitioner Industry was not functioning and, therefore, the electricity was not being consumed, liability of the petitioner Company for making payment of minimum consumption guarantee charges for the said period would not stand wiped off nor the companies obligation for making such payment of electricity charges would come to an end. Apart from the aforesaid amount the electricity charges which are being asked relate to the actual consumption of electricity for the period after the order was passed by BIFR, the realization of which is also not protected under the said provision of Section 22(1).

6. Learned counsel for the petitioner as well as learned counsel for the respondents both placed reliance on the case of Indian Maize and Chemicals Ltd. Vs. State of U.P. and Others, and laid emphasis upon the observations made by Hon"ble Supreme Court in paragraph 5 of the report which reads as under:--

"A reading of the above section would indicate that when the proceedings are pending before the BIFR in respect of any matter referred to therein for enquiry by the Board, the proceedings or order of execution, distress or the like would be stayed until the proceedings get concluded before the BIFR or would not be proceeded without the leave of the Board or Appellate Authority. It is seen that under the Indian Electricity (Supply) Act, 1948 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 the supply of electrical energy, except in accordance with the procedure prescribed under the contract or the regulation issued under the Indian Electricity (Supply) Act, 1948. Execution connotes pre-existing decree. It is true that any action for realization etc. pending decision by BIFR or without its permission is prohibited. Enforcement of compliance of 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 the existence of a decree of a competent court and the decreeholder should take steps to have it executed pending proceeding before BIFR. There is no decree of Court. Since the petitioner had committed default and as a condition for reconnection, agreed to

pay the amount in instalments, he is liable to comply with the undertaking given for supply of electrical energy. The petitioner committed default in that behalf. So, it is not entitled to seek any declaration or direction from the Court that since the matter is pending before the BIFR he would be entitled to the supply of electrical energy without the compliance of the corresponding obligation of payment under regulations or of: the contract under the Indian Electricity (Supply) Act, 1948. It is, therefore, not correct to say that since the proceedings are pending before the BIFR, the electricity is required to be supplied to the consumer without compliance of the conditions. It is then sought to be contended that the authorities may take coercive steps to recover the arrears. At this stage, we need not go into the question."

7. Learned counsel for the petitioner vehemently urges that the arrears of the electricity dues in any case cannot be recovered unless permission u/s 22 of the Sick Industries Act is taken from the Board in view of the dictum of the aforesaid judgment whereas counsel for respondents Sri Abhishek Sinha has tried to persuade that the obligation under the contract has to be fulfilled by the Industry which obligation has been kept intact and has not been disturbed even by the Apex Court in the aforesaid case.

8. The Supreme Court in the aforesaid case observed that under the Indian Electricity (Supply) Act, 1948, one of the conditions is that continued payment of the price of the electrical energy supplied by the Board is a condition for the continued supply and the default committed in payment thereof entails disconnection of the supply of electrical energy, except in accordance with the procedure prescribed under the contract or the regulation issued under the Indian Electricity (Supply) Act, 1948. The enforcement of the obligation under the contract or the regulation for supply of electrical energy by ordering payment of electrical energy is not and cannot be considered to be execution of a decree. In the said case an undertaking was also given by the Company for supply of electrical energy by making payment of the amount in instalments and the Supreme Court on taking into consideration, the aforesaid undertaking and the provisions of Section 22 of the Act observed that it was not correct to say that since the proceedings are pending before the BIFR, the electricity is required to be supplied to the consumer without compliance of the conditions.

9. The aforesaid judgment does not protect a Sick declared company under the provisions of Sick Companies Act from discharging its legal obligation under the contract nor it protects the obligation with respect to the payment of electricity dues for the electricity consumed after passing of the order by the BIFR.

10. In the instant case the petitioner Company was declared sick as far back as in the year 1991 but till date no amount towards the electricity dues have been paid. The petitioner Company had entered into an agreement, which is not being disputed by the petitioner for making payment of the minimum consumption guarantee charges. The challenge to minimum consumption charges has met with failure in Writ Petition No. 7056 of 1986 which was dismissed. After

dismissal of the writ petition filed by the petitioner, the petitioner continued to deposit the arrears in instalments till 3-3-1993 i.e. much after the date when the order by the BIFR was passed but thereafter they stopped making the payment.

11. Section 22 of the Sick Industrial Companies Act deals and explains the effect and impact of any contract, assurances, agreements, settlements, awards, standing orders or other instruments in force, to which such industrial company is a party or which may be applicable to such Sick Industrial Company immediately before the date of passing of order by the BIFR.

12. Section 22(3) of the Sick Industrial Companies (Special Provisions) Act, 1985 reads as under:--

"22(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 to 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 adaptations 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."

13. The argument of the learned counsel for the respondents is that the agreement which was entered into between the petitioner and the Electricity Board has not been placed under suspension by the Board nor any such order has been passed. In absence of any such order having been passed by the Board putting the agreement into abeyance, the petitioner cannot avoid payment under the said agreement. It has further been submitted that even if there had been an order for suspension of the agreement by the Board, the same could have been operative for a maximum period of seven years from the date of order which would have expired sometimes in the year 1998 and, therefore, also the petitioner is bound to pay the amount under the agreement.

14. Since the petitioner has neither claimed the benefit of the said provision nor there is any pleading to that effect nor any such order has been passed by the Board we find that the provisions of Section 22(3) of the Act would not be of any avail to the petitioners and rather would run contrary to the claim of the petitioners, regarding protection of the provisions of Section 22 of the Act. The agreement having not been suspended by the BIFR the provisions of Section 22(3) would not come to the rescue of the petitioner.

15. The fact still remains that in view of the agreement entered into between the parties, the obligation arising out of the agreement has not been discharged by making payment under the said agreement and there being no exceptional circumstances under which the right of the Electricity Board could be curtailed from realizing such dues the petitioner cannot say that the said charges should not be recovered from the petitioner because of the provision of Section 22 of the Act.

16. In another matter Hon"ble Supreme Court viz. in the case of Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, while considering the intention of the Parliament in enacting the aforesaid provisions of Section 22(1) observed as under:--

"It could not be the intention of Parliament in enacting the said provision to aggravate the financial difficulties of a sick industrial company while the said matters were pending before the Board or the Appellate Authority by enabling a sick industrial company to continue to incur further liabilities during this period. This would be the consequence if Sub-section (1) of Section 22 is construed to bring about suspension of proceedings for eviction instituted by landlord against a sick industrial company which has ceased to enjoy the protection of the relevant rent law on account of default in payment of rent. It would also mean that the landlord of such a company must continue to suffer a loss by permitting the tenant (sick industrial company) to occupy the premises even though it is not in a position to pay the rent. Such an intention cannot be imputed to Parliament...." (p. 1445)

In the case S.R.F. Limited Vs. Garware Plastics and Polyesters Ltd. and Others, Hon"ble Supreme Court observed as under:--

"The legislative intent which, therefore, becomes clear is that sick or potentially sick industry should be detected timely. Proceedings for revival and rehabilitation of the sick or potentially sick company should expeditiously be completed within the time frame and if unavoidable, it should be done within a reasonable time thereafter, say six months. The proceedings are not to be allowed to be used as dilatory tactics to prevent rehabilitation of the sick company or potential sick company, in particular by rival companies...." (p. 2232)

17. Learned counsel for the petitioner has not been able to indicate as to what happened to the petitioner industry after the order was passed by the BIFR in the year 1991. The respondents cannot be allowed to suffer in the hands of the petitioner for the reason that they had been declared Sick Industrial Unit by the BIFR as far back as in 1991. The petitioner's obligation, as already observed rests on an agreement entered into between the parties. Their own conduct in making payment of instalments continuously till 1993 even after the aforesaid order was passed by the BIFR and thereafter its non-payment and of course, the dues which have accrued after the order had been passed by the BIFR could in no way be withheld by the Company by taking protection of the provisions of

Section 22 of the Act. We, therefore, are of the view that recovery proceedings initiated against the petitioner do not suffer from any infirmity or illegality nor are dependent upon permission being taken u/s 22 of the Sick Industrial Companies Act.

18. In view of the above, we find no force in these petitions, they are accordingly dismissed.