

(2003) 12 BOM CK 0023

In the Bombay High Court

Case No : Writ Petition No. 4811 of 2003

Garware Chemicals Ltd.

APPELLANT

Vs

Board for Industrial and Financial Reconstruction and Another

RESPONDENT

Date of Decision : 18-12-2003

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1), 3(1), 33, 33(1)

Citation : (2004) 4 BC 54 : (2004) 5 BomCR 891 : (2004) 120 CompCas 315 : (2004) 1 CompLJ 350 : (2004) 2 MhLj 707 : (2004) 55 SCL 706

Hon'ble Judges : A.P. Shah, J;A.B. Naik, J

Bench : Division Bench

Advocate : A.P. Datar and P.M. Shah, S.M. Kulkarni, for the Appellant; E.P. Sawant, Government Pleader for respondent Nos. 1 and 2 and S.V. Gangapurwala, for the Respondent

Judgement

A.P. Shah, J.—The petitioner has challenged the legality and correctness of the two orders passed by the respondent No. 1 -- Board for Industrial and Financial Re-construction, hereinafter referred to as "the Board". The Board has rejected the two references made by the petitioner company under the Sick Industrial Companies (Special Provisions) Act, 1985, hereinafter referred to as "the Act", solely on the ground of limitation. It was held by the Board that Section 5 and other provisions of the Indian Limitation Act, are not applicable to reference made to the Board u/s 15 of the Act since the Board is not a court and, therefore, the provisions of Sections 4 to 24 of the Limitation Act read with Section 23 of the said Act are not applicable to the proceedings before the Board. The Board in its order dated 28 July, 2003, has also observed that any future reference also will not be maintainable since the earlier references are held to be time barred.

2. The facts which give rise to this petition lie within a narrow compass. The petitioner company was incorporated on 13 July, 1995 and commenced commercial production on 13 May, 2000. The petitioner is engaged in

manufacture of Dimethyl Terephthalate (DMT), which is covered u/s 19(2) of the First Schedule of Industries (Development and Regulation) Act, 1951. The company was reported to have paid up capital of Rs. 1,713.90 lakhs with free reserves of Rs. 3,580.90 lakhs and accumulated loss of Rs. 7,321.96 lakhs as on 30 September, 2001. The Board of directors of the petitioner company resolved in its meeting dated 27 December, 2001 that the petitioner company has accumulated losses, which are more than the net worth of the company and, therefore, the company has been a sick company within the definition contained in Section 3(1)(o) of the Act on completion of the audited accounts for the year ended on 30 September, 2000. u/s 15(1) of the Act, a reference has to be made within 60 days from the date of finalisation of the duly audited accounts of the company for the financial year. Admittedly, this was done on 28 March, 2002. On 1 April, 2002, a reference was made to the Board. Under the proviso to Section 15(1), the Board of directors is obliged to make a reference to BIFR even before the finalisation of the accounts, if the Board of directors form an opinion about the sickness of the company, and such reference has to be made within 60 days after the Board of directors has formed such opinion. The reference was rejected by the Board on 30 April, 2002, on the ground that it ought to have been filed within the period of limitation of 60 days from the date of formation of the opinion by the Board of directors, i.e., 27 December, 2001. Another reference was filed on 2 May, 2002 by the petitioner company, and it was also rejected by the Board by its order dated 28 July, 2003. The present petition was filed on 18 August, 2003. It appears that when the petition was mentioned before the Division Bench, circulation was refused on the ground that alternate remedy is available before the AAIFR u/s 25 of the Act. Therefore, the petitioner approached the Appellate Authority (AAIFR) constituted under the Act by way of an appeal on 16 September, 2003. By letter dated 24 September, 2003 -- it was communicated by the Appellate Authority that the Appellate Bench is yet to be constituted and, therefore, it may not be possible to accede to the request of the petitioner.

3. We have heard Mr. Datar, senior counsel appearing for the petitioner, Mr. Sawant, learned Government Pleader and Mr. Gangapurwala, learned counsel appearing for the respondent Nos. 4 and 5. The Act undoubtedly provides for an appeal before the AAIFR. However, it is an admitted position that the Appellant Bench is not constituted. We are, therefore, inclined to entertain this petition. Hence Rule is issued on the petition and the petition is taken up for hearing.

4. On behalf of the petitioner company, Mr. Datar strenuously contended that the Board completely misconstrued the provisions of Section 15(1) of the Act. According to Mr. Datar, the plain reading of Section 15(1) shows that the time limit of 60 days mentioned therein is to indicate an obligation cast on the directors of the company. It is their duty to approach the Board at the earliest and protect the interest of the company, its shareholders and the financial institutions who have lent money to the company. In case of a reference, which is competent at the behest of the other agency under the very section, the

period of 60 days cannot be treated as limitation. Therefore, to read the limitation in Sub-section (1) as barring reference beyond that period would be misreading of the provisions of law. If the legislation intended to provide specific rule of limitation and debarring reference beyond that period of limitation, the enactment would be couched in a different language. In any event, Mr. Datar urged that the proviso to Section 15(1) enables the Board of directors of the company to file a reference before finalisation of accounts in annual general meeting. That enabling provision will not preclude the petitioner company u/s 15(1) of the Act to file a reference after the annual general meeting. Therefore, the finding of the Board that the reference was not filed within 60 days -- is totally incorrect, and it suffers from non-application of mind.

5. On the other hand, Mr. Gangapurwala submitted that the provisions of Section 15(1) clearly lay down period of limitation of 60 days. He urged that the word "shall" occurring in Section 15(1) has to be interpreted in the context in which it has been used and the object and purpose of the Act shows that it was enacted as a special provision with a view to secure timely detection of sick and potentially sick industrial companies. The Board of directors, therefore, has a mandate under the Act to make a reference to the BIFR within 60 days from the date of finalisation of the duly audited accounts of the company. However, if the Board of directors even before the finalisation of the audited accounts, form an opinion that the company has become a sick industrial company, then the Board of directors are obliged to make a reference within 60 days after forming such opinion. He submitted that the reference filed by the Board of directors beyond the period of limitation is clearly not maintainable. Mr. Gangapurwala has placed reliance on the decision of the learned Single Judge of the Allahabad High Court in *ESS DEE Packagers (P) Ltd., Kanpur v Appellate Authority for Industrial and Financial Reconstruction, New Delhi*, and Ors. (2003) All LJ 194. He also placed reliance on the unreported decision of the Division Bench of the Delhi High Court in *The Empire Jute Company Ltd, v AAIFR and Ors.* (Civil Writ Petition No. 4035 and C.M. No. 6933 of 2001 decided on 13 August, 2001).

The short question which falls for our consideration is whether a reference to the Board is liable to be rejected solely on the ground that it was filed beyond the period of 60 days as provided in Section 15(1) of the Act. The incidental question is also whether the period prescribed u/s 15(1) is a period of limitation so as to bar a reference made after the expiry of the said period. The preamble of the Act shows that it has been enacted in public interest, with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measure so determined and for matters connected therewith or incidental thereto. The object of the Act appears to afford maximum protection of employment, optimise the use of the amount of the banks and to replace the existing time consuming and inadequate machinery by efficient machinery for expeditious determination by a

body of experts to safeguard the economy of the country and to protect viable sick units. Section 15 and Section 3(1)(da) deal with the time period. The relevant provisions, i.e., Section 15(1) and Section 3(1)(da) 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."

3(1). In this Act, unless the context otherwise requires --

(da) "date of finalisation of the duly audited accounts" means the date on which the audited accounts of the company are adopted at the annual general meeting of the company."

7. Thus Section 15(1) provides that where 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. If, however, the Board of directors had sufficient reasons, even before such finalisation, to form the opinion that the company has become a sick industrial company, the Board of directors shall, within sixty days after it has formed such an opinion, make a reference to the Board for the determination of the measures which shall be adopted with respect to the company. Upon receipt of such reference with respect to such company and upon information received or upon its own knowledge as to the financial condition of the company, a duty is cast by Section 16(1) on the Board to make inquiry as it deems fit for determining whether any industrial company has become a sick industrial company. Any violation on the part of a sick industrial company, of the provisions of Section 15(1) by either totally failing to make the obligatory reference u/s 15(1) or by not making it within the prescribed period of 60 days of the finalisation of its duly audited accounts or the formation of opinion by the Board of directors that the company has become sick within the meaning of Section 3(1)(o) amounts to violation of the provisions of the Act. This violation would attract the penal provisions in Section 33(1) and is punishable with simple imprisonment for a term which may extend to 3 years, and there is also a mandatory fine.

8. In the case of Maharashtra Tubes Ltd. Vs. State Industrial and Investment

Corporation of Maharashtra Ltd. and Another, the Supreme Court noted that the aim of the Act is to prevent sickness and in cases of sick undertakings, to prepare schemes for their rehabilitation by providing financial assistance by way of loans, advances, or guarantees or by providing reliefs, concessions or sacrifices from Central or State Governments, scheduled banks, etc. The basic idea is to revive sick units, if necessary, by extending further financial assistance after a thorough examination of the units by experts ; and only when the unit is found to be no more capable of rehabilitation, that the option of winding up may be resorted to. The provisions of Section 15(1) are required to be interpreted in the light of this legislative objective behind enacting the Act. Section 15(1) fixes on the Board of directors of an industrial company a responsibility or obligation to make a reference to the BIFR, if the company has become sick. For the purpose of making a reference, the sickness has to be judged on the basis of the finalisation of the audited accounts of a particular financial year. The proviso to Section 15(1) shows that the reference to the BIFR has to be made earlier if the directors formed an opinion about the sickness even before the finalisation of the accounts. Any contravention of the provisions clearly attracts the general penalty provision contained in Section 33(1). In our considered view, Section 15(1) does not lay down a period of limitation, but it creates a mandatory obligation on the part of the Board of directors to approach the Board within the period stipulated by the section. The remedial character of the statute, coupled with the fact that Section 33 itself provides for the consequences of contravention of any provision of the Act, which would include Section 15, would support the view canvassed by Mr. Datar that the Board cannot decline to entertain the reference solely on the ground that it was presented after the expiry of the period mentioned in Section 15(1). Sickness within the meaning of Section 3(1)(o) of the Act is a continuing process. Therefore, to hold that the Board is deprived of its jurisdiction after the expiry of 60 days would run counter to the objective of the Act.

9. The decision in the case of ESS BEE Packagers (P) Ltd. of the Single Judge of Allahabad High Court is of no assistance to the learned counsels. Mr. Gangapurwala. In that case, the reference was filed after a delay of two years. It seems that when the accounts of the petitioner therein for the financial year 1997-98 were finalised by adopting Auditors' Report in annual general meeting convened in the month of July, 1999, it was found that net worth of the company has been eroded due to huge losses and that the company had become sick industrial company within the meaning of Section 3(o) of the Act. A reference was made to the Board only on 11 August, 1999. The Board held that the reference was belated and the intention of the promoters was not honourable and that no public interest will be served in accepting the reference. The reference was, as such, rejected as not maintainable. In appeal, the AAIFR remanded the matter back to the Board. The Board, after the remand, again recorded a finding that the company had failed to explain the delay of two years. The Board came to the conclusion that it was not a fit case for entertaining the reference. The order of the Board was confirmed by the AAIFR and, the High

Court. The learned Single Judge observed thus :

"23. There is no dispute, in the present (instant) case, that the company had become a sick industrial company at the end of the finalisation of the duly audited accounts of the financial year 1996-1997, and thus, it was mandatory for the Board of directors to have made a reference to the Board. There was clear delay of close to two years in this case. The Board of directors have given reasons for condonation of delay. These reasons were considered and were found to be inadequate....."

"25. There is another reason for coming to the same conclusion, namely, that the object and purpose of the Act will be defeated in case the Board of directors are allowed to make a reference at their will. In such a case, the reference may be used as a tool against the recoveries initiated against the company by virtue of the umbrella of protection given u/s 22 of the Act. The Board for Industrial and Financial Reconstruction and Appellate Authority for Industrial and Financial Reconstruction are not courts to which Section 5 of the Limitation Act is applicable."

10. The unreported decision of the Division Bench of the Delhi High Court in the case of *The Empire Jute Co. Ltd. v AAIFR and Ors.* also does not support Mr. Gangapurwala. On the other hand, it supports the interpretation suggested by Mr. Datar. In that case, the reference was filed after almost eleven years. The Board stated that it found no reason to condone delay of unusual and explained period. The decision of the Board was confirmed by the Division Bench. The observations of the Division Bench in para 5 are extremely material and are reproduced below :

"5. Proviso to Section 15(1) is in the nature of an exception to the general requirement that 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" [as defined in Section 3(da)] 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 Board. In terms of proviso, if the Board of directors form an opinion that the company had become a sick industrial company even before finalisation of the accounts, it can, within sixty days after such opinion had been formed, make a reference. That shows the urgency postulated by the statutes that immediately after the company becomes a sick industrial company, reference has to be made. As the preamble to the Act shows, the object is securing timely detection of sick and potentially sick companies owning industrial undertakings, so that there can be speedy determination by a Board of Experts, of the preventive, ameliorative, remedial and other measures and consequentially, expeditious enforcement of necessary measures. If there is any supine indifference by the concerned company, which, prima facie, shows fact of urgency, BIFR and/or AAIFR would be justified in not accepting the reference. That is precisely what has been done in the case at hand. In this factual background, we find no reason to interfere with the orders

passed."

11. We are inclined to hold that Section 15(1) does not lay down any period of limitation, although it creates an obligation upon the Board of directors to approach the BIFR within the time stipulated by the section ; and failure to discharge the obligation may entail penal consequences as provided by Section 33(1) of the Act. However, we may hasten to add that the Board would be within its rights to reject the reference where the Board finds that the directors are guilty of supine indifference or there is lack of bona fides on the part of the directors or where the only purpose of making reference is to take shelter on the protection given by the Act. In such cases, the Board would be undoubtedly justified in rejecting the reference on the ground of delay and laches. In the present case, the delay in approaching the BIFR is only around 45 days. Moreover, we are informed that IDBI who are the 80% creditors of the company, have not raised any objection to the registration or the reference and the company being declared as a sick unit. In the circumstances, the impugned orders of the BIFR dated 30 April, 2002 and 28 July, 2003 cannot be sustained and same are hereby quashed and set aside. The BIFR is directed to consider the reference made by the company afresh in accordance with the provisions of the Act in the light of our judgment. It is needless to say that it would be open for the BIFR to consider the merits of the reference including the question whether other norms are satisfied by the company.

12. Accordingly, the rule is made absolute and the petition is disposed of in the terms of the above order.