(2018) 11 RAJ CK 0059

In the Rajasthan High Court

Case No : Civil Writ Petition No. 11845 Of 2013

Derby Textiles Ltd APPELLANT

Vs

Appellate Authority for Industrial RESPONDENT

Date of Decision : 28-11-2018

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 15(1)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 13, 13(2), 13(4), 15(1)
Sick Industrial Companies (Special Provisions) Repeal Act, 2003 — Section 4(b), 5, 252
Companies Act 2013 — Section 254
Insolvency and Bankruptcy Code, 2016 &mdash Section 29A

Citation : (2018) 11 RAJ CK 0059

Hon'ble Judges : Arun Bhansali, J

Bench : Single Bench

Advocate : Vinay Kothari, Manish Shishodia, Rajendra Salecha, Jagdish Vyas, R.S. Bhati, Manoj Bhandari, Vikas Balia,N.S. Rajpurohit

Final Decision : Partly Allowed

Judgement

This writ petition has been filed by the petitioner-Company aggrieved against the orders dated 13.06.2011 (Annex.-2) passed by the Board for

Industrial and Financial Reconstruction (â??BIFRâ??) and 27.02.2013 (Annex.-3) passed by the Appellate Authority for Industrial and Financial

Reconstruction (â??AAIFRâ??) and a prayer has been made that the reference filed by the petitioner-Company be restored with BIFR for hearing.

The petitioner-Company filed a reference under Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (â??SICAâ??) before the

BIFR on the basis of its audited balance-sheet as on 31.03.2010, which came to be registered as case No.20/2011. The BIFR by its impugned Order

dated 13.06.2011 (Annex.-2) observed and dismissed the reference as under:-

â??3.1 In todayâ??s hearing (13-06- 2011, the representative of Kotak Mahindra Bank Ltd (KMBL) stated that IDBI has assigned the debts of the

company to KMBL. KMBL with consent of more than 98% of secured creditors had taken action under section 13 (4) of SARFAESI act on

29.12.2009 and had taken symbolic possession of the assets of the company. Pursuant to the SARFAESI action, the Bank filed an application for

abatement of Reference No.46/2009 (earlier reference of the company) and BIFR vide order dated 19.01.2010, abated the said reference. The

representative of KMBL further submitted that in view of the above facts and provisions containing in the third proviso to sub section (1) of section 15

of SICA 1985, after exercise of action under section 13 (4) of SARFAESI, no reference/appeal under the Sick Industrial companies (special

Provision) Act, 1985 is maintainable. He requested the Bench to dismiss the reference of the company.

3.2 The Advocate on behalf of the company stated that the company preferred an appeal No. 79/2010 u/s 25 of SICA against BIFRâ??s abatement

order dated 19.01.2010, which is pending adjudication before the Honâ??ble AAIFR and is posted for 22.07.2011 for final arguments. The Appeal

filed before the Honâ??ble DRAT still continue to remain pending and the final outcome is awaited, as the appeal is listed on 30.06.2011 for final

arguments. He requested the Bench to adjourn the case sine-die in view of the above.

3.3 The Bench observed that as per provisions containing in the third proviso to sub section (1) of section 15 of the SICA 1985, after exercise of

action under section 13 (4) of SARFAESI, no reference/appeal under SICA is maintainable.

3.4 Having considered the submissions made in the hearing and material on record, the Bench came to the conclusion that the Companyâ??s

Reference No.20/2011 is dismissed as non-maintainable. The secured creditors and Govt. Department are at liberty to file/pursue suit, if already filed,

before the competent court of law to recover the dues from the company.â??

Feeling aggrieved, the petitioner-Company filed appeal before the AAIFR. The AAIFR also by its impugned order dated 27.02.2013 (Annex.-3),

dismissed the appeal.

The claim of the petitioner-Company in the present writ petition is that both the

BIFR and AAIFR, dismissed the reference/appeal on account of

initiation of proceedings by KMBL under the SARFAESI Act and issuing notice under Section 13(4) on 29.12.2009, however, the Debt Recovery

Tribunal (â??DRTâ??) had quashed and set aside the action under the SARFAESI Act by its order dated 28.12.2010, however, as the Debt

Recovery Appellate Tribunal (â??DRATâ??) by its order dated 14.01.2011 had stayed the order of DRT dated 28.12.2010, wrongly came to the

conclusion that on account of passing of such order, the notice issued under the SARFAESI Act would revive leading to rejection of the

reference/appeal.

Reliance has been placed on judgment of Honâ??ble Supreme Court in Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association :

AIR 1992 SC 1439.

During the pendency of the writ petition, an affidavit dated 05.10.2014 was filed by KMBL for placing on record subsequent facts, wherein it was

inter alia indicated that during the pendency of the writ petition, KMBL have issued a fresh notice under Section 13(2) of the SARFAESI Act on

30.05.2014, objections against which have been filed by the petitioner-Company on 21.07.2014 and the objections have been responded to by KMBL

on 06.08.2014; whereafter on 16.09.2014, the authorized officer in accordance with the provisions of Section 13(4) of the SARFAESI Act has taken a

symbolic possession of the mortgaged assets, which action has been challenged by the petitioner-Company before the DRT and the same is pending

adjudication.

Whereafter an application (IA No.1136/2017) has been filed by the respondent-KMBL. It was pointed out that the Sick Industrial Companies (Special

Provisions) Repeal Act, 2003 (â??SICA Repeal Act, 2003â??) has come into force w.e.f. 01.12.2016 and by another notification provisions of

Section 4(b) of the SICA Repeal Act, 2003 has been enforced providing for consequences of dissolution of the BIFR and AAIFR. It has been claimed

that on account of coming into force of the SICA Repeal Act, 2003, the writ petition has been rendered infructuous.

Learned counsel for the petitioner-Company with reference to the orders impugned passed by BIFR and AAIFR (Annex.-2 & Annex.-3 respectively)

made submissions that both the authorities fell in error in dismissing the reference/appeal filed by the petitioner-Company. It was submitted that the

entire basis for passing of the orders impugned has been initiation of proceedings by the respondents under Section 13 of the SARFAESI Act and that

the reference was not maintainable under third Proviso to Sub-Section (1) of Section 15 of SICA.

It is submitted that the authorities failed to take into consideration that the notice dated 29.12.2009 stood quash by order dated 28.12.2010 passed by

DRT and when the said fact was brought to the notice of AAIFR, merely on account of the fact that the order passed by DRT was stayed by DRAT,

it was assumed that the proceedings were pending, which consideration is ex-facie contrary to the settled position of law as laid down by Honâ??ble

Supreme Court in the case of Shree Chamundi Mopeds (supra).

Submissions were made that the claim made by the respondents pertaining to the proceedings having rendered infructuous on account of SICA Repeal

Act, 2003 coming into force is also baseless in view of provisions of Section 5 of the SICA Repeal Act, 2003, which save such proceedings.

Reliance has been placed on judgment of Delhi High Court in National Textile Corporation Ltd. v. D.V. Exports & Ors.: WP(C) No.2651/2014,

decided on 03.04.2017.

Learned counsel appearing for the respondents opposed the submissions made by the learned counsel for the petitioner-Company. It was, inter alia

submitted that the petitioner-Company was seeking to flog a dead horse, inasmuch as, even after dismissal of the present proceedings based on the

audited balance-sheet of the petitioner-Company as on 31.03.2010, another reference based on the audited balance-sheet of the petitioner-Company

as on 31.03.2011 were initiated by the petitioner-Company, which reference has also been rejected on 14.08.2013 and appeal arising therefrom has

been rejected by the AAIFR on 13.12.2013.

Further submissions have been made that the provisions of Section 5 of SICA Repeal Act, 2003 would have no application to the facts of the present

case, inasmuch as no order of the nature has been passed, which could be saved under the provisions of the SICA Repeal Act, 2003.

Further submissions have been made that even under the provisions of Section 254 of the Companies Act, 2013 which provided for application for

revival and rehabilitation to the Company Law Tribunal, a specific bar was created therein in case measures to recover the secured debts under Sub-

Section (4) of Section 13 of the SARFAESI Act have been taken, which provisions have now been repealed by the Insolvency and Bankruptcy Code,

2016 (â??IBC, 2016â??) and, therefore, the petitioner is not entitled to any relief.

Submissions were also made that the appeal filed by KMBL against the order passed by the DRT, which forms the basis for the petitioner-Company

claiming maintainability of the proceedings under the SICA, has been decided on 18.11.2014, the appeal has been disposed of observing that as fresh

action has been initiated by the KMBL, the symbolic possession of the property be allowed to remain with the KMBL. The said order has not been

challenged by the petitioner-Company and, therefore, the proceedings initiated under SICA have been rendered infructuous and, therefore, same

deserves to be dismissed as such.

I have considered the submissions made by learned counsel for the parties and have perused the material available on record.

A bare perusal of the order dated 13.06.2011 (Annex.-2) passed by the BIFR would reveal that the reference has been rejected based on provisions

contained in third Proviso to Sub-Section (1) of Section 15 of SICA on account of initiation of action under Section 13 of the SARFAESI Act. It is not

in dispute that before passing of the order dated 13.06.2011, by order dated 28.12.2010, the DRT had quashed the notice under Section 13(4) issued

by the KMBL.

Insofar as the order of BIFR is concerned, there is no reference and/or any consideration regarding the interim order passed by the DRAT against the

order dated 28.12.2010 though the pendency of the appeal before the DRAT has been noticed. In the appeal filed by the petitioner-Company against

the order dated 13.06.2011, the AAIFR specifically noticed the contention of the KMBL that the order of DRT had been stayed by DRAT, however,

observing that there was no stay against the action taken by the KMBL under Section 13(4) of the SARFAESI Act, held that the reference was not

maintainable.

The interim order dated 14.01.2011 passed by the DRAT reads as under:-

â??Counsel for the appellant heard. Appeal stands admitted. Notice be issued to the respondent for 14.01.2011, till then the order passed by the Ld.

Trial Court shall stand stayed.â??

Honâ??ble Supreme Court in the case of Shree Chamundi Mopeds (supra) while considering the effect of an interim order, laid down as under:-

â??While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing

of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the

order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been

stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from

existence. This means that if an order passed by the Appellate Authority is quashed and the matter is remanded, the result would be that the appeal

which had been disposed of by the said order of the Appellate Authority would be restored and it can be said to be pending before the Appellate

Authority after the quashing of the order of the Appellate Authority. The same cannot be said with regard to an order staying the operation of the

order of the Appellate Authority because in spite of the said order, the order of the Appellate Authority continues to exist in law and so long as it

exists, it cannot be said that the appeal which has been disposed of by the said order has not been disposed of an is still pending.â??

Once the proceedings under Section 13 of the SARFAESI Act were quashed by the DRT by its order dated 28.12.2010, merely because the said

order was stayed by the DRAT on 14.01.2011, in view of the law laid down by Honâ??ble Supreme Court in the case of Shree Chamundi Mopeds

(supra), it is apparent that it cannot be said that the proceedings under Section 13(4) of the SARFAESI Act, stood revived by order dated 14.01.2011

passed by the DRAT unless some further directions were given.

It would also be noticed that ultimately the appeal filed by the respondent-KMBL against the order dated 28.12.2010, was disposed of by merely

observing that the KMBL has initiated fresh action under the SARFAESI Act meaning thereby that the dismissal of the proceedings initiated by the

respondent-KMBL by issuing possession notice under Section 13(4) of the SARFAESI Act dated 29.12.2009 remains. Once the determination as

above has been made, the orders passed by the BIFR dated 13.06.2011

(Annex.-2) and by the AAIFR dated 27.02.2013 (Annex.-3), cannot be

sustained.

The same brings up the issue of consequence of such determination by this Court on account of the provisions of SICA Repeal Act, 2003 and IBC,

2016.

The provisions of Section 4(b) of the SICA Repeal Act, 2003 with its proviso as substituted by IBC, 2016, vide its Section 252 and Schedule VIII,

reads as under:-

â??(b) on such date as may be notified by the Central Government in this behalf, any appeal preferred to the Appellate Authority or any reference

made or inquiry pending to or before the Board or any proceeding of whatever nature pending before the Appellate Authority or the Board under the

Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) shall stand abated: Provided that a company in respect of which such appeal or

reference or inquiry stands abated under this clause may make reference to the National Company Law Tribunal under the Insolvency and

Bankruptcy Code, 2016 within one hundred and eighty days from the commencement of the Insolvency and Bankruptcy Code, 2016 in accordance

with the provisions of the Insolvency and Bankruptcy Code, 2016.â??

A perusal of the above provision which has been enforced w.e.f. 01.12.2016 reveals that from the notified date, any reference made or inquiry made

or inquiry pending before the Board, shall stand abated, however, the proviso to the above Sub-Section (b) of Section 4, in a case where a reference

stands abated, provides an opportunity to a Company to make reference to the National Company Law Tribunal (â??NCLTâ??) under the IBC, 2016

within 180 days from the commencement of the IBC, 2016 in accordance with the provisions of the IBC, 2016.

The submissions made by the learned counsel for the respondents regarding the provisions of Section 254 of the Companies Act, 2013, contained a

similar bar as contained under the provisions of Section 15 of the SICA pertaining to non-maintainability of reference on account of pendency of

proceedings under the SARFAESI Act are of no consequence, inasmuch as, the said provisions were never enforced and came to be repealed by

IBC, 2016.

Learned counsel for the respondent-KMBL, despite repeated queries made by the Court though made reference to Section 29A of IBC, 2016, failed

to point out any provision in the IBC, 2016 similar to third Proviso to Section 15(1) of the SICA and/or unenforced provisions of proviso to Section 254

of the Companies Act, 2013 barring the reference before the NCLT under the IBC, 2016.

In view thereof, as orders dated 13.06.2011 (Annex.- 2) and dated 27.02.2013 (Annex.-3) passed by the BIFR and AAIFR, cannot be sustained and

proceedings initiated/pending under the SARFAESI Act being not a bar for reference under the provisions of IBC, 2016, the petitioner-Company is

apparently entitled to the relief, which the petitioner-Company would have been entitled under the proviso to Sub-Section (b) of Section 4 of the SICA

Repeal Act, 2003.

The effect of the order passed by the DRAT dated 18.11.2014 permitting the continuation of symbolic possession of the property with KMBL and the

pending appeal of the petitioner-Company against the initiation of subsequent proceedings under the SARFAESI Act by KMBL would not be effected

by passing of the present order and their effect, if any, shall be examined by the NCLT, in case proceedings are initiated by the petitioner-Company.

In view of the above discussion, the writ petition filed by the petitioner-Company is partly allowed. The order dated 13.06.2011 (Annex.-2) passed by

the BIFR and order dated 27.02.2013 (Annex.-3) passed by the AAIFR are quashed and set aside. The petitioner-Company would be entitled to the

benefit of proviso to Sub-Section (b) of Section 4 of the SICA Repeal Act, 2003 in accordance with law within 180 days from the date of this order,

subject to the observations made hereinbefore.

No order as to costs.