

(2000) 08 MAD CK 0071

In the Madras High Court

Case No : Application No. 3118 of 2000 in Civil Suit No. 337 of 1998

Overseas Sanmar Financial Ltd.

APPELLANT

Vs

Sri Sivakaami Mills Ltd.

RESPONDENT

Date of Decision : 31-08-2000

Acts Referred:

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

Citation : (2000) 08 MAD CK 0071

Hon'ble Judges : A. Ramamurthi, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A. Ramamurthi, J.—This application is filed by the applicant/plaintiff to appoint an advocate-commissioner to seize and sell the assets more particularly described in Schedules A and B and after adjusting the costs of the sale, direct the sale proceeds to be made over to the applicant.

2. The case in brief is as follows :

The applicant/plaintiff filed the suit for recovery of a sum of Rs. 53 lakhs odd together with interest. The respondent had requested the applicant to extend to it certain credit facility by way of lease of equipment. The applicant had purchased an automatic cone winding machine and one crosclean file opener along with the accessories more fully described in Schedules A and B to the judge's summons. These assets were leased to the respondent under the lease agreement dated October 4, 1993. The applicant also purchased the assets described in the A schedule for a consideration of Rs. 80 lakhs odd. A sum of Rs. 1,69,049 was payable each month by the respondent by way of lease rentals commencing from April, 1994, and ending in January, 1999. B schedule property was purchased by the applicant for a consideration of Rs. 12,50,016. The lease rental of Rs. 26,250 per month was payable commencing from September, 1994, and ending in August, 1999. As per Clause 3 of the agreement, the applicant is

the sole and exclusive owner of the said assets. The respondent has no right or interest over the said assets except as a bailee. In terms of clause 6 of the agreement, the respondent has agreed to pay lease rentals to the applicant at Madras. In the event of any default in the payment of the lease rentals, the respondent shall be liable to pay default interest at the rate of 3 per cent. per month. As per Clause 23 of the agreement, the applicant is entitled to terminate the agreement and on termination, the respondent shall forthwith deliver the leased assets to the applicant and in the case of failure, the applicant is entitled to repossess the same.

3. The then managing director of the respondent, the late Karumutthu S. Chockalingam on October 4, 1993, executed a deed of personal guarantee in favour of the applicant. He died in May, 1997. Defendants Nos. 2 to 4 are the legal heirs of the guarantor who have inherited his estate and are liable to repay the said amount. Since the respondent has been highly irregular in the payment of the lease rentals, the applicant on February 18, 1998, sent a legal notice to defendants Nos. 1 to 3 terminating the lease agreement and calling upon them to pay the amount. Despite notices, the defendants have failed and neglected to pay the amount. The first defendant was by then declared a sick industrial company. While filing the suit, they have not secured the consent of the Board for Industrial and Financial Reconstruction (hereinafter referred to as "BIFR") as required u/s 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to "SIC Act"). The applicant also filed Application No. 1563 of 1998 to repossess the leased assets. This court ordered notice and the first defendant filed a counter objecting to the effect that it being a sick industrial company and hence u/s 22 of the Sick Industrial Companies (Special Provisions) Act, the applicant would not be entitled to repossess the same.

4. The BIFR in its order dated February 29, 2000, granted permission to the applicant to initiate and continue the legal proceedings against the first defendant and subject to the condition that any decree passed in this suit would not be executed without the consent of the BIFR. It also permitted the applicant to repossess the equipment that had been leased to the first defendant. All possibilities of rehabilitating the first defendant-company have been exhausted and that the first defendant is not likely to make its net worth exceed the accumulated losses within a reasonable time. The first defendant as a result is not likely to become viable and hence it was just and necessary that the first defendant-company has to be wound up. Show-cause notice was also issued calling for objections. The applicant would be entitled to repossess the same and unless an order is passed, the applicant would be put to much loss and hardship and the balance of convenience is also in their favour.

5. The respondents have been served and represented by counsel and posted for filing counter on August 1, 2000. No counter was filed on August 1, 2000, it was adjourned to August 8, 2000, and later adjourned by another two weeks. The matter was posted on August 23, 2000, and even then learned counsel for the

respondents was absent and posted for orders on August 31, 2000.

6. Heard learned counsel for the petitioner.

7. The points that arise for consideration are :

(1) Whether there are any valid and sufficient causes to appoint an advocate-commissioner to seize the movables as mentioned in the schedules A and B to the judge's summons ?

(2) To what relief ?

Points : The applicant/plaintiff filed the suit for recovery of a sum of Rs. 53 lakhs odd together with interest. The properties were leased out to the respondent under lease agreement dated October 4, 1993. A sum of Rs. 1,69,049 was payable by way of monthly instalments as lease rental commencing from April, 1994, to January, 1999. In respect of another lease, the rental payable is Rs. 26,250 per month. It is not in dispute that according to Clause 3 of the agreement, the applicant is the sole and exclusive owner of the assets. According to Clause 23 of the agreement, the applicant is entitled to terminate the agreement in the event of default. The respondent has committed default in payment of the lease rentals and the lease agreement was terminated. Now, the present application has been filed by the applicant to repossess the movables more specifically mentioned in the schedule.

8. Learned counsel for the applicant further stated that the first defendant was declared a sick industrial company and at the time of filing the suit, the applicant had not secured the consent of the BIFR as required u/s 22 of the Sick Industrial Companies (Special Provisions) Act. The applicant already filed Application No. 1563 of 1998 for appointment of an advocate-commissioner to repossess the leased assets and only notice was ordered. The first defendant filed the counter objecting to the same that it being a sick industrial company, the applicant is not entitled to repossess the same. Now, the BIFR by its order dated February 29, 2000, granted permission to the applicant to initiate and continue the legal proceedings subject to the condition that any decree passed in the suit would not be executed without the consent of the BIFR. It also permitted the applicant to repossess the equipment that had been leased to the first defendant. Now, the permission has been obtained from BIFR. Apart from that, Section 22 of the Sick Industrial Companies (Special Provisions) Act will not be a bar to prevent the applicant from repossessing the machinery which was leased out. It is settled position of law that only for recovery of the money, there will be a bar u/s 22, but for repossessing the equipment there cannot be any bar since the applicant is the owner of the machinery and the respondents are only hirers. Hence, I am of the view that the applicant is entitled to repossess the machinery.

9. For the reasons stated above, P. Udhaya Shankar, Advocate, Madras Bar Association, is appointed as commissioner to seize the properties more fully described in schedules A and B and hand over the same to the applicant on

proper acknowledgment. The commissioner is directed to give notice to the parties prior to seizure. If necessary, the commissioner can also secure the service of the police to carry out the work. The initial remuneration of Rs. 5,000 shall be paid by learned counsel for the applicant. Report in four weeks.