

CHAPTER XIV
SICK INDUSTRIAL COMPANIES
SPECIAL PROVISIONS ACT

Case No. 92

(1998) 4 Comp LJ 527 (Del)

IN THE HIGH COURT OF DELHI

GE CAPITAL TRANSPORTATION FINANCIAL SERVICES LTD. Appellants

Vs.

DEE PHARMA LTD. Respondent

(C.A. No. 890/98 in C.P. No. 236/98)

MS. USHA MEHRA, J.

22 September, 1998

Companies Act, 1956 - SICA - Financier leasing out machinery - possession with the borrower company - borrower company becomes sick - matter referred to BIFR - Ownership remains vested with the financier - financier/lessor can ask for appointment of receiver - proceedings under BIFR - not a bar.

Sick Industrial companies (Special Provisions) Act, 1985, Section 22.

FACTS :

In this case the petitioner based its claim for appointment of a receiver primarily on the ground that the respondent company had approached the petitioner to help it financially in obtaining plant and machinery on lease basis. It was agreed between the parties that the plant and machinery would be hired by the petitioner for the respondent. In this regard, hire purchase agreement was executed between the parties. Pursuant to this agreement, the petitioner hired an Automatic Hardshell Gelatine Capsule Making Machine to the respondent company. The possession of the machinery was handed over to the respondent, but the title in the machinery remained with the petitioner. The respondent contested the claim of the respondent, inter alia, on the ground that the respondent was a sick industrial company under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1958, and the reference against the respondent company having been registered, this application was not maintainable.

HELD :

The ownership of the machinery vested with the petitioner though possession of the same was with the respondent. Merely putting the possession of the machinery at the disposal of the respondent by no stretch of imagination would mean that the ownership of the property vested in the respondent company. Since the respondent company is not the owner of the machinery in question, therefore, mere registering of the case by BIFR would not disentitle this court to pass an order as prayed by the petitioner because the property does not belong to the respondent company.

Credit Capital Finance Corporation vs Foremost Industries Ltd. (1996) 2 Comp LJ 454 (Del) : (1996) 87 Comp Cas 251 (Del), followed.

Real Value Appliances Ltd. v Canara Bank and others (1998) 3 Comp LJ 58 (SC) : (1998) 3 Scale 427, distinguished.

COUNSEL :

Ms. ANJALI SHARMA, Advocate, for the petitioner.

ALOK DHIR, Advocate, for the respondent.

JUDGMENT

Ms. Usha Mehra, J. - The short point for consideration is whether the petitioner can ask for appointment of a receiver regarding the property of a company against which reference has been registered by the Board for Industrial and Financial Reconstruction (in short, BIFR).

2. The petitioner has based its claim for the appointment of a receiver primarily on the ground that the respondent company approached the petitioner to help it financially in obtaining plant and machinery on lease basis. Respondent company represented itself to be financially sound and assured the petitioner that it would be able to meet its commitments. It persuaded the petitioner to agree to get on lease the plant and machinery which the respondent wanted to purchase. However, subsequently, it was agreed between the parties that the plant and machinery would be hired by the petitioner for the respondent. In this regard, hire purchase agreement was executed between the parties. Term(s) of the agreement indicated the owner of the plant and machinery, respondent company as the hirer and the managing director of the respondent company as the guarantor. This hire purchase agreement was executed on 15 April, 1996. The period of this agreement was 36 months expiring in

the month of March, 1999. Pursuant to this agreement, the petitioner hired an Automatic Hardshell Gelatine Capsule Making Machine to the respondent company. The possession of the machinery was only handed over to the respondent but the title in the machinery remained with the petitioner. It was also the term of that agreement that in case hire charges as envisaged in the agreement are not paid by the respondent company or it defaulted in adhering to the terms of the agreement the petitioner would cancel the contract and take back its machinery. Respondent company according to petitioner committed default in paying the hire charges and has not adhered to the terms of the contract. Petitioner demanded its machinery. Respondent company according to petitioner committed default in paying the hire charges and has not adhered to the terms of the contract. Petitioner demanded its machinery back which the respondent has failed to do. There is, thus, apprehension in the mind of the petitioner that the respondent might fritter away the machinery which was hired by the respondent and placed at the premises of the respondent. The ownership of the machinery still vests with the petitioner.

3. Since the respondent company consistently defaulted in making payment of the hire charges and even the cheques issued by the respondent company had been dishonoured, hence, petitioner lodged complaint against the respondent company under section 138 of the Negotiable Instruments Act. Thus, an amount of Rs. 74,56,354.04 paise as on 13 May, 1998, is due from the respondent company to the petitioner. The respondent company has neither paid the hire charges nor handed back possession of the machinery in question. Since the title of this machinery vests with the petitioner, hence, the request for appointment of receiver in order to safeguard the machinery from respondent as well as from being wasted.

4. This application has been contested by the respondent, inter alia, on the ground that the respondent is a sick industrial company under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (in short, SICA) and the reference against the respondent company having been registered as BIFR Case No. 115/98 this application is not maintainable. Under the provisions of section 22(1) of SICA neither any application for winding up nor any coercive application is maintainable. If receiver is appointed, it would adversely affect the financial status of the respondent and would be a hurdle in its revival. Respondent is protected under section 22(1) of SICA.

5. I have heard Ms. Anjali Sharma for the petitioner and Mr. Alok Dhir for the respondent. It is an admitted fact that respondent is a sick industrial company registered

with BIFR as Case No. 115/98. It is also a fact that the respondent entered into an hire purchase agreement with the petitioner. Though the respondent in his reply took the plea that the same had been got signed by the petitioner under pressure of circumstances, but execution of the said agreement has not been denied. It has been pleaded that respondent is trying to revive its financial resources which were affected by recent recession in the pharmaceutical and bulk drug industry all over the country. According to the respondent, it is a temporary phase, otherwise the financial position of the company is not bad. It has further been pleaded that the cost of the machinery was Rs. 1,24,87,250, out of which the petitioner paid a sum of Rs. 86,00,000 whereas the respondent contributed an amount of Rs. 38,87,250. Respondent also incurred expenses to the tune of Rs. 30,50,000 towards acquiring the spare/accessories and further invested money for installation, erection and commissioning of the said machinery. It is respondent's case that out of Rs. 80,00,000 respondent company has already paid an amount of Rs. 47,49,900 to the petitioner.

6. It is in this backdrop that we have to see whether this application is maintainable. For the purpose of understanding the above objection raised by the respondent, reference can be made to section 22(1) of the SICA, which is reproduced 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 shall lie or be proceeded with further, except with the consent of the Board, or, as the case may be the appellate authority.

7. Reading of Sub-section (1) of section 22 makes it clear that in case enquiry under section 16 is pending, then, notwithstanding anything contained in the Companies Act, or any other instruments, etc., no proceedings for the winding up of the industrial company or for execution, distress or the like against the property of the company or for the appointment of a receiver and no suit for recovery of money or for the

enforcement of any security or of any guarantee shall lie or be proceeded with further, except with the consent of the Board or as the case may be, the Appellate Authority. This shows that execution or distress proceedings will be suspended with regard to the property of the company. The question, therefore, for consideration is whether the ownership of the machinery in question vests with the respondent company. If the answer is in the positive, then the present application for appointment of receiver is not maintainable and the respondent is protected under section 22(1) of the (SIC) Act. On the other hand, if the answer is in the negative, then, the respondent company cannot seek protection under section 22(1) of the (SIC) Act. The petitioner has claimed ownership over this machinery on the basis of the hire purchase agreement. He drew the attention of this court to various clauses of the agreement, and in particular, to clauses 1, 2, 14 and 15 of the said agreement, which are reproduced as under :

1. On the execution of this agreement, the hirer shall pay to the owners in Delhi, a sum of Re.1 in consideration of the option to purchases given to the hirer by clause 3 hereof and such article(s) shall, when such option has been exercised, become the absolute property of the hirer.

2. The hirer shall pay to the owners on the execution of this agreement, the sum of Rs. 38,87,250 as an initial payment by way of hire which shall become the absolute property of the owners and will punctually pay to owners at their above address and without previous demand, the sums mentioned in the Schedule 'A' (which forms an integral part of this agreement) hereto, by way of rent for the hire of the article(s), the first payment to be made on the 15th day of April, 1996, and each subsequent payment on dates as mentioned in Schedule 'A' unless the hirer shall have terminated this agreement as hereinafter provided.

14. The owner may with or without notice to the hirer, terminate this agreement and forthwith retake possession of the article(s) or call upon the hirer to restore possession of the article(s) to them :

- (a) If any monthly hire or part thereof is in arrears and left unpaid for a period of seven days from the date as mentioned in clause 2 hereinabove for any reason whatsoever, or
- (b) If the guarantor(s) ask / asks the owners in writing that the article(s) be taken possession of for any reason whatsoever including the protection of guarantor(s) or owner's interest.

15. In the event of the owners having recourse to seizure of the article(s), the hirer hereby gives leave and licence to the owners or their agent/s to enter by force, if necessary, any premises, building or place where the article(s) may suppose to be located for the purpose of taking / retaking possession of the article(s) without being liable to any claim, suit or other proceedings by the hirer or any person claiming under him in respect of such entry or retaking possession of the article(s). the owners shall have the right to repossess the article(s) together with all accessories.

8. Perusal of these clauses shows that the ownership of the machinery vested with the petitioner though possession of the same was with the respondent. Merely putting the possession of the machinery at the disposal of the respondent by no stretch of imagination would mean that the ownership of the property vested in the respondent company. Since the respondent company is not the owner of the machinery in question, therefore, mere registering of the case by BIFR would not disentitle this court to pass an order as prayed by the petitioner because the property does not belong to the respondent company. In this regard, I am supported by the decision of this court in the case of *Credit Capital Finance Corporation v Foremost Industries Ltd* (1996) 2 Comp LJ 454 (Del) : (1996) 87 Comp Cas 251 (Del). In that case, the plaintiff had entered into an agreement of lease of certain equipment in favour of the defendant company and filed a petition under section 20 of the Arbitration Act for appointment of an arbitrator. Receiver was appointed in respect of the leased equipment. Defendant company filed two applications - one was a petition under Section 446 of the companies Act and the second was an application contending that under section 22 of SICA receiver could not have been appointed. This court after interpreting section 22 of SICA came to the conclusion that the provisions of section 22 would be attracted only when the proceedings were in respect of the properties of an industrial company; Since ownership of the equipment subject matter of lease throughout remained with the petitioner in that case, therefore, appointment of receiver was upheld because section 22 was not attracted. In the present case also, as already pointed out above, the respondent has admitted the hire purchase agreement . The only plea taken by the respondent company is that is was got signed under pressure which plea appears to be an after thought and not reliable. Once the execution of the agreement is admitted pursuant to which machinery was placed at the disposal of the respondent, thereby keeping the ownership by itself, the machinery in question cannot be termed the property of the respondent company on the decision of the Supreme Court in the case of *Real Value Appliances Ltd. v Canara Bank and others* 1998 3 Comp LJ 58 (SC) : (1998) 3 Scale 427, is of no help to him. The apex court in that case was dealing with the proposition whether the registration of reference by

BIFR was sufficient to stay further proceedings, be that for winding up or for appointment of receiver and restoring the provisional liquidator, etc. However, if the property in question is held to be the property of the respondent company, then the ratio of the Supreme Court's decision in *Real Value Appliances Ltd. v. Canara Bank and others* 1998 3 Comp LJ 58 (SC), supra, would apply to the facts of this case. But the fact of the matter is that the ownership of the machinery in question always vested with the petitioner. The machine was given on hire. The title or ownership vested with the petitioner. Therefore, it cannot be said that machinery in question is the property of the respondent company. In that view of the matter, decision relied on by the respondent is of no help to him.

9. For the reasons stated above, the respondent cannot take shelter or benefit of the provisions of section 22(1) of SICA, nor the provisions of section 22(1) are attracted in the facts of this case. I find no merits in the arguments and defence set up by the respondent. This application is accordingly allowed. Mr. Manoj Khanna, Advocate, 166, Aravali Apartment, Alaknanda, New Delhi (Tel : 622 5766) is hereby appointed as the receiver who shall prepare the inventory of the parts of the machinery and then take into possession the Automatic Hardshell Gelatine Capsule Making Machine lying in the premises of the respondent company and thereafter make arrangement for its protection. For preparing inventory and for taking possession of the machinery, Mr. Manoj Khanna can take help of Mr. P.L. Gosain, Assistant of this court. Mr. Manoj Khanna's fee is fixed at Rs. 20,000 i.e. for preparing the inventory and for taking possession whereas Mr. P.L. Gosain will be paid Rs. 5,000 in lumpsum. Once the property is taken in possession by the said Mr. Manoj Khanna, the receiver, he shall be paid a monthly remuneration at the rate of Rs. 2,000 till the machinery remains under his possession.