Ajanta Infrastructures Ltd. Vs Pennar Steels Ltd. and Others

Court: Madras High Court

Date of Decision: March 25, 2009

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 151, 21, 47
Sick Industrial Companies (Special Provisions) Act, 1985 â€" Section 16, 17, 17(3), 18, 18(2)

Citation: (2009) 152 CompCas 249 : (2009) 5 MLJ 344

Hon'ble Judges: A.C. Arumugaperumal Adityan, J

Bench: Single Bench

Advocate: V. Raghavachari and P. Valliappan, for the Appellant; Srinath Sridevan, for respondent No. 1, S.S. Raju, for the Respondent

Final Decision: Dismissed

Judgement

A.C. Arumugaperumal Adityan, J.
This revision has been directed against the order passed in E.A. No. 10 of 2007 in E.P. No. 1 of 2007

on the file of the Court of Principal District Judge, Thiruvallur. E.A. No. 10 of 2007 in E.P. No. 1 of 2007 is. a petition filed u/s 47 of the CPC

read with Section 151 of the CPC seeking indulgence of the executing court to dismiss the execution petition. The decree holder in O.S. No. 1159

of 1993 on the file of the Second Senior Civil Judge, City Civil Court, Hyderabad to execute the decree in O.S. No. 1159 of 1993 had filed E.P.

No. 1 of 2007 before the Court of Principal District Judge, Thiruvallur after getting the decree transferred. The decree was transferred for

execution. The petitioner in E.A. No. 10 of 2007 in E.P. No. 1 of 2007, viz., the Auto Mobile Products of India Limited represented by its

director Vaidyanathan and two others who are the defendants in O.S. No. 1159 of 1993 on the file of the Second Senior Civil Judge, City Civil

Court, Hyderabad had challenged the decree On the ground that on the date of passing of the decree in O.S. No. 1159 of 1993, the BIFR

proceedings were pending and u/s 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to ""the Act"") the

decree itself is void and cannot be executed. Even though the said E.A. No. 10 of 2007 was filed before the executing court u/s 47 of the CPC,

there was no oral or documentary evidence let in by the petitioner in E.A. No. 10 of 2007 in E.P. No. 1 of 2007. On the basis of the available

materials and after due submissions made by learned Counsel on both sides, the learned executing court had dismissed the E.A. No. 10 of 2007 in

E.P. No. 1 of 2007 which necessitated the petitioner in E.A. No. 10 of 2007 in E.P. No. 1 of 2007 to approach this Court by way of this revision.

2. Learned Counsel appearing for the revision petitioner relying on an order passed by the Board for Industrial and Financial Reconstruction in

Case No. 36 of 1992 dated October 24, 1997 would contend that the BIFR proceedings against the revision petitioner was pending even on the

date of judgment in O.S. No. 1159 of 1993 on the file of the Second Senior Civil Judge, City Civil Court, Hyderabad and hence the decree

passed in O.S. No. 1159 of 1993 is hit by Section 22 of the Act. This argument of learned Counsel for the revision petitioner was meted out by

learned Counsel appearing for the first respondent by drawing the attention of this Court to paragraph 2 of the order passed by the Board for

Industrial and Financial Reconstruction in Case No. 36 of 1992 (page 36 of the typed set of papers) wherein the relevant observation runs as

follows:

As the company APIL ceased to become a sick industrial company, within the meaning of Section 3(1)(o) of the Act, the Board, vide its order

dated February 20, 2004, discharged the company from the purview of the SICA/BIFR, with the direction that the un-imple-mented provisions of

the SS-96, as may be there, would be implemented by the concerned agencies and their implementation would continue to be monitored by the

company and after the revision petitioner was discharged by the SICA/BIFR, it had received notice from EPFO and ESIC demanding

penalty/damages to the tune of Rs. 1.25 crores outstanding for the period from December, 1992 to October, 2003 and also the revision petitioner

brought to the notice of the Board that ESIC has also issued demand notice for payment of Rs. 0.90 crore towards damages and penal charges

outstanding for the period from February, 2003 to March, 2004, approached the Board through their letter dated September 24, 2007. The

Board in its order in Case No. 36 of 1992 at paragraph 4(ii) has directed both EPFO and ESIC to waive the penalty/damages claimed on the

revision petitioner herein under their demand notices/orders dated August 11, 2005 and November 7, 2006 respectively relating to the unexpired

period of scheme sanctioned by the Board on November 14, 1996.

3. So it is clear that the scheme was also sanctioned as early as on November 14, 1996 and that the revision petitioner was discharged from the

purview of the SICA/BIFR as early as on February 20, 2004. So it is clear from the Board''s orders in Case No. 36 of 1992 (page 376 of the

typed set of papers) that on the date of the impugned judgment in O.S. No. 1159 of 1993 dated March 9, 2004, the revision petitioner was

discharged from the purview of the SICA/BIFR and so the revision petitioner cannot take shelter u/s 22 of the Act and would further contend that

the judgment of the Second Senior Civil Judge, City Civil Court, Hyderabad in O.S. No. 1159 of 1993 is unexecutable or void.

4. Section 22 of the Act reads as follows:

(1) Where in respect of an industrial company, an inquiry u/s 16 is pending or any scheme referred to u/s 17 is under preparation or consideration

or a sanctioned scheme is under implementation or where an appeal u/s 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.

(2) Where the management of the sick industrial company is taken over or changed (in pursuance of any scheme sanctioned u/s 18)

notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law or in the memorandum and articles of association of

such company or any instrument having effect under the said Act or other law:

(a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the

company;

(b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.

Absolutely there was no material placed before the Executing Court/ Principal District Court, Thiruvallur to show that an inquiry u/s 16 or any

scheme referred to u/s 17 was pending at the time of pendency of O.S. No. 1159 of 1993 on the file of the Second Senior Civil Judge, City Civil

Court, Hyderabad.

5. Learned Counsel appearing for the revision petitioner relying on an unreported judgment in W.P. No. 26287 of 2004 dated April 19, 2005 by a

learned judge of this Court would contend that the revision petitioner is entitled to protection u/s 22 of the Act. For this, learned Counsel would

base his reliance at paragraph 13 of the judgment in the above writ petition which runs as follows:

When the relevant words in Section 22 are clear and unambiguous and it is clear that they are intended to protect the assets of the company from

being subject to any proceedings or suits as described in Section 22(1) and when such proceedings and suits cannot lie or be proceeded with

further except with the consent of the Board or the appellate authority, no fresh proceeding or suit can be initiated or filed and no pending suit or

proceeding can be dealt with except as contemplated in Section 22. Once a scheme is prepared u/s 18 of the Act, then Section 18(2) provides for

continuation of such proceedings against the sick industrial company or the transferee company which were pending against the sick industrial

company before the date of the order made u/s 17(3) of the Act. Therefore, Section 18(2) takes into its ambit the proceedings or suits which

could not be proceeded with further because of Section 22(1) of the Act.

There cannot be two opinion with regard to the said observation made by the learned judge.

6. As seen from the order in Case No. 36 of 1992 (page 36 of the typed set of papers) a scheme was sanctioned by the Board for the revision

petitioner-company as early as on July 19,1996, itself and as per the provisions contemplated under scheme the interest of the revision petitioner

has been protected. It is seen from the order in Case No. 36 of 1992 that the revision petitioner has positively turned out of assets as on

September 30, 2001 and even thereafter it maintained the positiveness even on the date of passing of the order in Case No. 36 of 1992. As per

the order in Case No. 36 of 1992, the Board has discharged the revision petitioner herein from the purview of the SICA/BIFR as early as on

February 20, 2004 itself. Under such circumstances, since the revision petitioner has been discharged from the purview of the SICA/BIFR it

cannot be contended that the revision petitioner can take shelter u/s 22 of the Act. It is pertinent to note at this juncture that so far as the judgment

in O.S. No. 1159 of 1993 on the file of the Second Senior Civil Judge, City Civil Court, Hyderabad was not challenged by the defendants before

any of the appellate forum. On the other hand, it is admitted that an interlocutory application has been filed before the court to set aside the ex

parte decree. Once, the revision petitioner challenges the jurisdiction of the court which passed the judgment in O.S. No. 1159 of 1993 then it is

not open to the revision petitioner to file a petition to set aside the ex parte decree before the same court which will tantamount indirectly to

accepting the jurisdiction of the said court.

7. The ratio decidendi laid down in Rafique Bibi (D) by Lrs. Vs. Sayed Waliuddin (D) by Lrs. and Others, , is that the decree passed by the court

which has no jurisdiction is void/null decree/illegal decree. But there is absolutely no material placed to hold that the decree passed in O.S. No.

1159 of 1993 by the Second Senior Civil Judge, City Civil Court, Hyderabad is without any jurisdiction. So the said dictum will not be applicable

to the present facts of the case.

8. The other judgment relied on by learned Counsel for the revision petitioner in Ekram Hussain Vs. Mt. Umatul Rasul and Others, , is also of no

avail to the revision petitioner because the point that arose for consideration in the said case was whether the execution can be defeated because

for want of trial court to make a fresh order of transfer subsequent to the affirmation of the decree by the first appellate court. The revision

petitioner does not question the jurisdiction of the executing court which had passed an order under a transferred decree. The revision petitioner

questions only the jurisdiction of the court which passes the judgment. Under such circumstances, the principle laid down in Ekram Hussain v. Mt.

Umatul Rasul AIR 1931 Patna 27, will not be applicable to the present facts of the case.

9. Learned Counsel appearing for the revision petitioner also based on his reliance on the dictum in Ettappa Nayakar Avergal, Zamindar of

Ettayapuram v. Chidambaram Chetty 39 MLJ 203, which also deals with the jurisdiction of the court wherein it is held that the dictum u/s 21 of the

CPC will be applicable only suits and proceedings in suit does not apply to proceedings in execution. The relevant observation in the above said

dictum runs as follows:

Assuming, however, that Section 21 does not apply, I am still of opinion that the present decree cannot be questioned in execution. An objection

to the jurisdiction is a ground for setting aside the decree and is not one of those questions relating to the "execution, discharge or satisfaction of the

decree" which are required by Section 47 to be dealt with in execution.

10. Learned Counsel appearing for the revision petitioner in support of his contention relied on a decision reported in Sivananda Steels Ltd. and

Another Vs. India Cements Capital Finance Ltd., (Formerly known as Aruna Sugars and Finance Ltd.), , wherein the relevant observation at

paragraph 9 is as follows:

A cursory reading of Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985, makes it clear that u/s 22, when an inquiry

u/s 16 is pending or any scheme referred to u/s 17 is under preparation or consideration or sanctioned scheme is under implementation or where

an appeal u/s 25 relating to an industrial company is pending, no proceedings for 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 shall lie or be proceeded with

further, except with the consent of the Board or the Appellate Authority, as the case may be.

11. As I have already referred to above, there is absolutely no material placed before the court to show that an inquiry u/s 16 or u/s 17 of the Act

is pending before the Board or an appeal u/s 25 of the Act relating to the revision petitioner-company is pending. Under such circumstances, it is

not open to the revision petitioner to contend that it is entitled to the benefit u/s 22 of the Act. The same proposition has been reiterated in the

dictum of this Court reported in I. Jairaj v. B. Champalal Jain [2004] 122 Comp Cas 79 : [2004] 2 CTC 151, in the following terms:

In Patheja Bros. Forgings and Stamping v. I.C.I.C.I. Ltd. [2000] 102 Comp Cas 21, the Supreme Court of India has held that the suit for the

enforcement of the guarantor in respect of the loan granted could not be proceeded with unless consent as required by Section 22 is obtained. In

V. Ravi Srinivasan v. Manipal Finance Corporation Ltd. [2002] 4 CTC 219, while considering the provisions of the Presidency Towns Insolvency

Act, 1909 and the Sick Industrial Companies (Special Provisions) Act, 1985, I have held that the benefit conferred on the principal debtor is

applicable to the guarantor... It is settled law that once a company is registered with the BIFR, all proceedings filed against a company and its

guarantors must be stayed forthwith and shall not be proceeded with, without the consent of the BIFR. Section 22 imposes a prohibition on

recovery from guarantors of the sick industrial company. The purpose behind such a provision is to prevent the isolated burdening of the guarantor

or co-obligant with the debt of the sick industrial company, until recovery can be commenced against the sick industrial company itself, which fact

has been disregarded by the learned trial judge. Further, the materials placed clearly show that the loan was granted to the sick industrial company

and that the petitioner was only the director of the company. It is also clear that the petitioner has signed the debt instrument only as a director on

behalf of the sick industrial company and I hold that the benefit of Section 22 of the Act will accrue to him. By virtue of the provisions of Section

22 of the Act, all co-obligants are also entitled to the benefit of stay in terms thereof, until permission is obtained from the BIFR.

12. But as I have already observed that even before the date of judgment in O.S. No. 1159 of 1993 on the file of the Second Senior Civil Judge,

City Civil Court, Hyderabad, the revision petitioner herein was discharged from the purview of the BIFR as early as on February 20, 2004, itself.

For the same proposition of law, learned Counsel appearing for the first respondent would also rely on a decision reported in DCM Hyundai Ltd.

v. Sita World Travels (I) Ltd. [2004] 4 CTC 204. Under such circumstances, I am of the view that the impugned order under challenge requires

no interference from this Court.

13. In fine, this civil revision petition is dismissed confirming the order of the learned Principal District Judge, Thiruvallur in E.A. No. 10 of 2007 in

E.P. No. 1 of 2007 in O.S. No. 1159 of 1993 on the file of the Second Senior Civil Judge, City Civil Court, Hyderabad. No costs. Consequently,

connected M.P. No. 1 of 2009 is closed.