

(2016) 09 DEL CK 0079
In the Delhi High Court
Case No : CM (M) 884 of 2016

Indo American Electricals Ltd.

APPELLANT

Vs

Sanjay Gupta @ Sanjay Mahajan

RESPONDENT

Date of Decision : 07-09-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13(4)
Sick Industrial Companies (Special Provisions) Act, 1985

Citation : (2017) 3 ADDelhi 48 : (2017) 170 AIC 672 : (2017) 1 BC 405 :
(2016) 235 DLT 19 : (2017) 1 DRTC 578

Hon'ble Judges : Jayant Nath, J.

Bench : Single Bench

Advocate : Mr. S. Chakraborty, Advocate, for the Petitioner; Mr. Naresh Sharma,
Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Jayant Nath, J. (Oral)—CM No. 32709/2016 (exemption)

Allowed subject to all exceptions.

CM(M) 884/2016 and CM No. 32708/2016 (stay)

By the present petition, the petitioner seeks to impugn the order dated 21.07.2016 by which an application filed by the petitioner/defendant under Order 7, Rule 11 CPC was dismissed.

2. The contention of the petitioner is that the respondent has filed a suit for recovery of Rs.5,95,390/-. The petitioner filed the application under Order 7, Rule 11 CPC stating that the defendant/petitioner company has a pending enquiry under BIFR and a reference has been made vide letter dated 19.10.2014 and that the reference has been approved and a case has been registered as Case No. 53/2014. On the basis of this averment, it was stated that the plaint be

rejected.

3. The impugned order of the trial court rejected the application giving several reasons. It was firstly stated that as per the third proviso to Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 where the specified number of secured creditors take measures for recovery of their secured debt under Section 13(4) of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "SARFAESI Act"), then it would automatically entail abatement of the reference/proceedings. Based on the said interpretation, it was held that the reference stands automatically abated. It is also stated that the last proceedings that have been filed on record are dated 22.10.2015 before BIFR and that subsequently, nothing has been filed by the petitioner pointing out what is the stage of the proceedings or as to whether the name of the petitioner/defendant is shown in the list of the secured creditors.

4. Learned counsel for the petitioner has relied upon the judgment of the Division Bench of this court in the case of M/s. Global Infrastructure Technology Ltd. v. Kotak Mahindra Bank Ltd. & Ors. in W.P.(C) 4862/2013 dated 16.04.2014 to contend that this court has already held that the satisfaction as stated in the third proviso to Section 15(1) of the SICA regarding the reference having being abated can only be decided by BIFR. He further submits that on the facts of the case, the Supreme Court in Civil Appeal No. 3076/2016 dated 18.03.2016 modified the directions passed by the Division Bench but did not disturb the findings of law recorded by the Division Bench. He also relies upon the judgment of the Supreme Court in the case of M/s. Madras Petrochem Ltd. & Anr. v. BIFR & Ors., (2016) 4 SCC 1/(2016 SCC OnLine SC 86) for the said purpose.

5. Learned counsel appearing for the respondent has relied upon the judgment of the Bombay High Court in the case of Nouveaw Exports Private Limited v. Appellate Authority for Industrial and Financial Reconstruction Co. dated 19.05.2010 passed in W.P.(C) 2079/2010 to contend that abatement as stipulated under the third proviso to Section 15(1) of the SICA could be automatic.

6. Learned counsel for the petitioner has in rejoinder pointed out that in para 5 of the said judgment of the Bombay High Court relied upon by the respondent, the High Court noted that the observations in the order may be treated only as prima facie. He further submits that in view of the fact that the Division Bench of this High Court has held differently, the legal position as stated by this court would prevail before the trial court.

7. Section 15(1) of the SICA reads 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 subsection (1) of section 5 of that Act:

Provided also that on or after the commencement of the Securitisation and Reconstruction of 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."

8. In the context of who would determine that the Enquiry has abated under third proviso to Section 15(1) of SICA, the Division Bench of this High Court in the case of *M/s. Global Infrastructure Technology Ltd. v. Kotak Mahindra Bank Ltd. & Ors.* (supra) stated as follows:

"16. Apart from authority, it seems to us that it would be incongruous to hold that a secured creditor or group of secured creditors who represent 75% in value of the financial assistance in respect of "a financial asset" and thus are entitled to recover the debt from the borrower without recourse to any tribunal or court and by taking any of the measures to recover the debt contemplated by section 13(4) of the SARFAESI Act can also scuttle the revival of a sick industrial company by asking for abatement of the reference pending before the BIFR without satisfying the more stringent requirement of the 3rd proviso to section 15(1) of SICA. To continue the example given earlier, if the total debts due by the borrower to the secured creditors is Rs. 100 crores, and if the contention of the respondent is right, then Bank "B" and Bank "C" which together have advanced Rs. 40 lakhs against the machinery can not only take steps to recover the debts under the SARFAESI Act but also successfully ask for abatement of the reference pending before the BIFR, though they woefully fall short of the threshold limit of Rs. 75 crores set by the 3rd proviso to section 15 (1) of the SICA. One fails to understand what purpose would be served if such an interpretation canvassed on

behalf of the respondent is accepted.

17. The question whether the threshold limits/conditions set by the 3rd proviso to section 15 (1) of SICA are satisfied is necessarily to be based on data reflected by the accounts of the petitioner and any other relevant material. That is an exercise which can only be embarked upon by the BIFR. While therefore setting aside the orders of the BIFR and the AIFR, we restore the matter to the BIFR for a decision, to be taken after giving a fair and reasonable opportunity to the parties to put forth their respective cases and place on record the accounts and all other relevant material. It shall be open to both sides to raise all other contentions and arguments (on the merits of which we express no opinion) which shall be considered and decided by the BIFR. It would be expedient that the decision is rendered by the BIFR within four months from today."

9. In an SLP against the above judgment, the Supreme Court in Civil Appeal No.3076/2016 dated 18.03.2016 noted that a finding of fact had been recorded by BIFR that the appellant before the Supreme Court was holding 100% of the outstanding of the secured debts of respondent No.1. Hence, the Supreme Court felt that the final direction of the High Court remanding the matter back for determination of the same question was a redundant exercise and accordingly set aside the impugned order. However, the legal proposition laid down by this court had not been dealt with by the Supreme Court.

10. In the context of the above, reference may also be had to the judgment of the Supreme Court in *M/s Madras Petrochem Ltd. & Anr. v. BIFR & Ors.*, (2016) 4 SCC 1. The Supreme Court in that judgment was considering the interplay between the Sick Industrial Companies (Special Provisions) Act, 1985 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The Supreme Court held as follows:

"50. Another important aspect as to the construction of the third proviso to Section 15(1) is the meaning of the expression "such reference shall abate". One of the meanings of the expression "abate" is "to put an end to; to curtail; to come to naught". (See Ramanatha Aiyar's Law Lexicon). A reference can be said to abate in one or several ways. One obvious way that a reference abates is where the Board, after inquiry, rejects the reference for the reason that the Board is satisfied that the Company is not a sick industrial company as defined under the Act. Another way in which a reference can abate is where a scheme is implemented successfully, and the sick industrial company is taken out of the woods successfully. A third manner in which a reference can abate is when a scheme or schemes have failed in respect of the sick industrial company, and in the opinion of the BIFR, the said Company ought to be wound up. A fourth instance of abatement is provided by the third proviso to Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. And that is that a reference which is pending in the sense understood here in above shall abate if the secured creditors of not less than 75th in value of the amount outstanding against the financial assistance disbursed to the borrower, have taken measures

to recover secured debts Under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. It is clear that the third proviso to Section 15(1) seeks to strike a balance between getting a sick industrial company out of the woods and secured creditors being able to recover the debt owed to them by such company. The legislature has thought it fit to annul all proceedings before the BIFR only when at least 75th of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors have taken the measures listed in Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The balance is therefore struck by the figure of "not less than 75th". The legislature has inserted this provision so that, if 75th or more of the secured creditors get together to take measures Under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, they will not be thwarted by the provisions of Section 22 of Sick Industrial Companies (Special Provisions) Act, 1985, and it will not be necessary for them to obtain BIFR permission before taking any such measures. This construction of the third proviso to Section 15(1) is in keeping with the march of events post 2002, when the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 came to be enacted pursuant to various committee reports, and for the reasons outlined here in above.

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54. The resultant position may be stated thus:

1. Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 will continue to apply in the case of unsecured creditors seeking to recover their debts from a sick industrial company. This is for the reason that the Sick Industrial Companies (Special Provisions) Act, 1985 overrides the provisions of the Recovery of Debts Due To Banks And Financial Institutions Act, 1993.
2. Where a secured creditor of a sick industrial company seeks to recover its debt in the manner provided by Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, such secured creditor may realise such secured debt Under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, notwithstanding the provisions of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985.
3. In a situation where there are more than one secured creditor of a sick industrial company or it has been jointly financed by secured creditors, and at least 60 per cent of such secured creditors in value of the amount outstanding as on a record date do not agree upon exercise of the right to realise their security under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 will continue to have full play.

4. Where, Under Section 13(9) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, in the case of a sick industrial company having more than one secured creditor or being jointly financed by secured creditors representing 60 per cent or more in value of the amount outstanding as on a record date wish to exercise their rights to enforce their security under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, being inconsistent with the exercise of such rights, will have no play.

5. Where secured creditors representing not less than 75 per cent in value of the amount outstanding against financial assistance decide to enforce their security under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, any reference pending under the Sick Industrial Companies (Special Provisions) Act, 1985 cannot be proceeded with further-the proceedings under the Sick Industrial Companies (Special Provisions) Act, 1985 will abate."

Hence, the Supreme Court took the view that where 75th or more of the secured creditors get together to take measures under SARFAESI Act, it is not necessary for them to obtain BIFR permission before taking such measures.

11. On the facts of this case, it is not clear as to how the trial court came to the conclusion that the proceedings have abated. The only light on this aspect is shown in the orders of the BIFR dated 24.06.2015 where the submission was noted on behalf of the SBI that SBI has taken symbolic possession of two assets of the company. The issue however remains as to whether the said act of SBI is covered by the third proviso to Section 15(1) of SICA and if so, how? This is it not discussed in the impugned order.

The reference abates only when secured creditors representing not less than 75th in the value of the amount outstanding against the financial assistance disbursed to the borrowers of such secured creditors have taken measures under Section 13(4) of the SICA. There are no facts available to show that such an eventuality has taken place. The conclusion of abatement by the trial court based on the order of BIFR dated 24.06.2015 is erroneous.

12. In view of the above, the present petition is allowed. The impugned order passed by the trial court dated 21.07.2016 is set aside. The suit filed by the respondent shall remain stayed till the pendency of the reference before the BIFR. The respondent would be at liberty to move an application for vacation of the stay in case subsequent developments take place which warrant vacation of the present stay.

13. The petition stands disposed of.

14. Dasti.