

(1983) 03 CAL CK 0034
In the Calcutta High Court
Case No : Civil Rule No. 95 (W) of 1979

Duncans Agro Industries Ltd.

APPELLANT

Vs

Secretary, Department of Industrial Development and Others

RESPONDENT

Date of Decision : 23-03-1983

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 35E, 72A, 72A(1), 80I, 80J

Citation : (1983) 35 CTR 225 : 87 CWN 756 : (1983) 144 ITR 94

Hon'ble Judges : Chittatosh Mookerjee, J

Bench : Single Bench

Advocate : D. Pal, R.N. Bajoria, S.K. Kapoor, S.N. Dutta, Soumitra Pal and C.M. Gharawat, for the Appellant; S.N. Banerjee and M.Q. Kabir for respondent Nos. 6 and 7 and A.K. Sengupta and R.N. Mitra, for the Respondent

Judgement

Chittatosh Mookerjee, J.—On 18th January, 1978, a learned single judge of this court taking company matters had sanctioned with effect from 1st March, 1977, a scheme for amalgamation of National Tobacco Co. of India Ltd. with the petitioner, Duncan Agro Industries Ltd. The Govt. of India, who had opposed the said amalgamation scheme of the two companies, had preferred an appeal against the aforesaid order. But the appellate court had dismissed the said appeal.

2. On 13th February, 1978, the petitioner, Duncans Agro Industries Ltd., made an application to the Central Govt. u/s 72A of the I.T. Act, 1961, for a declaration under the said section so that the petitioner-company might carry forward and set off the accumulated loss and unabsorbed depreciation of the amalgamating company, i.e., the National Tobacco Company of India Ltd. On 16th November, 1978, a Deputy Secretary of the Govt. of India, Ministry of Industries, had sent a memo to the petitioner stating that the specified authority was unable to recommend to the Central Govt. the aforesaid scheme of amalgamation of National Tobacco Co. of India Ltd, with the petitioner-company for the purposes of Section 72A of the I.T. Act, 1961.

3. Thereupon, the petitioner-company obtained the present rule, inter alia, praying that the said decision of the specified authority dated 16th November, 1978, be quashed and the respondents be commanded not to give effect to the said decision. The petitioner also prayed for a writ of mandamus to direct the respondents to act according to law and to make necessary recommendations and grant the petitioner declaration that the accumulated loss and unabsorbed depreciation of the National Tobacco Co. of India Ltd. shall be deemed to be the loss and allowance for depreciation of the petitioner for the previous year in which the amalgamation of the petitioner was effected and for further declaring the said provisions relating to set-off and carry forward of loss and allowance for depreciation shall apply to the petitioner. The petitioner also prayed for an injunction to restrain respondent No. 8 from taking any action or making assessment or enforcing any claim for payment of Income Tax for the assessment year 1978-79 on the basis of the petitioner's return for the said year until disposal of the said writ application.

4. Section 72A of the I.T. Act, 1961, contains provisions relating to carry forward and set-off of accumulated loss and unabsorbed depreciation allowance in certain cases of amalgamation. The Central Govt. u/s 72A of the I.T. Act, 1961, on the recommendation of the specified authority, may make a declaration to the said effect when it is satisfied that the conditions set out in Sub-section (1) of the said Act are fulfilled. In other words, the amalgamated company may obtain the benefit of the said provisions relating to carry forward and set-off of accumulated loss and unabsorbed depreciation allowance of the amalgamating company when the following conditions are satisfied :

(a) the amalgamating company was not immediately before the amalgamation financially viable for the reasons set out in the said Clause (a) of Section 72A(1);

(b) the amalgamation was in the public interest; and

(c) such other conditions as the Central Govt. may specify by notification to ensure that the benefit u/s 72A is restricted to amalgamations which would facilitate rehabilitation or revival of the business of the amalgamating company. The Central Govt. has not yet issued any notification specifying the said other conditions contemplated in Clause (c) of Section 72A(1) of the I.T. Act, 1961.

5. On the 11th October, 1977, the Central Govt. had issued guidelines for approval of the amalgamations for the purposes of Section 72A of the I.T. Act. The Central Govt. in para. (3) of the said guidelines stated that keeping in view the objective underlying the tax concession u/s 72A of the Act and the requirements of the statutory provision, it had evolved some objective guidelines for the purpose of determining whether the scheme of amalgamation can be considered to be in the interest of public or not. The said guidelines were indicated in the paragraph following. It may be noted that the above guidelines have no statutory force but amount to administrative directions for giving effect to the provisions of Section 72A of the I.T. Act.

6. Mr. Bajoria, learned advocate for the petitioner, has placed before me the unreported decision of the Division Bench of the Delhi High Court in the case of Atlas Cycle Industries Ltd. Vs. Union of India and another,). The Division Bench of the Delhi High Court had allowed the said writ petition and had quashed the decision of the specified authority which had refused to recommend the case of the petitioner-company to the Central Govt. u/s 72A(1) of the I.T. Act, 1961. According to the learned judges, the reasons for rejection were not contemplated either by Section 72A or by the guidelines framed by the Central Govt. The ratio of the said Division Bench decision of the Delhi High Court is that in making or refusing recommendation the specified authority is bound to consider the matters which are relevant u/s 72A read with the guidelines framed by the Govt. of India and in case the specified authority takes into account extraneous matters, the writ court may command the specified authority to again consider the matter.

7. The Deputy Secretary in his memo dated 16th November, 1978, did not set the reasons why the specified authority had declined to recommend to the Central Govt. the aforesaid scheme of amalgamation. Accordingly, Mr. Bajoria, learned advocate for the petitioner, had initially submitted that the impugned decision of the specified authority was liable to be quashed on the ground that the said authority did not make a speaking order and there was nothing to indicate that the specified authority had at all considered the relevant matters.

8. The respondents in their affidavit-in-opposition affirmed by Sri S.C.S. Marathe, the then chairman of the specified authority, have however, set out the matters which were allegedly taken into consideration by the specified authority and also the reasons why the specified authority decided not to recommend the petitioner's application u/s 72A of the I.T. Act, 1961, to the Central Govt. At the time of hearing the respondents also produced the original proceedings of the specified authority and also filed in court relevant extracts from said proceedings. The petitioner also filed copies of some correspondence which passed between the petitioner and the Govt. of India on the above subject. The said copies of the correspondence and the extracts of the minutes of the specified authority have been made parts of the record collectively marked with the letters " X " and " Y " respectively.

9. Mr. Bajoria, learned advocate for the petitioner, has next submitted that the specified authority had refused to recommend the petitioner's application u/s 72A upon extraneous and irrelevant grounds. The learned advocate for the petitioner has further submitted that there was divergence between the averments made in the affidavit-in-opposition filed on behalf of the respondents and the recorded minutes of the specified authority produced at the time of hearing. According to Mr. Bajoria, the deponent to the affidavit-in-opposition did not correctly set out the reasons and the grounds for which the specified authority had refused to recommend.

10. The specified authority according to Clause (6) of the Expln. to Section 72A

of the I.T. Act, 1961, means such authority as the Central Govt. may, by notification in the Official Gazette, specify for the purposes of the said section. In making recommendations the specified authority discharges statutory functions. Mr. Bajoria, learned advocate for the petitioner, correctly submitted that the specified authority's recommendation u/s 72A(1) of the said Act has civil consequences because the same affects the right of a company to carry forward and set off accumulated loss, etc., of the amalgamating company. Therefore, this writ petition is maintainable.

11. First, I propose to set out some of the salient facts appearing from the materials produced before me. On 22nd April, 1978, the petitioner's application u/s 72A of the I.T. Act was placed before a meeting of the specified authority held on 22nd April, 1978. The minutes of the said meeting dated 22nd April, 1978, recorded that the details regarding retrenchment of workers of the amalgamated company had not been indicated in the application filed by the petitioner. It was not clear as to whether as a result of the proposed amalgamation the retrenched labour would be absorbed. The minutes further recorded that it was necessary to verify whether the proposed amalgamation would result in the economies of scale. The authority felt that such economies of scale could not be expected for the reasons recorded. The specified authority was also not inclined to accept the claim that fall in demand was one of the causes of the sickness of the amalgamated company. Cigarettes could not be considered as an essential mass consumption item and, hence, it was felt that the test of public interest was not met. The specified authority also decided to call for a copy of the valuation report and also to ascertain whether there was any contravention of M.R.T.P. Act. The specified authority on 22nd April, 1978, decided that the representatives of the applicant-company should be requested to be present at the next meeting of the specified authority so that they could be heard on the points in respect of Which clarification had been sought.

12. Accordingly, the Industrial Development Dept, Govt. of India, issued a letter to the petitioner-company indicating the aforesaid points on which the specified authority required clarification. The petitioner-company furnished in writing the particulars asked for, and also sought to clarify the point raised. On 24th June, 1978, the specified authority held its second meeting to consider the said written clarifications submitted by the petitioner-company. The minutes of the second meeting, dated 24th June, 1978, recorded a summary of the clarifications submitted by the petitioner-company and also of the discussions between the members of the specified authority and the representatives of the petitioner-company who had been invited to attend. On 24th June, 1978, the specified authority did reach its final decision.

13. On 4th October, 1978, the 5th meeting of the specified authority was held. At the same meeting no other member except the chairman was present. The chairman recorded that when the shareholders of the two companies have approved the amalgamation scheme no undertaking was given to them subject

to relief u/s 72A of the I.T. Act, 1961. The amalgamating company was manufacturing cigarette which was a low priority item. Both the companies were inter-connected and registered under the M.R.T.P. Act. It was felt that even though the marketing network of the amalgamated company (Duncans Agro Industries Ltd.) would be of considerable assistance for marketing the products and might provide countervailing force to the multi-nationals who had a monopoly in production and supplies of cigarettes, the proposed relief of Rs. two crores u/s 72A of the I.T. Act would not be justified in view of the factors set out above and for maintenance of employment of only 1,900 workers. It would also be of the nature of windfall to the amalgamated company. The chairman proposed that the proposal be rejected subject to the confirmation in the next meeting of the members of the specified authority when other members of the authority would also be present. On 4th November, 1978, the specified authority confirmed the decision to reject the petitioner's application.

14. Having perused the extracts from the aforesaid minutes of the specified authority, I am unable to accept Mr. Bajpria's submission that there were substantial and material divergences between the facts set out in the counter-affidavit affirmed by Mr. S.C.S. Marathe, the chairman of the specified authority, and the said recorded minutes. The specified authority had given opportunity to the petitioner-company to clarify the points indicated in the minutes of the specified authority held on 22nd April, 1978. The petitioner had made written representation and on 24th June, 1978, the petitioner's representative had attended and discussed with the members of the specified authority the points raised by the said authority. After further consideration the specified authority had refused to recommend the petitioner's application u/s 72A of the I.T. Act, 1961.

15. The deponent, S.C.S. Marathe, in paras. (8) to (12) of his counter-affidavit, had set out the various points which the specified authority had taken into consideration for deciding whether it would recommend to the Central Govt. the petitioner's application u/s 72A of the I.T. Act, 1961. The averments made in para. (16) of the said counter-affidavit of S.C.S. Marathe appeared to be a fair summary of the various factors taken into consideration by the specified authority. In order to ascertain what matters were considered by the specified authority one ought to look into not only the minutes of the specified authority dated 4th October, 1978, and 4th November, 1978, but also to the minutes of the earlier meetings of the specified authority starting from 22nd April, 1978. The minutes of these different meetings of the specified authority indicate that on 22nd April, 1978, the specified authority had sought for clarification on various points and the specified authority had, inter alia, observed that cigarettes could not be considered an essential mass consumption item and hence the specified authority had felt that the test of public interest was not met. Only because the chairman of the specified authority in his minutes recorded on 23rd October, 1978, did not again mention all the points noted in the earlier meeting of the specified authority dated 22nd April, 1978, it would not be correct to infer that

the specified authority was satisfied with the explanation and clarification furnished by the petitioner-company. I have already observed that the legality of the impugned decision of the specified authority ought to be decided by considering the minutes of the specified authority recorded on 22nd April, 1978, 24th June, 1978, 4th October, 1978, and 4th November, 1978. From the very beginning the specified authority had raised the question of re-employment of the retrenched workers of the amalgamating company. I have also referred to the authority's observations dated 22nd April, 1978, that cigarettes which were being manufactured by the amalgamating company were not an essential mass consumption item and hence the test of public interest was not met. Therefore, it cannot be held that in refusing to recommend the petitioner's case the specified authority had considered any matter about which the petitioner had no opportunity to clarify and to make its submission. I also find that in deciding whether or not a declaration u/s 72A of the I.T. Act, 1961, ought to be made, the specified authority was entitled to consider whether the goods produced by the amalgamating company, was an essential mass consumption item.

16. In view of the clear language of Section 72A of the I.T. Act, 1961, I am not in a position to accept Mr. Bajoria's extreme contention that in every case of amalgamation of a company, which is not economically viable, the amalgamated company would be entitled to the benefit of carrying forward and set-off of the accumulated loss and unabsorbed depreciation of the amalgamating company. Mr. Bajoria has drawn my attention to paras. 48 and 49 of the memorandum explaining the provisions of the Finance (No. 2) Bill, 1977, by which Section 72A was inserted in the I.T. Act, 1961. Both the said memorandum and also the clear language used in Section 72A of the I.T. Act show that the said provisions relating to carry forward and set-off would be available in certain and not in all cases of amalgamation of a sick industrial unit with sound ones. In order to qualify for the benefits u/s 72A of the Act, the conditions set out in Clauses (a), (b) and (c) of Section 72A must be fulfilled. We have already pointed out that the Central Govt. has not yet specified "other conditions" mentioned in Section 72A. Therefore, only in case, on the recommendation of the specified authority, the Central Govt. is satisfied that the merger of a sick undertaking with a sound one was in public interest, the Central Govt. would make a declaration in terms of Section 72A of the I.T. Act, 1961. In the absence of any special definition of the expression " public interest " in Section 72A of the I.T. Act, 1961, we ought to adopt the usually accepted meaning of the said expression. The expressions "public interest" and "public purpose " are not generally capable of a precise definition and they have no rigid meaning. The meaning of these expressions ought to be taken from the colour of the statute in which they occur and the concept varying with the time and state of society and its needs. The point to be determined in each case is whether the said purpose or interest would be in the general interest of the community as distinguished from the private interests of an individual. In other words, the same should be useful to the public. It is, however, not necessary that such a measure would be for the benefit of the

whole community but it must be for a considerable number (see of the judgment of Mahajan J. in *The State of Bihar Vs. Maharajadhiraja Sir Kameshwar Singh of Darbhanga and Others*,).

17. Mr. Bajoria has submitted that the specified authority had acted in disregard of the guidelines framed by the Central Govt. Before I discuss the said contention, I may first dispose of another contention raised on behalf of the petitioner. Mr. Bajoria submitted that the specified authority had acted illegally by considering whether the goods manufactured by the amalgamating company were low priority items or whether cigarettes are goods of mass consumption. Mr. Bajoria in this connection has referred to some of several other provisions of the I.T. Act, where the nature of the industries or their location or the nature of goods manufactured have been specified as one of the conditions for obtaining reliefs or benefits under the said provisions. The section, inter alia, provides for deduction of expenditure incurred by an assessee for prospecting of any mineral or group of minerals specified in Part A or Part B respectively of the 7th Schedule, Section 80I of the I.T. Act deals with deduction in respect of profits and gains from industrial units producing articles or things not being any article or thing specified in the 11th Schedule, etc. Mr. Bajoria has also referred to the proviso to Section 80J of the I.T. Act which contains provision for deduction in respect of profits and gains from newly established undertakings in certain cases.

18. The scope of Section 72A of the I.T. Act, 1961, ought not to be decided in the light of the language used in the aforesaid Sections 35E 80I 80J, etc , of the I.T. Act. No doubt, unlike the aforesaid sections of the I.T. Act, Section 72A of the said Act does not expressly lay down that the relief under the said provision would be limited to specific kinds of industrial units with reference to the nature of the goods produced, the number of workmen employed or their location. In the case of merger of a sick unit with another, the amalgamating company may, u/s 72A of the Act, claim for carrying forward the accumulated loss, depreciation losses of the amalgamating company, when the conditions laid down by the said Section 72A(1) are satisfied. I find no substance in the contention of Mr. Bajoria that in case relief u/s 72A is refused on the ground that the test of public interest had not been satisfied, it would defeat the object for which Section 72A was enacted. The Legislature empowered the Central Govt. to make a declaration on the recommendation of the specified authority and on being satisfied with the conditions mentioned in Section 72A(1) have been fulfilled. By insisting upon fulfilment of the conditions laid down by the statute, the specified authority did not defeat the object of Section 72A of the Act because regardless of condition (b) of Section 72A(1) an amalgamated company cannot claim the benefit to carry forward the accumulated loss, depreciation allowances, etc., of the amalgamating sick company. The Legislature in its wisdom has preferred not to exhaustively lay down in Section 72A(1)(b) the meaning of the concept "public interest" but has conferred power upon the Central Govt. to decide whether a particular amalgamation of a sick unit with another was in public interest. I am unable to agree with the contention that if the above interpretation of Section

72A of the I.T. Act, 1961, is adopted, the purpose of enacting Section 72A would be defeated and the Central Govt. would have uncanalised arbitrary powers to make or refuse declarations u/s 72A of the I.T. Act. The statute provides consideration of an application u/s 72A by the specified authority which has been given power to decide whether it would recommend or not. Sub-section (1) of Section 72A also lays down the objective conditions upon which the Central Govt. has to form its opinion. Thus, in order to decide whether it would recommend to the Central Govt., the said authority may not only consider that the amalgamating unit was not a viable one but also whether its amalgamation was for the benefit of the general public, i.e., in the interest of the community as a whole. The nature or type of the goods manufactured by the company, importance of the industry, interest of the labour employed, managerial efficiency to be achieved, economy of scale would be certainly relevant for deciding whether an amalgamation was in the public interest. For this purpose, the specified authority may examine relevant facts and circumstances of each particular merger.

19. I have already referred to the guidelines administratively framed specifying what would be generally considered to be in public interest. At the same time, the said guidelines cannot curtail or modify the statutory provisions in Section 72A relating to carry forward of losses, etc., of the amalgamating company. Further, the said guidelines, which are in the nature of aids for adjudging whether a scheme of amalgamation was in public interest, do not exhaustively enumerate what would be in public interest. The impugned decision of the specified authority was also not contrary to the said guidelines. I have already observed that the legality of the said decision ought to be judged with reference to the minutes of all the meetings of the specified authority held to consider the petitioner's application.

20. The specified authority did not raise the question about the size of the amalgamating company with reference to the number of workers employed or the fair market value of its fixed assets (excluding land). Therefore, para. 4 of the guidelines was not relevant. But the specified authority acted substantially in terms of para. 5 of the guidelines by calling upon the petitioner to clarify how far the interests of the workers employed in the amalgamating company had been protected by giving re-employment to the retrenched workers. At its meeting held on 22nd April, 1978, the specified authority had raised the question of managerial resources for rehabilitation or revival of the business of the sick undertaking. The petitioner-company was presumably registered under the M.R.T.P. Act. Therefore, the specified authority was also entitled to consider the question of fulfilment of other conditions mentioned in para. 6 of the guidelines. The matters considered by the specified authority before they refused to recommend the petitioner's application were also relevant under the said para. 6. The specified authority under paras. 6(a) and (c) was entitled to consider, inter alia, the priority of the product manufactured. The specified authority at its meeting held on 4th November, 1978, had confirmed its chairman's minutes

dated 23rd October, 1978. According to the said minutes, it was felt that even though the marketing network of the amalgamated company would be of considerable assistance for marketing products of the amalgamated company which also may provide countervailing force to multi-nationals, the specified authority did not record any change in its tentative views formed on 22nd April, 1978, to the effect that the two companies had several common directors and hence no new managerial assistance could possibly be made available. The observation in the aforesaid minutes that the cigarettes manufactured was a low priority item were not irrelevant because I have already mentioned that according to paras. 6(a) and (c) of the guidelines, the specified authority was entitled to regard, inter alia, the economies of scale which might be achieved as a result of the amalgamation and priority of the product manufactured by the sick industrial unit. The specified authority had also taken into consideration the admitted fact that when the shareholders had been asked to approve the amalgamation of the two companies, no written undertaking was given that such merger would be subject to relief u/s 72A of the I.T. Act. I am not concerned with the actual number of retrenched labourers of the amalgamated company who had been subsequently given employment. But it is not very much disputed that a large majority of them were not re-employed. The specified authority also found that having regard to the factors mentioned in the minutes, it would not be justified to give relief to the tune of approximately rupees two crores u/s 72A and the same would be in the nature of windfall to the amalgamated company.

21. For the foregoing reasons, I hold that the impugned decision of the specified authority was not liable to be struck down by this court. The specified authority had declined to recommend the petitioner's application upon consideration of relevant facts. Therefore, exercising writ jurisdiction, I am not in a position to decide the sufficiency of the reasons which weighed with the specified authority. This rule accordingly fails.

22. I, accordingly, discharge this rule without any order as to costs. Let the operation of this order remain stayed for a period of four weeks from date.