(2008) 07 DEL CK 0228

In the Delhi High Court

Case No : Writ Petition (C) No. 2207 of 2007

Vijay Kumar Mills Ltd. and Another APPELLANT

Vs

ICICI Bank and Others RESPONDENT

Date of Decision : 10-07-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 114
General Clauses Act, 1897 — Section 27
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 20(1), 22A

Citation : (2010) 4 CompLJ 168

Hon'ble Judges : V.K. Shali, J;Mukul Mudgal, J

Bench : Division Bench

Advocate : Maneesha Dhir and Preeti Dalal, for the Appellant; Ajay Kumar Tandon and V.K. Tandon for respondent No. 3, V. Seshagiri, for respondent No. 4, Prem, for Respondent No. 5, A. Mariarputham and Anurag Mathur for respondent No. 8, Indrani Mukherjee and Chandrani Mukherjee for respondent 10, for the Respondent

Final Decision : Dismissed

Judgement

Mukul Mudgal, J.—This writ petition challenges the order of AAIFR dated 21st February,2007, dismissing the appeal preferred by the petitioner on the ground of limitation. The order of the BIFR confirmed its earlier order dated 2nd January, 2002 to wind up the company u/s 20(1) of the Sick Industrial Companies (Special Provisions) Act (hereinafter referred to as the SICA) and further directed that the opinion be forwarded to the concerned High Court for necessary action in accordance with law. The Company was also restrained u/s 22(b) of SICA, from disposing of or alienating any of its fixed assets and current assets without specific prior approval of the BIFR and the charge holders until the appointment of an Official Liquidator by the concerned High Court.

2. In the order challenged in appeal, dated 4th March, 2004, the BIFR noted that subsequent to the order dated 2nd January, 2002, giving the last opportunity to

the promoters, the company had not submitted any rehabilitation proposal till that date and had also failed to comply with the direction of the Madras High Court regarding deposit of Rs. 1 crore, resulting in the vacation of the interim order in the Madras High Court.

3. The company''s stand before the BIFR was that no scheme of rehabilitation was submitted as the Manging Director of the company had been in on going negotiations with the banks and financial institutions to arrive at a negotiated settlement and failure of negotiations was the cause of not submitting the rehabilitation scheme by the company. The ICICI submitted that no negotiations had been held by the Managing Director of the company for arriving at a settlement of dues and even the associate companies of the petitioner company namely Kongar Integrated Fibres Ltd. And Kongrar Textiles Ltd. had also been ordered to be wound up by the BIFR. Consequently, upon the following reasoning in the concluding paragraphs, the BIFR by order dated 4th March, 2004, held as follows:

9. Having heard the submissions and considering the material on record, the Bench particularly in view of the fact that the Company had failed to comply with MHC''s order dated 13.3.2003 for deposit of Rs. 1 crore with BOI came to the conclusion that despite having allowed enough time and opportunity, it had not been possible to formulate any acceptance revival scheme for the company enabling it to make its net worth exceed the accumulated losses within a reasonable time while meeting of its due financial obligations and that the company as a result thereof was not likely to become viable in future and that it was just, equitable and in public interest that the company should be wound up u/s 20(1) of the Act. The Bench, therefore, confirmed its earlier prima facie opinion formed vide order dated 2.1.2002 to wind up the company in terms of Section 20(1) of the Act. It was also directed that this opinion be forwarded to the concerned High Court along with copies of all earlier orders/proceedings in the case for further necessary action according to law.

10. The Bench further directed in terms of Clause (b) of Section 22A of the Act that the company should not dispose of or alienate in any other way any of its fixed assets and current assets without specific prior approval of the BIFR and the shareholders till such time as an Official Liquidator was appointed by the concerned High Court.

4. 4th March, 2004 was the date of the impugned order, which order was admittedly passed in the presence of the Consultant of the petitioner company. The certified copy of the said order was applied for the first time on 19th May, 2004. The appeal was thereafter filed before AAIFR on 4th June, 2004. Reliance was placed by Ms. Maneesha Dhir, the learned Counsel for the petitioner on Regulation 13 of the BIFR Regulations, 1987, which reads as follows:

13. Service of notices or other documents.--(1) Every notice or other document required to be served on or delivered on any person maybe sent by registered

post addressed to the person or his agent empowered to accept service at the address furnished by him for service or at the place where the person or his agent ordinarily resides or carries on business or personally works for gain, and every notice or other document required to be delivered to or filed with the secretary, may be delivered at the office of the Board or sent by registered post to the secretary of the office of the Board. An acknowledgment purporting to be signed by the person or the agent or an endorsement by a postal employee that the person or the agent has refused to take delivery may be deemed by the Board to be prima facie proof of service and Section 27 of the General Clauses Act. 1897 (10 of 1897), shall apply.

(2) Any notice or other document required to be served on or delivered to a company may be sent to the chairman, managing director, secretary, manager or other principal officer of the company at the registered office of the company, by registered post or by leaving it at its registered office.

(3) Every notice or other document required to be served on the Central Government or, as the case may be, the State Government, shall be addressed and sent to the secretary of the appropriate Ministry or Department and shall be served in the manner specified in Sub-regulation (1) to this regulation.

5. Section 25 of the SICA reads as follows:

25. Appeal.-- (1) Any person aggrieved by an order of the Board made under this Act may, within forty-five days from the date on which a copy of the order issued to him, prefer an appeal to the Appellate Authority:

Provided that the Appellate Authority may entertain any appeal after the said period of forty-five days but not after sixty days from the date of aforesaid if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) On receipt of an appeal under Sub-section (1), the Appellate Authority may, after giving an opportunity to the appellant to be heard, if he so desires, and after making such further inquiry as it deems fit, confirm, modify or set aside the order appealed against (or remand the matter to the Board for fresh consideration."

6. This clearly shows that beyond the period of 60 days, the appellate authority does not have any jurisdiction to entertain an appeal. In the present case, the appellant was conscious of the order dated 4th March, 2004, as its representative was present on that date and for the first time the application for certified copy was filed on 19th May, 2004, well after the expiry of 60 days. AAIFR has given the following reasoning in the order dated 21st February, 2007, while dismissing the appeal of the petitioner:

7. We find from records that the impugned order was passed on 4.3.2004 in presence of the representative on behalf of the appellant. The application for certified copy of the impugned order was submitted on 19.5.2004, although the

impugned order dated 4.3.2004 was issued to all concerned including the appellant by the Board on 24.3.2004 and the appellant ought to have received the same in the normal course shortly after 24.3.2004 which can be presumed from the provision u/s 114 of the Indian Evidence Act and Illustration (f) thereof.

On the basis of the above reasoning, the appeal was dismissed as being barred by limitation.

8. We have heard the learned Counsel for the petitioner who relied upon the judgment of the Hon''ble Supreme Court in Puwada Venkateswara Rao Vs. Chidamana Venkata Ramana, . The relevant position of law laid down by the Hon''ble Supreme Court in the said judgment reads as follows:

10. The two decisions are reconcilable. The Calcutta High Court applied a rebuttable presumption which had not been repelled by any evidence. In the Bombay case, the presumption had been held to have been rebutted by the evidence of the defendant on oath so that it meant that the plaintiff could not succeed without further evidence. The Andhra Pradesh High Court had applied the ratio decidendi of the Bombay case because the defendant-appellant before us had deposed that he had not received the notice. It may be that, on a closer examination of evidence on record, the Court could have reached the conclusion that the defendant had full knowledge of the notice and had actually refused it knowingly. It is not always necessary, in such cases, to produce the postman who tried to effect service. The denial of service by party may be found to be incorrect from its own admissions or conduct. We do not think it necessary to go into this question any further as we agree with the High Court on the first point argued before us.

9. In our view the above decision which related to the service of a notice to a party would not come to the aid of the petitioner as in the present case the petitioner inspite of being aware of the BIFR''s order passed in its presence had applied for certified copy well beyond the period of 60 days which was the outer limit within the AAIFR could have entertained the appeal. Further there is no enabling provision which would vest the Appellate Tribunal to condone the delay beyond 60 days even subject to a party showing sufficient cause for the same.

10. The learned Counsel for the petitioner also relied upon a judgment of a learned Single Judge of this Court in Jagat Ram Khullar and Another Vs. Battu Mal, . The relevant portion relied upon, reads as follows:

8. What then is the impact of the oral testimony of the tenant denying the tender and the refusal to accept delivery on the presumption of service that thus arose ? This question, my mind, must be answered in favour of the tenant. It is well settled that the presumption of fact u/s 114 of the Evidence Act, as indeed, the presumption of law u/s 27 of the General Clauses Act, are not irrebuttable but, on the contrary, are rebuttable. This is so because neither of the two presumptions are conclusive but only dispenses with the need of evidence and could not, therefore, be placed at a pedestal higher than evidence itself. If oral

and documentary evidence, produced by litigant in a cause could be rebutted by evidence produced by the other side, there would be no reason to hold that the presumptions could not be dislodged by evidence in rebuttal. It was not seriously disputed that the presumption may be rebutted but the real controversy between the parties turns on the question if a bare statement on oath by the tenant denying the tender and refusal to accept delivery was sufficient to rebut the presumption. This question to my mind must be answered in favour of the tenant because by making such a statement on oath, the tenant has really produced the best possible evidence he could. The presumption raised is with regard to the tender to him of a postal cover and refusal by him of its delivery. The best he could do is to make a statement on oath that no such tender was ever made to him and there was, therefore, no question to refuse the delivery. What other evidence could be possibly given in such a case ? Such an evidence would, to my mind be sufficient to shift the onus to the landlord to establish actual tender and refusal to accept delivery, inter: alia, by producing the postman concerned.

In our view the above position does not support the pleas raised by the learned Counsel for the petitioner as the application for certified copy was filed in the present case after the expiry of 60 days, the maximum period prescribed for preferring an appeal. In these circumstances whether or not and when the certified copy was received by the petitioner pales into insignificance. The petitioner''s plea if accepted would give an ingenious method of extension of statutorily prescribed period of limitation merely by applying for a certified copy beyond the expiry of the period of limitation and then computing the period of limitation from the date when the certified copy, belatedly applied for is received.

11. In our view the petitioner''s case set up in the writ petition cannot be sustained as the petitioner has only stated that the order dated 4th March, 2004 was not received by it in normal course by the petitioner. In our view the petitioner had applied for certified copy of the order beyond the period of 60 days, and cannot be now heard to say that its appeal should be treated in time. Even if we treat the appeal to be filed in time, we have already noted the finding of the BIFR that the appellant is not serious about the revival of the company and that the company has enjoyed the interim order of the Madras High Court which stipulated the deposit of Rs. 1 crore, and that non-compliance of the said condition of deposit led to the vacation of the interim order. The findings of facts by the BIFR that the petitioner never submitted a rehabilitation scheme, has rightly been recorded by it and even if the appeal was to be treated as having been filed in time, there is no ground to interfere with the aforesaid order of the BIFR on merits. The petitioner had thus enjoyed conditional interim order of the Madras High Court without complying with the condition of deposit of Rs. 1 crore. This is another factor which must preclude the exercise of the writ jurisdiction in favour of the petitioner. Thus even if we assume that the appellate order was not entirely right in law in dismissing the appeal on the ground of limitation, the facts of the case as noted above clearly dis-entitles the petitioner to the equitable and discretionary relief under Article 226 of the Constitution of India. The writ

petition is accordingly dismissed with costs quantified at Rs. 20,000/- payable not later than 4 weeks to the Delhi High Court Legal Services Committee.

