

(2006) 07 BOM CK 0094

In the Bombay High Court

Case No : Criminal Writ Petition No. 1434 of 2006

Omesh Keshav Karnik

APPELLANT

Vs

The Board for Industrial and Financial Reconstruction and
Others

RESPONDENT

Date of Decision : 18-07-2006

Acts Referred:

Companies Act, 1956 — Section 16, 17, 18, 20(1), 25
Negotiable Instruments Act, 1881 (NI) — Section 138
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22, 22(1), 22A,
3(1)

Citation : (2007) 1 BC 179 : (2007) 139 CompCas 88

Hon'ble Judges : S.A. Bobde, J;D.G. Deshpande, J

Bench : Division Bench

**Advocate : Usha Purohit, for the Appellant; D.S. Mhaispurkar, APP, for the
Respondent**

Judgement

D.G. Deshpande, J.—Heard the learned Advocate for the petitioner. The prayer in the petition is for quashing process issued against the petitioner u/s 138 of the Negotiable Instruments Act in Case No. 1387/SS/2005 pending before the 30th Metropolitan Magistrate's Court at Kurla and number of other cases mentioned in prayer Clause (b) of the petition.

2. The petitioner is Managing Director of Phoenix Fine Chem. Pvt. Ltd., which is a sick company. This petition is filed by the petitioner in the capacity of Managing Director of the said company. The respondent Nos. 2 to 4 have filed complaints against the petitioner u/s 138 of the Negotiable Instruments Act and as per this petition, there are Dumber of complaints against the petitioner, as described in paras 3, 4, 5 and 6 of the petition. The contention of the petitioner is that the complainants were aware at the time of the transaction with the petitioner that the petitioner company is declared as a Sick Industrial Company u/s 3(1)(o) of the SICA and, therefore, he has filed this petition for recalling a process issued at the instance of the respondent Nos. 2 to 4 in all those matters.

3. The learned Counsel for the petitioner in this regard relied upon the judgment of the Supreme Court in the case of Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, . Our attention was drawn by her, in particular, at paragraph Nos. 9, 15, 19 and 20 of the Supreme Court judgment. The said paragraphs arc reproduced below:

9. Coming to the provisions of SICA Sections 22 and 22-A which arc relevant for appreciating the questions raised in the case, are quoted hereunder-

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.

(2) Where the management of the sick industrial company is taken over or changed in pursuance of any scheme sanctioned u/s 18, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or in the memorandum and articles of association of such company or any instrument having effect under the said Act or other law-

(a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;

(b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.

(3) Where any 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.

(4) Any declaration made under Sub-section (3) with respect to a sick industrial company shall have effect notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law, the memorandum and articles of association of the company or any instrument having effect under the said Act or other law or any agreement or any decree or order of a Court, Tribunal, officer or other authority or of any submission, settlement or standing order and accordingly,-

(a) any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration, and all proceedings relating thereto pending before any Court, Tribunal, officer or other authority shall remain stayed or be continued subject to such declaration; and

(b) on the declaration ceasing to have effect-

(i) any right, privilege, obligation or liability so remaining suspended or modified, shall become revived and enforceable as if the declaration had never been made; and

(ii) any proceeding so remaining stayed shall be proceeded with subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded.

22-A. Direction not to dispose of assets.-The Board may, if it is of opinion that any direction is necessary in the interest of the sick industrial company or creditors or shareholders or in the public interest, by order in writing, direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets-

(a) during the period of preparation or consideration of the scheme u/s 18; and

(b) during the period beginning with the recording of opinion by the Board for winding up of the company under Sub-section (1) of Section 20 and up to commencement of the proceedings relating to the winding up before the High Court concerned.

15. The next question for consideration is whether under the provisions of SICA there was any legal impediment for payment of the amount for which the cheques were drawn and for that reason the appellants cannot be taken to have committed an offence u/s 138 of the N.I. Act. A bare reading of Section 22 of SICA makes the position clear that during pendency of an inquiry u/s 16 or during the preparation of a scheme referred to u/s 17 or during implementation

of a sanctioned scheme or pendency of an appeal u/s 25, no proceedings for 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 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 the appellate authority, as the case may be. The section only deals with proceedings for recovery of money or for enforcement of any security or a guarantee in respect of any loans or advance granted to the company and a proceedings for winding up of the company. The section does not refer to any criminal proceedings. In *BSI Ltd., v. Gift Holdings (P) Ltd.*, we held that pendency of proceedings u/s 22(1) of SICA alone is not sufficient to get absolved from the liability u/s 138 of the N.I. Act.

19. The question that remains to be considered is whether Section 22A of SICA affects a criminal case for an offence u/s 138 of N.I. Act. In the said section provision is made enabling the Board to make an order in writing to direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets-(a) during the period of preparation or consideration of the scheme u/s 18; and (b) during the period beginning with the recording of opinion by the Board for winding up of the company under Sub-section (1) of Section 20 and up to commencement of the proceedings relating to the winding up before the High Court concerned. This exercise of the power by the Board is conditioned by the prescription that the Board is of the opinion that such a directing is necessary in the interest of the sick industrial company or its creditors or shareholders or in the public interest. In a case in which BIFR has submitted its report declaring a company as "sick" and has also issued a direction u/s 22A restraining the company or its directors not to dispose of any of its assets except with consent of the Board then the contention raised on behalf of the appellants that a criminal case for the alleged offence u/s 138 N.I. Act cannot be instituted during the period in which the restraint order passed by BIFR remains operative cannot be rejected outright. Whether the contention can be accepted or not will depend on the facts and circumstances of the case. Take for instance, before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order or BIFR u/s 22A was passed against the company then it cannot be said that the offence u/s 138, N.I. Act was completed. In such a case it may reasonably be said that the dishonouring of the cheque by the Bank and failure to make payment of the amount by the company and/or its Directors is for reasons beyond the control of the accused. It may also be contended that the amount claimed by the complainant is not recoverable from the assets of the company in view of the ban order passed by BIFR. In such circumstances it would be unjust and unfair and against the intent and purpose of the statute to hold that the Directors should be compelled to face trial in a criminal case.

20. Except in the circumstances noted above we do not find any good reason for accepting the contentions raised by the learned Counsel for the appellants in favour of the prayer for quashing the criminal proceedings or for keeping the proceedings in abeyance. It will be open to the appellants to place relevant materials in this regard before the learned Magistrate before whom the cases are pending and the learned Magistrate will examine the matter keeping in mind the discussions made in this judgment. We make it clear that we have not considered the question whether in the facts and circumstances of a particular case Section 138 of N.I. Act is attracted or not, for that is a question to be considered by the Court at the appropriate stage of the case in the light of the evidence on record. The appeals are disposed of on the terms aforesaid.

4. In view of the aforesaid judgment of the Supreme Court, it is clear that option available to the petitioner is to go before the learned Magistrate. It is within the four corners laid down by the Supreme Court in its aforesaid judgment, the petitioner has to go before the Magistrate and get an order.

5. Since the issue raised by the petitioner on the basis of the aforesaid judgment of the Supreme Court, goes to the core of the matter, further proceedings mentioned in prayer Clause (b) of the petition, are stayed till the issue is decided by the concerned Court.

6. The petitioner to approach the concerned Magistrate in this regard within one month from today. Needless to say that before deciding the issue raised by the petitioner, the complainant will be heard by the Magistrate.

7. The petition is disposed of in the above terms.

8. All parties to act on the certified copy of this order.