
(1998) 08 PAT CK 0030

In the Patna High Court

Case No : C.W.J.C. No"s. 3216, 3221 and 3222 of 1997 (R)

Fusion Engineering Products Limited

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 25-08-1998

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 16, 17, 18, 19

Citation : (1998) 3 BLJR 1892 : (1998) 3 PLJR 772

Hon'ble Judges : Sachchidanand Jha, J;Aftab Alam, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Sachchidanand Jha, J.—The petitioner, which is a public limited company incorporated under the Indian Companies Act, 1956, seeks quashing of the order of attachment and the notice dated 28.10.1997, marked Annexure-7 to the writ petition in all the three cases, calling upon the Manager of the Indian Overseas Bank, Bistupur, Jamshedpur. Branch to deposit the amounts mentioned in the respective notices in the Government Treasury at Jamshedpur from the account of the petitioner, towards payment of its sales tax dues, in purported exercise of powers u/s 27 of the Bihar Finance Act, 1981. CWJC No. 3221 of 1997 (R) relates to the period 1989-90 and the amount involved in Rs. 15 lacs. CWJC Nos. 3222 of 1997 (R) and 3216 of 1997 (R) relate to the periods 1991-92 and 1992-93 and the amounts involved are Rs. 12.5 lacs and Rs. 10 lacs, respectively.

2. The ground on which the impugned order and the notice are sought to be quashed is that the petitioner-company has been declared as a sick industrial company under the provision of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as the Sick Industrial Companies Act or SICA). For its rehabilitation the Board for Industrial and Financial Reconstruction (BIFR) has finalised a scheme which is in the stage of implementation. In view of the provisions of Section 22 of the said Act dues against a sick industrial company cannot be recovered by coercive means until

the period envisaged in the rehabilitation scheme is over.

3. It may be stated at the outset that against the assessment orders with respect to sales tax liability passed by the assessing authority under the Bihar Finance Act, 1981 the petitioner had filed a separate writ petition being CWJC No. 3033 of 1997 (R) which was disposed of by this Court directing the petitioner to seek alternative remedy under the Bihar Finance Act. It was stated in course of hearing that in the light of the said order of this Court the petitioner has filed revision before the Commissioner of Commercial Taxes which is pending. In these petitions, thus, we are not concerned with the question of the correctness of otherwise of the assessment orders. The only point for consideration is whether coercive measures can be taken for recovery of the sales tax dues in view of the provisions of Section 22 of the Sick Industrial Companies Act.

4. Although the controversy centres around the provisions of Section 22 of the Sick Industrial Companies Act, I consider it appropriate to briefly refer to the scheme of that Act.

Section 3(1)(o) of the said Act defines "Sick Industrial Company" to mean an industrial company (being a company registered for not less than five years) which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth. The Explanation appended to the said provision lays down that an industrial company existing immediately before the commencement of the Sick Industrial Company (Special Provisions) Amendment Act, 1993, registered for not less five years and having at the end of any financial year the accumulated losses equal to or exceeding its entire not worth shall be deemed to be a sick industrial company.

Section 15 provides that when an industrial company has become 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 at the end of which the company has become a sick industrial company, make a reference to the BIFR for determination of the measures which shall be adopted with respect to the company.

Under Section 16 of the Act the BIFR is empowered to make such enquiry as it may deem fit for determining whether any industrial company has become that sick industrial company upon receipts of a reference with respect to such company u/s 15 or upon information received with respect to such company or upon its own knowledge as to the financial condition of the company. The Board is also empowered to appoint an operating agent to enquire into and make a report with respect to such matters as may be specified in the order.

Section 17 of the said Act further empowers the Board to make suitable orders on the completion of the enquiry. It lays down that if the Board is satisfied after making an enquiry u/s 16 that a company has become a sick industrial company, the Board shall after consideration all the relevant facts and circumstances of the case decide whether it is practicable for the company to make its net worth

exceed the accumulated losses within reasonable time. If the BIFR comes to the conclusion that it is practicable for a sick industrial company to do so within reasonable time it shall give such company time as it may deem fit to make its net worth exceed the accumulated losses. If, on the other hand, the BIFR comes to the conclusion that it is not practicable for a sick industrial company to do so within reasonable time, it may direct any operating agency to prepare a scheme for rehabilitation of the company.

Sections 18 and 19 provide for preparation and sanction of schemes pursuant to order u/s 17 as aforesaid. Where the BIFR after making enquiry u/s 16 and after considering all the relevant facts and circumstances comes to the conclusion that the sick industrial company is not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record its opinion to that effect and forward the same to the concerned High Court for winding up of the company in accordance with the provisions of the Companies Act, 1956.

5. Section 22 which is the sheet anchor of the petitioner's case may be quoted, so far as relevant, as follows-

22. Suspension of legal proceedings, contracts, etc.--(1) Where in respect of an industrial company, an enquiry u/s 16 is pending or any scheme referred to u/s 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal u/s 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding-up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no such for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.

(2)...

(3) Where an inquiry u/s 16 is pending or any scheme referred to in Section 17 is under preparation or during the period of consideration of any scheme u/s 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances or property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date,

shall remain suspended or shall be enforceable with such adoptions and in such manner as may be specified by the Board. Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate."

(4)...

(5)...

6. According to the petitioner, a scheme has been sanctioned by the BIFR after enquiry in terms of the provisions of Sections 17 and 19 of the Act for revival of the Company which is in the stage of implementation and, therefore, at this stage no proceeding "for execution, distress or the like" against any of the properties of the petitioner-company can be initiated or proceed except with the consent of the BIFR.

7. From the documents brought on record it is not clear as to when and in what manner the enquiry within the meaning of Section 16 of the Sick Industrial Companies Act commenced before the BIFR. From the documents on record however it appears that an order as contemplated u/s 17(2) of the said Act was passed on 3.3.1992. It may be useful to quote the relevant part of that order as follows-

On the basis of the material put forward before us and the submissions made at today's hearing, we are satisfied that the company will be able to make its net worth positive by its own efforts within a reasonable time, under the on going agreed rehabilitation scheme with the financial assistance reliefs and concessions as envisaged therein. Accordingly, in exercise of the powers conferred" by Section 17(2) of the Act we hereby grant to the said company time to make its net worth positive subject to the further conditions specified hereunder.

8. From the documents it further appears that the performance of the company came up for review before the BIFR on different occasions. Lastly, on 17.8.1995 after reviewing the past performance of the Company the BIFR concluded that the scheme sanctioned earlier (vide its order dated 3.3.1992) had failed and Company had not turned around and in the circumstances appointed the Industrial Development Bank of India (IDBI) as the operating agency u/s 17(3) of the Act to examine viability of the company. The petitioner-company was directed to submit revised rehabilitation scheme which was to be considered by IDBI. From the minutes of the proceeding dated 30.11.1995 it appears that the company submitted the revised scheme which was forwarded to the IDBI for consideration. Finally the IDBI sent the agreed modified scheme to the BIFR on 2.1.1996 which was approved by the BIFR. A communication to this effect was sent by the BIFR to the IDBI and other concerned parties including the petitioner on 11.1.1996. Copy of the said communication has been marked Annexure-3 to the writ petition.

9. There thus does not appear to be any doubt that in the present case the BIFR after enquiry has finalised and sanctioned a rehabilitation scheme in consultation with the various financial institutions and other interested parties. The revised sanctioned scheme contemplates rehabilitation of the petitioner-company in different stages ending in the financial year 2000-01. Inasmuch as the scheme is in the stage of implementation, Section 22 appears to cover the case of the petitioner-company.

10. On behalf of the respondents, learned Standing Counsel No. 1 submitted that the provisions of Section 22 would not stand in the way of the sales tax authorities to recover the tax dues. She placed reliance on Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others, .

11. In the case of Corromandal Pharmaceuticals, the sanctioned scheme u/s 19(3) of the SIGA had come into existence on 19.11.1990. The dues which were sought to be recovered by the Commercial Tax Officer however related to the subsequent period, namely, 1992-93 and 1993-94 on the basis of assessment orders passed on 3.1.1994 and in 1995 i.e., after the sanctioned scheme had come into effect on 19.11.1990. The Supreme Court observed that the provisions of SICA and certainly wide but in the totality of the circumstances, the safeguard is only against the impediments which are likely to be caused in the implementation of the scheme. The Court held that the bar or embargo envisaged in Section 22(1) can apply to only such dues which have been reckoned or included in the sanctioned scheme. Amounts like sales tax etc. which the sick industrial company is enabled to collect after the dated of the sanctioned scheme legitimately belong to the Revenue and the same is not covered by Section 22.

12. In am afraid, the ratio of the decision in Corromandal Pharmaceuticals case is of no avail to the respondents. In the present case, as noted above, the sanctioned scheme u/s 19(3) of the Act has come into effect from 11.1.1996. The alleged dues for recovery of which the order of attachment/notice has been, issued, however, relate to the periods 1989-90, 1991-92 and 1992-93.

13. Mr. Biran Poddar, learned Counsel for the petitioner referred to Tata Davy Ltd. Vs. State of Orissa and Others, and pointed that the decision in Corromandal Pharmaceuticals" case was distinguished by the Supreme Court on the ground that the case dealt with recovery of sales tax dues after the date of the sanctioned Scheme. The Supreme Court, instead, followed the earlier decision in the case of The Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and others, and held that Section 22 of SICA requires all creditors seeking to recover their dues from the sick industrial companies in respect of whom enquiry u/s 16 is pending or scheme is under preparation or consideration or has been sanctioned, to obtain the consent of the Board to such recovery. 1 may mention that a similar view was taken by the Supreme Court in the case of Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another, . The following observations from the judgment of may usefully be

noticed-

The purpose and object of suspension of proceedings etc. u/s 22(1) of the 1985 Act is to await the outcome of the reference made to the BIFR for the revival and rehabilitation of the sick industrial company. The words "or the like" which follow the words "execution" and "distress" are clearly intended to convey that the properties of the sick industrial company shall not be made the subject-matter of coercive action of similar quality and characteristic till the BIFR finally disposes of the reference made u/s 15 of the 1985 Act. The legislature has advisedly used an omnibus expression "the like" as it could not have conceived of all possible coercive measures that may be taken against a sick undertaking...

14. In the above view of the matter, there cannot be any doubt that in the facts of the case the petitioner is entitled to the benefits of Section 22 of the Sick Industrial Companies Act and the impugned order of attachment and notice, therefore, cannot be sustained.

15. In this connection, however, I would like to point out that as per the revised sanctioned rehabilitation scheme communicated by letter dated 11.1.1996 (Annexure-3), one would have expected the petitioner-company to have improved its financial position to the extent enabling it to clear the tax dues by now. It may be mentioned that the sanctioned scheme contemplates liquidation of different kinds of dues in the manner laid down therein. The scheme, inter alia, lays down-

The carry forward losses of the company of Rs. 152 lakh would be absorbed by the profits earned in 1995-96 and 1996-97, and hence the company would be liable to pay tax in the year 1996-97 itself. As the losses would be wiped off in 1996-97." However, this cannot be a ground to allow the respondents to recover the tax dues. In terms of provisions of Sub-section (1) of Section 22, as noted above; it is open to the respondents to approach the BIFR and subject to consent which may be granted by it, proceed for recovery of the dues. If the respondents, therefore, think that despite improving its financial position to the extent envisaged in the rehabilitation scheme, the company is not clearing its tax dues and resisting recovery on the basis of the provisions of Section 22, or that its performance has been below the expected level and it is not likely to turn around in near future as per the sanctioned scheme it is open to them to approach the BIFR and seek its consent. The following words of anguish occurring in the minutes of the BIFR dated 30.11.1995 (supra) may be referred to in this connection:

The Bench took a strong view of the company's not repaying the over dues of IDBI and BICICO in spite of earning profits.

But, as the things stand, in view of the fact that the sanctioned scheme is in the stage of implementation, it is not possible to allow the respondents to take steps for recovery without such consent.

16. It is to be kept in mind that Section 22 of the Act does not wipe out the tax liability of the company, it merely seeks to keep the proceeding for execution, distress or the like, in abeyance until the full and final implementation of the sanctioned scheme. Thus after the period envisaged in the scheme is over, it will be open to the respondents to recover the dues by taking recourse to coercive measures in the event the petitioner-company fails to discharge its tax liability on its own in accordance with law. Further, in view of the provisions of Sub-section (5) of Section 22, there is no question of the claim of the respondents becoming time-barred.

17. In the result, for the reasons stated above, the impugned order of attachment and the notices contained in Annexure-7 are quashed and these writ petitions are allowed subject to the observations made hereinabove. I will make no order as to cost.