

(2004) 01 BOM CK 0017
In the Bombay High Court
Case No : Writ Petition No. 736 of 2003

Esquire Polymers Ltd.

APPELLANT

Vs

Appellate Authority for Industrial and Financial
Reconstruction and Others

RESPONDENT

Date of Decision : 15-01-2004

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1), 16(1), 33(1)

Citation : (2004) 2 ALLMR 15 : (2004) 3 BC 157 : (2004) 2 BomCR 475 :
(2005) 128 CompCas 601 : (2004) 2 MhLj 739 : (2004) 53 SCL 183

Hon'ble Judges : H.L. Gokhale, J;F.I. Rebello, J

Bench : Division Bench

Advocate : A.V. Anturkar, for the Appellant; A.Y. Sakhare, Varsha Palav and Sarang Aradhye for respondent No. 4, Shyam Mehta, Cyrus Ardeshir and Swati Deshpande, instructed by Bodhanwalla and Co. For respondent No. 3 and Sureshkumar and Dubey for respondent Nos. 1 and 2, for the Respondent

Final Decision : Allowed

Judgement

H.L. Gokhale, J.—Heard the learned Counsel for the parties.

2. The petitioner is a Public Limited Company. It made a reference u/s 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short, "the SICA") on the basis of its Annual Statement of Accounts as on 31st March 2001. As against the net worth of the Company which is Rs. 231.60 Lacs, its losses have mounted to Rs. 422.29 Lacs. The Board of Directors of the Company passed a Resolution on 3rd September 2001 to approach the Board of Industrial and the Financial Reconstruction ("BIFR" in short). The accounts were settled and approved by the Board of Directors on 27th September 2001. The reference was filed and received by the BIFR on 13th November 2001. The BIFR, by its order dated 5th July 2002, took a view that the reference was beyond the limitation of 60 days as provided u/s 15(1) of the SICA. The BIFR counted the period of 60 days from 3rd September 2001. It, therefore, dismissed the reference. The

Company applied for review of this order and also filed an Appeal. The review came to be rejected on 26th August 2002 and the appeal came to be dismissed on 2nd January 2003. Being aggrieved by the appellate order, the present petition has been filed.

3. The only question which is required to be decided in the present petition is as to whether the period of 60 days as provided in Section 15(1) of the SICA for making the reference is, in any way, a period of limitation and that if the reference is not made within this period, the proceedings should automatically be dismissed. Mr. Anturkar, learned Counsel appearing for the petitioner, has drawn our attention to the provisions of Sections 15, 16(1) and 33(1) of the SICA, which read as follows :-

"15. Reference to Board.-- (1) When 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 measures 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 and 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-fourth 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.

(2) Without prejudice to the provisions of Sub-section (1), the Central Government or the Reserve Bank or a State Government or a public financial institution or a State level institution or a scheduled bank may, if it has sufficient reasons to believe that any industrial company has become, for the purposes of this Act, a sick industrial company, make a reference in respect of such company to the Board for determination of the measures which may be adopted with respect to such company;

Provided that a reference shall not be made under this sub-section in respect of any industrial company by --

(a) the Government of any State unless all or any of the industrial undertakings belonging to such company are situated in such State;

(b) a public financial institution or a State level institution or a scheduled bank unless it has, by reason of any financial assistance or obligation rendered by it, or undertaken by it, with respect to, such company, an interest in such company."

"16. Inquiry into working of sick industrial companies.-- (1) The Board may make such inquiry as it may deem fit for determining whether any industrial company has become a sick industrial company --

(a) upon receipt of a reference with respect to such company u/s 15; or

(b) upon information received with respect to such company or upon

its own knowledge as to the financial condition of the company." "33. Penalty for certain offences.-- (1) Whoever violates the provisions of this Act or any scheme, or any order of the Board, or the Appellate Authority and whoever makes a false statement or gives false evidence to the Board or the Appellate Authority, shall be punishable with simple imprisonment for a term which may extend to three years and shall also be liable to fine."

4. Mr. Anturkar, learned Counsel appearing for the petitioner, submitted that as the preamble of the Act itself shows that the Act is enacted in public interest. It contains special provisions with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination thereof by a Board of experts and the preventive, ameliorative remedial and other measures to be recommended and expeditiously implemented. In his submission, Section 15 of the SICA is related to the date of finalisation of the audited accounts. This section specifically provides that the Board of Directors shall make a reference to the BIFR, if the Company has become sick, within sixty days from the date of finalisation of the audited accounts. Proviso of this section lays down that even before such finalisation, if the Board of Directors forms an opinion that the Company had become sick, it may approach the BIFR. Mr. Anturkar pointed out that u/s 16(2) of the SICA which provides for making of a reference by the Central Government, Reserve Bank, State Government or a Public Financial Institution, no period of limitation is provided and u/s 16(1)(b) of the SICA, the BIFR itself can take up a reference upon its own knowledge and there is no period of limitation for that. In his submission, in the event the reference is not so made by the Board of Directors within the time provided, the consequence will be the one u/s 33(1) of the SICA viz. that for violation of the provisions of this Act, a fine or imprisonment will follow as provided under that section. It cannot, by any stretch of imagination, lead to the dismissal of the reference itself. He submitted that the aims and objectives of this Act, as reflected in the preamble, ought to be kept in mind by

the BIFR as well as by the Appellate Authority. They have erred in ignoring the same and, therefore, both the orders are erroneous in holding the period u/s 15(1) as the period of limitation. Mr. Anturkar, therefore, submitted that these orders ought to be interfered with, set aside and the BIFR be directed to register the reference and proceed therewith.

5. Mr. Anturkar, in this behalf, has relied upon a judgment of a learned Single Judge of this Court (Mrs. Sujata Manohar, J. as Her Ladyship then was in this Court) in the case of Polyolefins Industries Ltd. v. Kosmek Plastics Manufacturing Ltd. reported in (1990) 69 Comp Cas 527. On page 532 of that report, the observation of the learned Judge appears as follows :--

"Under Section 15, where an industrial company has become a sick industrial company, there is an obligation cast on the board of directors to make a reference to the board within 60 days from the date of finalisation of the duly audited accounts of the company for the financial year, at the end of which the company became a sick company. Failure to discharge this obligation results in penal consequences for the board of directors."

6. Mr. Mehta, learned Counsel appearing for respondent No. 3, raised two submissions. Firstly, he submitted that this Court did not have jurisdiction to entertain this petition. He submitted that there was a difference between the cause of action leading to the filing of the reference to BIFR and the cause of action to file the present Writ Petition. The cause for filing the present petition was the so-called erroneous determination on the part of BIFR or AIFR and, therefore, the petition ought to have been filed where those decisions have been arrived at i.e. in the Delhi High Court.

7. Mr. Mehta, in support of his submissions, has relied upon a judgment of the Apex Court in the case of Union of India and Others Vs. Adani Exports Ltd. and Another, where in a matter concerning the provisions of Import Export Policy, the Court observed in paragraphs 13 and 17 to 19 that what was material was to see as to where the ultimate effect of the impugned action of the Government Authority is felt. In the facts of the present case, the ultimate effect will be felt in Pune and not in Delhi and, therefore, the authority relied upon does not assist the respondents - Banks. The cause of action leading to the original proceedings and the one to the present petition cannot be spilt in the manner in which it is sought to be canvassed by Mr. Mehta. The cause of action leading to the present original proceedings was sickness of the Company and it is the same cause which has been subsequently agitated in the present Writ Petition. The reliance on the aforesaid judgment is, therefore, misplaced.

8. The other judgment relied upon by Mr. Mehta is in the case of Mannalal Khetan and Others Vs. Kedar Nath Khetan and Others, . That is the judgment on Section 108 of the Companies Act, 1956, which prohibits the registration of a transfer of shares unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee is delivered to

the Company. The Court interpreted the words "shall not register" as mandatory inasmuch as a clear prohibition was created thereunder. It is not possible to extend the same analogy to the provisions of SICA. There is no prohibition created in the provision contained in Section 15(1) of the SICA. Section 15(1) requires the Company to approach BIFR within sixty days from the date of the finalisation of the accounts. It casts a duty on the Company to act accordingly and for the failure to do that, penal consequences are provided u/s 33(1) of the SICA. It is not a prohibitory measure and, therefore, the analogy cannot be extended in the manner suggested by Mr. Mehta.

9. The second submission of Mr. Mehta was that, that period of sixty days was a period of limitation. Mr. Sakhare, learned Counsel appearing for respondent No. 4, supported it and submitted that Section 15(1) of the SICA provided a remedy and that it would get extinguished at the end of the period of sixty days. It is not possible to accept this submission. It is not a provision creating the remedy in the nature of filing of a suit. This Statute is an enactment by way of a rehabilitation measure and under the Act, a quasi Judicial Authority and the Appellate Authority have been created for that purpose. The duty is cast on the Board of Directors of the Company to approach the Authority when the Company becomes sick and, therefore, analogy of filing of a suit or remedy getting extinguished cannot be brought into.

10. As noted above, u/s 16 of the SICA, the BIFR itself is empowered to take cognizance of the problem and register reference on its own. There is no period of limitation therein. There is no period of limitation when it comes to the reference at the instance of Central Government, Reserve Bank, State Bank or Public Financial Institutions u/s 15(2) of the SICA. In this background, when we look at Section 15(1) of the SICA, the only inference, that can be drawn, will be that this is a requirement which puts the Companies on their toes and it expects them to file their reference within a period of sixty days. In the event, the reference is not filed, there will be a penal consequence u/s 33(1) of the SICA. However, to say that the reference would not be registered at the end of the period of sixty days, would be negating the objectives, for which the quasi Judicial Authority under the Act is created. The Authority cannot close its eyes to the problem brought to its notice merely because the reference is made beyond sixty days. It has power to hold an inquiry as required u/s 16(1) of the SICA and proceed to frame an appropriate scheme by way of rehabilitation and/or to pass appropriate orders, if it is of the opinion that no rehabilitation is possible. Reference must go to its logical conclusion and it cannot be scuttled by reading Section 15(1) as a period of limitation.

11. For the reasons stated above, we allow this petition and set aside the order dated 5th July 2002 passed by the BIFR as well as the order dated 2nd January 2003 passed by the AIFR. We make the Rule absolute in terms of prayer Clause (a) of the petition. The reference made to the BIFR will stand restored to its file. The BIFR will proceed to decide the restored reference expeditiously.

12. In the facts and circumstances of this case, we do not make any order as to costs.

13. Parties to act on an authenticated copy of this order.