

(1998) 05 PAT CK 0037

In the Patna High Court

Case No : Letters Patent Appeal No. 644 of 1996

Hathwa Vanaspati Limited

APPELLANT

Vs

Board for Industrial and Financial Reconstruction and Others

RESPONDENT

Date of Decision : 06-05-1998

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 20

Citation : (2000) 2 CompLJ 76

Hon'ble Judges : Bisheshwar Prasad Singh, J; Bharat Prasad Sharma, J

Bench : Division Bench

Advocate : Binod Kumar Kanth, D.K. Sinha, Shailesh Kumar Sinha, Binod Bihari Sinha and Kishore Kumar Sinha, for the Appellant; Shabbir Ahmed and R.K. Sinha, for the Respondent

Final Decision : Dismissed

Judgement

1. This Letters Patent appeal preferred by the appellant company is directed against the judgment and order of a learned Judge of this court, dated 24 May, 1996, dismissing the writ petition filed by the appellant company being CWJC No. 3485 of 1994, whereby the appellant company had prayed for quashing of the order, dated 22 April, 1992, passed by the Board for Industrial and Financial Reconstruction (for short "BIFR") and the appellate order passed by the Appellate Authority for Industrial and Financial Reconstruction (for short "the appellate authority"). The petitioner had also prayed for other consequential reliefs, but had primarily challenged the correctness of the order passed by the BIFR which had directed its opinion to be forwarded to this court u/s 20 of the Sick Industrial Companies (Special Provisions) Act, 1985, to the effect that the sick industrial company, namely, the appellant company, should be wound up as the case of the appellant company had been found to be totally unviable. The appellate authority dismissed the appeal preferred against the order of the BIFR.

2. The appellant company thereafter preferred a writ before this court which has been dismissed by a learned Judge of this court by the impugned judgment and

order. The learned Judge having considered all aspects of the matter came to the conclusion that the efforts of BIFR, the appellate authority, and this court, for rehabilitation of the appellant company have failed, and no useful purpose will be served by asking the authority to consider its decision keeping in view the reliefs/concessions granted by the State Government, since the revised rehabilitation scheme was not acceptable to the financial institutions/banks.

3. We may notice at the threshold that even during the pendency of this appeal, efforts were made to bring about a consensus so that the appellant-company with the help of the State of Bihar and the financing institutions could work out the scheme of rehabilitation. We must confess that such efforts have failed to bring about the desired result.

4. The relevant facts have been succinctly stated in the impugned judgment and order of the learned Judge, but it is only necessary to recapitulate the facts necessary for the disposal of this appeal. The appellant-company set up a plant to manufacture 50 metric tonnes of vanaspati per day. The promoters have contributed 41.75 per cent. of the equity capital, while the State of Bihar and its financial institutions, namely, the Bihar State Financial Corporation and the Bihar State Industrial Development Corporation have contributed 43.25 per cent towards the share capital of the company. While there are the two representatives of the promoters on the Board of directors of the company, the other shareholders nominated eight members to the Board of the company.

5. Unfortunately for the company, it started running into difficulties from its very inception. According to the appellant company, there was delay in, allotment of land, apart from the problem of power shortage, compounded by the delay in disbursement of the sanctioned term loan, which resulted in over-running of costs from the estimated Rs. 156 lakhs in 1972 to Rs. 228 lakhs in 1978. However, the company went into production in the year 1979 and the production continued till 28 December, 1987, when the factory was closed down on account of disconnection of power supply for non-payment of the bills of the Bihar State Electricity Board. The appellant company makes a serious grievance against the conduct of the Bihar State Electricity Board, as according to it, it was later discovered that the company owed to the Bihar State Electricity Board only a sum of Rs. 2.72 lakhs against the bills for consumption of electrical energy, whereas inflated bills to the tune of Rs. 48.65 lakhs was raised and for non-payment of the bills, supply of electrical energy to the company was disconnected. According to the petitioner, the bill of Rs. 48.65 lakhs was subsequently reduced to Rs. 13.10 lakhs inclusive of Rs. 2.72 lakhs being the actual charges for electrical energy consumed, and Rs. 10.37 lakhs being the amount of annual minimum guarantee charges, etc., for the disconnected period, which also was directed to be waived by the State of Bihar. It is, however, not disputed that the accumulated losses of the company exceeded the net worth of the company and consequently, the company became a sick industrial company within the meaning of Clause (o) of Sub-section (1) of Section 3 of the Sick

Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "the Act"). The company was, therefore, compelled to make a mandatory reference u/s 15(1) of the Act to the BIFR on 30 July, 1987, requesting the BIFR for determination of measures to be adopted with respect to the petitioner.

6. By order dated 25 April, 1988, the BIFR appointed a special director u/s 16(4) of the Act and directed the Industrial Finance Corporation of India (for short "IFCI"), the lead institution, to prepare a rehabilitation package that had been agreed to in principle by the financial institution, the banks and the State Government in their joint meeting held in December, 1987. The IFCI was also required to secure the advice from the State Government regarding the quantum, date of release and terms and conditions of the margin loans which the Government representatives had agreed would be extended to the appellant-company, in course of the discussion held in December, 1987. In the light of the advice of the State Government, the IFCI was to work out the financial data. Unfortunately, the response of the State Government was not positive and excuse was advanced by the State Government that it was in the process of laying down its policy for the sick units and, therefore, some more time was required by the State Government to take a decision. On 22 January, 1988, the representatives of the State Government stated that the Government had agreed in principle to provide a loan of Rs. 94 lakhs, but the terms and conditions had not been settled, and for that, further time was prayed for. The BIFR appointed the IFCI as operating agency u/s 17(3) of the Act by order, dated 22 November, 1988, and required it to examine the viability and prepare a scheme of rehabilitation of the appellant company. In preparing the draft rehabilitation scheme on 26 June, 1989, the operating agency took into account the reliefs and concessions from the State Government for grant of term loan of Rs. 94 lakhs towards the margin money for working capital, as also reliefs proposed in respect of sales tax, waiver of AMG charges and fuel surcharge from the BSEB. A revised draft scheme was circulated on 12 January, 1990, with further proposals and suggestions. Though the appellant company supported the adoption of the draft scheme and accepted the obligations imposed on it, in view of the absence of the representative of the State Government, the BIFR granted four weeks time to the State Government to give its consent to the proposed reliefs/ concessions fixing the cut-off date as 30 June, 1990. Ultimately, the State Government by letter, dated 25 April, 1990, indicated that the reliefs/concessions to be extended to the petitioner would provide for Rs. 94 lakhs margin money and deferment of sales tax for seven years subject to an overall ceiling of Rs. 340 lakhs. The State Government, however, did not agree to grant reliefs/concessions as proposed in the draft scheme for set-off of the purchase tax on raw materials, and exemption from payment of excise duty on power, and for grant of subsidy.

7. In view of the stand of the State Government, the operating agency informed the BIFR by letter, dated 23 July, 1990, that the viability of the scheme for rehabilitation of the appellant company had become doubtful. The State Government, however, informed the BIFR on 25 October, 1990, that the matter

with regard to exemption of sales tax was under consideration of the State Government. Not satisfied with the response of the State Government, and after examining all aspects of the matter, the BIFR reached the conclusion that with a view to salvage whatever was possible, the appellant company should be wound up without further delay. Accordingly, notices were issued to all concerned to show cause why the appellant company be not wound up. The promoters were directed to reconsider their decisions in regard to their capability to organise funds as per the provisions of the scheme and for funding the estimated cash losses up to 31 March, 1991. The State Government was also requested to consider favourably the reliefs/concessions expected of it particularly, in regard to exemption from sales tax and reliefs from the Bihar State Electricity Board. The Bihar State Industrial Development Corporation was required to consider the take over of the unit as promoters either by itself or in association with some other entrepreneur who may be willing to provide funds urgently required for rehabilitation of the company.

8. Ultimately, by an order, dated 22 April, 1992, the BIFR heard all the concerned parties and having found that the draft scheme for revival/rehabilitation was not viable, having regard to the attitude of the State Government, it directed its opinion to be forwarded to this court u/s 20 of the Act for further necessary action according to law. As noticed earlier, the State Government was given several opportunities to clarify its stand, but the State Government was not willing to extend the reliefs/concessions as envisaged in the draft scheme, and it was willing to grant reliefs/ concessions only partially.

9. The appellant company preferred an appeal before the appellate authority against the order of the BIFR, dated 22 April, 1992. Before the appellate authority, the Additional Development Commissioner, Government of Bihar, by his letter dated 10 May, 1993, informed the appellate authority about the proposed new industrial policy of the State of Bihar. Under the new policy, there was provision for exemption/deferment from sales tax for a period of eight and ten years to new vanaspati ghee units depending upon the location of the unit. The unit had a choice either to opt for exemption from payment of sales tax or for deferment of sales tax limited to 150 per cent of the total fixed capital investment of the unit. The deferred amount was to be repaid in three equal annual instalments within a period of three years from the date of expiry of deferment period. The State Government was willing to consider providing similar reliefs/concessions to the sick and closed vanaspati ghee units, if the rehabilitation package was approved by the BIFR/State Government. Since the appellant unit was located in a district under Category "A" it was eligible for exemption from sales tax/deferment of sales tax for ten years. The new policy further envisaged exemption from tax on purchase of raw materials for a period of seven years from 1 April, 1993, and for this benefit, all existing units whose investment on plant and machinery was not more than Rs. 15 crores as on 1 April, 1993, were eligible. The State Government requested that the operating agency may be directed to rework the rehabilitation scheme of the appellant

company in light of the new relief and concessions which the State Government may consider, if the package got approval from BIFR.

10. The appellate authority by its impugned order, dated 15 September, 1993, dismissed the appeal. From a perusal of the appellate order, it appears that the appeal was dismissed primarily on the ground that there was no promoter willing to finance the rehabilitation scheme and the promoter did not have sufficient resources to do so. The appellant company made a grievance before this court while impugning the order of the appellate authority that the appellate authority did not take into account the proposals of the State Government which were communicated to the appellate authority by letter, dated 10 May, 1993, highlighting the reliefs/ concessions to which the appellant company would be entitled in view of the proposed new industrial policy of the State. During the course of the hearing of the writ petition, the learned Judge thought it worthwhile to make another attempt to investigate whether there was any reasonable possibility of rehabilitation of the company in view of the offers of financial reliefs coming from the State Government. With this in view, the learned Judge directed that a meeting should be convened in which the operating agency, IDBI and other creditors of the appellant company should listen to the appellant company and its allies on the relevant points. The respondents including the financial institutions having a stake in the matter were required to attend the meeting with an open mind to objectively assess the appellant's chances for rehabilitation.

11. Ultimately, on 8 November, 1995, such a joint meeting was held presided over by the General Manager, IDBI, Patna. The representatives of the banks as well as the Bihar State Financial Corporation were willing to support the proposals provided the unit's viability could be established, but the Bihar State Electricity Board expressed its inability to consider restoration of power to the appellant company in view of mounting overdues to the Board. The promoters were, of course, sanguine that they will be able to resolve their disputes with the Electricity Board. The other creditors, however, were not hopeful of working out the scheme and they expressed their inability to bring in the requisite funds. The promoters submitted two proposals, one for rehabilitation of the unit at an estimated cost of Rs. 209 lakhs envisaging term loans of Rs. 72 lakhs from other financial institutions, but the IFCI and IDBI did not agree to advance any further financial assistance. The other proposal pertained to a one-time settlement of dues from two parties, but the said proposal was also not acceptable since the concerned institutions were not willing to waive a part of the principal outstanding and the entire penal interest and other interest overdues. Moreover, the promoter was required to deposit the settled amount in a "no-lien account" with a nationalised bank and in consultation with the BIFR. The promoters were not in a position to arrange for such funds to be deposited in a no-lien account. The revised rehabilitation scheme was submitted by the appellant taking into account the reliefs/ concessions granted by the State Government.

12. The learned Judge by his impugned judgment and order has found that the financial institutions and the banks have refused to extend any further financial assistance to the appellant company. The requirement of additional funds to the tune of Rs. 72 lakhs was not forthcoming from the banks/financial institutions. The promoter was not in a position to bring in any other co-promoter, nor was it possible to make any proposals for one time settlement. The learned Judge has, therefore, held that despite the best efforts of the BIFR, the appellate authority and this court, it was not possible to formulate and work out a viable rehabilitation package. Under these circumstances, there appeared to be no justification for interference with the impugned orders of the BIFR and the appellate authority.

13. In course of the hearing of the appeal, we were told by the counsel for the appellant that having regard to the changed circumstances, in view of certain concessions granted by the State Government and willingness of the Bihar State Industrial Development Corporation to contribute a sum of Rs. 21 lakhs towards the equity capital of the company, as also having regard to the fact that the promoters had arranged for a sum of Rs. 43 lakhs, it may be worthwhile making one more effort to arrive at a consensus so that a rehabilitation package could be drawn up and worked out. Having regard to the fact that the appellant company is located in a backward district of Bihar, and in view of the fact that a working industrial unit had to close down on account of disconnection of supply of electrical energy, that too, on the basis of inflated bills submitted by the Bihar State Electricity Board, we were impressed by the submission urged before us. The profitable running of an industry in a State like Bihar, not only adds to the economic wellbeing of the State, but also provides employment to a large number of persons, apart from making available a product for human consumption. In a State like Bihar, where the industrial growth is negligible, and more industries have closed down than those newly established, we were keen that the appellant company should be given a chance of survival provided it was possible within the legal framework to do so. It was with this objective that we went out of the way to make efforts for working out rehabilitation scheme and to have a fresh look in the light of the changed circumstances.

14. In our order, dated 21 April, 1997, we had noticed the submission urged on behalf of the appellant company that the State Government had sanctioned a sum of Rs. 94 lakhs by way of margin money out of which a sum of Rs. 79 lakhs had actually been withdrawn and kept in a "no-lien account". This amount would be available to the appellant company. The promoters had also arranged for a sum of Rs. 43 lakhs. In this manner, a sum of Rs. 137 lakhs would be available to the appellant company to start its production. This was apart from the fact that a sum of Rs. 21 lakhs was expected from the Bihar State Industrial Development Corporation being its contribution to the equity of the company.

15. It was further stated that the new industrial policy of the State provided for generous exemption to the appellant company. The policy envisaged grant of

exemption from payment of sales tax on the purchase of raw materials which will benefit the company to the extent of Rs. 150 lakhs. The benefit that may accrue by way of exemption/deferment on payment of sales tax would be to the tune of Rs. 450 lakhs, apart from excise duty benefit of about Rs. 51 lakhs. The Bihar State Electricity Board had reduced its claim from Rs. 48.65 lakhs to Rs. 2.72 lakhs and it may be obliged to grant subsidy to the appellant company to the extent of Rs. 77 lakhs being a sick industry. These benefits generated considerable hope of chances of revival of the appellant company. Not being sure as to whether the scheme put forward by the appellant's company would really result in the hopeful revival of the company with a view to its profitable running, we directed the appellant company to produce before us a scheme to show how a sum of Rs. 137 lakhs would be utilised in the petitioner's unit for the purpose of starting production. The proposal made by the appellant company for restarting the plant was directed to be considered at a meeting of all the concerned institutions. Such a meeting was held on 30 May, 1997, but the meeting did not produce the desired result. The banks and the financial institutions are adamant in their stand that it is not possible to invest further funds in a sick unit like the appellant company. We, therefore, proceeded to hear the parties with a view to disposing of the appeal.

16. The proposal submitted by the appellant company before us pursuant to our order, dated 21 April, 1997, details the manner in which the appellant company can commence production of vanaspati ghee with the help of funds presently available to it. The proposal/estimate for recommencing production is Annexure 2 to the supplementary affidavit filed on behalf of the appellant company. Under the heading of funds, the promoters have committed themselves to provide Rs. 43 lakhs. The margin money expected from the Government of Bihar is stated to be Rs. 94 lakhs. The equity contribution of BSIDC is shown as Rs. 21 lakhs. The term loan from the banks is said to be Rs. 20 lakhs and from financial institutions Rs. 50 lakhs. So far as the banks and the institutions are concerned, the figures have been taken from the draft scheme prepared by the BIFR, though the banks and the financial institutions are not willing to provide the term loans.

17. We shall first deal with the provisions for margin money expected from the Government of Bihar to the tune of Rs. 94 lakhs. From the supplementary affidavit filed on behalf of the State of Bihar on 27 June, 1997, affirmed by the Secretary, Department of Industries, Government of Bihar, it appears that the State Government had sanctioned a sum of Rs. 94 lakhs towards margin money during the years 1989-90 and 1990-91. The cabinet had granted approval to make available a sum of Rs. 94 lakhs as margin money towards the rehabilitation of the appellant unit on certain terms and conditions. Approval was also given to make available a sum of Rs. 21 lakhs as additional share capital to the company by the Bihar State Industrial Development Corporation. However, due to reduction in Plan outlay, a sum of only Rs. 59 lakhs as against the aforesaid sum of Rs. 94 lakhs could be withdrawn and kept in the account in the Secretariat Treasury. For the withdrawal of the said amount of Rs. 59 lakhs, the concurrence

of the Finance Department is needed.

18. It would, thus, appear that against the expected receipt of Rs. 94 lakhs from the State Government, the assurance held out is only to the extent of Rs. 59 lakhs and that too with the concurrence of the Finance Department. So far as contribution by the Bihar State Industrial Development Corporation to the share capital of the appellant company to the extent of Rs. 21 lakhs is concerned, in paragraph 7 of the affidavit it is stated that the Bihar State Industrial Development Corporation is at present not in a position to contribute to additional equity in the appellant company. It is further stated in paragraph 6 of the affidavit that in the proposed estimates for recommencing production, the financial contribution expected from the State Government and the Bihar State Industrial Development Corporation is much more than the promoters' contribution. The State Government was not in a position to give any comment about the viability of the project either technically or financially.

19. From the affidavit filed on behalf of the State of Bihar, it becomes clear that if at all, only a sum of Rs. 59 lakhs may be provided, subject to concurrence of the Finance Department, for providing margin money, thereby reducing the working capital by Rs. 35 lakhs, the equity capital expected from the BSIDC is not forthcoming, making a further reduction of Rs. 21 lakhs. Thus the projected receipts are reduced by Rs. 56 lakhs.

20. Next comes the proposal of the promoters to bring in Rs. 43 lakhs. From a perusal of Annexures 2 and 2/1 annexed to the supplementary affidavit filed by the appellant on 5 May, 1997, it appears that a sum of Rs. 43 lakhs is not being brought by the promoters by making available a sum of Rs. 43 lakhs in cash for meeting the working capital requirement. The promoters propose to contribute Rs. 43 lakhs to the equity share capital by converting unsecured loans to equity shares. This would only mean that the amount outstanding to the extent of Rs. 43 lakhs by way of unsecured loan would get converted into equity capital. This would not, in any manner, augment the cash in-flow required by way of working capital requirement. Thus, this amount of Rs. 43 lakhs also cannot be taken into account for working out the availability of funds to restart the factory.

21. Similarly, other benefits envisaged under the New Industrial Policy will accrue to the appellant company only after it goes into production. Such reliefs may contribute to the profits that may be generated by the appellant company, once it goes into production. The banks and the financial institutions suspect that the funds as shown available in the proposal/estimate submitted by the appellant company contained in Annexures 2 and 2/1, will be sufficient to commence production. If out of that, a sum of Rs. 96 lakhs is deducted, as the State of Bihar and BSIDC have not given an assurance to that extent, and the further sum of Rs. 43 lakhs which the promoters claim to have brought in is not available by way of working capital requirement, the entire calculation becomes meaningless. In fact, with the State of Bihar and the BSIDC reducing their commitment, the scheme becomes impractical.

22. In view of these circumstances, we are satisfied that there is no scope for interference in this appeal. It is not possible with the present resources to profitably commence production. No purpose will, therefore, be served by referring the matter again to the BIFR for reconsideration in the changed circumstances.

23. This appeal is, therefore, dismissed. There will be no order as to costs.