

(1998) 08 CAL CK 0016

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction Original Side A.P.O.T. No. 723 of 1997 G.A.
No. 4442 of 1997

Premier Industries (India) Ltd.

APPELLANT

Vs

Alliance Credit and Investments

RESPONDENT

Date of Decision : 06-08-1998

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 22(1)

Citation : (1998) 2 CALLT 562 : (2000) 102 CompCas 456

Hon'ble Judges : Ruma Pal, J; Basudeva Panigrahi, J

Bench : Division Bench

Judgement

R. Pal J.

1. I fully concur in the judgment of my learned brother who has narrated the facts in some detail. However having regard to the Issues involved in this appeal it is necessary to highlight and deal with certain aspects of the matter.

2. The first Issue pertains to the construction of section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereafter referred to as the Act). It was contended by the appellant that the language of section 22 must be given a wide Interpretation in order to effect the object of the Act. In my opinion while one of the objects of the Act, may be to help sick Industrial companies to survive by affording remedial measures, the other object is to prevent companies from becoming sick. The remedial measures afforded to an already sick company cannot be enforced in a manner which could tend to drive another healthy company to sickness. Section 22(1) thus provides for protection of a sick company so that its assets and its finances are maintained in status quo in order to give the company a chance to revive. To that extent the creditors rights to the assets of the company whether movable or Immovable are suspended. But the section does not envisage the company being revived with the assets and the properties of third parties. According to the appellant if the machines are returned to the respondent there could be no scheme for rehabilitation. Apart

from the fact that the Act does not provide for rehabilitation with the properties of third parties in the company's rehabilitation programme, the appellant being sick itself, cannot survive parasitically on the property of others against their will. It does not appear that the respondent was even asked to participate in the revival programme by the Board of Industrial and Financial Reconstruction. If the appellant is to survive it is to survive on the basis of its own assets with the protection afforded thereto by the provisions of the Act.

3. The question of balance of convenience would arise if the appellant had even a prima facie right to the machines without any payment for user. There is no such right. Therefore there is no question of mere balance of convenience determining the Issue. Irrespective of the Inconvenience that may be caused to the appellant, in the absence of any right to the machines and equipment, the appellant cannot be permitted to remain in possession of the same nor utilise it as the part of any revival scheme. On the other hand, because of section 22 of the Act, as held by my learned Brother, the respondent would not, for the time being, be able to claim any money from the appellant either on account of rentals or for any loss or damage which it may suffer by reason of such non-payment of the rental by the appellant or by reason of deprivation of the user of the equipment. To deprive the respondent of its machinery would be even to effect a future business and source of profit of the respondent. Therefore even the balance of convenience is in favour of the machineries being returned to the respondent.

4. Two grounds have been raised in the pleadings of the appellant which are dealt with briefly. The first is the existence of an arbitration clause in the agreement. The ground is untenable as no application has been made by the appellant to court for reference of the disputes to arbitration. Perhaps this was the reason that no submission was made by the appellant on the Issue.

5. The second relates to the territorial Jurisdiction of this court. The suit was filed with leave under Clause 12 of the Letters Patent on the ground that a part of the cause of action arose within the jurisdiction of this court. An application was made by the respondent for revocation of the leave granted. The application was dismissed by the same order which allowed the respondent's application for interlocutory relief. It appears that a separate appeal has been preferred by the appellant from the dismissal of its application. No stay or other interim order appears to have been granted in that appeal. Therefore as matter stand, we must proceed on the basis that this court has correctly assumed jurisdiction.

6. Finally is the submission of the appellant that the court has no power to pass an order on an interlocutory motion which would virtually amount to decreeing the suit. The submission is unacceptable. The courts have held consistently that in certain circumstances particularly when there is no dispute as to the right of the plaintiff to the property there is no bar to passing an interim order even if it amounts to decreeing the suit [see : *Thompson v. Park* : 1944 (2) All ER 477 ; *Heywood and another v. B.D.C. Properties. Ltd.*: 1963 (2) All ER 1063; *Woodford and another v. Smith and another* : 1970 (1) All ER 1091 at page 1093 ;

Manchester Corporation v. Connolly and Others : 1970 (1) All ER 961 at pages 964, 967: New Chhatabar Coal Co. Ltd. and Another Vs. J.G. Kumarmangalam and Others, ; Indian Cable Company Limited Vs. Smt. Sumitra Chakraborty, ; Chanda Jhunjhunwalla and Another Vs. State of West Bengal and Others, In this case the appellant has never claimed that the machinery and equipment leased to it by the respondent belonged to the appellant it has not even a prima facie right thereto. Even the right to user under the agreement was dependent upon payment of rental. Admitteldy the appellant has not paid any amount to the respondent for its continued use of the equipment at least from March, 1997. The court cannot be party to a continued breach of agreement. In our opinion, the facts in this case are such that the trial court rightly directed the return of the respondent's machines & equipment to the respondent.

B. Panlgrahl, J. --This is an appeal filed by the defendant in Civil Suit No. 221 of 1997 challenging the judgment/order passed by the learned single Judge of this court on 26th November, 1997 whereby and whereunder the trial court directed relief in terms of prayer a, c, d and e of the petition affirmed on 2nd May, 1997 on behalf of the respondent plaintiff. Prayers (a), (c), (d) & (e) reads as follows :

"(a) A receiver be appointed to take possession of the equipment referred to in schedule "B" hereof;

(c) The receiver to be appointed herein be directed to make over the said equipment to your petitioner forthwith;

(d) The respondent, its servants agents and/or assigns be restrained from in any way or manner to deal with, dispose off and/ or encumbering the said equipment referred to in schedule "B" hereof ;

(e) The respondent, its servants, agents and/or assigns be restrained from operating its bank accounts at Canara Bank, Siyagang, Indore, State Bank of Indore, Branch Code--3604 and SBI, Indore without leaving a sum of Rs. 27,21,429 therein."

8. The defendant/petitioner is a body corporate under the Companies Act. 1956 having its registered office at 107, Chetak Centra, 1st floor, RabIndranath Tagore Marg, Indore. The plaintiff. Alliance Credit and Investment Limited is also a company, incorporated under the provisions of Companies Act, 1956 whose registered office is situated at 28/2, Shakespeare Sarani, Calcutta.

9. According to the plaintiff/respondent's case, in or about 1995 appellant/defendant approached the plaintiff/respondent for grant of financial assistance in respect of machinery and equipment for use in factory, pursuant to the said negotiation by and between the representative of both parties, the opposite party plaintiff agreed to grant lease of various equipment to the defendant under the terms and conditions contained in the deed of agreement dated June 30, 1975. The agreement was executed at Calcutta, wherein it was stipulated, inter alia, that the plaintiff would grant lease of equipment to the defendant for a term

of five years. The defendant would also pay lease rental of Rs. 3,27,684 per quarter during the subsistence of the lease. In the event of delay in payment, he shall pay 3% Interest per month of each Instalment towards delayed payment after expiry of seven days. It was further agreed between them that in default of lease rental, the outstanding dues shall carry interest at the rate of 12% per annum. On failure to make payment of the said, sum within thirty days the plaintiff would be entitled, inter alia, to payment of liquidated damages of amount equal to unpaid lease rental which in the absence of default would have been payable together with Interest therein at the rate of 2 per cent per month. In the event of default, the opposite party/plaintiff would be entitled to have unfettered right to terminate the agreement and forfeit the amounts paid and demand return of all equipment and/or be entitled to sell the same.

10. pursuant to an aforesaid agreement, the plaintiff opposite party on its part purchased various equipments, details whereof are set out in the schedule hereto annexed as "X" of the plaint and delivered the same to the defendant. From time to time the defendant/plaintiff paid Instalment as per the agreement to the plaintiff/respondent hi Calcutta Office aggregating the amount of Rs. 20,98,061.

11. Since the defendant did not takes steps to pay all the lease rental in time and there were many occasions of delayed payment, plaintiff, therefore, demanded for payment of the arrear lease rental. Whereby, the defendant/appellant unconditionally and unequivocally admitted its liability and agreed to pay the same in writing on 8th January, 1997. In evidence whereof a Memorandum of Understanding was executed between the plaintiff and the defendant Since, when, the defendant did not take any steps to pay the arrears or the running lease rental, the plaintiff Issued a notice terminating the agreement and filed this suit for recovery of lease rental to the tune of Rs. 27,21,429 as on May, 1997 and also claimed for physical possession and delivery of the equipment referred to in schedule -X- of the plaint.

12. The plaintiff Inter alia. filed an application for appointment of receiver to take possession of equipment referred to in schedule "B" therein. The receiver was appointed exparte. Pursuant to the order dated 23rd May, 1997 passed by the learned single Judge, the receiver took charges of the machineries as per schedule "X" of the plaint and submitted a report in terms thereof. The defendant/appellant thereafter, filed an application for revocation of the lease and also to discharge the receiver.

13. The learned single Judge was Inclined to pass an order in terms of a, c, d and e of the petitioner affirmed on 2nd May, 1997. It was further clarified that the receiver if so desired, could also remove the machineries from the factory premises. The defendant while such removal of machineries could not put in resistance "or hindrance to the receiver. Therefore, the defendant being aggrieved by such order/judgment filed this appeal and Inter alia, prayed for stay operation of the order. The said application as well as the appeal were heard together and have been disposed of under this judgment.

14. The case of the appellant/defendant is that the Premier Industries (I) Limited had availed plants and machineries from the plaintiff company on lease basis, whereupon an agreement was executed on 30th June, 1995. In the said agreement there was an arbitration clause and therefore, this court had no Jurisdiction to entertain the suit nor was competent to pass any order thereto. The agreement could not have been unilaterally terminated by the plaintiff/opposite party. Since, there was a financial set back and severe monetary stringency whereupon the appellant was forced to take shelter under the provisions of Sick Industries (Special Provision, Act 1983). The matter was, however, carefully considered by the learned BIFR Bench and it was declared that the defendant company is sick Industry and therefore, a scheme was asked to be evolved for its rehabilitation. Hence, in the aforesaid situation no monetary claim can be laid against the appellant company by anyone else muchless by the plaintiff.

15. Mr. Sen, the learned Advocate appearing for the appellant company has invited our attention that the plaintiff/respondent cannot claim any monetary claim nor machinery as the proposal for revival of factory is still under the consideration by the BIFR in case, appellant/defendant is directed to return machineries and other equipments to the plaintiff, the scheme which is likely to be evolved would render otiose. The learned trial Judge did not, however, realise the merit of section 22 under the provision of Sick Industrial Companies (herein referred to as the Act). It has been further stressed at the time of arguments that till March, there was a default on only Rs, 3,88,420. therefore, for recovery of such amount, the learned trial Judge should not have passed such harsh order whereby revival of the company stood practically receded to the background. The learned advocate appearing for the plaintiff/respondent while supporting the order impugned has invited our attention that there was an outstanding lease rental till January, 1997 was for Rs. 27.21,429. The defendant in the Memorandum of Understanding has candidly and unequivocally admitted its liability to pay over 7,00,000 till December, 1996. As per the agreement since the defendant did not pay the amount, therefore, plaintiff rightly terminated the agreement and thereafter filed the suit for recovery of lease rental along with the return of equipments. The defendant, since is not the owner of this machineries and equipments has no legal or equitable right to withhold possession. Therefore, the learned trial Judge Justifiably passed an order appointing a receiver to protect the right of the plaintiff. In so far as past lease rental was concerned, the defendant's liabilities cannot be ignored.

16. The admitted facts emerged from the case of the both parties is that there was an agreement by and between the plaintiff and defendant on 30th June. 1995, whereby the following conditions were agreed upon:

SURRENDER--Upon expiration or earlier termination of the lease, lessee shall deliver to the lessor the said Equipment at such a place as Lessor may specify in good repairable condition and working order, normal wear and tear resulting from

the proper use of the Equipment and damage by fire not caused by the negligence of the lessee shall be expected, (underline supplied for emphasis)

REMEDIES--Upon the occurrence of any default and at any time thereafter the lessor would declare all future rentals due to become due hereunder for the full terms of the lease Immediately due and payable and on such declaration being made by lessor, Lease shall forthwith provide to the lessor the present value of the said sums due discounted at the rate of 12% per annum and upon lessee falling to make the said payment within 30 days thereof Lessor may in its discretion do any one of the following:--

a. Take action for recovery as liquidated damages for loss of bargain and not as penalty, of any amount equal to all unpaid lease rental payment which in the absence of a default would have been payable by lessee hereunder for the full term thereof plus interest thereon at the rate of 2% per month for the period until receipt of the said amount.

b. Upon notice to Lessee terminate this Agreement and all schedules executed pursuant hereto and forfeit the amounts paid by Lessee by way of rentals and demand that Lessee return all Equipment to Lessor at Lessor's own risk and expenses in the same condition as delivered ordinary wear and tear and damage by fire not caused by the negligence of Lessor excepted, at such location as the Lessor may designate and upon failure of Lessee to do so within 14 days from the date of demand, enter upon premises where such Equipment is located and take immediate possession of and remove the same, all take without liability to Lessor or its Agent for such entry or for damage to property or otherwise. Lessor may detach and dismantle the Equipment from any part of the free hold or process machinery to which it may be affixed without the written permission of Lessee;

c. Sell all the Equipment at public or private sale or lease to others with 7 days notice on account and at the risk of Lessee and appropriate the net sale proceeds or realisation or rental towards the present value of all the future rental be Immediately due and payable at the rate of 12% per annum as aforesaid and to recover from the Lessee the shortfall or deficit together with Interest thereon at the rate 2% per month but the Lessor shall not in any such action or for duty to account to Lessee for such action or for any surplus realised by the Lessor by sale or lease.

The remedy referral to hereinabove is Intended to be in addition to any other remedy available to Lessor by Law provided however that on the Lessee making payment to the Lessor at any time before action under Clauses (a) or (b) above is taken by Lessor of the present value of all future lease rentals as provided hereinabove. the lessee shall retain all the Equipment leased hereunder for its own use and the lessor shall retain all the Equipment leased hereunder for its own use and the lessor further undertakes to transfer all its title and Interest on the said Equipment to the Lessee on receipt of payment as referred to herein-above.

17. On a plain reading of the terms of the agreement. It would unequivocally suggest that the plaintiff had never intended to confer ownership right to the defendant. The defendant had hereby agreed to pay lease rental to the plaintiff on the terms and conditions stipulated therein. The defendant had undisputedly committed default to pay the lease rental, as a result, the notice of termination was given by the plaintiff. From the agreement. It appears that the conditions have been embodied therein that the right of the user was given on the payment of lease rental, but right of ownership was never given to the defendant. Even the leasee shall forfeit right of user in case of default. From the Memorandum of Understanding it is indicated that liability of the defendant has been admitted therein.

18. The defendant has assailed the order of appointment of receiver before us. Inasmuch as a right was created upon the lessee and before the determination of such right by the court, which could be decided at the final conclusion of suit, therefore, no order of appointment of receiver could have been passed. As by such order it would amount to dispossession from the use of machineries and appliances. It has been further contended that in view of the provisions of section 22 of the Act, neither any order to appoint a receiver nor any direction for payment could be passed.

19. While appreciating the contentions of the learned advocate, we feel it necessary to quote the provisions of section 22 of Sick Industrial Companies (Special Provision) Act, 1985.

"Section 22(1) : Suspension of legal proceedings, contracts etc; 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."

20. There is no dispute that an Inquiry u/s 16 of the Act is pending and that section 22 is applicable. The question is as to the scope of section 22. On reading of section 22, it appears to us that it comprises two parts :

(i) That there shall be no proceeding for the winding up of the company or for execution of decree or distress warrant or the like against the property of the company or for appointment of a receiver in respect thereof.

(ii) No suit for recovery of money or for the enforcement of any security against Industrial Company or of any guarantee in respect of any loans."

21. In this respect reliance has been placed upon a recent judgment reported in 1998(3) Judgment Today SC page 716 in the case of Engineering Kamgar Sangh v. Vardhaman Spinning & Gen. Mills Ltd. It has been held as follows :--

"It is to be noticed that according to section 22, in case an "Inquiry u/s 16" is pending, then, notwithstanding anything in the Companies Act or any other Instrument etc.. no proceedings for the winding up of the company or for execution or distress or the like against the property of the company or for the appointment of a receiver and no suit for recovery of money or enforcement of any security or of any guarantee shall lie or be proceeded with further, except with the consent of the Board or, as the case may be by the appellate authority. Section 22A permits the Board to pass certain conditional orders.

22. While considering the scope and ambit of section 22 of the Act, reliance can also be placed on a Judgment reported in Calcutta Law Times 1996(1) page 171 in the case of Braithwatte v. D.T.H. Construction. It has been held following the Judgment reported in 1993(2) SCC page 142 in the case of Maharashtra Tubes Ltd. v. State Industrial Investment Corporation Ltd. & Ors. that section 22(1) permits BIFR to consider what remedial measures requires to be taken in respect of revival of a sick Industrial Company. In this case, admittedly, the BIFR in its order dated 3.11.1997 suggested various measures to ameliorate the conditions of the factory. It has been, inter alia, observed that the appellant company has diversified major portion of the funds towards their sister concern, as a result, there was total financial collapse of the company.

23. We are not concerned with the reason stated by the BIFR, but fact remains that there has been a proceeding pending with them who shall look-forward the ways and means to revive the factory. Since, the claim of amount towards lease rental is governed by the provisions of section 22 of the Sick Industrial Companies (Special Provision) Act, 1985, we are constrained to modify the order that the plaintiff cannot and shall not proceed to recover the amount till the finalisation of the proceeding pending before the BIFR or till revival of the company which ever is latter. Therefore, in the above background the monetary claim of the plaintiff company shall remain in animated suspension till the culmination of the proceedings before BIFR.

24. While considering the scope and application of section 22 of the Sick Industrial Companies Act, 1985, it has to be carefully considered whether the property in fact belongs to the sick Industry. If it is otherwise held that the ownership did in fact not belong to sick Industry, then section 22(1) of the Act cannot be stretched its application over such property. Our observation also gets support not only from the above Supreme Court decision but also on a single bench decision of Bombay High Court reported in M/s. Kotak Mahendra Finance Limited Vs. M/s. Deve Paints Limited, in the case of Cotak Mahendra Finance Ltd.

v. Devepains.

25. On a close scrutiny of the agreement, we find that there has been nothing embodied in terms of the agreement that the tools and machineries have vested in the company rather it is found that such ownership vested in the lessor. After termination notice, the lessee ceased to have any Interest, even the right of user over the appliances and the machineries Therefore, we are of the view that after termination notice, the lessee loses its right over the equipments and machineries and those articles before appointment of receiver were neither under the control of the lessor nor the lessee has any right over them. Thus, the machineries and appliances were in medio. The trial court in the above context, had therefore, justifiably appointment receiver who could take hold those of the articles to save them from further waste, dissipation and damage.

26. Since the defendant/appellant did not have any present right over the movables in question, the trial court, therefore, has exercised its discretion by appointing a receiver.

27. In the above conspectus of the case, we after careful cogitation of the facts and circumstances of the case found that there is no reason to disturb the order of the trial court in so far as deals with the machinery. But, in so far as the past monetary claim of the respondent company towards lease rental is concerned, in view of section 22 of the Act we are of the firm view that it shall remain stayed till the culmination of the proceedings pending before BIPR or until the consent of the BIFR is obtained by the respondent u/s 22 of the Act.

In view of our observation made above, we partly allow the appeal and accordingly, modify the order. Both parties are directed to bear their own costs.

The Court: The stay of operation of this Judgment and Order, as prayed for, is refused.

Let xerox copies of this Judgment and Order, duly signed by the Assistant Registrar of this court, be made available to the parties upon their undertaking to apply for and obtain certified copies thereof on payment of usual charges.

28. Appeal allowed in part