

(2012) 03 JH CK 0134

In the Jharkhand High Court

Case No : Writ Petition (C) . No. 772 of 2012

Bihar Sponge Iron Ltd., Seraikela Kharsawan

APPELLANT

Vs

Appellate Authority for Industrial and Financial
Reconstruction, New Delhi and Others

RESPONDENT

Date of Decision : 06-03-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 18(5), 18(9)

Citation : (2012) 3 JCR 233 : (2012) 2 JLJR 417

Hon'ble Judges : Aparesh Kumar Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Aparesh Kumar Singh, J.—Heard Learned Counsel for the parties.

2. In this writ petition, the petitioner has prayed for quashing of the order dated 23.12.2011 passed by the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) in Appeal Nos. 306/2007 and 303/2010, whereby the AAIFR has upheld the order dated 03.09.2007 and 22.09.2010 passed by the Board for Industrial and Financial Reconstruction (BIFR).

3. The facts of the case are that a revival scheme for M/s Bihar Sponge Iron Ltd. (BSIL) was sanctioned by BIFR on 29.07.2004 with cut off date as 30th September, 2001. BIFR thereafter held several review hearings to monitor the implementation of the sanctioned scheme. In the hearing on 03.09.2007 the Monitoring Agency ICICI submitted before BIFR that although repayment of the dues of the Rupee Payment Lenders (RPL) was going on without any delay or dispute, certain dispute and delay has arisen in regard to payment of the dues of the Foreign Currency Lenders (FCL). BSIL had raised certain issues regarding payment of foreign exchange fluctuations, which needed BIFR's clarifications and directions. IFC(W), one of the Foreign Currency Lenders, had submitted that in terms of the provisions of SS-04, the company was to pay the differential due to

foreign exchange fluctuations(FEFD) to its FCLs, and the company has been paying FEFD to IFC(W), but the company had not paid the installment due on July, 2007 and the foreign exchange fluctuations on the instalments due to IFC(W) so far.

4. At the same time, on behalf of the Deutsche Investitions -und Entwicklungsgesellschaft MbH (DEG), it was submitted that the company was misinterpreting the provisions of SS-04 in regard to foreign exchange fluctuation dues, and the company, while withholding the FEFD, has also not paid the instalment due to DEG in July, 2007.

5. The BIFR passed certain directions in respect of the same, which is also quoted in the impugned order at para 2.1(f) which is as follows:

As the statement of installment payments" to be made by the company to its foreign current year lenders for the period from July, 2004 to September, 2011 attached as Annexure II page 31 of SS-04 clearly shown that the installment amounts are to be paid to FCLs in Euro and also as in terms of 8.1(c)(iii) & (iv) of SS-04, the payment of said installment are to be serviced only in Euro, the BIFR in exercise to powers conferred u/s 18(5) & Section 18(9) of SICA hereby clarifies and directs that the company M/s BSIL would make payment of the dues installment to the FCLs in Euro in said Annexure II page 31 of SS-04 along with applicable interest LIBOR +1% p.a.(LIBOR + 3% in case of delay/default in payment of installments).

6. The appellant-petitioner preferred appeal against the said direction in Appeal No. 306/2007. Subsequently, in its review meeting dated 22.09.2010 BIFR reiterated the directions passed in the order dated 03.09.2007, which was also challenged by the petitioner-company in Appeal No. 303/2010. Both these appeals were decided by the common impugned order dated 23.12.2011 by the AAIFR.

7. It has been urged on behalf of the petitioner before this court while challenging the impugned order dated 23.12.2011 that the sanctioned scheme does not contain any provision for payments of foreign exchange fluctuation short fall by the company to its FCLs either on the upfront payment amount of Rs. 65 crores or on balance amount of Rs. 70 Crores to be paid in quarterly installment. It has been contended that AAIFR and BIFR have both failed to appreciate that under the sanctioned scheme the exchange fluctuation is fixed and not floating. It was further contended that the AAIFR had earlier dismissed the appeal filed by IFC(W) and DEG vide order dated 21.6.2007 which was preferred against the order of the BIFR dated 21.7.2004 thereby confirming the total liabilities of the company under the sanctioned scheme at Rs. 135 Crores. It was also contended that the order of the BIFR amounts to a modification of scheme which is impermissible without following the procedure prescribed u/s 18(5) of the SICA and any directions contrary to the provisions of the sanctioned scheme would have been issued by the BIFR u/s 18(9) of SICA.

8. Having heard the counsel for the petitioner, at length and from perusal of the facts of the case it appears that all the contentions of the appellant/petitioner-company were taken note of by AAIFR in the impugned order at para 3 thereof. The contesting respondent Nos. 17 and 19 had also appeared and advanced their submissions opposing the contention of the petitioner before the AAIFR which is further been noticed in para 4 of the impugned order in detail.

9. It appears that upon hearing the rival parties, the AAIFR framed two issues, which were relevant for determination in the instant case: (i) Whether the sanctioned scheme had put a cap on all the liabilities of the company at Rs. 135.00 crore thereby implying that the company was not liable to bear the foreign exchange rate differential as it was paying earlier; and (ii) whether AAIFR order's dated 21.06.2007 has decided that all liabilities of the company would be met only within Rs. 135.00 crore, beyond which the company has no liability.

10. Learned AAIFR has noticed the relevant clauses of the sanctioned scheme based on the OTS proposal. The relevant Clauses are quoted herein below:

Clause 6 The settlement of the dues of the secured creditors envisages payment of the principal amount aggregating Rs. 135 Crores with upfront payment of Rs. 65 crore and the balance Rs. 70 Crores over a period of 10 years from the cut off date of 30th September, 2001 carrying interest at 9% p.m. On R.T.L and LIBOR + 1% on FCLs. All other dues are to be waived. The amount of upfront payment has been brought in by private promoters(Rs. 32.5 crores) which will be converted into equity and GOJ (short loan of Rs. 32.50 Crore). The balance will be made from internal generation.

Clause 8.1(c)(iii) Respective share of IFCW and DEG out of aforesaid Rs. 75 crore as on 30.09.2001 shall continue as foreign currency loan in Euro and shall be serviced as FCLs in quarterly instalments.

Clause 8.6 (vii).....Any financial shortfall out of the delayed implementation of the schedule or for any other reason shall be made by the company's promoters by bringing in fresh funds as equity/subordinate unsecured loan without any recourse to FIs and banks or seeking any further reliefs/concessions from them than what had already been provided for in the scheme.

Clause 10 Any cash flow projections, apart from actual foreign exchange fluctuation as on date, depreciation at 3.25% p.a. On the FCL portion of Rs. 70 crore of the settlement amount for the period 31.07.2004 till repayment has been provided so as to take care of future fluctuation in foreign exchange payments.

11. The AAIFR, after considering the rival submissions of the parties and noticing the aforesaid clauses, held that there is no scope for any doubt that the company was obligated by the sanctioned scheme to pay the foreign currency lenders in Euro and its liabilities on this account were over and above Rupees 135.00 crore, which was only an OTS amount of the loans of the secured creditors, while

answering the first question.

12. That regarding the second question, the learned AAIFR has clearly dealt with its earlier order dated 21.06.2007 in para-9 of the impugned order and unequivocally clarified that the aforesaid order of AAIFR dated 21.06.2007 did not determine anywhere that the company's liability in paying the remaining Rupees 70.00 crore will not extend to the foreign exchange differential payment. It also held that its earlier order has not absolved the company of responsibility of paying the additional foreign exchange fluctuation differential (FEFD) in respect of Rs. 70.00 crore. It accordingly held that the company's sudden claim that it had made excess payment in the past on account of foreign exchange fluctuation differential (FEFD) and is not liable to pay FEFD, is misconceived.

13. The learned AAIFR has also dealt with the contention of the appellant-petitioner-company in relation to the order of BIFR making reference to Section 18(5) and Section 18(9) of the Sick Industrial Company (Special provisions) Act, 1985. It has categorically observed that the order of BIFR is not inconsistent with the provisions of the sanctioned scheme. It had power to remove any difficulty in giving effect to the provisions of the sanctioned scheme and the directions issued by it were in the nature of clarification irrespective of the provision used. It has also taken note of in the impugned order that the company had been paying the foreign exchange fluctuation from 2004 to 2007, that any modification in the sanctioned scheme was unnecessary because such a liability had already been stipulated in the sanctioned Scheme(SS).

14. After hearing the counsel for the petitioner and going through the impugned order, it is clear that the Appellate Authority has taken into account all the contention of the rival parties, gone through the relevant provisions of sanctioned scheme and passed a well reasoned order after proper application of mind which does not suffer from any infirmity. The learned AAIFR accordingly proceeded to hold that the company has a clear liability to pay the FCLs in Euro and exchange rate is not fixed. It has also held that enhanced liability of the company is in accordance with the sanctioned scheme and cannot be violated unless the BIFR modifies the scheme through due procedure on the ground that the present sanctioned scheme does not lead to the revival of the company.

15. Under the provisions of the SICA Act 1985, the Board for Industrial and Financial Reconstruction is the statutory body constituted to approve the rehabilitation scheme for a Sick Company so that it leads to the revival of the company. The SICA Act 1985 provides for a forum of appeal before the AAIFR against the provisions of BIFR. The BIFR and the AAIFR, after considering the sanctioned scheme in relation to the petitioner-company as well as contention of the petitioner and the contesting respondent have arrived at a decision that the company is liable to pay foreign currency lenders in Euro and the exchange rate is not fixed. The learned AAIFR has also held that the enhanced liability of the company is in accordance with the sanctioned scheme itself. Therefore, the contention of the petitioner that the sanctioned scheme does not contain any

provision for payment of Foreign Exchange Fluctuation shortfall by it to the FCLs cannot be countenanced

16. This Court, in exercise of its certiorari jurisdiction, does not sit in appeal over the decisions of the statutory authorities such as BIFR and AAIFR. As has been repeatedly observed by the Hon"ble Supreme Court in such matters it must be kept in mind that BIFR and AAIFR has been statutorily conferred with special powers to adjudicate upon the question of revival of a company and it has the necessary expertise at its command to do so. If the aforesaid statutory authorities have taken a decision in accordance with law after due application of mind and after considering the view of the parties likely to be affected in the manner which may not be said to be irrational or perverse the court should not interfere in their decision.

17. In exercise of the powers of judicial review under Article 226 of the Constitution of India, this court is required to see whether the decision making process suffers from any such grounds of illegality, irrationality or is otherwise perverse.

18. The Hon"ble Supreme court has time and again held that in exercise of the powers of judicial review, the writ court is concerned with the decision making process and not with the correctness of the decision. It would only be profitable to quote the expression used by the Hon"ble Supreme Court in respect of the exercise of certiorari jurisdiction as held in the case of Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others, which is as follows:

The common law writ, now called the order of certiorari, which is also been adopted by our constitution is not meant to take the place of an appeal where the statutes does not confer the right of appeal. Its purpose is only to determine on the examination of the record, whether the inferior Tribunal has exceeded its jurisdiction or not proceeded in accordance with the essential requirements of the law which was meant to administer of the mere formal or technical errors, even though of law, will not be sufficient to attract this extraordinary jurisdiction. Where the errors cannot be said to be errors of law apparent on the face of the record, but they are merely errors in appreciation of documentary evidence or affidavits, errors in drawing inferences or omission to draw inferences or any other words errors which the court stating as a court of appeal only, could have examined and, if necessary, corrected, and the appellate authority under the statute in question is unlimited jurisdiction to examine and appreciate the evidence in the exercise of its appellate or revisional jurisdiction and it has not been sanctioned that in exercising its power the appellate authority disregarded any mandatory provisions of the law but what can be said it is must was that it had disregarded certain executive instructions not having the force of law, there is no case for exercising of the jurisdiction under Article 226.

19. The learned BIFR and AAIFR have come to a consistent finding of fact on the

relevant provisions of the sanctioned scheme relating to the liability of the company to pay the FCLs in Euro and exchange rate being not fixed and there appears to be no error apparent on the fact of the record.

20. Having considered the contention advanced on behalf of the parties and also after going through the facts of the case, I do not find any reason to interfere with the impugned order dated 23.12.2011 passed by learned AAIFR as no case of illegality or perversity has been made out on the part of the petitioner.

21. Accordingly, the writ petition stands dismissed.