(2021) 04 OHC CK 0008

In the Orissa High Court

Case No : W.P.(C) No.3440 Of 2009

Central Electricity Supply Utility Of Oidhsa, Now Tata Power Central Distribution Ltd — APPELLANT

Vs

Paradeep Phosphates Ltd. & Another — RESPONDENT

Date of Decision : 06-04-2021

Acts Referred:
Constitution Of India, 1950 — Article 226
Electricity Act, 2003 — Section 22, 26
Sick Industrial Companies Act, 1985 — Section 3, 16, 18, 19(1), 25

Citation : (2021) 04 OHC CK 0008

Hon'ble Judges : D. Dash, J

Bench : Single Bench

Advocate : N.C.Panigrahi, S.R. Panigrahi, G.S.Dash. N.K.Tripathy, N.C.Nayak, Asok Mohanty, D.C.Das, P.K.Das, A. Das and S.Satyakam

Final Decision : Dismissed

Judgement

D.Dash, J

1. The Petitioner-Tata Power Central Odisha Distribution Limited Company (TPCODL) has prayed for issuance of a writ in the nature of Mandamus/Certiorari or any other appropriate writ or order by quashing the letter dated 05.01.2009 issued by the Opposite Party No.1-Paradeep Phosphates Limited (PPL) a wholly public sector undertaking to the extent that it affects the Petitioner.

It is pertinent to state here that the Central Electricity Supply Utility Odisha (CESU) created in pursuance to a Scheme framed by the Odisha Electricity Regulatory Commission (OERC) in accordance with Section 26 of Section 22 of the Electricity Act engaged in the business of retail supply of electricity in the Central Zone of Odisha and was the original writ-Petitioner.

In view of the order of vesting dated 26th may, 2020 passed by the Odisha Electricity Regulatory Commission (OERC), the TPCODL (present Petitioner) has taken over the powers, assets, managements and liabilities subject to the limitations from the CESU for the purpose of distribution of electricity in the area in the State of Odisha in which CESU was carrying out all said activities.

By order dated 4.12.2020 passed by this Court in I.A. No.13986 of 2020, the TPCODL has come to stand as the Petitioner and has been pursuing the same.

2. Facts as are necessary for the purpose are as under:-

(a) The Opposite Party No.1 (PPL), a wholly owned Public Sector Undertaking of the Government of India, being a Sick Industrial Undertaking made a reference to the Board for Industrial and Financial Reconstruction (in short, 'the BIFR') as established under section-4 of the said Act for determination of the measures which shall be adopted with respect to the Company. The BIFR then undertook necessary enquiry under section 16 of the SICA. Having conducted the enquiry as contemplated under the said provision arrived at a satisfaction that the Company has become a Sick Industrial Company in terms of clause (o) of the sub-section 1 of section 3 of the Sick Industrial Companies (Special Provision) Act, 1985 (for short, hereinafter, referred to as 'the SICA') and then considering all the relevant facts and circumstances of the case and hearing all concerned having come to conclude that the revival of the Company (PPL) with the potential for generation of profit and providing employment of 923 persons should not be hampered, prepared and sanctioned the Scheme as under section-18 of the SICA.

Sub-item-1 of item no.20 of the said sanctioned Scheme under the heading of "Reliefs and Concessions from Various Other Agencies and Concerns" is the subject matter of the present proceeding. The relevant portions are reproduced hereunder:-

"20. The Reliefs and Concessions and Various Agencies and Concerns.

xx xx xx

(i) From the State Government of Orissa Sales Tax

(a) xx xx

(b) xx xx

Electricity

(c) To exempt the Company from the levy of 20 paise per unit on self-generation of electricity;

(d) To exempt the Company from the charge of "Minimum Demand Charges" in case of under utilization of contract - load for a period of seven years from the cut-off date.

(e) xx xx xx

(f) xx xx xx

(g) xx xx xx"

The Petitioner for filing this writ application have first of all assigned the reasons for not resorting to the alternative remedy by carrying an Appeal against the order passed and the Scheme sanctioned by the BIFR so far as it affects it as provided under section 25 of the SICA.

The first grounds taken in support of the same is that the order of the BIFR followed by the Scheme as sanctioned, particularly as to the reliefs and concessions with which the Petitioner is concerned which have been impugned in this writ application is without jurisdiction and has been passed in violation of the principles of natural justice and otherwise void and nonest in the eye of law. Next, it is stated that the BIFR lacks jurisdiction to sanction the Scheme in passing the directions providing relief or concessions against the Petitioner so as to be binding on them. With the above grounds of challenge to the order passed and the Scheme sanctioned, according to the Petitioner, the writ jurisdiction of this Court is invokable.

Pursuant to the order and the Scheme that has been passed / sanctioned by the BIFR, the Opposite Party No.1 (PPL) requested the Petitioner to give the said reliefs as provided in the Scheme finally sanctioned by the BIFR in that proceeding before it. In terms of the Scheme, the Opposite Party No.1(PPL) approached the Petitioner seeking compliance of the followings:-

"(i) Refund of Rs.3,62,000/- for the period 1.4.2007 to 30.11.2007 towards the shortfall of minimum demand charges as per the following breakups:-

Actual demand for September, 2008-9390 kva

Payment made for September, 2008-11200 kva

Request for refund of differential - 1810 kva X @ Rs.200 per kva coming to Rs.3,62,000/-.

(ii) Issue exemption order in favour of the Company from the charge of minimum demand charges with effect from 1.12.2008 to 31.03.2004 in case of under utilization of contract load."

(c) It is the case of the Petitioner that the Opposite Party No.1 (PPL) had executed an agreement on 13.05.2007 with GRIDCO for availing power supply with contract demand of 14 MVA at 132 KV. It is stated that in pursuance of the distribution license issued by the Odisha Electricity Regulatory Commission (OERC) in favour of the then Central Electricity Supply Corporation (CESCO) was the consumer under CESCO which thereafter was substituted by CESU, the Petitioner. According to the agreement, there was no outstanding against the Opposite Party No.1(PPL)-consumer up to January, 2009. Therefore, receipt of letter sent by the Opposite Party No.1 caused surprise to the Petitioner as for the first time therefrom, it was known that such an order has been passed by the BIFR and pursuant to the same, the Scheme has been sanctioned which contained financial relief and concession from the side of CESU i.e, the Petitioner. The Petitioner claims that said order has been passed by the BIFR and the Scheme has been sanctioned without any notice to the Petitioner so as to have their say in said matters which was mandatory.

(c) In the second limb of challenge, the Petitioner claims that the Petitioner was not a State Level Financial Institution in consonance with the provisions of sub-section-(1) of section 19 of SICA, which refers to Central Government, a State Government, only Scheduled Bank or other Bank, a public Financial Institution or State Level Institution or any Institution or other Authority (any Government, Bank, Institution or other Authority) can be required by a Scheme to provide for such financial assistance.

It is, therefore, stated that the BIFR had no jurisdiction in sanctioning the Scheme of rehabilitation of concerned Sick Industry by providing financial relief or concession in the Scheme by the Petitioner, thereby placing financial burden upon the Petitioner either regarding the old, current or future dues/demand towards supply of electricity arising from the agreement in that regard.

3. The Opposite Party No.1 (PPL) in the Counter Affidavit have raised an objection as to the maintainability of the writ application on the face of the statutory provision as to Appeal as provided under section 25 of SICA as against an order of the BIPR by the person aggrieved. In reply to the non-service of notice upon the Petitioner in relation to the proceeding pending before the BIFR, relying on the letter dated 10.09.2008 of the Petitioner to the BIFR as at Annexure-4 of the writ application, it is stated therein that the Petitioner have admitted about the receipt of the notice. Having received the notice of the proceeding, a request had been made thereunder (Annexure-4) in response to that notice that it ought to be addressed to the Chief Executive Officer, of the Petitioner and not the Chairman.

According to the Opposite Party No.1 (PPL), the Petitioner thus had been served with the notice and for proper response; they had requested to address it to one of its Officers. Referring to paragraph-2 of the said letter as at Annexure-4, it has been placed that the Petitioner knew about the existence of the Scheme on 10.09.2008 and the petition averment in asserting that it was learnt on 5.1.2009 only when it was so communicated by the Opposite Party No.1(PPL) is false and untrue.

In support of their case as to the knowledge of the Petitioner about the proceeding, the Opposite Party No.1 has also relied upon the notice published in English daily, "The Indian Express" and local Odia daily "Dharitri" on 27.03.2008 under Annexures-D and E respectively. It is further stated that the case being heard by BIFR on 15.05.2008, the proceeding was circulated to all the parties including the Petitioner vide letter dated 23.05.2008. In the said letter, the next date of hearing was intimated to 05.06.2008. The BIFR's forwarding letter dated 23.5.2008 along with the order dated 15.5.2008 have been filed under Annexure-

F. It is further stated that on 05.06.2008, after hearing, the matter was again fixed to 05.08.2008. The proceeding of the BIFR again was sent to all the parties including the Petitioner on 13.06.2008 under Annexure-G. On 10.07.2007, the BIFR sent notice to all the concerned including the Petitioner intimating the next date of hearing to be 05.08.2008 for the Petitioner to do the needful. On 05.08.2008, the BIFR heard the parties and next posted the matter to 2.9.2008. Said proceeding was also communicated to the parties including the Petitioner on 13.08.2008. In support of the same, reliance is placed upon the documents under Annexure-H and I. On 12.08.2008, the BIFR issued notice to all concerned communicating that the matter will be next heard on 2.9.2008 and accordingly on 2.9.2008, the case being heard, taking into account the suggestions etc. and considering the matter from all relevant angle; the prior circulated Scheme with some amendments was sanctioned for implementation by all concerned giving direction to the Petitioner to the extent as found mention therein. Reliance for the purpose is placed upon the documents as at Annexure-J, K/1 and K/2.

It is stated that the Petitioner had received the notice of the proceeding before the BIFR and it is not correct to state that behind the back of the Petitioner all such developments in the proceeding took place and ultimately the rehabilitation Scheme was sanctioned.

According to them, the Petitioner having chosen not to participate therein, therefore, at such belated stage cannot complain against the sanction plan.

As regard the jurisdiction of the BIFR in sanctioning the Scheme and passing directions against the Petitioner; it is stated that such a claim is fallacious. Referring to the provisions of section 19(1) of SICA, it is stated that the BIFR has all the jurisdiction to sanction the Scheme of rehabilitation and the directions/ reliefs/concessions/as contained therein have the binding effect not only on the State Level Institutions but also any Authority and the Petitioner falls with the scope and ambit.

4. Mr.S.R. Panigrahi, learned Counsel for the Petitioner submitted that the final order sanctioning the Scheme for rehabilitation of a Sick Industry by the BIFR even though is appellable as per section 25 of the SICA, yet here said objection as to non-availing of alternate remedy does not merit acceptance since the challenge to the order followed by the Scheme is on the ground of non-service of notice of the proceeding upon the Petitioner and as to the lack of jurisdiction of the BIFR in directing the Petitioner to provide the reliefs/concessions having financial implications concession towards the services provided in the terms of the agreement between the Parties. He submitted that the order of the BIFR is thus nonest, void and without jurisdiction, firstly because this Petitioner was never noticed in that proceeding before the BIFR and everything right from the beginning till the sanction of the Scheme have been made keeping the Petitioner at dark and secondly, that the BIFR had no jurisdiction to give any direction/ observations in the said Sanctioned plan in so far as the reliefs/concessions to be so provided by the Petitioner arising from the contractual relationship between

the Petitioner and the Opposite Party No.1 (PPL) which thus cannot bind the Petitioner. He, therefore, urged that the writ application with the prayer as advanced be allowed.

5. Mr.Asok Mohanty, learned Senior Advocate being assisted by Mr. S. Satyakam, learned Counsel for the Opposite Party No.1 submitted that on the face of the overwhelming documentary evidence on record showing service of notice of the proceeding before the BIFR upon the Petitioner from time to time; the final order in sanctioning the Scheme passed by the BIFR ought to have been questioned by carrying an Appeal before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) as provided in section 25 of the SICA.

It was submitted that the Petitioner, without availing the right of statutory Appeal, could not have approached this Court seeking invocation of the extra ordinary jurisdiction under Article 226 of the Constitution. He, therefore, submitted that the writ application is not entertainable.

Coming to the question of jurisdiction of the BIFR in passing the direction against the Petitioner, placing the provision of section 19 of SICA, it was submitted that said ground is untenable. He, thus, submitted that the writ application is liable to be dismissed.

6. The Petitioner and the Opposite Party No.1 (PPL) have also filed their respective notes of submissions which have been taken on record.

I have perused the same.

7. The Petitioner here in this writ application has prayed quashing the letter dated 05.01.2009 (Annexure-2) issued by the Opposite Party No.1 (PPL) to the Petitioner in terms of the order dated 02.09.2008 (Annexure-2) passed by the BIFR and the sanctioned Scheme to the extent it affects the Petitioner.

The letter dated 05.01.2009 issued by the Opposite Party No.1 (PPL) is based upon the order dated 02.09.2008 passed by the BIFR. It is not in dispute that the order like the one under Annexure-3 passed by the BIFR is appealable under section 25 of SICA and any party aggrieved by the said order within 45 days from the date of issuance of an order may prefer Appeal before the AAIFR. The AAIFR in deciding the Appeal has the power to confirm/modify or set aside the order appealed against or remand the matter to the BIFR for fresh consideration. The AAIFR has all the power to rule upon the jurisdictional aspects as are raised by the Petitioner. With the above statutory provision providing of right to Appeal to any aggrieved person which the Petitioner claims to be so, in my considered view this writ application is not entertainable. In that view of the matter, there arises no further need to address the rival contentions on merit.

However, the fact remains that this writ application being filed on 02.03.2009 on the grounds of attack to the order and sanctioned Scheme being two fold; one as to non-service of notice of the proceeding which is the mandatory requirement under the SICA and the second one is the lack of jurisdiction of BIFR to pass the directions as to financial concessions against the Petitioner has been remaining on Board since then, i.e, more than a decade. In such state of things keeping in view the grounds taken in the writ application for quashment of the order passed by the BIFR touching upon the jurisdiction of the BIFR in passing the order and sanctioning the Scheme, financially burdening the Petitioner instead of putting a halt to the proceeding in view of what has been said in proceeding para; this Court deems it apposite to address the challenges to the subject matter also on their merit.

9. Coming to the first ground of attack as to service of notice, the correspondence made by the Petitioner in response to the letter of the BIFR under Annexure-4 reveals that notice had been received by the Petitioner and it had been addressed to their Chairman. The response is to the effect that the same be addressed to Chief Executive Officer (CEO). The notice being received in the Office of the Chairman it has not been made over to the CEO for needful action as is the normal course to be followed and that having not been done, by simply posting a response indicating the proper person to be addressed, does not give a premium to the Petitioner at a belated stage to say that there was no service of notice.

Furthermore, as is seen from the documents as at Annexure-C to K series that the Petitioner was being apprised of the developments of the proceeding before the BIFR from time to time. All these documents on record are not disputed from the side of the Petitioner and in fact these are all the records of the proceeding of the Statutory Authority. With all these above developments right from the commencement of the said proceeding till conclusion, the Petitioner having chosen not to participate in the proceeding before the BIFR, the objection as to the non-service of the notice of the proceeding in contending that the orders have been passed and the Scheme has been sanctioned behind their back, is to be whittled down.

10. In order to address the next ground of attack, it would be profitable to first place the provision of 19 of SICA which runs as under:-

"19. Rehabilitation by giving financial assistance:-

(1) Where the Scheme relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial company, the Scheme may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution or any institution or other authority (any Government, bank, institution or other authority required by a Scheme to provide for such financial assistance being hereafter in this section referred to as the person required by the Scheme to provide financial assistance) to the sick industrial company.

(emphasis supplied)

(2) Every Scheme referred to in sub-section (1) shall be circulated to every person required by the Scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation [or within such further period, not exceeding sixty days, as may be allowed by the Board, and if no consent is received within such period or further period, it shall be deemed that consent has been given].

(3) Where in respect of any Scheme the consent referred to in sub-section (2) is given by every person required by the Scheme to provide financial assistance, the Board may, as soon as may be, sanction the Scheme and on and from the date of such sanction the Scheme shall be binding on all concerned.

(3A) On the sanction of the Scheme under sub-section (3), the financial institutions and the banks required to provide financial assistance shall designate by mutual agreement a financial institution and a bank from amongst themselves which shall be responsible to disburse financial assistance by way of loans or advances or guarantees or reliefs or concessions or sacrifices agreed to be provided or granted under the Scheme on behalf of all financial institutions and banks concerned.

(3B) The financial institution and the bank designated under sub-section (3A) shall forthwith proceed to release the financial assistance to the sick industrial company in fulfilment of the requirement in this regard.]

(4) Where in respect of any Scheme consent under sub-section (2) is not given by any person required by the Scheme to provide financial assistance, the Board may adopt such other measures, including the winding up of the sick industrial company, as it may deem fit."

A close and careful reading of the above, leads to say that a Scheme as sanctioned by the BIFR may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or scarifies from the Central Government, a State Government, any Scheduled Bank or other Bank, a Public Financial Institutions or State Level Institution or any Institution or other Authority.

This 'other Authority' preceeding the bracket portion as finds mentioned in sub-section 1 of section 19 of SICA has been further clarified under the bracketed portion that it may include any Government Bank, Institution or other Authority required by a Scheme to provide for such financial assistance being then referred to as the person required by the Scheme to provide financial assistance. (emphasis supplied) The bracketed part in sub-section-1 of section-19 of the Act, after the word 'other Authority' provides greater emphasis and rather stresses upon such as not to leave any room of doubt to sit over to interpret further. The jurisdiction of the BIFR thus under the above provision is broad with the clear legislative intent as to provide all such reliefs etc. to the Sick Industry under the Scheme prevailing over all such Government, Institutions, Authorities etc. which have their contribution in some way or other as to the existence, running of the

Sick Industry and rehabilitation as otherwise the whole exercise by the BIFR at the expense of time and energy of all concerned in the direction of serving the objective of the legislation would be futile rendering no result in reality.

This has been so made with the purpose of achieving the goal set forth in bringing the legislation in the public interest to succeed in reviving the Sick Industry so as to prevent loss of production, loss of employment, loss of revenue, lacking of invisible funds affecting the society at large. Any other interpretation including the one as submitted by the learned counsel for the Petitioner as to curtailment of the jurisdiction of BIFR to give direction to the Authority like Petitioner providing one of the important services to the Sick Industry to make concession/relief/sacrifices etc. thus in my considered view would be wholly non-purposive and the effort of the BIFR in that exercise may not be wholesome with the aim of revival of the Sick Industry. Thus I find that this ground of attack has no merit and falls flat.

11. In the wake of aforesaid, this Writ Application is hereby dismissed.

No order as to cost.

