HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

CIA No.37/2012 & CMA No.63/2012

Date of order: 03.01.2015

M/s Modi Rubber Ltd. & anr. Vs. State Tyres Shop & anr.

Coram:

Hon'ble Mr. Justice Bansi Lal Bhat, Judge.

Appearing counsel:

For Appellant(s) : Mr. O. P. Thakur, Advocate.
For Respondent(s) : Mr. R. K. Bhatia, Advocate.

i/	Whether to be reported in Press/Media	:	**Yes**
ii/	Whether to be reported in Digest/Journal	:	**Yes**

1. This appeal is directed against the judgment and decree dated 30.04.2012 passed by learned 1st Additional District Judge, Jammu, by virtue whereof, decree for recovery of Rs.8,85,500/- alongwith interest at the rate of 6% per annum pendente lite as well as future has been passed against the appellant.

2. The factual matrix attending upon the passing of impugned judgment and decree may be noticed briefly.

3. Respondent No.1 filed suit for recovery of Rs.8,85,500/- against the appellants and respondent No.2 on the ground that respondent No.1 was a dealer of tyres manufactured by the

appellants and had deposited total amount of Rs.5,75,000/- with appellant No.1 as security on four occasions. It was averred in the plaint that the appellants had undertaken to pay interest at the rate of 18% per annum on the deposited security amount of respondent No.1 and refund the entire amount alongwith interest on demand. It was further averred in the plaint that the interest for the said amount deposited upto 31st March, 2001 was paid but thereafter the appellants neither paid the interest on the deposited amount nor supplied the tyres to respondent No.1 as the factory of the appellants was closed. Respondent No.1 approached the appellants for refund of security amount deposit but the refund was not made. Respondent No.1 served notice to the appellants for refund of the amount of security deposit alongwith interest further stipulating therein that respondent No.1 was no more interested to do any business with the appellants and his dealership had become redundant. Respondent No.1 also filed complaint before learned 3rd Additional Munsiff, Judicial Magistrate 1st Class, Jammu, alleging

misappropriation of the security deposit by the appellants. However, the complaint was quashed by learned 2nd Additional Sessions Judge, Jammu and the same was affirmed by this Court on the ground that the dispute was of civil nature. Thus, the security amount of Rs.5,75,000/- alongwith interest amount of Rs.3,10,500/- accrued thereon at the rate of 18% per annum with effect from 01.04.2001 till filing of the suit was lying outstanding against the appellants which respondent No.1 was entitled to recover with pendente lite and future interest and costs of the suit.

4. The appellants did not respond to the summons and they were set ex-parte. Respondent No.2 responded to the summons and filed his written statement, denying the averments made in the plaint but admitted deposit of security by respondent No.1, in respect whereof he had issued receipts on behalf of respondent No.1 in his capacity as Sales Manager of Jammu area of appellant No.1. Parties joined the following issues:-

(i) Whether the plaintiff has deposited an amount of Rs.5.76 Lacs as security with the defendants as per details mentioned in Para No.2 of the plaint? OPP

(ii) *Whether the plaintiff has paid interest upto 31.03.2001 on the security deposited upto 31.03.2001 acknowledging that the plaintiff is entitled to security deposited along with interest? OPP*

(iii) *Whether defendant No.3 issued letter No.JMU/ Sales/054 dated 10.06.2002 acknowledging that the plaintiff is entitled to security deposited along with interest? OPP*

(iv) *Whether the defendants failed to repay the amount despite legal notice served upon the defendants to refund the security deposit along with interest? OPP*

(v) *Whether the plaintiff is entitled to Rs.8,85,000/- as security deposit amount and interest till filing of the suit and also entitled to pendent lit and future interest along with cost of the suit? OPP*

(vi) *Whether the plaint is not verified in accordance with law and the plaintiff has no cause of action to file the suit against defendant No.3? OPD*

(vii) *Whether the defendant No.3 is not liable qua the plaintiff for the amount to the plaintiff, as he being employee had acted on behalf of defendant No.1? OPD*

(viii) *Relief.*

5. It is after framing of the issues that respondent No.2 abstained from proceeding in the suit and the suit was heard in ex-parte. On consideration of the testimonies of PWs Malvinder Singh, Ram Kishen and Aatam Dev Singh examined by respondent No.1 in respect of its claim and the documentary evidence placed on record, the Trial Court decreed the suit in terms of the impugned judgment and decree which

have been assailed in the instant civil first appeal.

6. The appellants have assailed the impugned judgment and decree on the grounds that there was an illegal strike in the Factory of appellant No.1 which brought its manufacturing activity to a grinding halt. On account of losses from October 1999 onwards, there was complete erosion of net worth of appellant No.1 by 31.03.2003. Appellant No.1 filed a reference before the Board for Industrial and Financial Reconstruction (hereinafter to be referred to as '**BIFR**') under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter to be referred to as '**SICA**'). It was registered as Case No.153 of 2004. That the manufacturing activity of appellant No.1 ceased from 07.08.2001 and appellant No.1 was not in a position to discharge its liability on account of huge losses incurred by it. According to the appellants, they had no knowledge of filing of the suit by respondent No.1 and it was only upon receiving a notice in execution proceedings that the appellants learnt about the passing of the impugned judgment and decree in ex-parte. The impugned judgment and

decree are assailed on the grounds that the appellants had no knowledge of filing of the suit; that appellant No.1 was declared as a Sick Company by BIFR vide order dated 17.05.2006 and BIFR sanctioned rehabilitation scheme vide order dated 08.04.2008 which provides for settlement of dues of creditors including unsecured creditors and "unsecured non-pressing creditors" whose dues are to be paid as per the revival scheme, in terms whereof an unsecured non-pressing creditor is to be paid 20% of the principal outstanding in full and final payment at the end of 3rd year from the date of sanctioning of the scheme dated 31.03.2008. Respondent No.1 could, at the most, be termed as an unsecured non-pressing creditor and since he filed the suit without complying with the provisions of SICA, the entire proceedings conducted and the decree passed by the Trial Court were without jurisdiction.

7. Heard learned counsel for the parties.

8. It is contended on behalf of the appellants that the ex-parte decree dated 30.04.2012 has been passed without insisting upon the proof of service of

summons upon the appellants; that appellant No.1 was declared as a Sick Company by BIFR on 17.05.2006 and BIFR had sanctioned a rehabilitation scheme vide order dated 08.04.2008 for settlement of dues of creditors including unsecured non-pressing creditors, who would be entitled to 20% of the principal outstanding in full and final payment at the end of 3rd year from the date of sanctioning of the scheme; that respondent No.1 had not filed the suit before filing of reference by appellant No.1 with BIFR and the suit filed without complying with the provisions of SICA was not maintainable without permission from the BIFR.

9. *Per contra*, learned counsel for the respondents, submits that the mode of service adopted was a valid one under law and since the registered covers, under which the summons were sent to the appellants, were not received back served or un-served, it was a case of deemed service and the impugned judgment and decree passed on consideration of oral and documentary evidence was valid and final as the same had not been assailed by the appellants. It is submitted that the appellants

can not escape liability under the impugned judgment and decree which has attained finality.

10. Having given my anxious consideration to the submissions made at the Bar, I find that the facts relating to appellant No.1 being engaged in manufacture and sale of automobiles tyres, tubes and flaps and respondent No.1 being a dealer of appellant No.1 are not in controversy. Factum of respondent No.1 being an unsecured creditor of appellant No.1 is also not disputed. It is also not in controversy that the Trial Court proceeded ex-parte against the appellants on the principle of deemed service 'as the registered summons issued against appellant Nos.1 & 2 were not received back either served or un-served within the statutory period'. It further appears that respondent No.2, who was the Sales Manager of appellant No.1 at the relevant time, had initially appeared before the Trial Court and filed his written statement, denying the averments made in the plaint but admitted that the security deposit, in respect whereof respondent No.1 filed his claim, had been deposited with appellant No.1. He also admitted the execution of receipts

issued in respect of security deposit made by respondent No.1. It further appears from the pleadings that respondent No.2 had issued receipts in question in lieu of security deposit, the same having been issued by him in his capacity as the Sales Manager of Jammu area of appellant No.1. The factum of the security deposit having been made by respondent No.1 and acknowledgment of its receipt by respondent No.2 as the authorized officer of appellant No.1 being admitted facts, it would not lie in the mouth of appellant No.1 that appellant No.1 had no knowledge of filing of suit by respondent No.1 regarding his claim to refund of security deposit. This conclusion is deducible from the pleading of the parties before the Trial Court and the factum of respondent No.2 having put in his appearance before the Trial Court where he filed his written statement admitting the execution of receipts in respect of the security deposit in his capacity as Sales Manager of appellant No.1. In view of this, the appellants cannot be heard to say that they had no knowledge about the institution of the suit and the mode of service adopted by the Trial

Court did not justify setting them ex-parte without proof of service.

11. It is undisputed that the appellants did not avail the remedy available under provisions of Order 9 Rule 13 of Civil Procedure Code (CPC). Even respondent No.2, who initially contested the suit despite admitting execution of receipts in respect of the security deposit and subsequently abstained from proceedings after framing of issues, did not assail the judgment and decree passed by the Trial Court in ex-parte. However, non-availing of remedy for setting aside of ex-parte decree within ambit of Order 9 Rule 13 CPC would not disentitle the appellants to question the impugned judgment and decree in appeal. That being so, the instant appeal is considered on merits.

12. The point for determination is whether appellant No.1 was declared as Sick Industrial Unit and in view of the same, respondent No.1 could not maintain the suit for recovery of the amount due on account of security deposit made on various occasions without securing permission in terms of Section 22 of SICA. It is not disputed that appellant

No.1 had, on account of losses due to strike in the Factory resulting in bringing of manufacturing activities to a grinding halt, filed a reference with BIFR under the provisions of SICA. The reference was received by BIFR on 04.02.2004 and registered as Case No.153 of 2004. This is borne out by Communication made by Registrar, BIFR, to appellant No.1 vide its letter dated 17.03.2004. It further appears that respondent No.1 filed suit for recovery of Rs.8,85,500/- on 01.04.2004. Thus, it is manifestly clear that when the suit for recovery was filed by respondent No.1 on 01.04.2004, reference registered under Case No.153 of 2004 was pending consideration before BIFR. The question for consideration is whether the suit filed by respondent No.1 culminating in passing of the impugned judgment and decree would lie in view of the express bar under section 22 of SICA which is reproduced hereinbelow:-

> ***"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, 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 Appellant Authority."***

13. From a plain reading of the aforesaid provision, it emerges that where in respect of an industrial company, *inter alia,* an inquiry under Section 16 is pending, no suit for 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 shall lie or be proceeded with further, except with the consent of the Board. It implies that no suit of the type contemplated under this section would be filed

after the date of reference when the Board is seised of the inquiry and that if such suit has been filed prior to making of such reference by the Sick Industrial Company, same shall not be proceeded with further except with the leave of Board. The ambit and scope of Section 22(1) of SICA came up for consideration before a Co-ordinate Bench of this Court in '***State Bank of India versus M/s Ess Emm Coated Steel and anr***.', reported in '***1997 SLJ 58***', the relevant paras whereof are extracted hereunder:-

> ***"8. The purpose and object of the suspension of all proceedings under this provision is to await outcome of the reference made to the BIFR for a revival and rehabilitation of the sick industrial company so that no coercive steps are taken against its properties which may militate against its revival, till the Board finally disposes of the reference under Sec. 15. In such a situation, the provision requires a creditor to obtain the consent of the Board to proceed ahead against the industrial company.***
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> ***9. A quick look at the relevant sections under Chapter III of the Act, shows that under Sec.15 a reference can be made by the Board of Directors of the company to the BIFR for declaring the company as sick. After the Board is seized of the reference, it can order an***

inquiry under Sec. 16 for determining whether a company has become a sick industrial company. Sec. 17 empowers the Board to make a suitable order for completion of the inquiry and Sec. 18 provides for preparation and sanction of the schemes for revival and rehabilitation of the company. Sec. 19 envisages the rehabilitation by giving financial assistance and Sec. 20 provides for recommending of the winding up of the sick industrial company where the BIFR forms the opinion that the sick industrial company is not likely to make its net worth to exceed the accumulated losses within a reasonable time while meeting all its financial implications. It is in this backdrop that Sec. 22 provides for suspension of the legal proceedings and the contracts against the sick industrial company in the circumstances and conditions laid down therein."

14. In another case titled '***M/s Rom Industries Ltd. Vs. State of J&K***' reported in '***2005 (1) SLJ***', this Court held that the protection of Section 22(1) of SICA is available during the pendency of the proceedings before the Board for Industrial and Financial Reconstruction. If the reference has been rejected by BIFR, such protection would not be available.

15. In '***Real Value appliances Ltd. etc. versus Canara Bank & ors*. etc.**' reported in '***1998 (4)***

Supreme 478', the Hon'ble Apex Court, after taking into consideration the amendment to Regulation 19 w.e.f. 24.03.1994, held that '*once the reference is registered and it is mandatory to call for information/documents from the informant and such a direction is given, then inquiry under Section 16(1) must-for the purposes of Section 22-be deemed to have commenced. Section 22 and the prohibition contained in it shall immediately come into play'.*

16. The effect of judicial pronouncements in regard to interpretation of Section 22(1) of SICA is that after the commencement of proceedings upon reference before BIFR resulting in inquiry under Section 16(1), no suit for recovery of money or enforcement of any security or of any guarantee shall lie or be proceeded with further except with the consent of the Board. Admittedly, in the instant case, the suit was filed by respondent No.1 after the acknowledgment of reference by the Board leading to an inquiry which culminated in declaring appellant No.1 as a Sick Company. This fact is borne out by order dated 17.05.2006 passed by BIFR. It is not disputed that BIFR subsequently

sanctioned rehabilitation scheme in terms of its order dated 08.04.2008. The position of respondent No.1 undoubtedly was that of an unsecured creditor who was entitled to relief in terms of the revival/rehabilitation scheme.

17. Thus viewed, the impugned judgment and decree cannot be sustained as admittedly no leave had been obtained from BIFR for filing of the suit and its continuation subsequent to making of reference by appellant No.1 to BIFR culminating in declaring of appellant No.1 as a Sick Company. The impugned judgment and decree being hit by the prohibitory provisions engrafted in Section 22 of the SICA cannot be supported and the same are liable to be set aside. The impugned judgment and decree are, accordingly, set aside. This will not, however, disentitle respondent No.1 from claiming appropriate relief in terms of sanctioned scheme dated 08.04.2008 as an unsecured creditor.

18. The instant appeal stands **disposed of** alongwith CMA No.63/2012.

(Bansi Lal Bhat)
Judge

Jammu
03.01.2015(***R****am* ***M****urti)*