

CASE NO.:
Appeal (crl.) 847 of 1999

PETITIONER:
M/S. BSI LTD. & ANR.

Vs.

RESPONDENT:
GIFT HOLDINGS PVT. LTD. & ANR.

DATE OF JUDGMENT: 15/02/2000

BENCH:
K.T. THOMAS D.P. MOHAPATRA

JUDGMENT:

THOMAS, J.

L...I...T.....T.....T.....T.....T.....T.....T...J

Some companies and their Directors are now frantically struggling to get themselves extricated from the catch of prosecution proceedings pitted against them, consequent to non-payment of amounts covered by cheques issued by such companies. All the companies involved in this batch of appeals have a common cause now in that those companies have, subsequent to the filing of complaints against them, approached the Board for Industrial Finance and Reconstruction ('BIFR' for short) and sought for declaration that those companies became sick as envisaged in the Sick Industrial Companies (Special Provisions) Act, 1985, ('SICA' for short). They maintained the stand that when proceedings are pending before the BIFR no prosecution can be maintained under law against those companies. But the plea so made by such companies was not found favour with the trial courts, nor with the revisional courts nor even with the High Courts before which the companies approached. All these appeals have been filed by special leave against the orders passed by the High Courts by which the aforesaid plea was discountenanced.

It is sufficient to set out the facts from one of these appeals in this batch. Answers given to the questions raised in that appeal would apply to all the connected appeals now being heard along with that appeal. Facts in Criminal Appeal No.847 of 1999 are the following: Cheques issued by the appellant therein were dishonoured by the drawee bank on 27.12.1996 on the ground of insufficiency of amount in the account concerned, and the payee thereof issued a notice on 2.1.1997, demanding payment of the amount covered by such cheques. As the drawer of the cheques failed to make the payment as per demand, within 15 days of receipt of the notice, a complaint was filed on 29.1.1997 against the company and its Directors for the offence under Section 138 of the Negotiable Instruments Act ('NI Act' for short). The magistrate before whom the complaint was filed

issued process against the accused who were arrayed therein.

Two petitions for winding up of the company were filed in June 1997, one at the instance of a creditor of the company and the other by the company itself. Thereafter the company moved the BIFR to declare it a sick industrial company. When proceedings were pending before the BIFR under Section 16 of the SICA a declaration was made by the order passed by the BIFR as per Section 22(3) of SICA. The above is the background in which the appellants contend that they are not liable to be prosecuted in view of the embargo contained in Section 22(1) of SICA.

When the offence under Section 138 of the NI Act has been committed by a company "every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly." (vide Section 141 of the NI Act).

In Anil Hada vs. Indian Acrylic Ltd. {2000 (1) SCC 1} it has been pointed out that three categories of persons can be discerned as brought within the purview of the penal liability, through the legal fiction envisaged in Section 141 of the NI Act. They are: (1) The company which committed the offence. (2) Every person who was in charge of and responsible to the company for the conduct of the business of the company. (3) Any other person who is a director or a manager or a secretary or an officer of the company with whose connivance or with whose neglect the company has committed the offence.

Learned counsel for the appellant submitted that when reconstruction efforts of a sick industrial company are pending under the provisions of SICA all other legal proceedings including any prosecution proceedings would stand suspended by the operation of the embargo contained in Section 22(1) of SICA. In order to persuade the court to place such an interpretation on the said sub-section learned counsel invited our attention to certain other provisions of SICA also.

In the Statement of Objects and Reasons for introducing the Bill in the Parliament which later became Act No.1 of 1986, it is stated, inter alia, that the ill effects of sickness in industrial companies such as loss of production, loss of employment, loss of revenue to the Governments and locking up of investible funds of banks and financial institutions are of serious concern to the Government and the society at large. "A need has, therefore, been felt to enact in public interest a legislation to provide for timely detection of sickness in industrial companies and for expeditious determination by a body of experts of the preventive, ameliorative, remedial and other measures that would need to be adopted with respect to such companies and for enforcement and for enforcement of the measures considered appropriate with utmost practicable despatch." A sick industrial company is a company which has "at the end of any financial year accumulated losses equal to or exceeding its entire net worth." {vide Section 3(1) of SICA}

Section 15 enables the Board of Directors of a company which has become sick to make reference to the BIFR for

determination of measures which shall be adopted with respect to the company. (The Central Government or the Reserve Bank or the State Government concerned may also make the reference to the BIFR for the same purpose if it has sufficient reasons to believe that a company has become sick.) Once a reference is made it is open to BIFR to conduct an inquiry for determining whether the company has become sick. If the BIFR is satisfied, on completion of the inquiry, that the company has become sick it can adopt any of the measures envisaged in Section 17 of SICA. When an order is made under Section 17 a scheme with respect to the company shall be prepared by "the operating agency" specified in such order. The above is the general scheme of SICA.

It is in the above background that Section 22 of SICA has to be looked at. Sub-section (1) of Section 22 is extracted below:

"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, 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."

Sub-section (2) is not of any relevance so far as the points raised in this batch of appeals are concerned. Sub-section (3) confers power on the BIFR to declare that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force shall be suspended and that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date shall remain suspended. Sub-section (4) says that when any such declaration is made under sub-section (3) it shall have overriding effect and "any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration, and all proceedings relating thereto pending before any court shall remain stayed."

As the arguments based on Section 22(1) of SICA were endeavoured to be fortified with the help of Section 22.A of SICA the said provision is extracted below:

22.A Direction not to dispose of assets. - The Board may, if it is of opinion that any direction is necessary in the interest of the sick industrial company or creditors or shareholders or in the public interest, by order in writing, direct the sick industrial company not to dispose of, except

with the consent of the Board, any of its assets-

(a) during the period of preparation or consideration of the scheme under section 18; and

(b) during the period beginning with the recording of opinion by the Board for winding up of the company under sub-section (1) of section 20 and up to commencement of the proceedings relating to the winding up before the concerned High Court."

We do not think it necessary to labour on the scope of Section 22.A of SICA in the present batch of appeals as the BIFR did not pass any order against any company involved herein until the expiry of the period of 15 days from the receipt of notice contemplated in clause (c) of the proviso to Section 138 of the NI Act. So none of the companies was interdicted by any such order envisaged in Section 22.A during the above period of 15 days. Hence, we are unable to find any help from the said provision which could salvage the appellants from the prosecution proceedings against them.

Switching back to sub-section (1) of Section 22 of SICA, we may point out that its operation commence in respect of the companies involved in this batch of appeals only after the expiry of the period of 15 days envisaged in clause (c) of the proviso to Section 138 of the NI Act within which the companies did not pay the amount covered by the cheques. The ban imposed, as per Section 22(1) of the SICA, is against maintainability of the following legal actions:

(1) Proceedings for the winding up of the company;

(2) Proceedings for execution, distress or the likes against any of the properties of the company;

(3) Proceedings for the appointment of a receiver in respect of such properties;

(4) Suits for recovery of money or for enforcement of any security against the company or guarantee in respect of any loan or advance granted to the company.

Some of the learned counsel pointed out that when a company is convicted under Section 138 of the NI Act the court can only impose a fine as the sentence since a juristic person like the company cannot possibly be sent to prison. On its premise learned counsel contended that recovery of the fine covered by such sentence would be impractical on account of the ban envisaged in Section 22(1) of SICA against proceedings for execution, distress or the likes as against any of the properties of the company. As a corollary, it was submitted that prosecution against the company cannot be maintained since a court would not be able to effectively impose a sentence on a company after convicting it of the offence under Section 138 of NI Act.

The fallacy of the above contention is two-fold. First is that maintainability of a prosecution proceeding is not to be tested on the touchstone of any practical hurdle in enforcing the sentence which might be imposed on a company after conviction. Second is, there is no insurmountable hurdle for recovery of the fine covered by the sentence even from a sick industrial company because the ban contained in

Section 22(1) is only conditional as could be discerned from the last limb thereof which reads thus: "Except with the consent of the Board or, as the case may be, the Appellate Authority." It means that with such consent the court would be in a position to resort to proceedings for distress against the properties of the sick industrial company. Hence the aforesaid contention has no merit at all.

It was next contended that the ban against maintainability of a suit for the recovery of money would encompass prosecution proceedings also. To support the said contention reliance was sought to be made on the following meaning of the word "suit" as given in Bouvier's Law Dictionary:

"Suit is a generic term of comprehensive signification, and applies to any proceeding in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of any injury or the recovery of a right In its most extended sense, the word suit includes not only a civil action, but also a criminal prosecution, as, indictment, information and a conviction by a magistrate".

Learned counsel invited our attention to the maxim *contemporanea expositio est optima et fortissima in lege* (contemporaneous exposition is the best and strongest in law) for the purpose of stretching the scope of the word suit to envelope criminal prosecution as well.

Our attention has also been invited to the observation of a two Judge Bench of this Court in *Maharashtra Tubes Ltd. vs. State Industrial & Investment Corporation of Maharashtra Ltd* and anr. {1993 (2) SCC 144}. While considering the purpose and objects of suspension of proceedings mentioned in Section 22(1) of SICA, therein it has been held that the expression "proceedings" in the sub-section must be widely construed. This is what the Bench has observed:

"The legislature has advisedly used an omnibus expression 'the like' as it could not have perceived of all possible coercive measures that may be taken against a sick undertaking."

The said contention is also devoid of merits. The word "suit" envisaged in Section 22(1) cannot be stretched to criminal prosecutions. The suit mentioned therein is restricted to "recovery of money or for enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company. As the suit is clearly delineated in the provision itself, the context would not admit of any other stretching process.

A criminal prosecution is neither for recovery of money nor for enforcement of any security etc. Section 138 of the NI Act is a penal provision the commission of which offence entails a conviction and sentence on proof of the guilt in a duly conducted criminal proceedings. Once the offence under Section 138 is completed the prosecution proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to the penal liability. What was considered in *Maharashtra Tubes Ltd. (supra)* is

whether the remedy provided in Section 29 or 31 of the State Finance Corporation Act, 1951 could be pursued notwithstanding the ban contained in Section 22 of the SICA. Hence the legal principle adumbrated in the said decision is of no avail to the appellants.

In the above context it is pertinent to point out that Section 138 of NI Act was introduced in 1988 when SICA was already in vogue. Even when the amplitude of the word "company" mentioned in Section 141 of the NI Act was widened through the Explanation added to the section, Parliament did not think it necessary to exclude companies falling under Section 22 of SICA from the operation thereof. If Parliament intended to exempt sick companies from prosecution proceeding, necessary provision would have been included in Section 141 of the NI Act. More significantly, when Section 22(1) of SICA was amended in 1994 by inserting the words ["and no suit for the recovery of money or for enforcement of any security against industrial company or of any guarantee in respect of any loans or advance granted to industrial company"] Parliament did not specifically include prosecution proceedings within the ambit of the said ban.

The conclusion which we have to draw is that if commission of the offence under Section 138 of the NI Act was completed before the commencement of proceedings under Section 22(1) of SICA there is no hurdle in any of the provisions of SICA against the maintainability and prosecution of a criminal complaint duly instituted under Section 142 of the NI Act. The decisions rendered by the High Courts, which are assailed before us in this batch of appeals, are therefore not liable to be interfered with. Appeals are accordingly dismissed. Special Leave Petitions heard along with the above appeals are also hence dismissed.