

(2004) 12 DEL CK 0010

In the Delhi High Court

Case No : IA 6385/02, 265/03 and 908/04 in CS (OS) No. 1193 of 2002

National Small Industries Corporation Ltd.

APPELLANT

Vs

ADL International Ltd. and Others

RESPONDENT

Date of Decision : 06-12-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 22, 5

Citation : (2005) 127 CompCas 637 : (2005) 116 DLT 107 : (2005) 79 DRJ 477 : (2005) 59 SCL 297

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Amit Dayal, for the Appellant; A.K. Thakur and C.S. Gupta, for the Respondent

Judgement

Vikramajit Sen, J.

I.A. 6385/2002

1. The question that arises at this stage of the proceedings is whether the ex parte ad interim injunction orders passed should be confirmed and whether a Receiver ought to be appointed in respect of the suit property.

2. At the first hearing it had been observed by this Court that the plaintiff had supplied the machinery and equipment under the two hire-purchase agreements dated 26th March, 1993 and 30th July, 1993. Under the said agreements the plaintiff delivered the machinery and equipment as detailed in paragraph 6 of the plaint. The total hire-purchase value of the machinery and equipment in the first agreement was fixed at Rs.34,30,892/-. The defendant paid a sum of Rs.3,00,646/- as earnest money and agreed to pay the balance amount in 13 installments. Similarly, the total hire-purchase value of the machinery and equipment in the second agreement was fixed at Rs.21,56,039/- and the defendant No.1 paid a sum of Rs.1,88,931/- as earnest money and the balance

was agreed to be paid in 13 installments. In terms of clause 2(v) of the said agreements the de jure possession of the property always remained with the plaintiff; and defendant No.1 was only entitled to use the property at its factory premises. After the payments enumerated above, defendant No.1 defaulted in payment of the installments. A request was made for extension of time for completing the payment. On the failure of the defendants in making payment the plaintiff also served a legal notice terminating the hire-purchase agreements. An offer was made by the defendants for a onetime settlement which was refused by the plaintiffs. It is sated that the defendants are likely to sell the machines, equipments and the mortgaged properties and if this were to happen, the plaintiff shall suffer irreparable loss and would not be able to recover the same or the value thereof.

3. A reading of Clause 2(v) of the Hire Purchase Agreements leaves no possibility for doubt that the property in question remains in the ownership of the plaintiff and changes hands only on the completion of the payments envisaged in the Hire Purchase Agreements. Clause 2 (v) reads as under:

If the Hirer shall make default in payment of any sum herein provided as and when the same shall have become due or shall fail to observe and perform any of the terms and conditions of this agreement or if the Hirer shall be adjudicated insolvent or has any receiving order or any other order under an Insolvency Act and made against him or he wound up whether voluntarily or otherwise or if execution shall be levied or threatened to be levied upon the said property or upon any premises where the said property may be or upon the Hirer's effect for rent, rates or taxes or if the execution shall be levied upon the Hire's effect or if the Hirer shall allow any judgment against him remain unsatisfied then and in each and every such case the owner shall forthwith become entitled to immediate possession of the hired property, (the ""Dejure"" possession shall always remain with the owner and the Hirer being only entitled to work the said property in terms of this agreement) and the owner may:

(a) Without prejudice to any claim for arrears of hire rent or damages for breach of this Agreement forthwith and without notice or demand terminate the hiring and retake possession of the property and/or;

(b) by written notice either served personally on the Hirer or sent by post or otherwise to the Hirer or to his last known address forthwith for all purposes absolutely determine this Agreement and the hiring hereby constituted and thereupon the Hirer shall no longer be in possession of the property with the owners, consent nor shall either party thereafter have any rights under this Agreement, but such determination shall not discharge any pre-existing liability of the hirer to the owners, and the Hirer shall not be entitled to claim any damages, compensation for such termination of the agreement and taking over of possession of the property by the owner or for any loss, damage, inconvenience that the Hirer may directly or indirectly incur, as a result of such termination of agreement or taking over the said property by the owner.

4. Defendant No.1 has pleaded that it has filed a Reference u/s 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as 'SICA') which has allegedly been registered by BIFR on 30.11.2000. The Defendant had contended that under the mandatory provisions of Section 22 ""the present suit is not maintainable as the same does not lie and/or in any event is liable to be stayed"". Inasmuch as the Defendant has not affirmatively stated that properties in question belong to or owned by it in the only pleadings before this court (being I.a. No. 265/2003), this application deserves to be reproduced verbatim. Application u/s 22 of SICK Industrial Companies (Special Provisions) Act read with Section 151 of CPC on behalf of Defendant No.1 and 4. Most Respectfully Showeth:

1. That the plaintiff has filed the above Suit for recovery of Rs. 91.54 lacs (approx.) and Rs. 25.77 lacs as well as for possession and injunction in respect of alleged properties. It is stated that the Defendant No.1 company which is alleged to be a borrower/ hiree to whom the machinery/ equipments had been given on Hire Purchase Agreement is a sick industrial company within the meaning of Sick Industrial Companies (Special Provisions) Act. The Defendant No.1 has filed a reference u/s 5 of the said Act which has been duly registered. In this connection copy of registration of the Reference to BIFR dated 30.11.2000 showing that the reference filed by Defendant No.1 has been duly registered is annexed hereto and marked as Annexure-

2. The reference having been registered, the enquiry is pending consideration before BIFR and as such under the mandatory provisions of Section 22 of SICK Industrial Companies (Special Provisions) Act, the present suit is not maintainable as the same do es not lie and/or in any event is liable to be stayed.

3. This application is made bonafide and in the interest of justice.

PRAYER

In the circumstances, it is most respectfully prayed that this Hon''ble Court may be pleased to

a) Stay further proceedings of the suit.

b) Pass such further order/orders as this Hon''ble Court may deem fit and proper in the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNES THE APPLICANT/DEFENDANT SHALL FOREVER PRAY.

Payments have been made pursuant to the Hire Purchase Agreements dated 26.3.1993 and 30.7.1993 and the Defendant had requested for extension of time for making further payments and also negotiating for one time settlement. The execution of these Agreements is, Therefore, not contestable. The only defense is that because of the SICA registration these proceedings should be stayed.

5. The following passage from Shree Chamundi Mopeds Ltd. Vs. Church of South

India Trust Association CSI Cinod Secretariat, Madras, is of relevance:

""12. Eviction proceedings initiated by a landlord against a tenant company would not fall in categories (1) and (3) referred to above. The question is whether they fall in category (2). It has been urged by the learned counsel for the appellant company that such proceedings fall in category (2) since there are proceedings against the property of the sick industrial company. The submission is that the leasehold right of the appellant-company in the premises leased out to is property and since the eviction proceedings would result in the appellant-company being deprived of the said property, the said proceedings would be covered by category (2). We are unable to agree. The second category contemplates proceedings for execution distress or the like against any other properties of the industrial company. The words `or the like' have to be construed with reference to the preceding words, namely, `for execution, distress' which means that the proceedings which are contemplated in this category are proceedings whereby recovery of dues is sought to be made by way of execution, distress or similar process against the property of the company. Proceedings for eviction instituted by a landlord against a tenant who happens to be a sick industrial company, cannot in our opinion, be regarded as falling in this category. We may, in this context, point out that, as indicated in the Preamble, the Act has been enacted to make special provisions with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of Experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined. The provision regarding suspension of legal proceedings contained in Section 22(1) seeks to advance the object of the Act by ensuring that a proceeding having an effect on the working or the finances of a sick industrial company shall not be instituted or continued during the period the matter is under consideration before the Board or the Appellate Authority or a sanctioned scheme is under implementation without the consent of the Board or the Appellate Authority. 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 S.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. We are, Therefore, of the view that Section 22(1) does not cover a proceeding instituted by a landlord of a sick industrial company for the eviction of the company premises let out to it.""

6. Similar views have been expressed by the Apex Court in *Deputy Commercial Tax Officers v. Corromandal Pharmaceuticals*, 1979 III AD 713. In *Garden Finance Ltd. Vs. Prakash Inds. Ltd. and Another*, , the basic prayer made was for recovery of the leased equipment. Although a decree for the recovery of the lease money had also been claimed the Court considered it a composite action which was not barred by Section 22, and a Receiver was appointed for taking symbolic possession of the machinery. A learned Single Judge in *SRF Finance Limited v. Prakash Industries Limited and Anr.*, OMP No. 184/1997 decided on 23.8.2002 had considered the appropriateness of the appointment of a Receiver in a situation similar to those prevailing in the present case. After noting the decision in *Prakash Industries Ltd. v. Bajaj Auto Finance Ltd.*, 1993 (2001) DLT 159 , *Space Capital Services Ltd. v. Prakash Industries Ltd.*, 2000 V AD 476 : 2001 30 SCL 420, Delhi, *GE Capital Transportation Financial Services Ltd. v. Dee Pharma Ltd.* 76 (1998) DLT 278 = 1998 VI AD 530, *Wipro Finance Ltd. Vs. M/s. Dee Pharma Ltd.*, *M/s. Credit Capital Finance Corporation Vs. Foremost Industries Ltd.*, , the Single Judge had appointed a Receiver to take over the custody of the plant and equipment. In *Prakash Industries Ltd.* (supra) the Division Bench had held that since the Defendant was not paying the installments it could not be allowed to continue to use machinery and earn money from it in an unbusinesslike manner. In cases where the Respondent has already invoked the provisions of the SICA, it is imperative for the Court to intervene since otherwise not only would the installments be RENDERED unrecoverable but there would be a danger of the equipments being damaged or becoming non-functional by careless handling of the Lessee/bailee. There may be an exception where the Defendant is legitimately carrying on business a(sic)d is in a position to honour the decree or orders passed by the Court. This is not so once the Sick Industrial Companies (Special Provision) Act, 1985 comes into operation.

7. Predicated on these precedents I had appointed an Arbitrator in *Atul Limited v. Prakash Industries Ltd*, 2003 (3) AD 459 In *M/s. Kotak Mahendra Finance Limited Vs. M/s. Deve Paints Limited*, it had been opined that the motor vehicles given on lease by finance companies remained their property, and if the company which has taken the vehicles on hire comes within the purview of SICA, the finance company ought to be asked to approach BIFR for the recovery of vehicles which were owned by it.

8. In the present case Defendants 2 to 8 are alleged guarantors. In *M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others*, the Court had favored the view that if the legal action is for the enforcement of a guarantee in respect of a loan granted to the sick industrial company, Section 22 would be attracted. When the order of the Court amounts only to returning the property in possession of the sick industrial company to the property's rightful owner Section 22 is obviously not attracted. This view has also found favor with a learned Single Judge of the Bombay High Court in *Jetu Jacques Taru Lalvani v. Solestrap Industries Pvt. Ltd. and others*, [2002] 110 Comp Cas 831 where the Defendant was found liable on a Bill of Exchange u/s 30 of the Negotiable

Instruments Act, even though the second Defendant had become a sick industrial company.

9. For these manifold reasons the interim order passed on 26.7.2002 is made absolute. I appoint Ms.Reema Kalra, Advocate, Chamber No.305, Lawyer's Chamber, Delhi High Court, Phone No.23389225, as the Receiver directing her to take possession of the machines and equipments covered under the two Hire Purchase Agreements dated 26.3.1993 and 30.7.1993 from the Respondent No.1's premises at Village and P.O. Kundli, District Sonapat (Haryana) or from wherever the said machines and equipment may be available. The Receiver shall also be entitled to seek police assistance if considered necessary. The Deputy Commissioner concerned is directed to provide complete protection and assistance to the Receiver when he is contacted to do so, to enable him to execute his duties as per the directions passed herein. The Receiver shall be paid a fee of Rs. 25,000/- initially together with incidental expenses. She shall file her Report within thirty days from today.

10. is No. 6385/2002 stands disposed of.

I.A. 265/2003

11. This application is without merit and is dismissed.

I.A. 908/2004

12. Ninety days have expired since the service of summons on the Defendants. No Written Statement has been filed till date. I have observed in *Texstyles and Ors. v. Kiran Overseas Export Limited and Anr.*, 2004 VII AD 98 and *K.R. Builders Private Limited v. Delhi Development Authority and Ors.*, 2004 VII AD 104. that no further opportunity to file a Written Statement is permissible beyond ninety days.

13. Although, in these circumstances, the Court could have pronounced judgment against the Defendants under Order VIII Rule 10 of the CPC I consider it expedient to direct the plaintiff to lead evidence by way of affidavits which should be filed within six weeks from today.

14. I.A. Stands disposed of in these terms.

CS(OS) No. 1193/2002

15. The case be listed before the Joint Registrar for exhibition of documents on 21.2.2005.

16. The case be listed before Court for cross-examination of the daffiest/witness on 14.3.2005.