IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.12.2014

PRONOUNCED ON : 12.3.2015

CORAM

THE HONOURABLE MR.JUSTICE R. MAHADEVAN

A.S.No.875 of 2008

Avanthi Leather Ltd.,
represented by its Managing Director
Mr.K. Vijayakumar ...Appellant/Defendant

Versus

Impress Cutting Dies Pvt. Ltd.
Represented by its Director
Mr.K.V. Divakar ...Respondent/Plaintiff

Prayer: This appeal is filed under Section 96 r/w Order 41 Rule 1 C.P.C. against the judgment and decree dated 5.3.2008 and made in O.S.No.6351 of 2006 on the file of the learned VI Additional Judge, City Civil Court, Chennai.

For Appellant : Mr.G.T. Subramanian

For Respondent : Mr.T.V. Viswanatha Rao

J U D G M E N T

This regular appeal is directed against the judgment and decree dated 5.3.2008 and made in O.S.No.6351 of 2006 on the file of the learned VI Additional Judge, City Civil Court, Chennai.

2. Having been dissatisfied with the decreeing of the suit, the defendant has knocked the door of this court by way of this appeal.

3. For easy reference and also for the sake of convenience, the appellant may hereinafter be referred to as the defendant and the respondent be referred to as the plaintiff

wherever the context so require.

Background facts:

4. The plaintiff is a registered private limited company and engaged in the manufacturing of cutting dies & clicking Knives used in the leather industry, whereas the defendant company is engaged in the manufacturing of leather goods. The defendant had placed orders with the plaintiff for the supply of cutting dies & clicking knives and the plaintiff has been supplying cutting dies & clicking knives on credit basis under a running account. During the course of the business, a sum of Rs.5,28,677.97 has become due to be paid by the defendant to the plaintiff.

5. Despite repeated demands, as the defendant did not pay the balance, the plaintiff had issued a lawyer's notice, dated 2.8.2003 demanding the payment and the defendant had sent a reply, dated 11.8.2003. Hence, the present suit was filed by the plaintiff for the following reliefs:-

6. To direct the defendant to pay the plaintiff a sum of Rs.5,28,677.97 together with interest at 12% p.a. from the date of the plaint till realisation.

7. The defendant has stated in the written statement that the suit is not maintainable in law and the court has no jurisdiction to try the case when the defendant had specifically made reference to the Board of Industrial and Financial Reconstruction under Section 15(1) of the Act.

8. The defendant has stated that the plaintiff had supplied goods which were spurious and could not be used at all for manufacturing the leather and it was in dispute and there were oral and personal talks at the defendant's office since the defendant had not put anything in writing about the quality of goods due to the good relationship they had with the plaintiff. The claim made by the plaintiff is totally barred by the limitation and they must have filed the suit on or before 12.10.2004 and it is only to get over the limitation the plaintiff had made certain alterations in the statement of accounts filed by them in this suit by showing certain 'C' forms in the year 2002 and giving false credits.

9. The defendant states that it had become imminent for the members of the company to refer the company as it had become sick and made reference to the Board of Industrial and Financial Reconstruction at New Delhi under Section 15(1) of the

Sick Industrial Companies (Special Provisions) Act, 1985 and it was numbered as F.33(A-7) BC/2005. The BIFR on 28.7.2005 had passed an order admitting the reference made under Section 15(1) of SICA and to enquire as per the provisions of the Act.

10. Further, the defendant has stated that once the Board has taken the reference on its file under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act 1985, then it will act as per the provisions of the Act and finally pass their opinion whether the company should be wound up or is there anybody to take over the management and make it viable in future to meet all its financial obligations and record the same and had to forward its opinion to the High Court.

11. In such a situation if any suit is filed by any person, the same will automatically become suspended as per the provisions of Section 22(1) of the Act, which says that where an inquiry under Section 16 is pending 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 loan or advance granted to the Industrial company shall lie or be proceeded with further except with the consent of the Board. Therefore, on this ground alone this suit is not maintainable and liable to be dismissed.

12. Based on the pleadings of the plaintiff as well as the defendant, the trial court has formulated the following seven issues:-

a. Whether the suit is maintainable?

b. Whether the suit is barred by limitation?

c. Whether the plaintiff is entitled to decree and judgment against the defendant for the sum of Rs.5,28,677.97?

d. Whether the plaintiff is entitled to get any interest? If so at what rate?

e. Whether the plaintiff is entitled to get the operation of the Sick Industrial Company Provision?

f. To what reliefs the plaintiff is entitled to?

13. In order to substantiate their respective cases both the plaintiff and the defendant were directed to face the trial.

14. On the side of plaintiff, one Divakar, the Director of the plaintiff company was examined as P.W.1 and one more witness was examined as P.W.2. During the course of their examination, Exs.A1 to A12 were marked. On the other hand, on the side of the defendant, one Vijayakumar was examined as D.W.1 and during the course of his examination, Exs.B1 to B5 were marked.

15. On evaluating the evidences both oral and documentary, the learned trial Judge had proceeded to decree the suit.

16. Challenging the correctness of the judgment and decree of the trial court dated 5.3.2008, the defendant stands before this court with this appeal.

17. Heard Mr.G.T. Subramanian, learned counsel appearing for the appellant and Mr.T.V. Viswanatha Rao, learned Counsel appearing for the respondent.

18. The learned counsel appearing for the appellant/defendant has submitted that the suit itself is not maintainable as the defendant company was a sick industry at the time of institution of the suit and the proceeding was pending before the Board of Industrial Financial Reconstruction.

19. The learned counsel has further submitted that when the matter was pending before the B.I.F.R. a suit for recovery of money against the sick industry is not maintainable.

20. The learned counsel has contended that as per Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985, no suit can be maintained against the sick industry for recovery of money or for the enforcement of any security or for the loans or advances given to the sick industry without the consent of the B.I.F.R.

21. The learned counsel has maintained that though the appellant had produced the documentary evidence to substantiate its claim, the court below has miserably failed to appreciate the same.

22. The learned counsel has argued that the court below had failed to appreciate Exs.B.3 to B.5 produced by the appellant to substantiate its claim and therefore, the judgment and decree of the trial court has to be set aside.

23. In support of his contention, the learned counsel has relied on the decision in Managing Director, Bhoruka Textiles Limited vs. Kashmiri Rice Industries (2009) 7 SCC 521).

24. On the other hand, the learned counsel appearing for the respondent/plaintiff has submitted that as rightly held by the trial Court, when the suit was filed, there was no proceedings pending before the B.I.F.R. and therefore, the court below has come to the conclusion that B.I.F.R. Proceedings were come to an end and nothing to show that BIFR proceedings are still pending and further more, D.W.1 has not stated that the proceedings before the B.I.F.R. were pending and therefore, the contention of the learned counsel for the appellant cannot be accepted.

25. Further, the learned counsel has argued that even D.W.1 in his cross examination has admitted that the defendant company is liable to pay a sum of Rs.5,28,677.97 and the respondent/plaintiff has proved the same by adducing oral and documentary evidence and therefore, nothing warrants to interfere with the judgment and decree of the trial court.

26. The only question to be decided in this appeal is whether the suit is maintainable and when the suit was filed, whether there was any reference to the B.I.F.R. under the Sick Industrial Companies (Special Provisions) Act, 1985?

27. If the above question is decided, then there is no need to go into the question of liability of the defendant.

28. It is the case of the plaintiff that the defendant had placed orders with the plaintiff for the supply of cutting dies & clicking knives and the plaintiff has been supplying cutting dies & clicking knives on credit basis under a running account from the year 2000 to 12.10.2001. During the course of the business, a sum of Rs.5,28,677.97 has become due to be paid by the defendant to the plaintiff and therefore, the present suit was filed for the recovery of the same.

29. On the other hand, it is the case of the defendant that it had become imminent for the members of the company to refer the company as it has become sick and made reference to the Board of Industrial and Financial Reconstruction at New Delhi under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 and it was numbered as F.33(A-7) BC/2005 and on 28.7.2005, the BIFR had passed an order admitting the reference made under Section 15(1) of SICA and to enquire as per the provisions of the Act.

30. Under these circumstance, if any suit is filed by any person, the same will automatically becomes suspended as per the provisions of Section 22(1) of the Act, which says that where an inquiry under Section 16 is pending 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 loan or advance granted to the Industrial company shall lie or be proceeded with further except with the consent of the Board. Therefore, on this ground alone this suit is not maintainable and liable to be dismissed.

31. Now, it is useful to refer to the provisions of Sub-section (1) of Section 22 of the Act, which 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."

32. A plain reading of the aforementioned provision would clearly go to show that a suit is barred when an enquiry under Section 16 is pending. Further, if the plaintiff wanted to file the suit before the civil court for recovery of money, the written consent of the B.I.F.R. or the appellate authority is indispensable.

33. In the light of the provisions of sub-section (1) of Section 22 of the Act, it is pertinent to see when the plaintiff filed the suit and when the defendant made reference to B.I.F.R.

34. The suit was filed on 22.12.2005 and it was numbered and taken on file on 25.7.2006 as O.S.No.6351 of 2006, whereas the defendant company had made reference to the B.I.F.R. even prior to 4.4.2005 and on appeal, the Secretary, B.I.F.R. had passed the following order, on 28.7.2005, which reads as under:-

ORDER

As the deficiencies noted by the registrar, BIFR on account which the registration was declined to the company have now been rectified as indicated above, the appeal is allowed and we may register the company, M/s. Avanti Leathers Ltd., Kambakkam Vilalge, Varadayapalem Mandel, Chittor District, Andhra Pradesh under Section 15(1) of Sick Industrial Companies (Special Provisions) Act, 1985.

35. Thereafter, a communication was sent to the defendant company by the Government of India, Ministry of Finance, Department of Economic Affairs, Board of Industrial and Financial Reconstruction, on 3.8.2005, which reads as under:-

" Sir,

I am directed to refer to your reference dated 25.11.2004 and to say that the reference has been registered as Case No.140 of 2005 on appeal to Secretary, BIFR. A certified copy of order, dated 28.7.2005 passed by the Secretary is enclosed herewith for your information.

You are hereby directed to send a copy of the Form-A along with its enclosures filed by you to the concerned State Government, Banks and financial Institutions, immediately and report the compliance of the direction to the undersigned within 15 days of the receipt of this letter.

(signed)

REGISTRAR"

36. From the above, it is very clear that since the defendant company had become sick, a reference was made to the B.I.F.R. and on 28.7.2005 the appeal was allowed registering the defendant company under Section 15(1) of the Act and the same was latter communicated by the Registrar directing the defendant company to send a copy of the Form - A along with its enclosures

to the concerned State Government, Banks and Financial Institutions.

37. The above referring process was completed on 3.8.2005, whereas the suit was filed only on 22.12.2005. In other words, much prior to the filing the suit by the plaintiff, the defendant had made reference to the B.I.F.R. and therefore, in view of the provisions of Sub-Section (1) of Section 22 of the Act, the suit itself is not maintainable and is liable to be dismissed.

38. Further, in view of Section 22 of the Act, the civil court's jurisdiction is ousted as has been held by the Hon'ble Apex Court in Managing Director, Bhoruka Textiles Limited vs. Kashmiri Rice Industries ((2009) 7 SCC 521) as under:-

> "12. If the civil court's jurisdiction was ousted in terms of the provisions of Section 22 of the Act, any judgment rendered by it would be coram non judice. It is a well-settled principle of law that a judgment and decree passed by a court or tribunal lacking inherent jurisdiction would be a nullity. In Kiran Singh v. Chaman Paswan this Court held (AIR p. 342, para 6).
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> "6. .... It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such defect cannot be cured even by consent of parties."

39. Though the defendant had brought to the knowledge of the trial court by pleading that the reference had been made prior to the filing of the suit and by adducing oral and documentary evidence Ex.B.3 and Ex.B.4, the trial court decreed the suit on the wrong footing, which is held to be a nullity, in the light of the principle laid down in the Managing Director, Bhoruka Textiles Limited's case, cited supra.

In view of the above, the regular appeal succeeds and the same is allowed setting aside the judgment and decree of the trial court and the suit is also dismissed. However, there will be no order as to costs.

Sd/-
Deputy Registrar(J)

//True Copy//

Sub Assistant Registrar

rnb

To

1. The VI Additional Judge,
City Civil Court,
Chennai.

2. The Section Officer,
V.R.Section, High Court,
Madras.

1CC to M/s. T.Viswanatha Rao, Advocate, SR 14330

1CC to Mr.G.T. Subramanian, Advocate, SR 13989

A.S.No.875 of 2008

NM [CO]
PSI 26.03.2015