Saketh India Limited Vs. W. Diamond India Limited

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Court : Delhi

Decided On : Apr-30-2010

Judge : Vikramajit Sen and; Sunil Gaur, JJ.

Acts : Sick Industrial Companies (Special Provisions) Act, 1985 - Sections 3(1), 16, 17, 20(4), 22, 22(1) and 25; ;Sick Industrial Companies (Special Provisions) Repeal Act, 2003; ;Companies Act, 1956; ;Code of Civil Procedure (CPC) , 1908 - Order 7, Rule 11 - Order 38

Appeal No. : RFA(OS) 114/2009, CM Nos. 17726-27/2009 and EFA(OS) 33/2008

Appellant : Saketh India Limited;rites Ltd.

Respondent : W. Diamond India Limited;bihar Sponge Iron Ltd.

Advocate for Def. : Rajeeve Mehra, Sr. Adv. and; Deepak Khurana, Adv. in EFA(OS) 33/2008

Advocate for Pet/Ap. : Manisha Dhir and; Preet Dalal, Advs. in RFA(OS) 114/2009 and CM Nos. 17726-27/2009;;

Disposition : Appeal dismissed

Judgement :

Vikramajit Sen, J.

1. The Appellant, Saketh India Limited, assails the impugned Order of the learned Single Judge passed on 24.8.2 009, whereby two Applications preferred by the Appellant/Defendant were dismissed and the Suit filed under Order XXXVIII of the Code of Civil Procedure, 1908 ('CPC' for short) for the recovery of mesne profits for the sum of Rupees 31,30,153/- together with interest and costs was decreed. In the first Application, IA No. 1171/2006, the Appellant/Defendant prayed for condonation of delay in entering appearance (that is filing the Address Form). In the second Application, IA No. 1170/2006, the Appellant/Defendant sought the rejection of the Plaint under Order VII Rule 11(d) of the CPC on the ground that it had been declared a Sick Industrial Unit in terms of Section 3(1)(o) of Sick Industrial Companies (special Provisions) Act, 1985 ('SICA' for short). Before us, the only aspect that has been argued is that SICA places a complete prohibition on all judicial proceedings leaving no alternative to the Trial Judge other than ordering the rejection of the Plaint.

2. It appears from a perusal of the records that Summons in Form 4 under Order XXXVII of the CPC were served on Defendant No. 1 by affixation at Hosur, Karnataka on 22.8.2005 and on Defendant No. 2 on 30.8.2005 at Bangalore. The aforementioned Applications filed on behalf of the Defendants are dated 25.1.2006 and were filed on that very day; they have been supported by Affidavits of Defendant No. 2 who is the Managing Director of Defendant No. 1. On 7.11.2008, the learned Single Judge directed the Defendants to file, within four weeks, an affidavit stating whether or not the monies claimed by the Plaintiff have been admitted by the Defendant and have been reflected in the documents filed by the Defendant before the Board for Industrial and Financial Reconstruction ('BIFR' for short). On 16.3.2009, the learned Single Judge granted a last opportunity to file the said Affidavit. On the next date of hearing, viz., 19.5.2009, the submission made on behalf of the Plaintiff to the effect that the Defendant was not before BIFR was recorded. In response, the Defendant stated that proceedings were pending before Appellate Authority for Industrial and Financial Reconstruction ('AAIFR' for short). Yet another opportunity to file the aforementioned Affidavit was granted to the Defendant, subject to payment of costs of Rupees 5,000/-. Since the directions were not complied with, costs were increased to Rupees 10,000/- and another chance for filing the said Affidavit before 24.8.2009 was permitted.

3. On 24.8.2009, the Court, keeping in perspective the plentitude of opportunities granted but not availed of by the Defendants to file the required Affidavit, as well as the Defendants failure to pay costs, dismissed both the Applications. The Court took into consideration that delay in entering appearance had not been condoned and, therefore, opined that all the averments in the Plaint were deemed to have been admitted, and decreed the Suit. This Appeal arises before us in these circumstances.

4. We are not persuaded by the arguments of learned Counsel for the Appellant that the provisions of SICA should be applied to the facts of the present case. Assuming that there is a prohibition placed, and not just a moratorium, placed by Section 22 of SICA on legal proceedings against a company coming within the pale of that statute, it remained the legal duty of the Appellant to substantiate that it had qualified for that protection. For discharging this obligation, the Defendant should have complied with the Orders passed by the learned Single Judge and made good the submission that the proceedings under SICA with relation to the Appellant were pending in a manner such that the benefit of Section 22 of SICA would enure to the Appellant. Secondly, the Appellant should have paid costs imposed upon it; it has, without demur, paid Rupees 33,000/- as Court Fee in this Appeal. Thirdly, the Appellant should have disclosed that at least the principal amount claimed by the Plaintiff in the Summary Suit had been shown and disclosed in the Scheme formulated and laid before the BIFR. Having failed to do so, we are in complete agreement with the learned Single Judge that the averments made in the Plaint would, in the absence of a Written Statement, have to be presumed to be correct. The CPC now mandates that the Written Statement must be filed within thirty days and in exceptional circumstances not later than ninety days of service. The rigours of this provision are not circumvented by preferring an application under Order VII Rule 11 of the CPC. We, therefore, conclude that the Appeal, inasmuch as it challenges the impugned Judgment, is bereft of merit.

5. We think it appropriate, however, to consider the provision of SICA and analyse what it endeavours to achieve. We must immediately take note of the fact that SICA has been repealed by Sick Industrial Companies (Special Provisions)

Repeal Act, 2003. While it is yet to be notified, it is significant that provisions akin to Section 22 are conspicuous by their absence in the new Scheme of revival of sick companies inserted in form of Part VIA, namely, 'Revival and Rehabilitation of Sick Industrial Comapnies'. Obviously, empirical analysis discloses that more often than not companies which have sought shelter of SICA have done so to procrastinate, delay and defer clearing its liability, with the obvious intention of coercing creditors into unfair settlements rather than implementing projected schemes supposed to assist in their reconstruction. When the statute is notified, amendments to the Companies Act, 1956 will become effective and all proceedings pending before BIFR will stand abated. To some extent, therefore, the present controversy has been rendered academic.

6. Courts, however, have always been alive to the possible mischief that invocation of SICA can lead to. In a nutshell, where the net worth of a company is reduced to a negative, and the amelioration that is sought is for reviving the company rather than winding it up, the recourse to the Act would be legitimate. There is no justifiable reason, therefore, for all legal proceedings to be immediately even held in abeyance, if not dismissed. We are mindful of the fact that Parliament has incorporated an amendment in the Section with effect from 1.2.1994 in these words - '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'. It appears to us that the phrase 'recovery of money' must be construed ejusdem generis and accordingly recovery proceedings in the nature of execution or any other coercive enforcement that has been ordained to be not maintainable. We do not find any logic in holding legal proceedings to be not maintainable, or to be liable to be halted unless, even if the debt sought to be proved in the Plaint has not been admitted. Given the delays presently endemic in the justice delivery system if a creditor is disallowed even from proving the indebtedness of a recalcitrant debtor SICA company, it would cause unjustified hardship. Whichever way we look at the matter, there can be no logic in denying legal recourse to a party for proving its debt. In the event that at least the principal amount, or a substantial part of it stands admitted, either in the suit or by means of a mention in

the Scheme placed before the BIFR, the aggrieved party must be permitted to prove its claim. In holding so, the only prejudice that we can conceive of is incurring expenditure in legal fees. When this is weighed against the interests of a person claiming that the company is indebted to it, the balance tilts in favour of the latter. A holistic reading of Section 22(1) of SICA makes it manifestly clear that Parliament's intention was to insulate sick companies only against proceedings for winding-up or for execution, or distress or the like or for enforcement of any security or guarantee. In the case in hand, despite several opportunities granted to the Appellant, it has miserably and perhaps deliberately failed to substantiate that the claim mentioned in the Suit has been reflected in the Scheme placed before the BIFR but even more poignantly, that a scheme was, in fact, pending before BIFR. If an Appeal is pending, has BIFR failed to grant or has withdrawn registration under SICA. We see the conduct of the Appellant as nothing more than an abuse of SICA.

7. The Apex Court has in Deputy Commercial Tax Officer v. Corromandal Pharmaceuticals : [1997] 10 SCC 649 enunciated the law in the context of SICA to be that a cessation of legal proceedings would be justified only if the dues in respect of which adjudication is ongoing is also included in or within the contemplation of the Scheme presented to BIFR. Their Lordships had analysed and distinguished its previous decisions in Gram Panchayat v. Shree Vallabh Glass Works Limited : [1990] 2 SCC 440 as well as Maharashtra Tubes Ltd. v. State of Industrial and Investment Corporation of Maharashtra Ltd. : [1993] 2 SCC 144 on the reasoning that in those cases the liability of the sick company had arisen for the first time after the sanction of the Scheme by BIFR. Their Lordships observed thus:

Any step for execution, distress or the like against the properties of the industrial company other of similar as steps should not be pursued which will cause delay or impediment in the implementation of the sanctioned scheme. In order to safeguard such state of affairs, an embargo or bar is placed under Section 22 of the Act against any step for execution, distress or the like or other similar proceedings against the company without the consent of the Board or, as the case may be, the appellate authority. The language of Section 22 of the Act is certainly wide. But, in

the totality of the circumstances, the safeguard is only against the impediment, that is likely to be caused in the implementation of the scheme. If that be so, only the liability or amounts covered by the scheme will be taken in, by Section 22 of the Act. So, we are of the view that though the language of Section 22 of the Act is of wide import regarding suspension of legal proceedings from the moment an inquiry is started, till after the implementation of the scheme or the disposal of an appeal under Section 25 of the Act, it will be reasonable to hold that the bar or embargo envisaged in Section 22(1) of the Act can apply only to such of those dues reckoned or included in the sanctioned scheme. Such amounts like sales tax, etc, which the sick industrial company is enabled to collect after the date of the sanctioned scheme legitimately belonging to the Revenue, cannot be and could not have been intended to be covered within Section 22 of the Act. Any other construction will be unreasonable and unfair and will lead to a state of affairs enabling the sick industrial unit to collect amounts due to the Revenue and withhold it indefinitely and unreasonably. Such a construction which is unfair, unreasonable and against spirit of the statute in a business sense, should be avoided.

The situation which has arisen in this case seems to be rather exceptional. The issue that has arisen in this appeal did not arise for consideration in the two cases decided by this Court in Gram Panchayat and Anr. v. Shree Vallabh Glass Works Ltd. and Ors. : [1990] 1 SCR 966 and Maharashtra Tubes Ltd. v. State Industries and Investment Corporation of Maharashtra Ltd. and Anr. : [1993] 1 SCR 340 . It does not appear from the above two decisions of this Court nor from the decisions of the various High Courts brought to our notice, that in any one of them, the liability of the sick company dealt with therein itself arose, for the first time after the date of sanctioned scheme. At any rate, in none of those cases, a situation arose whereby the sick industrial unit was enabled to collect tax due to the Revenue from the customers after the 'sanctioned scheme' but the sick unit simply folded its hands and declined to pay it over to the Revenue, for which proceedings for recovery, had to be taken. The two decisions of this Court as also the decisions of High Courts brought to our notice are, therefore, distinguishable. They will not apply to a situation as has arisen in this case. We are, therefore, of the opinion that Section 22(1) should be read down or understood as contended by the

Revenue. The decision to the contrary by the High Court is unreasonable and unsustainable. We set aside the judgment of the High Court and allow this appeal. There shall be no order as to cost.

8. In Sirmor Sudburg Auto Ltd. v. Kuldip Singh Lamba [1998] 91 Comp.Cas. 727, R.C. Lahoti, J., as the Learned Single Judge of this Court then was, opined that to be entitled to a stay of legal proceedings under Section 22 of the Act, a mere pendency of the enquiry would not suffice; the claimed dues must be reckoned or included in the sanctioned scheme. A suit for eviction against a sick industrial company is not liable to be stayed under Section 22(1) of the SICA. This decision has been followed by the Division Bench of the Calcutta High Court in Taulis Pharma Ltd. v. Bengal Immunity Ltd. [2002] 108 Comp.Cas. 237. Similar views have also been expressed in Vibgyar Ink Chem (Pvt.) Ltd. v. Safe Pack Polymers Ltd. [1998] 93 Com.Cas. 407, which likewise is a decision of the Division Bench of the Andhra Pradesh High Court which enunciates that 'an independent transaction de hors the scheme obviously cannot thus be covered within the ambit of Section 22 of the 1985 Act'.

9. Justice Lahoti's view has also been followed by a Single Bench of the Calcutta High Court in Fort William Industries Limited v. Usha Bentron Limited [2002] 108 Comp. Cas. 176. His Lordship, Dr. Mukundakam Sharma, J. has, in the Cement Corporation of India v. Manohar Basin : 82 (1999) DLT 343 observed that since no documentary proof had been furnished to disclose that any scheme stood sanctioned the so-called SICA bar was not attracted. A Single Bench of the Bombay High Court in Special Steels v. Jay Prestressed Products Ltd. [1991] 72 Comp.Cas. 277 has opined that the pivotal question in connection with the current conundrum concerns the assets of the Company and its functioning, and these would not be jeopardised if a civil suit continues. In Hardip Singh v. Income Tax Officer, Amritsar : [1979] 118 ITR 57 (SC) the winding-up petition was allowed to continue and only when the third and final stage of the dissolution of the Company came to be reached, was the moratorium of Section 22 of the SICA enforced.

10. Finally, we must consider the relevance of NGEF Limited v. Chandra Developers (P) Ltd. : (2005) 8 SCC 219, on which reliance has been placed by

learned Counsel for the Appellant. In the backdrop of several Judgments of the Supreme Court, it is inconceivable for a Bench comprising two learned Judges to charter a fresh and diametrically different view of Section 22 of SICA to previous pronouncements. A careful consideration of the Judgment discloses that their Lordships had countenanced a completely contrary scenario. This is clear from the following summation contained in paragraph 9 of the Judgment authored by His Lordship S.B. Sinha, J:

9. Mr. T.R. Andhiyarujina, the learned Senior Counsel appearing on behalf of the Appellants, in Civil Appeal Nos. 5199-5201 of 2004, would, inter alia, contend that the learned Company Judge and the Division Bench of the High Court misdirected themselves in passing the impugned judgment and order insofar as they failed to take into consideration that BIFR retains the control over the assets of the company in terms of Sub-section (4) of Section 20 of SICA and, thus, it was BIFR alone which could issue a direction as regard sanction of sale of assets of the company in respect whereof the learned Company Judge had no jurisdiction. In any event, the learned Company Judge had no jurisdiction to issue any direction to the Company to execute a deed of sale which amounted to grant of a decree for specific performance of contract. In any view of the matter, the finding of the Company Judge to the effect that there existed a concluded contract between the First Respondent and the Company is wholly erroneous.

11. In the case in hand, the amount in respect of which the adjudicatory process has been initiated has not been admitted or reflected in the Scheme laid before BIFR. If any doubt prevails, it would stand dispelled from a reading of Jay Engineering Works Ltd. v. Industry Facilitation Council : AIR 2006 SC 3252 in which Justice S.B. Sinha expounded the law in these pithy words:

17. The said provision, thus, mandates that no proceeding inter alia for execution, distress or the like against any of the properties of the industrial company and no suit for recovery of money or for the enforcement of any security, shall lie or be proceeded with further, except with the consent of the Board or as the case may be, the Appellate Authority. The said statutory injunction will operate when an inquiry had been initiated under Section 16 or a scheme referred to under Section

17 is under preparation and/or inter alia a sanctioned scheme is under implementation. It is not disputed before us that the amount awarded in favour of the Respondent by the council finds specific mention in the sanctioned scheme which is under implementation.

18. The award of the Council being an award, deemed to have been made under the provisions of the 1996 Act, indisputably is being executed before a Civil Court. Execution of an award, beyond any cavil of doubt, would attract the provisions of Section 22 of the 1985 Act. Whereas an adjudicatory process of making an award under the 1993 Act may not come within the purview of the 1985 Act but once an award made is sought to be executed, it shall come into play. Once the awarded amount has been included in the Scheme approved by the board, in our opinion, Section 22 of 1985 Act would apply.

19. If the liabilities of the Appellant are covered by the Scheme framed under Section 22 of the 1985 Act, the High court was clearly in error in coming to the conclusion that the provisions thereof are not attracted only because the debt had been incurred after the Company was declared to be a sick one.

12. It is in this analysis that we have reached the conclusion that the Appeal calls for dismissal with costs, which we quantify at Rupees 2 5,000/- which are in addition to the sum of Rupees 10,000/- already imposed as costs by the learned Single Judge. The Appeal is dismissed in these terms. Pending applications are also dismissed.

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13. As the learned Single Judge has taken note of the fact that the proceedings before him were for the execution of a Decree dated 19.1.2005 for a sum of Rupees 1,41,28,854/- along with interest passed by this Court, the proceedings before him partook of the nature of Execution. The Judgment Debtor had objected to the maintainability of those proceedings, keeping in view the sundry provisions of SICA. On behalf of the Decree Holder/Appellant, Mr. J.C. Seth has contended that the decreetal amount does not find mention in the Scheme presented to BIFR and hence there is no legal impediment in carrying the execution proceedings to

their logical end. The learned Single Judge has observed that the object of Section 22 of SICA is to keep legal proceedings in abeyance so that no impediment may be caused to the revival of the sick company. In doing so, the learned Single Judge relied on Real Value Appliances Ltd. v. Canara Bank : (1998) 5 SCC 554, Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Ltd. : (2000) 5 SCC 515 and Jai Engineering v. Industrial Facilitation Council : (2006) 8 SCC 677. The argument raised on behalf of the Appellant by its learned Counsel, Mr. J.C. Seth is to the effect that since the debt had not been mentioned in the Scheme, the only inference possible was that the Judgment Debtor had treated the Decree as standing out of or beyond those proceedings. This begs the question whether it should not be immune to execution proceedings.

14. The discussion contained above leads to the thesis that as soon as a claim stands admitted, either because it has been reflected in the Scheme, or because it stands favourably adjudicated in a Court of law, the protection of Section 22 of SICA would automatically have to be implemented. This is the watershed between the present and the preceding case. Having obtained a decree, further proceedings fall within the protective mantle of Section 22 of SCIA as they cannot but be in the nature of 'execution, distress or the like'. A plain reading of the provision cannot but lead to any other conclusion. If there are unique circumstances, which would justify the execution of the decree, even in the face of the registration of a Scheme under SICA, the proper recourse possible would be to obtain the permission or consent of the Board or the Appellate Authority as the case may be. Any other interpretation would completely annihilate and defeat the intendment of Parliament.

15. The Appeal is without merit and is dismissed. Ordinarily costs should follow but we desist from imposing any, primarily because it may eventually transpire that the Appellant before us has succeeded only in obtaining a paper decree.