

IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.A. 10/2015

ANKUR DRUGS & PHARMA LTD. & ANR. Appellants
Through: Mr. Shekhar Gupta, Advocate.

versus

S.E. INVESTMENT LIMITED Respondent
Through: Mr. P. Nagesh, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER
25.02.2015

Caveat No. 195 of 2015

1. Since learned counsel for the Respondent has put in appearance, the caveat stands discharged.

ARB. A. No. 10 of 2015

2. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 ('Act') is directed against an order dated 30th December 2014 passed by the sole Arbitrator rejecting an application filed by Appellant No. 2, Purnandu Shekharmal Jain (A-2) praying that in view of the Appellant No. 1 Ankur Drugs & Pharma Ltd. (A-1) being in liquidation and also having preferred a reference under the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), the arbitration proceedings against A-2 should not continue.

3. The brief facts necessary for the purposes of the present appeal are that the disputes between Respondent No. 1 S. E. Investments Ltd. (SEIL) and the Appellants arising out of the loan agreement dated 28th June 2010 were referred to a Sole Arbitrator. A-2 stood as

Guarantor for the loan availed by A-1 and was party to the arbitral proceedings.

4. It is also not in dispute that A-1 is under liquidation. It has also applied under the SICA before the Board of Industrial and Financial Reconstruction (BIFR) to be declared a 'sick company'. Accepting the plea of A-1, the learned Sole Arbitrator has by another order dated 30th December 2014 suspended the arbitral proceedings as far as A-1 is concerned.

5. An application was filed before the learned Sole Arbitrator stating that the arbitral proceedings cannot continue even against the Guarantor. Reliance was placed by A-2 on the judgment of the Supreme Court in *Paramjeet Singh Patheja v. ICDS Ltd. (2006) 13 SCC 322*.

6. By the impugned order, the learned Sole Arbitrator negated the above plea relying on the decisions of the Supreme Court in *Kailash Nath Agarwal v. Pradeshiya Industrial and Investment Corporation of U.P. Ltd. AIR 2003 SC 1886* and *Inderjeet Arya v. ICICI Bank Limited 2013 (15) SCALE 302*.

7. This Court has heard the submissions of Mr. Shekhar Gupta, learned counsel appearing for the Appellants and Mr. P. Nagesh, learned counsel appearing for the Respondent.

8. Under Section 22 SICA when an inquiry under Section 16 is pending or any scheme referred to under Section 17 SICA is under preparation or consideration or a sanctioned scheme is under implementation then proceedings for winding up of the company or

for execution, distress or like against any of its properties, then “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 BIFR or, as the case may be, the Appellate Authority for Industrial Financial Reconstruction.”

9. The question as far as the present appeal is concerned is whether the expression “suit” under Section 22 SICA would include arbitration proceedings against the guarantor (A-2) in respect of a loan borrowed by A-1, the principal borrower which is before the BIFR.

10. In *Patheja Bros. Forgings & Stamping v. ICICI Ltd. (2000) 6 SCC 545*, the Supreme Court held that the wording of Section 22 SICA was clear that a suit even against a guarantor could not proceed. However, in that case the question whether a suit would include arbitral proceedings was not considered.

11. Subsequently in *Kailash Nath Agarwal v. Pradeshiya Industrial and Investment Corporation of U.P. Ltd.* (supra), a two-Judge Bench of the Supreme Court considered the question whether recovery proceedings under the U. P. Public Money (Recovery of Dues) Act, 1972 against a guarantor could continue notwithstanding that a reference against the main borrower was pending under the SICA. This time the Court held that Section 22(1) SICA “only prohibits recovery against the industrial company, there is no protection afforded to guarantors against recovery proceedings”. It was held that the word ‘suit’ in Section 22 SICA would not include

recovery proceedings against the guarantor under the UP Act. The Supreme Court drew a distinction between the expressions 'proceeding' and 'suit' used in Section 22 (1) SICA and held that they were not used interchangeably in SICA. Therefore, the same meaning could not be given to two different words.

12. However, in *Kailash Nath Agarwal* (supra) the Supreme Court did not specifically consider whether the word 'suit' under Section 22 (1) SICA would include arbitration proceedings. That question came to be considered squarely in *Paramjeet Singh Patheja v. ICDS Ltd.* (supra) which was again by a two-Judge Bench of the Supreme Court. The questions that arose before the Supreme Court were in the context of the Presidency Towns Insolvency Act, 1909 and the SICA. The Appellant, therefore, was sought to be proceeded against in his capacity as a Guarantor for the loans borrowed by the company which was before the BIFR. Arbitration proceedings were initiated against the Appellant. The Arbitrators were informed that the company was before the BIFR under Section 15 SICA. The Arbitrators nevertheless proceeded to render an Award against the company and the Appellant. Subsequently, the BIFR passed an order rejecting the reference of the company. An insolvency notice under Section 9 (2) of the Insolvency Act was issued to the Appellant on the basis of the Award. The Supreme Court held that an arbitral Award was not a decree for the purposes of Section 9 of the Insolvency Act and an insolvency notice could not be issued on the basis of the Award. The Court further proceeded to consider whether the arbitration proceedings could themselves have proceeded in light of the pendency of the reference under SICA. The Court held ".....it is imperative that the expression 'suit' in Section 22 SICA be given its plain meaning, namely, any proceedings adopted

for realisation of a right vested in a part by law. This would clearly include arbitration proceedings”. Thus the question whether the expression ‘suit’ in Section 22 (1) SICA included arbitration proceedings was answered unambiguously in the affirmative by the Supreme Court in *Paramjeet Singh Patheja v. ICDS Ltd.* (supra). It is another matter that in coming to the above conclusion, the Supreme Court did not take note of the decisions in *Patheja Bros. Forgings & Stamping v. ICICI Ltd.* (supra) or *Kailash Nath Agarwal* (supra).

13. As a result the said issue, as noted by the learned Sole Arbitrator in the impugned order, stands referred to a larger Bench of the Supreme Court for reconsideration. However, the fact remains that since it has not been overruled by a subsequent larger bench of the Supreme Court as of date, the decision in *Paramjeet Singh Patheja v. ICDS Ltd.* (supra) is binding on all authorities including the High Courts and Arbitrators.

14. It may be noticed here that the decision in *Inderjeet Arya v. ICICI Bank Limited* (supra) considered the expression ‘suit’ in Section 22 (1) SICA in the context of the proceedings before the Debt Recovery Tribunal (DRT) under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDB Act). That decision did not deal with the question that directly arises for consideration in the present case viz., whether the expression 'suit' in Section 22 (1) SICA includes arbitral proceedings.

15. The Court is therefore unable to agree with the impugned order of the learned Sole Arbitrator which proceeds on the basis that since the correctness of the decision in *Paramjeet Singh Patheja v. ICDS*

Ltd. (supra) is pending consideration before a larger Bench of the Supreme Court, the line of reasoning in *Kailash Nath Agarwal* (supra) has greater persuasive value and would apply. As already noticed, the later decision in *Paramjeet Singh Patheja* (supra) is clearly applicable to the facts of the present case as it answers in the affirmative the precise question that arises, i.e., whether the expression ‘suit’ in Section 22 (1) SICA includes arbitral proceedings, whereas the decision in *Kailash Nath Agarwal* (supra) does not answer that question. The decision in *Paramjeet Singh Patheja* (supra) continues to be good law as of date.

16. Consequently, the Court sets aside the impugned order dated 30th December 2014 of the learned Sole Arbitrator holding that the arbitral proceedings against A-2 can continue. As a result, it is directed that the further arbitral proceedings against A-2 shall remain stayed till such time the Respondent seeks the leave of the BIFR to continue such proceedings.

17. The appeal is allowed in the above terms.

S. MURALIDHAR, J.

FEBRUARY 25, 2015

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