(2001) 10 MAD CK 0059

In the Madras High Court

Case No : Criminal O.P. No''s. 17263 to 17266 of 2000

Sivananda Mills Ltd. and Another — APPELLANT

Vs

Thirumalai Traders and Another — RESPONDENT

Date of Decision : 17-10-2001

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 141
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22, 22A

Citation : (2002) 108 CompCas 889

Hon'ble Judges : C. Nagappan, J

Bench : Single Bench

Advocate : C.S. Dhanasekaran, for the Appellant; V. Sairam, for the Respondent

Final Decision : Allowed

Judgement

C. Nagappan, J.—The petitioners in all these petitions are one and the same and they are accused Nos. 1 and 2 respectively in C.C. Nos. 63 to 66 of 1995 on the file of the Judicial Magistrate No. 111, Coimbatore. The petitioners have prayed for quashing the records in the respective cases in these petitions.

2. The respondent in Crl.O.P. Nos. 17263 and 17264 of 2000 is M/s. Thirumalai Traders and the respondent in Crl.O.P. Nos. 17265 and 17266 of 2000 is M/s. M.C.S. Kumaran Combines and they had supplied cotton to the first petitioner-company. Towards the sale proceeds, the cheques were issued by the first petitioner-company and signed by the second petitioner. When those cheques were presented for collection, they were returned unpaid with an endorsement "payment stopped by the drawer". Legal notices, dated August 18, 1994, were sent in all the four cases and intimation of notice was delivered on August 24, 1994, on the petitioners. No payment was made and hence four complaints were filed under Sections 138 and 141 of the Negotiable Instruments Act, 1881, against the petitioners herein and they were taken on file by the Judicial Magistrate No. II, Coimbatore, in C.C. Nos. 63 to 66 of 1995.

3. The grounds on whiqh the petitioners seek for quashing the case records in all the four petitions are one and the same and they are summarised as follows. All the four complaints have been filed by the respondents after the commencement of the proceedings before the Board for Industrial and Financial Reconstruction, hereinafter called the "BIFR" wherein a statutory ban order was passed on March 31, 1994, u/s 22A of the Sick Industrial Companies Act, hereinafter called "the Act", directing the first petitioner-company not to alienate/dispose of in any manner whatsoever any assets of the company. The BIFR was established u/s 4 of the Act to discharge quasi-judicial function. Whenever a company becomes financially sick, on its approach, a reference is made to the BIFR u/s 15 of the Act. Such reference is registered, numbered and inquiry is conducted by the BIFR u/s 16 of the Act. During the pendency of the inquiry, all the proceedings like, winding up, execution, distress or the like against the properties of the company shall stand suspended u/s 22(1) of the Act, because prior consent of the BIFR is required for such proceedings. Likewise, a statutory ban order by way of direction is issued u/s 22A of the Act to the company restraining it from disposing of any of its assets during the pendency of BIFR proceedings.

4. The petitioners approached the BIFR to declare the first petitioner-company a sick industry and areference was made and registered in Case No. 40 of 1989 by the BIFR. The BIFR issued notices to all the institutions like Bank of Baroda and other Government undertakings, to which the first petitioner owes dues, to submit their written submissions. The BIFR, in the proceedings held on March 31, 1994, directed the first petitioner-company not to alienate its assets in terms of Section 22A of the Act. Thus a ban order had been issued by the BIFR and the restraint order remains operative now. No payment was made by the petitioners in view of the above ban order. Since the first petitioner was restrained from alienating its assets, it could hardly make payment. The non-payment of the amount of dishonoured cheques is neither wilful nor wanton, but only due to the ban order passed by the BIFR u/s 22A of the Act. In view of the restraint order, the amount claimed by the respondents is not recoverable from the assets of the first petitioner-company. Since the criminal cases have been filed during the operation of Section 22A ban order, the entire prosecution is nothing but an abuse of the process of the Court and unnecessary harassment to the petitioners. As the statutory ban order was passed by the BIFR before the expiry of statutory period of 15 days after notice, the alleged offence u/s 138 of the Negotiable Instruments Act was not completed. When the alleged offence was incomplete, the petitioners herein may not be compelled to face trial. In view of the judicial dictum laid down by the Supreme Court in the case of Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, , the continuation of the proceedings before the learned Magistrate is nothing but an abuse of the process of the Court and hence the proceedings are liable to be quashed.

5. The common question that arises for consideration in. these petitions is whether the first petitioner-company and the second respondent managing

director can be proceeded against for having committed an offence u/s 138 of the Negotiable Instruments Act, 1881, after the company has been declared sick, under the provisions of the Sick Industrial Companies Act, 1985.

6. Since the question to be decided in all the four petitions is a common one, a common order is passed in all these petitions.

7. Admittedly, the second petitioner, as managing director of the first petitioner-company, has drawn the cheques in favour of the respondents and the respondents have presented all those cheques for collection on the same day, i.e., on August 6, 1994, through Tamil Nadu Mercantile Bank Limited, Pollachi and all those cheques got dishonoured for the reason "payment stopped by the drawer" and the respondents received the memo of dishonour of Bank of Baroda through their Bankers M/s. Tamil Nadu Mercantile Bank Limited, Pollachi, on August 10, 1994. The respondents sent notices through their Advocate on August 18, 1994 for all the dishonoured cheques demanding payment of the amounts within 15 days of the receipt of the notice and intimation of notice was delivered on the petitioners on August 24, 1994.

8. The petitioners, to declare the first petitioner as sick industrial company, made a reference to the BIFR and it was registered as Case No. 40 of 1989 and the BIFR, after issuing notice to all the institutions concerned and after conducting inquiry u/s 16 of the Act, satisfied that the first petitioner-company has become a sick industrial company and approved the rehabilitation of the company u/s 17(2) of the Act. A copy of the proceedings of the BIFR, dated March 31, 1994, is filed by the petitioners and it reveals that the BIFR directed the first petitioner-company not to alienate/dispose of in any manner whatsoever any assets of the company and the above direction was issued u/s 22A of the Act.

9. Learned Counsel for the petitioners has contended that the BIFR in its proceedings, dated March 31, 1994, directed the first petitioner-company not to alienate/dispose of any of the assets of the company and in view of the order passed u/s 22A of the Act, the petitioners could not make any payment when demanded by the respondents in their notices, dated A ugust 18, 1994, and the offence u/s 138 of the Negotiable Instruments Act is not completed and he relies on the decision of the Supreme Court in Kusum Ingots and Alloys Ltd. v. Pennar Peterson Securities Ltd. (supra). Their Lordships of the Supreme Court have laid down the law as follows (page 764) :

"In a case in which the 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 of the Negotiable Instruments Act cannot be instituted during the period in which the restraint order passed by the 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 of the BIFR u/s 22A was passed against the company then it cannot be said that the offence u/s 138 of the Negotiable Instruments 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 the 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."

10. Admittedly, in the present case, the BIFR has declared the first petitioner-company "sick" and also issued direction u/s 22A of the Act restraining the first petitioner-company not to dispose of any of its assets. As already seen, the respondents have issued statutory notices on August 18, 1994, demanding payment of the amounts of the dishonoured cheques within 15 days. Learned Counsel for the respondents contended that the petitioners have not filed any proof to show that the restraint order was in.force during that period of 15 days. The BIFR in its proceedings, dated March 31, 1994, have approved the rehabilitation of the company u/s 17(2) of the Act and directed the Bank of Baroda to identify a suitable promoter for rehabilitating the company and fixed the next hearing of the case on June 28, 1994, and in it, the BIFR issued a direction u/s 22A of the Act to the first petitioner-company not to alienate/ dispose of any of its assets. In such circumstances, there can be no doubt that the restraint order of BIFR must have been in force during the 15 days period from August 18, 1994, and the contention of the respondents in this regard is devoid of merit.

11. Learned Counsel for the respondents further contended that the petitioners, after issuance of the cheques, assured payment of those amounts in their letter to the respondents, dated April 9, 1994, when the restraint order was already passed by BIFR on March 31, 1994, and hence the petitioners are liable to be proceeded against. A perusal of the copy of the BIFR proceedings, dated March 31, 1994, reveals that no representative of the petitioner-company was present and the proceedings were issued only on April 12, 1994, and it was received by the petitioners on April 25, 1994. It is relevant to note that all the cheques were presented in the Bank for collection only on August 6, 1994, and the cheques got dishonoured for the reason "payment stopped by the drawer". It is the contention of the petitioners that the nonpayment of the amounts of dishonoured cheques is neither wilful nor wanton but only due to the restraint order passed u/ s 22A of the Act by BIFR. In the circumstances of the case, this contention of the petitioners cannot be brushed aside.

12. It is next contended by learned Counsel for the respondents that the trial of the cases has commenced and witnesses have been examined and the proper

course would be to allow the proceedings to go on and come to its logical conclusion and in this regard he mainly relied on the decision of the Apex Court in Amar Chand Agarwalla v, Shanti Bose (1973) SCC (Crl.) 651. A perusal of the records of the calendar cases shows that the trial has commenced and P.Ws. 1 to 3 were examined-in-chief only and the cross-examination has not taken place. The Apex Court in its decision referred to above has held that the accused in that case, immediately after the charges were framed, did not approach the High Court for quashing the proceedings and he had cross-examined several prosecution witnesses and hence the proper course would be to allow the proceedings to go on and to come to its logical conclusion one way or the other and declined to interfere with those proceedings. As already seen, in the present cases, the petitioners/accused did not cross-examine P.Ws. 1 to 3 and have moved this Court for quashing the proceedings on the basis of judicial dictum laid down by the Apex Court in the case of Kusum Ingots and Alloys Ltd. v. Pennar Peterson Securities Ltd. I (2000) BC 300=II (2000) SLT 375=I (2000) CCR 308 (SC)=(2000) 100 Comp Cas 755, referred to earlier, on the ground that the offence u/s 138 of the Negotiable Instruments Act is not completed.

13. Learned Counsel for the petitioners, relying on the decision of the Supreme Court in Kusum Ingots and Alloys Ltd. v. Pennar Peterson Securities Ltd. (supra), contended that it is fairly certain that there is no prospect of the present cases ending in conviction and the trial of the cases only for the purpose of formally completing the procedure to pronounce the conclusion on a future date is not warranted and he mainly relied on the decision of the Apex Court in Satish Mehra v. Delhi Administration, IV (1996) CCR 4 (SC) = (1996) 3 Cri 85. In the decision, their Lordships of the Supreme Court have held that when the Judge is fairly certain that there is no prospect of the case ending in conviction, the valuable time of the Court should not be wasted for holding a trial only for the purpose of formally completing the procedure to pronounce the conclusion on a future date.

14. In the present cases, the respondents have issued statutory notices on August 18, 1994, demanding payment of the amounts of the dishonoured cheques within 15 days and during that time, the restraint order of the BIFR was in force and in such circumstances, as held by the Apex Court in the decision in Kusum Ingots and Alloys Ltd. v. Pennar Peterson Securities Ltd., (supra), it cannot be said that an offence u/s 138 of the Negotiable Instruments Act was completed. The failure to make payment of the amount by the first petitioner-company or the second petitioner managing director is for reasons beyond their control. It is also contended by the petitioners that the amounts claimed are not recoverable from the assets of the company in view of the ban order passed by the BIFR. As declared by the Apex Court in the decision referred to above, it would be unjust and unfair to compel the petitioners to face trial in the criminal cases and hence the proceedings against the petitioners are liable to be quashed.

15. In the result, all the petitioners are allowed and the proceedings in C.C. Nos.

63 to 66 of 1995 on the file of the Judicial Magistrate No. II, Coimbatore, are quashed. Connected Crl.M.P. Nos. 6382 to 6385 of 2000 are closed.

