

(2002) 10 DEL CK 0088

In the Delhi High Court

Case No : CP 42 of 1998

Mrs. Amrita Singh

APPELLANT

Vs

Brisk Capital Market Services Ltd.

RESPONDENT

Date of Decision : 08-10-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8, 8(1)
Companies Act, 1956 — Section 111, 433, 434, 439
Negotiable Instruments Act, 1881 (NI) — Section 138
Special Courts Act, 1979 — Section 2, 3(2), 3(3)

Citation : (2003) 113 CompCas 661

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Abhinav Vashisht and Prachi Vashisht, for the Appellant; A. Subbarao for the Custodian and Dinesh Agnani, for the Respondent

Judgement

Vikramajit Sen, J.—This Petition for winding-up of the Respondent Company has been filed under Sections 433(e), 434 and 439 of the Companies Act, 1956. The petitioner's allegation is that she had placed with the Respondent Company a sum of Rs. 6,00,000/- in two Fixed Deposits, bearing interest at the rate of 14% per annum. These deposits were made on 8.11.1994 and 2.1.1995 and were to respectively mature two years thereafter. In the meanwhile, the Company was notified on 17.6.1997 under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (hereinafter referred to as Special Court Act).

2. Notice of this petition was issued to the Respondent Company and consequent thereupon a Counter Affidavit has been filed by the Custodian appointed under the Special Courts Act the gravamen of which is that these proceedings ought not to continue any further. The Custodian has himself made a Reference to the decision of the Hon'ble Supreme Court dated 9.9.1996 in Civil Appeal No. 7143-7144- entitled Tejkumar Balakrishna Ruia Vs. A.K. Menon and another, in which it had laid down that while the income or usufruct of attached property is

also attached, the income generated by a notified person by dint of his own labour after notification are not attached property. Nevertheless, the Custodian has inexplicably still come to the conclusion that the Company Court has no jurisdiction to entertain the present winding-up petition, even though it has been correctly stated in the Counter Affidavit that the assets of the notified persons on the date of the Notification has to be determined by the Custodian for the purpose of disposal of attached assets u/s 11 of the Special Court Act. The effect of the Custodian stance is that the petition has been delayed, to the advantage of the Respondent Company. A Reply has also been filed on behalf of the Respondent Company in which the factum of the Fixed Deposit is not denied but refuge is sought to be taken behind the Notification of the Company under the Special Courts Act and the position adopted by the Custodian. What falls for decision is, Therefore, whether the jurisdiction of the Company Court is automatically ousted and completely extinguished on a Notification being made u/s 3(3) of the Special Courts Act.

3. In Harshad Shantilal Mehta Vs. Custodian and Ors, , a number of issues had been considered by the Hon"ble Supreme Court. While doing so, it had been opined, firstly, that the jurisdiction of the Special Courts in civil and criminal matters is in respect of transactions during the statutory period of 1.4.91 to 6.6.92, and in relation to those properties of a notified person that had been attached pursuant to that reason having been notified under the Special Courts Act. The entire operation of the said Act revolves around the transactions in securities during the said period only, and not in respect of any others that may have occurred anterior or posterior thereto. It should be recalled that the FDRs in question are dated 8.11.94 and 2.1.95, and their maturity dates are 7.11.86 and 1.1.97 respectively. Since the Respondent Company was notified u/s 3(2) on 17.6.97, while the movable and immovable assets on that date alone stood attached, the Notification has no impact on subsequently acquired assets, or on the transaction pertaining to the two FDRs. Secondly the Court reiterated the view that the attached property does not vest in the custodian, as had earlier been expressed by it in BOI Finance K.S. Vidyanadam and Ors. v. Vaiaaravan AIR 1997 SC 1951, viz. the Custodian"s position is not like that of Receiver of Official Liquidator "in whom not only the property vests but who is also in control thereof." Thus, it is not open to the Respondent Company to shield itself from its duty to file a Reply to the Winding-up petition on the ground that a Caretaker/Custodian has been appointed in the matter. What must still be adjudicated is whether the claim based on the two FDR is genuine, and whether any assets have been acquired post Notification. The Apex Court observed that "a property not having any nexus with the illegal dealings in securities can be released from attachment by the Special Court in an appropriate case." Thirdly, the Hon"ble Court did not dilute the powers of the Company Court in adjudicating upon debts. Although the Special Court possesses owners over non-notified assets in the event it detects fraudulent dealings, there is per se no embargo on a Company settling claims in connection with a transaction which is beyond the ambit of the

period envisaged in the Notification, and from assets acquired by it after the Notification. There is also no apparent obstacle in the Special Courts ordering payment, in full or in part, in respect of claims found due and payable by the Court, from out of the notified assets.

4. In *Canara Bank v. Nuclear Power Corporation of India Ltd. and Ors.* [1995] 84 Comp.Cas. 70, the Hon'ble Supreme Court had to decide whether the jurisdiction of the Company Law Board (CLB) could be invoked by virtue of Section 111 of the Companies Act in view of the prohibition contained in the Special Court Act. The CLB had been approached by Canara Bank since NTPC had refused to register its Bonds in the name of the Bank, which had alleged that it had purchased them from the Andhra Bank Financial Services Ltd. through a broker, Shri Hiten P. Dalal. Shri Dalal was a person notified u/s 3(2) of the Special Court Act. The CLB favored the view that its jurisdiction was unaffected by the provisions of the Special Courts Act. The Apex Court was of the opinion that the word "Court" must be read in the context in which it is used in the statute, and if so done, it would encompass all curial or judicial bodies which have the jurisdiction to decide claims arising out of transactions in securities entered into between the stated date in which a notified person is involved. It held that the CLB, even though it would be akin to a Tribunal, falls within the sweep of the said Act. I am unable to appreciate how this case has any bearing on the questions to be resolved in this petition. True, if the CLB is a "Court" within the ambit of the said Special Courts Act, the Company Court should also be. Even so, it is the relief and the facts connected thereto which should be kept in perspective. The definition of "securities" contained in Section 2(c) of Special Courts Act, reads thus--"In this Act, unless the context otherwise requires,-.... (c) "securities" includes- (i) shares, scrips, stocks, bonds, debentures, debenture stock, units of the Unit Trust of India or any other mutual fund or other marketable securities of a like nature in or any incorporated company or other body corporate; (ii) Government securities; and (iii) rights or interest in securities. Mindful that the definition is inclusive and Therefore does not exhaust the items to be considered as securities, the ejusden generis rule must nevertheless still be applied. When so interpreted, there is no room to include a Fixed Deposit of the Company as falling within the definition. The claim in this petition is thus not in respect of any security, and even if the FDR's are assumed for the sake of argument as a security the transaction not having occurred during the period 1.4.91 and 6.6.92, are beyond the ambit of the Special Courts Act.

5. In *Hiten P. Dalal v. Bratindranath Banerjee*, JT 2001 (5) SC 389, the Apex Court has clarified that in the context of Section 3(2) it is the transaction and not the offence that should have occurred between 1.4.91 and 6.6.92. It had been unsuccessfully contended that since the cheques in question had been dishonoured after 6.6.92, the Special Court did not possess jurisdiction to try the complaint u/s 138 of the Negotiable Instruments Act. When the ratio of this judgment is applied to the present case, the subject transaction (FDRs) not being "securities" and since they did not transpire between 1.4.91 and 6.6.92, it is

beyond the pale of the Special Courts Act, and hence winding-up petition is maintainable. The decision of the Hon"ble Supreme Court in Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., , is of great relevance and guidance, even though the legal modus in that case was the interplay between the Arbitration and Conciliation Act 1996 and the Companies Act. The following passage is self explanatory, and on its strength it can be concluded that the Company Court retains jurisdiction over all matters except those specifically falling within the purview of the Special Courts Act.

"Mr. Jaitley submits that according to Section 8(1) the judicial authority is bound to refer that matter to arbitration when an arbitration agreement exists between the parties. Section 8 of the 1996 Act reads as under:

"8. Power to refer parties to arbitration where there is an arbitration agreement -
(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in Sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under Sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

Sub-section (1) of Section 8 provides that the judicial authority before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in our opinion, that what can be referred to the arbitrator is only that dispute or matter which the arbitrator is competent or empowered to decide.

The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter like this, that the company has become commercially insolvent and, Therefore, should be wound up. The power to order winding up of a company is contained under the Companies Act and is conferred on the court. An arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company. The matter which is pending before the High Court in which the application was filed by the petitioner herein was relating to winding up of the Company. That could obviously not be referred to arbitration and, Therefore, the High Court, in our opinion was right in rejecting the application."

6. C. Makertih Ltd. v. Custodian and Ors., 2002 108 Comp Cas 811 has also been cited.

7. Having perused the response to the petition filed by the Respondent Company there is no room for doubt on the genuineness of the subject Fixed Deposit

Receipts, and that they do come within the sweep of the Special Courts Act. The petition is consequently admitted as it does not impinge on the jurisdiction of the Special Court. Citation to be published in the Statement, Veer Arjun and Delhi Gazette returnable for 12.12.2002, on which date the Petition should be relisted before Court.

8. The Respondent Company is directed to file a Statement disclosing the details of assets, if any, acquired by it after 6.6.92. It shall also state on affidavit the manner of the utilisation by it, or by the Custodian, of the sum of Rs. 6,00,000/- received by it from the Petitioner. The question of the appointment of a provisional liquidator in respect of such assets will thereafter be considered.

9. Renotify on 12.12.2002.