IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1535 OF 2017
IN
SUMMARY SUIT NO. 3211 OF 1999

ARCL Organics Ltd. ...Applicant

In the matter between

Madras Engineering Works ...Plaintiff
Vs.
Allied Resins & Chemicals Ltd. ...Defendant

Mr.Sandip Kumar Bhattacharya with Shailesh Kumar, Abdul Murshid I/b. Shailesh Kumar for Applicant.
None for Respondent.

CORAM : S.C. GUPTE, J.

DATE : 26 FEBRUARY 2018

P.C. :

Heard learned Counsel for the Applicant. None for the Respondent, despite service of notice. Even on the last occasion, none had appeared for the Respondent.

2 The Applicant herein is a judgment debtor in a summary suit filed by the Respondent / Plaintiff. By an order dated 20 September 2005, the Plaintiff's suit was decreed against the Applicant herein for a sum of Rs.16,28,600.82 together with interest in the sum of Rs.7,38,403.67 and for the costs of the suit quantified therein. This decree is sought to be set aside and recalled by the present notice of motion on the ground of pendency of an appeal under Section 25 of the Sick Industrial Companies

(Special Provisions) Act before the appellate authority when the decree was passed and there being no leave of the authority to proceed with the hearing of the suit.

3 On 9 November 1998, Case No.329/1998 was registered under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 in respect of Allies Resins & Chemicals Ltd., who is the transferor company of the Applicant herein (hereafter referred to as the “transferor company”). On 19 April 1999, the transferor company was declared as a sick industrial company by Board for Industrial and Financial Reconstruction (“BIFR”) under Sick Industrial Companies (Special Provisions) Act, 1985 (“SICA”) and IDBI was appointed as operating agency. During the pendency of further proceedings in pursuance of the declaration, on 21 May 1999, the Respondent herein filed the present suit against the transferor company. On 24 November 1999, the transferor company filed a short affidavit disclosing the declaration of the transferor company as a sick company by BIFR. On 28 May 2002, BIFR proposed a revival proposal together with NLA deposit to be submitted by the transferor company, warning the latter that failing such deposit, BIFR would have no option but to recommend its winding up. On 25 November 2002, BIFR recommended winding up of the transferor company. The company and its promoters were directed in terms of Section 22A, Clause (b) of SICA, to safeguard the company's assets till such time as the Official Liquidator of the High Court took charge of the property and assets. This order was carried in appeal by the Applicant herein by filing an appeal, being Appeal No.93/2003, before the Appellate Authority for Industrial & Financial Reconstruction (AAIFR). During the pendency of this appeal, on or about 20 September 2005, the present decree came to be passed. It

appears that the court was informed at that time by the Respondent / Plaintiff that in pursuance of BIFR order, the Defendant had come out of BIFR proceedings and winding up was recommended and that Section 22 of SICA was no more available to the Applicant. Learned Counsel representing the transferor company stated that he had no instructions. In the premises, the summons for judgment was made absolute and a decree was passed. On 16 July 2008, AAIFR set aside the impugned order of BIFR recommending winding up. AAIFR issued directions to the operating agency as well as BIFR for early rehabilitation of the transferor company. During the pendency of these proceedings, on or about 15 September 2009, the Respondent (decree holder) affirmed an affidavit applying for certificate under Order 21 Rule 6(c) of the CPC from the Prothonotary & Senior Master of this court for transfer of the exparte decree to the High Court of Calcutta for its execution. It appears that thereafter, on 1 October 2009, the Respondent obtained the requisite certificate from the Prothonotary & Senior Master. The Respondent decree holder thereafter proceeded with its execution proceeding before Calcutta High Court. Since at that time the proceeding for rehabilitation of the judgment debtor (i.e. the transferor company) was pending before BIFR, a learned Single Judge of that High Court dismissed the execution case reserving, however, liberty unto the decree holder (Respondent herein) to obtain consent from BIFR in accordance with law. At that stage, on or about 15 September 2010, in pursuance of an order passed by the High Court at Calcutta in Company Petition No.340/2010 connected with Company Application No. 441 of 2010, the transferor company got merged with the present Applicant. Thereafter, on 21 November 2011, BIFR directed deregistration of the transferor company as 'sick industrial company' in the course of Miscellaneous Application No.484/BC/2011 in Case No.329/1998 filed by the transferor company. In or about 2015, yet another execution case, Execution Case No.395/2015, was filed by the Respondent decree holder in Calcutta High Court in respect of the transferred decree, *inter alia* suppressing the fact of dismissal of the earlier execution case, Execution Case No.101/2010, by the High Court at Calcutta. In 2016, the Respondent decree holder filed a general application, being G.A. No.12/2016, before Calcutta High Court praying for incorporating the name of the Applicant herein in the schedule purportedly as the party liable on the decree. On 1 February 2016, the High Court of Calcutta disposed of that general application recording the name of the transferor company, i.e. the present Applicant, though the matter continued to be proceeded in the name of the transferor company. An order of deposit towards execution came to be passed against the transferor company. On 9 March 2016, the Applicant herein appeared before Calcutta High Court in the execution proceedings, E.C. No.395/2015, and sought accommodation. The Applicant disclosed its intention to challenge the decree passed in favour of the Respondent decree holder. On 5 April 2016, on the application of the Applicant herein (G.A. No.1056/2016), Calcutta High Court granted extension of time for making the deposit ordered by it. In the premises, on 17 May 2016, the Applicant herein filed another general application, being G.A. No.1530/2016, purportedly under Section 47 read with Section 151 of the CPC before Calcutta High Court in Execution Case No.395/2015 to set aside the decree transferred on the same grounds which are urged before this court in the present notice of motion. On 16 February 2017, a learned Single Judge of that court declined to intervene and rejected the general application. In an appeal, being Appeal No.187/2017, a Division Bench of Calcutta High Court rejected the appeal. The orders of the learned Single Judge and the Division Bench are purportedly on the footing that Calcutta

High Court was not the originating court so far as the decree impugned in the general application was concerned. The review filed by the transferor company (RVWO 26/2017) was rejected on 11 May 2017 by Calcutta High Court. In an order passed on that review application on 15 May 2017, Calcutta High Court observed that the disposal of the appeal and the review petition and observations in the orders of those disposals would not preclude the Applicant herein from raising the issue before this court. In the premises, the present notice of motion is filed by the Applicant herein.

4 The main ground, on which the application proceeds, is that under the provisions of Section 22 read with Section 25 of SICA, pendency of a reference before BIFR or an appeal before AAIFR bars the jurisdiction of the civil court to hear any suit for recovery of money or for enforcement of any security against the industrial company. The civil court's jurisdiction having been, thus, ousted, any judgment rendered by it would be *coram non judice*. It was clearly held to be so by the Supreme Court in the case of **Managing Director, Bhoruka Textiles Ltd. vs. Kashmiri Rice Industries**[1]**.** The court in that case referred to its own judgment in the case of **Tata Motors Ltd. vs. Pharmaceutical Products of India Ltd.**[2] which considered the effect of provisions of SICA and where the court, in no uncertain terms, held that SICA is a special statute and, thus, overrides other Acts like the Companies Act, 1956. The Supreme Court thereafter proceeded to hold as follows :

> "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

1 **(2009) 7 SCC 521**
2 **(2008) 7 SCC 619**

> lacking inherent jurisdiction would be a nullity. In *Kiran Singh v. Chaman Paswan*[3] 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 a defect cannot be cured even by consent of parties."
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> (See also *Chief Engineer, Hydel Project v. Ravinder Nath*[4] SCC p.361, para 26.)"

5 Thus, the proposition that in the face of a clear bar of jurisdiction, termed as suspension of proceedings, under Section 22 of SICA, the civil court's jurisdiction is clearly ousted and any judgment rendered by it is *coram non judice*. In the present case, the reference was indeed pending before BIFR in respect of the transferor company after a declaration of itself as a sick industrial undertaking on 19 April 1999. The suit, in the first place, thus, could not have been filed on 21 May 1999 except after seekng leave of BIFR. Secondly, in the face of pendency of an appeal before AAIFR, the court could not have proceeded with the hearing of the suit on 20 September 2005. The court was clearly not informed on that date about the pendency of appeal before AAIFR. The impugned order of 20 September 2005, thus, suffers from an illegality, which goes to the root of the matter and renders the order *non est*.

6 In the premises, the impugned order dated 20 September 2005

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3 **AIR 1954 SC 340**
4 **(2008) 2 SCC 350 : (2008) 1 SCC (L&S) 940**

is recalled and set aside. The suit is restored to file. It will be open to the Applicant as a transferee of the original Defendant to contend before the trial court that the suit itself was not maintainable on account of declaration of the Defendant as a sick industrial undertaking and pendency of the reference for framing of a scheme of rehabilitation before BIFR.

7 The notice of motion is disposed of. No order as to costs.

(S.C. GUPTE, J.)