(2011) 03 DEL CK 0193

In the Delhi High Court

Case No : Writ Petition (Civil) No. 1106 of 2011

Alpine Industries Ltd. APPELLANT

Vs

Appellate Authority for Industrial and Financial Reconstruction and Others RESPONDENT

Date of Decision : 01-03-2011

Acts Referred:

Companies Act, 1956 — Section 529(1), 529A
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(4), 13(9), 17, 5(1)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 15(1), 20(4), 22(1)

Citation : (2011) 162 CompCas 563 : (2011) 2 CompLJ 387

Hon'ble Judges : Veena Birbal, J;Anil Kumar, J

Bench : Division Bench

Advocate : Vivek Sibal, for the Appellant; S.L. Gupta, for Respondent No. 3, R.C. Chawla and Sriram Kamal for Respondent No. 10, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.—The Petitioner has impugned the order dated January 25, 2011 by the Appellate Authority for Industrial and Financial Reconstruction in Appeal No. 275 of 2010 titled as Alpine India Ltd. v. BIFR, dismissing the appeal against the order dated August 30, 2010 in case No. 458 of 2001 of the Board for Industrial and Financial Reconstruction (BIFR). By order dated August 30, 2010, it was held by the BIFR that the dues of the State Bank of India (SBI) and the Bank of India (BOI), who had taken action u/s 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 were more than 75 per cent. of the total secured debt of the company and relying on Sheel International''s case of the AAIFR and an order passed by the High Courts of Delhi, Chennai and Bombay, it was held that the reference u/s 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 has abated.

2. While holding that the reference had abated u/s 15(1) of the SICA, the BIFR

had also noted that the first reference No. 58 of 1999 filed by the Petitioner was dismissed as not maintainable as the Petitioner-company had manipulated the accounts and in the appeal filed by the Petitioner against the order dated July 20, 1999, dismissing the reference, the Appellate Authority had also dismissed the appeal by order dated April 7, 2000 holding that the beneficial provisions of the SICA are not meant for companies/managements who resort to frauds and falsification of accounts for the personal benefit of promoters and run to take shelter under the umbrella of the SICA to protect themselves from proceedings for recovery/winding up initiated by the creditors.

3. While holding by order dated August 30, 2010 that the reference has abated u/s 15(1) of the SICA, it was also noticed by the AAIFR that the Petitioner had filed a writ petition bearing W.P. (C) No. 990 of 2000 against the order of the AAIFR dated April 7, 2000 in the High Court of Madhya Pradesh, which was disposed of with a direction to the BIFR to dispose of the second reference within a period of two months, the BIFR had also dismissed the reference pursuant to the direction of the High Court of Madhya Pradesh as non-maintainable as the company had come with manipulated accounts and unclean hands.

4. In the order dated August 30, 2010, the BIFR also relied on various directions given to the Petitioners to deposit amounts which were not complied with. In order to take a decision of abatement of reference in view of action u/s 13(4) of the SARFAESI Act taken by the SBI and BOI, the Petitioner-company had been directed to provide break up of debt of each secured creditors as on record date. It was stated by counsel for the company that the total secured dues of the company were Rs. 113.80 crores out of which dues of SBI and BOI were Rs. 90 crores.

5. The order of the BIFR dated August 30, 2010 in paragraph 2.7 is as under:

... In order to take a decision on abatement of reference in view of completion of action u/s 13(4) under the SARFAESI Act, taken by the SBI and BOI, the Bench asked learned Counsel of the company to provide break up of debt of each secured creditors as on record date. Learned Counsel of the company stated that the principal dues of the SBI were Rs. 64 crores, of BOI were Rs. 26 crores, Standard Chartered Bank Rs. 8.40 crores, ICICI assigned dues to SCB were Rs. 10 crores, EXIM Bank Rs. 1.40 crore and IIBI Rs. 4.00 crores. Hence total secured dues of the company were Rs. 113.80 crores out of which dues of the SBI and BOI were Rs. 90 crores.

6. The order of the BIFR dated August 30, 2010 was challenged in Appeal No. 275 of 2010 along with M.A. No. 582 of 2010 alleging that the SBI and BOI who had taken action u/s 13(4) of the SARFAESI Act do not represent 75 per cent. of the secured debt and therefore, the condition necessary for abatement as prescribed under the third proviso of Section 15(1) of the SICA was not met and therefore, reference could not abate. The plea was also raised that the BIFR failed to hold an inquiry to ascertain conclusively whether the condition of three-

fourths in value of the amount outstanding against the borrower under the third proviso to Section 15(1) of the SICA was met or not. In the circumstances, it was contended that prior permission of the BIFR u/s 22(1) of the SICA before taking coercive action u/s 13(4) of the SARFAESI Act was necessary.

7. The order was also challenged on the ground that even if one of the manufacturing unit of the Petitioner-company was taken over, two industrial units will remain under the ownership of the company and therefore, instead of abating the reference of the Appellant company, the BIFR ought to have considered the rehabilitation of the company on the basis of the two surviving units of the Petitioner-company.

8. Before the AAIFR reliance was placed by the Petitioner on a judgment of the Bombay High Court in the case of Nouveaw Exports P. Ltd. dated January 13, 2010, which was distinguished by the AAIFR on the ground that the observations made by the High Court of Bombay were tentative and prima facie. Reliance had rather been placed on Kandhari Rubber Limited (Appeal No. 37 of 2007) and Sheel International Ltd. (Appeal No. 229 of 2008) holding that the BIFR/AAIFR is not entitled to go into the legality or the merits of any action u/s 13(4) of the SARFAESI Act by the secured creditors.

9. The AAIFR has held that three-fourths'' requirement flows from the provisions of Section 13(9) of the SARFAESI Act. Section 13(9) of the SARFAESI Act, 2002 is as under:

13. (9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to Sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of Section 529A of the Companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to Sub-section (1) of Section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen''s dues with the liquidator in accordance with the provisions of Section 529A of that Act:

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditor the workmen''s dues in accordance with the provisions of Section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen''s dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen''s dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen''s dues, such creditor shall be liable to pay the balance of the workmen''s dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen''s dues, if any. Explanation.: For the purposes of this Sub-section,:

(a) ''record date'' means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date ;

(b) ''amount outstanding'' shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

10. The AAIFR has also held that once the action u/s 13(4) is taken, it is to be presumed by the BIFR/AAIFR that the action has been taken in accordance with law and the BIFR/AAIFR will not go into the correctness/legality of any action u/s 13(4) as the power to challenge an order u/s 13(4) of the SARFAESI Act will not be with the BIFR/AAIFR. The Tribunal also repelled the plea of the Petitioner that the jurisdiction of the BIFR and the Debts Recovery Tribunal is concurrent on the ground that this will lead to jurisdiction chaos. Reliance was also placed on NGEF Ltd. v. Chandra Developers P. Ltd. (2005) 127 Comp Cas 822 : where it was held by the Supreme Court that the company court and the BIFR do not exercise the concurrent jurisdiction and had repelled the plea that despite the BIFR having jurisdiction to get the assets of the sick company sold in terms of Sub-section (4) of Section 20 of the SICA, the leave of the company court is required.

11. Relying on Punjab National Bank v. AAIFR (2009) 149 Comp Cas 390 (Delhi), Madras Petrochem Ltd. v. BIFR (2009) 149 Comp Cas 402; it was held that protection of Section 22(1) of the SICA will not be available to sick industrial companies when secured creditors have taken action u/s 13(4) of the SARFAESI Act, 2002.

12. Learned Counsel for the Petitioner has contended that the Petitioner is not questioning the legality or otherwise of the action u/s 13(4) of the SARFAESI Act, 2002 before the BIFR but the issue raised by the Petitioner-company is whether the reference filed by the Petitioner-company has abated under the third proviso to Section 15(1) of the SICA when it has not been determined by the BIFR whether the action was taken by three-fourths of secured creditors. Section

15(1) of the SICA is as under:

15. Reference to Board.: (1) Where an industrial company has become a sick industrial company, the board of directors of the company, shall, within sixty days from the date of finalisation of the duly audited accounts of the company for the financial year as at the end of which the company has become a sick industrial company, make a reference to the Board for determination of the measure which shall be adopted with respect to the company:

Provided that if the board of directors had sufficient reasons even before such finalisation to form the opinion that the company had become a sick industrial company, the board of directors shall, within sixty days after it has formed such opinion, make a reference to the Board for the determination of the measures which shall be adopted with respect to the company:

Provided further that no reference shall be made to the Board for Industrial and Financial Reconstruction after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where financial assets have been acquired by any securitisation company or reconstruction company under Sub-section (1) of Section 5 of that Act:

Provided also that on or after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where a reference is pending before the Board for Industrial and Financial Reconstruction, such reference shall abate if the secured creditors, representing not less than three-fourths in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under Sub-section (4) of Section 13 of that Act....

13. This Court has heard learned Counsel for the Petitioner-company and other counsel in detail and have also perused the orders of the AAIFR and the BIFR and the precedent relied on and distinguished by learned Counsel. In Punjab National Bank v. AAIFR (2009) 149 Comp Cas 390, a Division Bench of this Court had held that it was not disputed that the Punjab National Bank, the Oriental Bank of Commerce and the State Bank of Bikaner and Jaipur, admittedly represented the secured creditors of more than three-fourths of the value. What was considered was whether decision taken will amount to a measure taken to recover the secured debt u/s 13(4) of the SARFAESI Act, 2002. It was held that a mere decision in the meeting of the secured creditors representing three-fourths in value of the amount outstanding may not amount to a measure taken to recover a secured debt u/s 13(4) of the Securitisation Act and something more concrete has to be done by the secured creditors. It was also held that the bar of Section 15 proviso will apply not only to original proceedings but also to the appeal emanating from the order of the BIFR.

14. The requirement of three-fourths of the secured creditors taking measures for the abatement of reference under the proviso to Section 15 of the SICA is not

independent of the measures taken by three-fourths of the secured creditors u/s 13(9) of the SARFAESI Act, 2002. Once the measures have been taken, which is not disputed in the present case as one of the unit had been taken over, whether the action was by three-fourths of the secured creditors or less in violation of Section 13(9) of the SARFAESI Act, 2002 is not to be re-determined independently by the BIFR. The action of three-fourths secured creditors being not representing three-fourths secured creditors can be challenged in an appeal u/s 17 of the SARFAESI Act, 2002. The plea of learned Counsel for the Petitioner that the Petitioner-company is not challenging the action taken by the secured creditors under the SARFAESI Act, 2002 will not enure any benefit to the Petitioner-company. If the action of three-fourths of the secured creditors is not challenged under the SARFAESI Act, 2002 on the ground that it is not by three-fourths of the secured creditors, this issue cannot be raised by the Petitioner-company before the BIFR/AAIFR nor the Board and Appellate Authority would be competent to go into the issue whether the measure taken was by three-fourths of the secured creditors or less. In the circumstances the plea of the Petitioner that the BIFR should have independently adjudicated the issue cannot be sustained and the orders of the BIFR/AAIFR cannot be faulted on this ground. In these circumstances abatement under the proviso to Section 15 of the SICA on the ground that measures have been taken by three-fourths of the secured creditors under the SARFAESI Act, 2002 will not be on the basis of independent judicial enquiry by the BIFR/AAIFR as has been contended on behalf of the Petitioner.

15. Learned Counsel for the Petitioner has also contended that since two units of the company are still with it, the BIFR should have continued the reference with respect to two units. The Respondents, however, have granted liberty to the Petitioner-company to file a fresh reference u/s 15(1) of the SICA on the basis of modified balance-sheet. Taking over one of the unit of the company will have profound impact on the financial profile of the company. If that be so permitting the Petitioner-company to file a fresh reference u/s 15(1) of the SICA with modified balance-sheet cannot be termed to be illegal or unsustainable or the orders of the Respondents cannot be termed to be perverse. The plea of learned Counsel for the Petitioner that filing fresh reference will take its own time, will not justify any direction by this Court to the Respondents to continue with reference to two units and holding that the reference has abated only in respect of one unit on account of measure taken by three-fourths of the secured creditors. No other grounds have been canvassed by learned Counsel for the Petitioner impugning the orders of the AAIFR and BIFR.

16. For the foregoing reasons this Court does not find any grounds to interfere with the orders of the AAIFR and BIFR impugned before us. The orders cannot be termed to be illegal or unsustainable or perverse so as to entail any interference in exercise of writ jurisdiction by this Court. The writ petition is, therefore, dismissed.