

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on : 26.04.2013

% *Judgment pronounced on : 03.05.2013*

+ **FAO(OS) 140/2011**

LML LTD. Appellant

Through: Mr.Ravinder Singh, Advocate.

Versus

SUNIL MITTAL Respondent

Through: Mr.Dinesh Goyal and Mr. Rupesh Goyal,
Advocates

CORAM:

HON'BLE MR. SANJAY KISHAN KAUL

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the order dated 17.01.2011 wherein an application filed by the petitioner (defendant in the suit) (I.A. No.7089/2009) under Section 22(1) of the Sick Industrial Companies (Special) Provisions Act,1985 (hereinafter referred to as “the said Act”) had been dismissed.

2 Record shows that the respondent (plaintiff in the suit) had filed a suit for recovery of Rs.44,05,803.47 of which the principal amount was Rs.24,83,409.27; there was an interest figure of Rs.15,39,714.20 and sales tax was claimed in the sum of Rs.3,82,680/-. The suit was numbered as CS(OS) No.2249/2008. The plaintiff claiming himself to the proprietor of M/s Shree Shyam Packaging Industries, Gulshan Park,

Opposite Rajdhani Dal Mills, Main Rohtak Road, Nangloi, Delhi was engaged in the business of manufacture and sale of packaging material. The appellant was a company engaged in the business of manufacture and sale of two wheeler scooter in the domestic as also in the foreign market. The appellant had sent a requirement to the respondent for packaging of its scooters which were meant for export; these crates were supplied by the respondent. The bills of the respondent remained unpaid which had culminated in the principal figure of Rs.24,83,409.87. Suit was accordingly filed for the recovery of the principal amount. Interest was claimed at 24% per annum; the suit amount also included the alleged sales tax dues claimed by respondent.

3 Written statement was filed by the appellant. The claim of the respondent was disputed. The preliminary objection raised was that the suit of the respondent was not maintainable as the petitioner was a sick company and in view of the provisions of Section 22(1) of the SICA without the permission of the Board of Industrial and Financial Reconstruction (BIFR) suit could not proceed. A separate application under Section 22(1) of the said Act was also filed; order passed by the BIFR (case No. 180/2006) on a reference by the appellant company was placed on record. An affidavit of the appellant company through its Director D.R.Dogra was also placed before the learned Single Judge to substantiate the argument of the appellant that the claim made by the respondent was for a sum of Rs.21,74,490.88 which was clear from the

audited statement of account of the respondent company itself; it was not Rs.24,83,409.27 .

4 The fact that the company was registered as a sick company before the BIFR is not in dispute. The fact that a sum of Rs.21,74,490.88 has been admitted by the appellant as due and payable to the respondent is also not in dispute. The principal amount claimed in the suit is, however, a different figure; it is Rs.24,83,409.27 which figure is noted supra has been disputed by the appellant; submission of the appellant on affidavit being that figure is not in conformity with the statement of account of the respondent itself.

5 The short question which had arisen before the learned single Judge was whether in view of the aforementioned factual scenario i.e. the appellant company having been declared as a sick company by the BIFR; could the suit filed by the respondent seeking recovery of money be proceeded with in the absence of permission from the BIFR.

6 Both the parties had addressed their legal submissions before the learned single Judge as is evident from the impugned order. The learned single Judge was of the view that although admittedly the appellant company is a sick company but the appellant not having placed on record any document to show the current status of the company i.e. the stage of its revival/rehabilitation prayer under Section 22 of the said Act could not be granted. He was of the view that the appellant company had in fact created a confusion with regard to the actual amount which

was claimed by the respondent; since the entire amount did not stand admitted by the respondent, the application filed by the petitioner was misconceived; it was accordingly dismissed. Learned single Judge had relied upon the ratio laid by the Supreme Court in Dy. Commercial Tax Officer Vs. Corromandal Pharmaceuticals AIR 1997 SC 2007 to return a finding that a suit simpliciter for recovery of money need not be stayed unless the amount is fully covered in the scheme. The legal enunciation was deduced correctly but the learned single Judge has faulted in the application of the legal proposition to the facts in the correct perspective.

7 Appellant is aggrieved by the aforementioned finding.

8 On 22.9.2011 a Bench of this Court had noted the admission made by the appellant in the affidavit filed before the learned single Judge that a sum of Rs.21,74,490.88 was payable to the respondent in the books of account of the appellant and this amount also stood reflected in the Draft Rehabilitation Scheme (DRS) which had been circulated by the BIFR. The dispute of Rs.3,00,000/- arose out of certain C-forms not having been issued by the appellant.

9 On 18.3.2013 it was reiterated by the appellant that the liability to the respondent of Rs.21,74,490.88 was unequivocal; a further submission made was that if the C-Forms had not been supplied the liability towards the same would also be that of the appellant. The appellant was directed to file an affidavit in the aforesaid terms i.e.

whether the C-Forms had been supplied and if no, what would be the effect on the liability qua the said C-Forms. Counsel for the appellant on that date also assured the court that if any modification is necessitated qua the amount required to be shown under the DRS an appropriate application would be filed before the BIFR.

10 The affidavit of the appellant has since been placed on record. This is the affidavit of Ravinder Kumar Chadha, Division Manager (Account) of the appellant company. It is reiterated that as per the duly audited account of the appellant company maintained under the Indian Companies Act as on 31.3.2006 a sum of Rs.21,74,490.88 is due and payable to the respondent. It has been clarified that in the suit the respondent had made a claim of Rs.24,83,409.27 and the difference in the two figures is on account of the difference in the opening balance as on 01.5.2005 as also qua bill No.126 dated 23.10.2005 for which material was not received by the appellant company. The freight charges have also not been adjusted by the respondent and if the same are adjusted the figure would reconcile to the same amount of Rs.21,74,490.88. Qua the C-Forms it has been deposed that the appellant could not provide the C-Forms in 2006 because of lock out proceeded by strike but he is ready and willing to provide the C-Forms and the respondent may take adjustment from the Sale Tax/concerned authorities. The affidavit further deposes that there is no contractual rate of interest between the parties. Adjustment of the freight charges had

been detailed in Annexure C. The reconciled statement has also been filed along with the affidavit.

11 Reply/affidavit has been filed by the respondent. It is pointed out that as per their Auditor's report it may not be possible for the respondent to claim adjustment against the C-Forms as the amount already stand paid to the concerned authorities in 2006. The rest of the averments made in the affidavit are not disputed.

12 It is in this background that the question of applicability of Section 22 of the said Act arises.

13 The said Act had in fact been promulgated by the Legislature in 1985 to provide for a timely determination, by a body of experts, as a preventive and remedial measure for the revival and rehabilitation with respect to sick industrial units. The ill-effects of sickness in industrial companies, such as cessation of production, loss of employment, loss of revenue to the Central and State Governments and blocking up of investible funds of the banks and financial institutions, were of a serious concern to the Government as well as to the society at large; it had repercussions on the industrial growth of the country. With the passage of time the number of sick industrial units had also increased rapidly. Therefore, in order to salvage the productive assets, to the extent possible, of such sick companies the said Act was enacted.

14 Under Section 22 of the said Act no proceedings for execution, distress or the like proceedings against any of the properties of the

company shall lie or be proceeded further except with the consent of the Board. Relevant would it be to extract provisions of Section 22(1) of the said Act. It reads as under.

“22. SUSPENSION OF LEGAL PROCEEDINGS, CONTRACTS, ETC.

(1) Where in respect of an industrial company, an inquiry under section 16 is pending, or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 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.

15 The law with regard to Section 22 of the said Act is no longer *re-integra* The Apex Court in AIR 2012 SC 1440 *Raheja Universal Ltd. Vs. NRC Limited and Ors.* had the occasion to examine the aforementioned provision. The relevant extract reads herein as under:

“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.”

16 The principle of law is thus unambiguous. Where the amount claimed or the liability sought to be set up is covered under the scheme, Section 22(1) will be attracted and there would be an automatic suspension of all legal proceedings including a suit for recovery of money. In the present case, the amount of 21,74,490.88 is admittedly a part of the DRS pending before the BIFR. The debt of Rs.3,00,000/- on account of sales tax dues, the petitioner admits as his liability. Even if this amount is not permitted to be adjusted at this stage as has been pointed out by the learned counsel for the respondent, keeping in view the wide import of the language of Section 22 of the said Act there can be no question of continuing with the suit proceedings. It also cannot be lost sight of the fact that the parties were maintaining a running account; payments were being made from time to time; it would thus not be possible to segregate the element of debt since the question would be whether the debt due to the plaintiff is correctly reflected or a lesser amount is in fact due to him. The language of Section 22 would take into its sweep a situation even where if the full amount is not a part of the DRS. The question of continuation of the suit would not arise.

17 In such a situation it would be open to the respondent to approach the BIFR seeking leave for continuation of the suit qua the balance amount or in the alternate it may approach the BIFR seeking enhancement of the amount as included in the scheme if so permitted by law.

18 The judgment of Corromandal Pharmaceuticals (supra) is inapplicable in this factual scenario. That judgment related to sales tax dues of the department; the ratio being noted as under:

“amounts like sales tax which a sick company is enable to collect after the date of sanction scheme legitimately belonged to the revenue could not and may not have been founded to be covered within Section 22 of the said Act.”

This judgment did not relate to the liability against a sick company. Clearly those facts would be inapplicable in the present case.

19. The appeal is allowed in the aforesaid terms. Parties are left to bear their own costs.

INDERMEET KAUR, J.

SANJAY KISHAN KAUL, J.

MAY 03, 2013
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