
(1996) 03 DEL CK 0030

In the Delhi High Court

Case No : I.A. No. 4708/94 and I.A. No. 8158 of 1995, in Suit No. 2673 of 1993

M/s. Credit Capital Finance Corporation

APPELLANT

Vs

Foremost Industries Ltd.

RESPONDENT

Date of Decision : 25-03-1996

Acts Referred:

Citation : AIR 1996 Delhi 310 : (1996) 87 CompCas 251

Hon'ble Judges : Arun Kumar, J

Bench : Single Bench

Advocate : Sanjeev Puri, for the Appellant; M/s. Shashi Saxena, for the Respondent

Judgement

Arun Kumar, J.—I.A. No. 4708 of 1994.

The plaintiff has filed a petition u/s 20 of the Arbitration Act praying that the agreement between the parties which contains an arbitration clause be filed in court and for appointment of an arbitrator in accordance with the arbitration clause contained in the agreement. Along with the main petition u/s 20 of the Arbitration Act, the plaintiff filed an application under Order 40, Rule 1 of the same Act for appointment of a Receiver with respect to the leased equipment. On the said application, this court had appointed a Receiver to take possession of the leased equipment. In the meantime the present application has been filed under Sections 442 and 446 of the Companies Act, 1956 praying that proceedings pending in this court are liable to be stayed until the plaintiff seeks permission or leave of the Company Court which has allegedly passed the winding up order with respect to the defendant Company. The learned counsel for the plaintiff has chosen not to file a reply to the application and has argued for dismissal of the application orally.

2. No doubt provisions of Section 446 of the Companies Act envisages that when a winding up order has been made or the Official Liquidator has been appointed as Provisional Liquidator, no suit or other legal proceedings shall be commented

or if pending at the date of winding up order shall be proceeded with against the company except with leave of the Company court. The applicant has annexed a copy of the winding up order dated 28th September, 1993 passed by the Company Judge of the Bombay High Court. The operative part of the order shows that the respondent company (present applicant) was directed to deposit a sum of Rs. 11,45,424.60 p. in the court within a period of four months, i.e., by or before 28th January, 1994. It was further ordered that in the event of the said amount being deposited within the specified time, the Company Petition would stand dismissed. Further the order provides that in the event of the amount not being deposited within the time allowed, the Company Petition would stand admitted and it would be advertised in the Gazette etc. The crucial words in the said order for present purposes are "in the event of the amount not being deposited the Official Liquidator will also stand appointed as Provisional Liquidator". The Company Court also directed the Official Liquidator to make an inventory of assets, moveable and immovable of the Company.

3. It is stated in para 4 of the present application that on or about 27/28th January, 1994, i.e., just before the time for deposit allowed by the Company Judge was about to expire, the parties to the winding-up petition entered into a compromise and mutually agreed to extend the time for payment and consent terms recorded between the parties were filed in the High Court of Judicature at Bombay on or about 28th January, 1994. It follows from this that the conditional winding up order passed by the Company Judge of the Bombay High Court did not come into operation. The order dated 28th September, 1993 says in so many words that if the payment of the specified amount was made within the time specified, the winding-up petition would stand dismissed. The time for payment was extended by the parties as per their mutual agreement. Therefore, the winding up order did not come into operation nor the appointment of the Official Liquidator as Provisional Liquidator come into operation. In view of extension of time for payment by mutual agreement between the parties, it cannot be said that the Company has failed to deposit the amount by the specified date.

4. In view of all these facts, the applicant is not correct in saying that a Provisional Liquidator stands appointed and, Therefore, permission of the Company Court u/s 446 of the Companies Act must be obtained before the present suit can be proceeded with. The conditions contained in Section 445 on the basis of which the said provision comes into operation are not satisfied in the facts of the present case. Neither it can be said that any winding up order has been passed qua the respondent company nor it can be said that a Provisional Liquidator has been appointed. None of the conditions of Section 446 of the Companies Act are satisfied. The applicant has tried to mislead this court by making averments in the present application which are not borne out from the order of the learned Company Judge of the Bombay High Court. The application is, Therefore, not only without any merit but is also mala fide. The same is dismissed with costs.

I. A. No. 8158 of 1995.

5. This is an application u/s 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short "SICA") by the respondent for stay of proceedings in the present suit. As noted while dealing with another application of the defendant company, the plaintiff has filed the main petition u/s 20 of the Arbitration Act for appointment of an Arbitrator in accordance with the arbitration clause contained in the agreement between the parties. The existence of the agreement between the parties is not disputed. The agreement in question is a lease agreement under which certain equipment was leased by the plaintiff to the defendant. The plaintiff also sought appointment of a Receiver with respect to the leased equipment and this court was pleased to appoint an advocate of this Court as a Receiver. The Receiver was not able to take possession of the leased equipment. In the meanwhile, the defendant filed two applications, one of which has been disposed of already. This part of the order deals with the second application. This application can be disposed of on the basis of a bare reading of Section 22 of SICA. The relevant portion of the said Section is "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..... shall lie or be proceeded with further,....." This provision shows that it is attracted only when the proceedings are with respect to any of the properties of the industrial company. In the present case, the leased equipment cannot be said to be the property of the company. The lease agreement between the parties shows that the ownership of the equipment subject matter of lease throughout remains with the lessor, in the present case the plaintiff. When the ownership of the equipment subject matter of the lease agreement remains vested with the plaintiff, it cannot be said that the present proceedings relate to property of the industrial company. The present application is liable to be rejected on this ground alone. In taking this view, I find support from a decision of the Supreme Court in *Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras*, . This was a case of lease of a property in favor of a company which was under the SICA. It was held that lease-hold rights in a property cannot be said to be a property of the sick industrial company. The application is dismissed.

6. Application dismissed.