
(2000) 09 BOM CK 0075

In the Bombay High Court

Case No : Notice of Motion No. 2356 of 2000 in Suit No. 187 of 1997

Murablack India Ltd.

APPELLANT

Vs

UBS AG and Others

RESPONDENT

Date of Decision : 04-09-2000

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22, 22(3)

Citation : (2001) 1 BomCR 371 : (2003) 115 CompCas 210 : (2004) 52 SCL 38

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : K. Cooper and D.J. Kakalia, instructed by Mulla and Mulla and Cragie Blunt and Caroe for Defendant No. 1, for the Appellant; G.E. Vahanvati and Shekhar Shetye, instructed by S. Satpute and Co. for Defendant No. 5, for the Respondent

Judgement

F.I. Rebello, J.—By consent of learned counsel, heard forthwith.

2. By the present motion, the plaintiffs pray that pending the hearing and final disposal of the suit, the defendants be restrained by an injunction from taking any steps whatsoever to recover from the plaintiffs any amount whatsoever under the loan agreement without first getting permission from the BIFR. The suit by the plaintiff is to restrain defendant No. 5 from encashing the bank guarantee given by defendant No. 5 to defendant No. 1 at the instance of the plaintiffs. The suit was filed in 1997.

3. On November 4, 1999, the plaintiffs moved the BIFR under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. The BIFR on March 31, 2000, has declared the company as a sick company. It is subsequent to these events that the present motion.

4. It is the case of the plaintiffs that once a company is declared as a sick company by virtue of Section 22, proceedings against the company cannot be proceeded with further, except with the consent of the Board or as the case may

be the appellate authority. In the instant case neither defendant No. 1 nor defendant No. 5 has filed a suit against the company. As a matter of record, however, defendant No. 1 has filed a suit against defendant No. 5 invoking the bank guarantee in Switzerland. It is the contention of the plaintiffs that even in respect of guarantees given on its behalf no suit can be filed for recovery of the guarantees against the guarantor. In the instant case it is contended that defendant No. 5 has given the guarantee on behalf of the plaintiffs in favour of defendant No. 1. Defendant No. 5 as a guarantor and plaintiff as the principal debtor, and as such Section 22 of Sick Industrial Companies Act would be attracted. It is contended that a suit would not lie against the guarantor has now been so held by the apex court in the case of M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, overruling the Division Bench judgment of this court in Madalsa International Ltd. and others Vs. Central Bank of India, .

5. It is further contended that proceeding does not merely include civil suit but include all proceedings as held by the apex court in the case of Maharashtra Tubes Ltd. v. State Industrial and Investment Corporation of Maharashtra Ltd. [1993] 78 Comp Cas 803. In the instant case invocation of the bank guarantee itself would be such other proceedings.

6. Section 22 of the Act reads as under :

"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 lie or be proceeded with further, except with the consent of the Board or, as the case may be, the appellate authority . . .".

7. In the instant case we are concerned at the highest with a suit filed by the person in whose favour the guarantee was given, i.e., defendant No. 1 against the guarantor, defendant No. 5. Under Sub-section (2) of Section 1, the Act extends to the whole of India. The suit by defendant No. 1 against defendant No. 5 is filed in Switzerland. Prima facie, therefore, the provisions of Section 22 which have only territorial application would not be attracted. Apart from that, defendant No. 1 does not have any office in this country. What the plaintiff in fact is seeking to do is to restrain defendant No. 1 from proceeding with the suit

instituted by defendant No. 1 in Switzerland against defendant No. 5 in September, 1999, i.e., even before an application was moved by the plaintiff before the BIFR. Courts would not injunct proceedings in a foreign court unless this court by itself would have jurisdiction to grant the relief, considering other factors. Defendant No. 5 in terms of the provisions of the guarantee given to defendant No. 1 had agreed to submit to the jurisdiction of the Swiss court and Swiss law. Can the provisions of the Sick Industrial Companies Act be read into Swiss law ? Similarly, the plaintiffs pursuant to an agreement with defendant No. 1 has agreed that it is the Swiss court that alone has jurisdiction and further that Swiss law would be applicable.

8. Secondly, can mere invocation of guarantee be said to be proceedings to hold Section 22 of Sick Industrial Companies Act would be applicable ? The judgment in so far as Maharashtra Tubes Ltd. v. State Industrial and Investment Corporation of Maharashtra Ltd. [1993] 78 Comp Cas 803 (SC) is concerned, relates to the first part and not to the amendment brought about by the amendment Act of 1993. By the amendment Act all that is stated is that a suit for 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 cannot be or be proceeded with. It does not speak of any other proceedings. Therefore, only suits will not be or cannot be proceeded with. It does not include other proceedings. That contention must, therefore, also fail. Even otherwise, on a consideration of language of Section 22, invocation of a bank guarantee is invocation of a term of the guarantee. Invocation by itself cannot be read into Section 22 of the Sick Industrial Companies Act. Further invocation of a bank guarantee is admittedly a transaction by itself.

9. It is independent of the main contract between the plaintiff and defendant No. 1. If reference need be made, it can be made to the case of Hindustan Construction Co. Ltd. Vs. State of Bihar and Others, . The apex court held that a guarantee constitutes a separate, distinct and independent contract. The contract is between the party as the guarantor and the person in whose favour the guarantee is given. It is independent of the contract between the principal and the person on whose behalf the guarantee is given. However, suit by a plaintiff to restrain the bank from making payment in terms of the guarantee is maintainable. Relief cannot be granted if in such a case the plaintiff is able to make out a case of fraud and/or irretrievable injustice. In the instant case, defendant No. 5 who has given the bank guarantee has expressed no difficulty in making payment to defendant No. 1. It is the contention of defendant No. 5 that considering international trade and commerce they have to honour the commitment to defendant No. 1 otherwise it is they who will have to suffer irreparable injury and loss in international financial circles. In these circumstances as defendant No. 5 is not invoking the provisions of Section 22, assuming it could invoke, the question of the court granting any relief at the instance of the plaintiff would not arise.

10. Even otherwise, if the plaintiff has any grievance the plaintiffs would and if at all have to pursue the remedy according to law u/s 22(3) against defendant No. 5. Section 22(3) reads as follows :

"(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 or 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."

11. The plaintiff has chosen not to invoke the said provision. It may be made clear that the court has not answered any issue whether the plaintiffs would be entitled to any relief on the facts as now dealt with before this court u/s 22(3) of the Sick Industrial Companies Act.

12. Considering the above, in my view, no case has been made out for grant of relief as prayed for. In the light of that the motion is dismissed with no order as to costs.