
(2009) 11 DEL CK 0181
In the Delhi High Court
Case No : Writ Petition (C) 2662 of 2007

IFCI Limited

APPELLANT

Vs

Modi Industries Limited and Others

RESPONDENT

Date of Decision : 27-11-2009

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1), 22(1)

Citation : AIR 2010 Delhi 108 : (2011) 163 CompCas 29 : (2009) 8 ILR Delhi 170 Supp : (2010) 7 RCR(Civil) 869

Hon'ble Judges : Veena Birbal, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Parag Tripathi, ASG, Ashwani Mata, Suresh Dobhal, Rajeev Rai, Ruchi Kohli and Monisha Honda, for the Appellant; Rajeev Sawhney and Rakesh Sawhney, for the Respondent

Final Decision : Allowed

Judgement

Badar Durrez Ahmed, J.—The petitioner seeks the setting aside of the order dated 11.12.2006 passed by the Debts Recovery Appellate Tribunal (hereinafter referred to as "DRAT") in Miscellaneous Appeal No. 150/2003, which, in turn, arose out of an order passed by the Debts Recovery Tribunal (hereinafter referred to as "DRT") on 18.11.2003 in IA No. 507/2003 in O.A. No. 439/2000 (Delhi-I).

2. The entire controversy in this writ petition centres around the question of whether the petitioner herein had the permission and / or consent of the Board for Industrial and Financial Reconstruction (hereinafter referred to as "BIFR") u/s 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "SICA") prior to the institution of the said O.A. No. 439/2000 before the Debts Recovery Tribunal. According to the petitioner, it had the permission and/or prior consent of BIFR for instituting the said O.A. No. 439/2000. The learned Counsel for the petitioner place reliance on a communication of May 2000 issued by the Bench Officer to establish the same.

3. On the other hand, it is the case of the respondent No. 1 company that the said communication of May 2000 cannot be regarded as "the consent of the Board" as contemplated u/s 22(1) of SICA.

4. In the year 1990, the respondent No. 1 became a sick company and made a reference to the BIFR u/s 15(1) of SICA. The said reference came to be registered as Case No. 151/1990. By an order dated 14.03.1991, the BIFR declared the respondent No. 1 as a sick company and appointed IDBI as the operating agency for preparing a scheme of rehabilitation of the company. During the pendency of the proceedings before the BIFR, a writ petition [Civil Writ Petition No. 45214/1993] was filed before the High Court of Judicature at Allahabad by one Bhartiya Kisan Union. The Allahabad High Court, by an order dated 10.12.1993, stayed further proceedings in Case No. 151/1990 pending before the BIFR.

In the meanwhile, BIFR had received several applications / letters from creditors requesting for permission to initiate the proceedings against the respondents. It is thereafter that the following communication was issued by the Bench Officer of the BIFR in May 2000:

Case No. 151/90 Dated: 5.2000 To

As per list enclosed.

SUB: Case No. 151/90: MODI INDUSTRIES LTD.

In this case the Board has received a number of requests from the secured/unsecured creditors filing their claims against the captioned company with this Board. The case has been placed before the bench and the bench has noted that writ petition filed by the Bharatiya Kisan Union in the Hon"ble High Court of Allahabad against winding up of the captioned company is still pending and the stay granted by that Court vide judgment/order dated 10.12.93 on the proceedings of BIFR in respect of the company, is still operative.

Accordingly, the bench has advised all secured creditors that they may be permitted to (i) move Allahabad High Court for vacation of stay if they so wish and (ii) file suits for recovery of their dues, if desired, but no decree to be executed without prior permission of this board.

By the order of the Board

H.K. Gupta

Bench Officer

5. On the basis of the said communication of May 2000, the petitioner filed the said O.A. No. 439/2000 (Delhi-I) before the Debts Recovery Tribunal. In the O.A. itself, the petitioner had indicated that the BIFR, by its order dated 05.05.2000, permitted the petitioner, being a secured creditor, to file the suit (O.A.) for the recovery of its dues.

6. Subsequently, by a communication dated 13.09.2000 issued by the Registrar of BIFR, it was notified that the Bench, "after due consideration has withdrawn forthwith the permission granted by the Board to the secured creditors to file recovery suits". Since this communication is of material significance in deciding the controversy at hand, the same is set out hereunder:

Case No. 151/90 Dated: 13.9.2000 To

As per list enclosed

Sub: Case No. 151/90 M/s. Modi Industries Ltd.

In supersession of this Board's letter of even number of May, 2000, and in view of the continuing stay order of Hon'ble Allahabad High Court even after 11.5.94 the Bench after due consideration has withdrawn forthwith the permission granted by the Board to the secured creditors to file recovery suits. However, the applicants i.e. M/s. Greaves Ltd. and office of the General Manager, Telecom Deptt. Ghaziabad along with the IDBI (OA) have been advised to pursue the question of vacation of stay with the Hon'ble Allahabad High Court, since the recovery of Bank/FIs dues as well as revival process of the co. is held up on account of the said stay orders. Besides, due to deterioration in the condition of the assets and mounting losses of the co., the revival prospects for the co. are getting more and more remote with each passing year. By order of the Board

Sd/

Rupa Duta

REGISTRAR

On the basis of the said communication dated 13.09.2000, whereby the earlier permission was withdrawn, the respondent No. 1 company filed an application being I.A. 213/2001 for dismissal of O.A. No. 439/2000. By an order dated 23.07.2001, the said application was disposed of and the said O.A. No. 439/2000 was adjourned sine die.

7. Thereafter, in the course of hearing before the BIFR on 20.08.2002, the petitioner, alongwith the Allahabad Bank and Syndicate Bank, sought specific permission u/s 22(1) of SICA to continue their suits and also indicated that they had given copies to the respondent No. 1 company and the respondent No. 1 had submitted replies to them. By virtue of the order dated 20.08.2002, passed by the BIFR, IFCI (the petitioner herein), Allahabad Bank and Syndicate Bank were allowed "to continue their suits filed against the company with the condition that if any decree or award would be obtained, the same should not be executed without the prior specific approval of the Board". It was also observed in the said order dated 20.08.2002, that the Board had given this permission keeping in view the fact that the funds given by the secured creditors were out of public savings and there was a need to ensure that the secured creditors should be able to safeguard the public interest in the process.

8. Thereafter, on an application moved by the petitioner, the DRT, by an order dated 31.01.2003, revived the proceedings in O.A. No. 439/2000. Subsequently, the respondent filed I.A. No. 507/2003 in the said O.A. 439/2000 before the DRT, for dismissal of the said O.A. on the ground that it was without jurisdiction and that it was "void ab initio". The said I.A. No. 507/2003 was rejected by the DRT by virtue of its order dated 18.11.2003. The operative portion of the order passed on 18.11.2003 reads as under:

I have heard the application and also perused the record of OA. Vide order dated 31.1.2003 my learned predecessor allowed the respondent financial institution to revive the proceedings as the reference was rejected by the BIFR. I do not find any illegality in the continuance of further proceedings in this case especially when applicant defendant No. 1 has itself stated BIFR allowed the secured creditors including IFCI to continue with their respective suits against the company with the condition that if any decree or award is obtained, the same should not be executed without prior specific approval of the Board. Accordingly, in my view, this application has no merits and is rejected as the OA has been filed against other defendants also.

9. Being aggrieved by the said order dated 18.11.2003, the respondent No. 1 filed an appeal. The said appeal was allowed by the DRAT by virtue of the impugned order dated 11.12.2006. This is where the matter rests.

10. The learned Counsel for the respondent No. 1 company laid great emphasis on the requirement of prior permission / consent u/s 22(1) of SICA, before any recovery proceedings in respect of a sick industrial company could be initiated. It was also contended that the requirement of prior permission was not a mere technicality, but was a mandatory provision. With respect to these contentions, reliance was placed on the following decisions:

1. The Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and others,

2. Gear Enterprises v. Mafatlal Engineering Industries Ltd. 1994 (3) Comp. LJ 72 (Bom);

3. C.J. Gelatine Products Ltd. 1995 (2) Comp. LJ 343 (Bom);

4. Asian Bearings and Tools Corporation v. The Coastal Chemicals Ltd. 1997 (1) Comp. LJ 78 (AP);

5. Cochin Malabar Estates and Industries Ltd. v. Overseas Latex (P) Ltd. and Ors. 2002 (1) Comp. LJ 107 (Ker); and

6. M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others,

11. At the outset, we may state that there is no dispute with the proposition that the requirement of consent of the Board u/s 22(1) of SICA is a mandatory requirement and is not a mere technicality. From this flows the corollary that if

there is no consent of the Board, no suit for recovery of money can be instituted and, if any suit for recovery of money or for the enforcement of any security against a sick industrial company or of any guarantee in respect of any loans or advances granted to such company, is instituted without the consent of the BIFR, the same would not be maintainable.

12. But, the answer to the question in the present case rests upon the interpretation to be given to the communication of May 2000. If the said communication is to be regarded as one which communicates the decision of the BIFR granting permission to institute recovery proceedings, then, clearly, the O.A. instituted by the petitioner before the DRT would be maintainable and cannot be regarded as having been instituted without the permission and / or consent of the BIFR u/s 22(1) of SICA. On the other hand, if the said communication of May 2000 cannot be regarded as a communication of the consent of the Board, then, clearly, the said O.A. (O.A. No. 439/2000) would have to be regarded as a non-starter.

13. Going back to the communication of May 2000, a plain reading thereof would disclose that the Bench had permitted all secured creditors to (i) move the Allahabad High Court for vacation of the stay if they so wished; and (ii) file suits for recovery of their dues, if desired, but no decree be executed without prior permission of the BIFR. The communication dated 13.09.2000, on the strength of which the respondent No. 1 company had filed I.A. No. 213/2001 seeking dismissal of O.A. No. 439/2000, clearly recognizes the fact that the communication of May 2000 had been issued by the Board. This is apparent from the very first sentence appearing in the said letter dated 13.09.2000, to the following effect:

In supersession of this Board's letter of even number of May, 2000....

This, in itself, is sufficient indication of the fact that the BIFR did not, at any point of time, disown the communication dated May, 2000. The respondent No. 1 had also placed reliance on the communication of 13.09.2000. Therefore, the respondent No. 1 company cannot now be heard to say that the communication of May 2000 was not a communication of the BIFR.

14. Another important aspect of the matter is that the communication of 13.09.2000 uses the expression "in supersession of" with regard to the communication of May 2000. It also uses the expression "has withdrawn forthwith the permission granted by the Board". These expressions make it absolutely clear that the BIFR recognized the fact that, by the communication of May 2000, it had granted permission to the secured creditors to file recovery suits and that because of certain circumstances mentioned in the communication dated 13.09.2000 itself, the Bench, after due consideration, had withdrawn the permission granted earlier. It is, therefore, clear that the BIFR had, in fact, granted permission to, inter alia, the petitioner, being a secured creditor, to file recovery suits, subject, however, to the condition that no decree be executed

without prior permission of the BIFR. It is another matter that by virtue of the communication dated 13.09.2000, the said permission was subsequently withdrawn.

15. We have already referred to the proceedings of 20.08.2002 before the BIFR. It may be recalled that in the course of the said proceedings, the petitioner, alongwith the Allahabad Bank and Syndicate Bank, had sought specific permission u/s 22(1) of SICA "to continue" their suits. The BIFR, after hearing the submissions made by all concerned and examining the material on record, inter alia, directed that the petitioner, Allahabad Bank and the Syndicate Bank, be allowed "to continue" their suits filed against the respondent No. 1 company with the condition that if any decree or award be obtained, the same should not be executed without the prior specific approval of the BIFR. We may also reiterate that BIFR had given this permission keeping in view the fact that the funds advanced by these secured creditors were from the public savings and that there was a need to ensure that the secured creditors should be able to safeguard the public interest in the process.

16. At this juncture, it may be relevant to point out that, according to the petitioner, the outstanding dues as on 22.07.2009 were to the extent of approximately Rs 85.82 crores, though the amount mentioned at the time of filing of the said O.A. No. 439/2000, was approximately Rs 22.41 crores.

17. The impugned order proceeds on the basis as if no permission / consent was given by the BIFR prior to the institution of O.A. No. 439/2000. Such a presumption is not borne out by the record, as indicated by us. When the petitioner instituted O.A. No. 439/2000, it had the consent of the BIFR. The subsequent withdrawal of consent and, thereafter, permission by the Board for continuing the proceedings clearly indicates that the consent existed originally. Therefore, the impugned order passed by the DRAT cannot be sustained. We may also observe that there is no discussion in the impugned order with regard to the effect of the communication dated 13.09.2000 and, in particular, the use of the expressions "in supersession of" and "withdrawn forthwith the permission granted by the Board", which clearly lead to a conclusion contrary to what has been assumed by the DRAT.

18. As a result of the foregoing discussion, the impugned order is set aside. Consequently, it is open to the DRT to proceed with O.A. No. 439/2000. The writ petition stands allowed accordingly with an order of costs in favour of the petitioner and against the respondent No. 1 company which we quantify at Rs 50,000/-.