

(2003) 03 DEL CK 0090

In the Delhi High Court

Case No : Suit No. 972 of 2001 and IAs 4783 of 2001 and 10326 of 2002

PNB Capital Services Ltd.

APPELLANT

Vs

Atul Glass Industries Ltd.

RESPONDENT

Date of Decision : 17-03-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 2 Rule 2
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22, 22(1), 22(3), 22A

Citation : (2003) 105 DLT 767 : (2003) 70 DRJ 80 : (2003) 135 PLR 39 : (2004) 51 SCL 122

Hon'ble Judges : Manmohan Sarin, J

Bench : Single Bench

Advocate : Jagdeep Kishore, for the Appellant; Vikas Pahwa and Deepak Diwan, for the Respondent

Judgement

Manmohan Sarin, J.—The plaintiff is a wholly owned subsidiary of M/s. Punjab National Bank. The plaintiff filed the present suit seeking a mandatory injunction directing the defendant to hand over possession of the two Diesel Generating Sets, particulars of which are given in Annexure-A to the plaint. Written statement on behalf of the defendant has been duly filed. The plaintiff upon the filing of the written statement, moved is 10326/02 under Order XII Rule 6 CPC, seeking a decree on the admissions contained in the written statement. The material facts as averred by the plaintiff in the plaint are not disputed or traversed by the defendant in the written statement. The defendant has raised a legal objection with regard to the maintainability of the suit on account of the bar and embargo by virtue of Section 22(1) and (3) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as SICA).

2. Before I advert to the above, the relevant facts in brief may be noted. The plaintiff has filed the present suit for mandatory injunction seeking re-possession of the leased machinery. The suit has been instituted by Mr. D.S. Sunderam as the General Power of Attorney Holder. The plaintiff being in the business of

merchant, banking and leasing of equipment, had been approached by the defendant for grant of Lease Finance Facility. The plaintiff granted Lease Finance Facility of Rs. 46.34 lacs approximately to the defendant, for the purchase of two Diesel Generating sets from M/s. MCL Industrial Services Pvt. Ltd. The lease finance was granted in terms of letter dated 9.2.96. The defendant accepted the aforesaid terms and executed inter alias the following documents i.e. (a) a Promissory Note dated 10.2.1996 for a sum of Rs. 77,85,792/- and (b) lease Agreement dated 10.2.96 etc. Upon approval of the Lease Finance Facility and execution of requisite documents, the plaintiff vide cheque No. 175070 dated 14.2.96 remitted a sum of Rs. 45,85,440/- in favor of M/s. MCL Industrial Services Pvt. Ltd. The balance of Rs. 50,000/- being contributed by the defendant as margin money. Pursuant to the above finance, the two Diesel Generating Sets were delivered at the factory premises of the defendant. Defendant confirmed having availed of the Lease Finance for the Diesel Generating Sets and having put the same used from 15th March, 1996 vide its letter of 29th March, 1996. Defendant was required to repay a sum of Rs. 77.86 lacs over a 60 months period in 20 quarterly Installments.

3. The following are the material terms of the lease agreement, by which the ownership of the equipment was retained and remained with the plaintiff :-

"4.4. Hold the equipment as the bailees of the Lesser and not claim any right, title or interest in the Equipment other than that of a Lessee or contest the Lesser"s sole and exclusive ownership thereof.

6.6. As between the Lesser and the Lessee and their respective successors in title the Equipment shall remain personal property of and shall continue to be in the ownership of the Lesser.

8.2.1. The Lesser, shall without any notice be entitled to remove and repossess the Equipment and for that purpose by itself, its servants or agents enter upon any land, buildings or premises where the equipment is situated or is reasonable believed by the Lesser to be situated for the time being and detach and dismantle the same and the Lesser shall not be responsible for any damage which may be caused by any such detachment or removal of the Equipment."

4. The defendant defaulted in the payments. The plaintiff sent numerous reminders, during the period December, 1997 to January, 2000 regarding payment of the lease rentals and over due interest. The defendant vide its letters of 9th January, 1998 and 28th October, 1998, sought re-schedulement of Installments promising to pay regularly in future. It is averred that some of the cheques issued by the defendant were dishonoured. Finally vide a notice sent through the counsel dated 18th September, 2000, plaintiff demanded a sum of Rs. 42,19,121/- and also called upon the defendant to hand over the said equipment or pay the amount demanded. The defendant failed to comply with the demand made. Hence the present suit.

5. The plaintiff Along with the suit had moved an application being is No.

4784/2001 under Order II Rule 2 CPC seeking leave for the institution of a suit for recovery of Rs. 42,19,121/- at a later stage. The said application was allowed vide order dated 16.5.2001. The relief in the present suit is confined to repossession of the two Diesel Generating Sets. The plaintiff filed I.A.No. 10326/2002 being an application under Order XII Rule 6 CPC seeking a decree on admission. It is an admitted position that defendant has already sought a reference for being declared a sick industrial unit. Proceedings are pending before the BIFR. In these circumstances, defendant contends that suit for recovery of money would be barred in terms of Section 22(1) of the Sick Industrial Companies (Special Provisions) Act 1985, without the leave of the BIFR.

6. The defendant in the written statement filed admits that a sum of Rs. 46.34 lacs had been disbursed by the plaintiff. The defendant also avers that on account of recession in the automobile industry, glass manufactured by it could not be sold and inventory started piling up. Ultimately the glass manufactured had to be destroyed. The Financial condition of the defendant deteriorated and per-force the defendant approached the BIFR on 29.1.01 and reference was registered as 339/000. The defendant relies on the provisions of Section 22(1) and 22(3) of the SICA to urge that no proceedings for execution distress or the like against any of the properties of the Industrial Company would lie except with the consent of the BIFR. Similarly, the BIFR u/s 22(3) of SICA is empowered to suspend the operation of all or any of the contracts, assurance of the property, agreement and other instruments. In these circumstances, the present suit against the properties of the defendant would not be maintainable. Learned counsel also relies on order passed by the BIFR to the following effect :-

"That Company shall not dispose of, encumber or alienate any other way any of its fixed and current assets without specific approval of the BIFR and the charge holders u/s 22A of the Act. However, after the unit resumes operations, the current assets should be utilised for running day-to-day operations subject to keeping proper accounts thereto and routing all transactions through a cash credit current accounts to be opened by the Company with its financing banks subject to mutually acceptable tagging."

7. The learned counsel, Therefore, submits that in view of this order, alienation, in any way, of the assets in charge of the defendants without the prior approval of the BIFR, was not permissible. Hence the present suit would not be maintainable. Learned counsel for the defendant submitted that presently the defendant's claim for rehabilitation and restructuring was under consideration and the defendant be granted some time for the new promoter to make an alternative proposal, for settlement of the dues including that of the plaintiffs and prayed in the alternative that the present suit should be deferred. Mr. Jagdeep Kishore, learned counsel for the plaintiff opposes this request submitting that the default has been continued over a period of time since September, 2000. Mr. Jagdeep Kishore with regard to the objections raised on the maintainability of the suit submitted that the whole plea of the defendant proceeded on the

assumption that the property and assets in question were that of the defendant. In the instant case the ownership and title and the property belonged to the plaintiff. It had been simply leased to the defendant. No order u/s 22(3) of SICA suspending the Hire Purchase Agreement has been passed.

8. The question arising for consideration is whether the bar u/s 22 of the SICA would apply in case of properties which not are owned by the defendant-Company or not? This question is no longer rest integra. Reference may be invited to a decision of this Court in GE Capital Transportation Financial Services Ltd. Vs. Dee Pharma Limited, . In the cited case, the petitioner had sought the appointment of a receiver. This was also a case of lease finance of plant and machinery. Similar arguments were advanced by the defendant submitting that in case a receiver was appointed, it would adversely effect the financial position and the revival of the Company. The Court considered whether Section 22(1) of SICA would operate as a bar to the appointment of the Receiver. It was held that execution or distress proceedings would be suspended u/s 22 of SICA with regard to the property of the Company and not otherwise. It was held that under the agreement the ownership of the plant and machinery vested with the petitioner though the possession of the same was with the respondent. The Court approved the appointment of the Receiver holding that the respondent was not entitled to the benefit of the provisions of Section 22 of the SICA since the equipment was given on hire to the respondent and the title and ownership vested with the petitioner.

9. Again in Space Capital Services Ltd. Vs. Parkash Industrial Ltd 2000 Comp Cas C 101, the above position was reiterated and it was held that provisions of Section 22 of the SICA would not apply as they in terms apply only to properties belonging to the Company and not those leased to it and there was no bar to appointment of a receiver to take possession of the leased equipment. The Court also rejected the argument that the equipment having been affixed to the ground was liable to be treated as immovable property. It held that the appointment of receiver to secure the leased equipment could not be resisted and the receiver could take possession of the leased equipment.

10. Reference may also be made to Foremost Industries India Ltd. Vs. Credit Capital Finance Corpn.Ltd. 1997 4 AD (Delhi) 62 holding that an equipment under a hire purchase agreement upon failure to make the payment does not belong to the buyer but to the financier and the hirer could take possession of the equipment as it was owned by it.

11. Again in Wipro Finance Ltd. Vs. Dee Pharma Ltd. 2000 (5) AD Delhi 967 a learned Single Judge of this Court noted and followed the decisions in Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, , wherein it was held that the interest of a sick Company, continuing in occupation of the tenanted premises as a statutory tenant, could not be regarded as property of the Company for purposes of Sub-Section (1) of Section 22 of the SICA as also the decisions in GE Capital Transportation

Financial (supra) and the decision of the Division Bench dismissing the appeal against the above decision in M/s. Dee Pharma Pvt.Ltd. Vs. Gee Capital Transportation Financial Services Ltd. (Co.Appeal No. 29/98).

12. Applying the principles enunciated in the aforesaid decisions and noting the agreement terms as reproduced in paras 4.4, 6.6 and 8.2.1, it is clear that the Diesel Generating Sets which were leased belonged to the plaintiff. Once it is held that it is not the property or asset belonging to the defendant-Company, the bar u/s 22 would not come into operation as the same applies to only the properties and assets which belong to the Company in respect of which proceedings under the SICA are pending.

13. In view of the admissions of the defendant contained in the written statement regarding disbursement of the amount by the plaintiff for the lease finance and default in payment as noted in para 5 above, and the legal objections to the maintainability of the suit having been found to be not sustainable, the plaintiff is entitled to a decree on admissions. I.A. 10326/2002 is, accordingly, allowed. Accordingly by a decree of mandatory injunction, the defendant is directed to hand over possession of the Diesel Generating Sets as detailed in Annexure A to the plaint. The suit is decreed with costs. A decree of mandatory injunction shall issue directing the defendant to hand over the possession of two Diesel Generating Sets as specified in Annexure-A to the plaintiff. The decree shall be executable after a period of 30 days. This time has been granted in view of the prayer made by the defendant that sometime be granted to the defendant to make an endeavor to clear the dues. In the meantime, restraint on the defendant from alienating or parting with possession of equipment shall continue. All I.As. stand disposed of.