

(1994) 03 DEL CK 0065

In the Delhi High Court

Case No : Civil Appeal No. 217 of 1994 and Civil Petition No. 3 of 1991

Industrial Development Bank of India

APPELLANT

Vs

Surekha Coated Tables and Sheets Ltd.

RESPONDENT

Date of Decision : 25-03-1994

Acts Referred:

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

Citation : (1994) 2 AD 229 : (1996) 85 CompCas 594 : (1994) 29 DRJ 90

Hon'ble Judges : Y.K. Sabharwal, J

Bench : Single Bench

Advocate : Shankar Ghosh, G. Joshi, G.L. Rawal, K.K. Jain, S.K. Tiwari and A.K. Jain, for the Appellant;

Judgement

Y.K. Sabharwal, J.

(1) Company Petition 3 of 1991 was filed on 7th January 1991 seeking winding up of lie respondent company on the ground that the Company was unable to pay its debts. The petition was admitted to hearing: citation was directed to be published in newspapers and the Provisional Liquidator was appointed in terms of orders made by this Court on 30th April 1993. On 25th January 1994 the appeal filed by the Company against the order dated 30th April 1993 was dismissed by a Division Bench. The operative portion of the order dated 25th January 1994 reads as under:-

"ON consideration of the matter we find no ground to interfere. However. we leave the appellant to move the learned single Judge for appropriate orders in view of the supervening facts which have come into being during the pendency of this appeal."

(2) Now this application leas been filed by the Company praying that this Court may he pleased to:-

"A)Recall/modify the order dated 30.4.93. or in the alternative. b) Allow the Applicant Company to work and carry on its business under the supervision of

the official liquidator/provisional liquidator, appointed by this Hon'ble Court. c) Clarify that the passing of the order dated 30.4.93 passed by this Hon'ble Court does not create any conflict between this honorable Court and the Bifr and that BIFR/AAIFR is free to carry on its proceedings as statutorily enjoined upon it to do so. "

(3) It is not necessary to restate title facts which have been noticed in the order dated 30th April. 1993. It appears that during the pendency of the winding up petition the Company had filed before the Board for Industrial & Financial Reconstruction (BIFR) a reference u/s 15 of Sick Industrial Companies (Special Provisions) Act. 1985. (for short "the Act"). This fact was not brought to the notice of this Court by the Company. The fact that the Company had approached Bifr was brought to the notice of this Court by the petitioner on 18th March 1993 and on that date. the petitioner also placed on record a copy of order dated 4th March, 1993 passed by BIFR. In the order dated 4th March 1993 Bifr clarified that no enquiry had been initiated u/s 16(1) of the Act pending a decision on the admissibility of reference made u/s 15(1) of the Act. It was also noticed by Bifr that. while taking up the case to consider whether the reference filed by the company is valid for an enquiry u/s 16(1) of the Act. the Bench observed that certain issues are not clear in deciding title admissibility of the reference filed in Form "A". A reference to the aforesaid order has been made in the order of this Court dated 30th April 1993. Admittedly, reference made by the Company u/s 15 of the Act was dismissed by as non-maintainable in terms of order dated 18th August. 1993 passed hy Bifr, holding that enquiry u/s 16 of the Act was not conducted in view of insufficiency of proof in support of Company's claim regarding the number of workers employed in the Company. It was also noticed hy Bifr that due to the reasons stated in the last proceedings no enquiry was proceeded with u/s 16(1)01 the Act. It seems that reference to "last proceedings" is to the proceedings as recorded in the order dated 4th March 1993. In the proceedings dated 4th March 1993 it was also noticed that in the absence of balance-sheet not being made available to the Banks. the hanks were in dark on the legal requirements for making a reference to BIFR. The order dated 18th August, 1993 is subject matter of appeal before the Appellate authority under the Act.

(4) According to the Company, the supervening fact which has come into being during the pendency of appeal before the Division Bench, is the pendency of aforesaid appeal before the Appellate authority. Mr.Rawal, learned counsel for the Company. vehemently contends that in view of pendency of appeal u/s 25 of the Act, the bar contained in Section 22 of the Act applies and these proceedings cannot be proceeded with further and also that the order dated 30th April 1993 deserves to be recalled and the winding up petition is liable to be dismissed. It is also the contention of Mr. Rawal that enquiry u/s 16 of the Act is deemed to be pending and as such too the winding up petition deserves dismissal.

(5) Section 16 is a part of Chapter Iii of the Act which deals with references,

inquiries and schemes under the Act. A reference to Bifr can be made by an industrial company that has become a sick industrial company in the manner provided for in Section 15 of the Act. The reference is required to be made in Form "A" appended to "The Board for Industrial and Financial Reconstruction Regulations, 1987". Regulation 19(6) provides that if, on scrutiny, the reference is found to be in order, it shall be duly registered, assigned a Serial number and put up before the concerned Bench. Upon receipt of reference or upon information received or upon its own knowledge as to the financial condition of the Company, the Bifr, as required by Section 16 of the Act, is required to make such enquiry as it deems fit for determining whether any industrial company has become a sick industrial company. Where the Bifr deems it fit to make such an enquiry or to cause an enquiry to be made into any industrial company, sub-section (4) of Section 16 requires it to appoint one or more persons to be Special Director or Special Directors of the Company for safeguarding the financial and other interests of the Company. Section 17 provides that if after making an enquiry u/s 16, the Bifr is satisfied that the Company has become a sick industrial company, it shall, after considering all the relevant facts and circumstances of the case, decide, whether it is practicable for the Company to make its net worth positive within a reasonable time. If the Bifr decides in affirmative, it shall, by order in writing give such time to the Company as it may deem fit to make its net worth positive but if it decides in the negative and considers it necessary or expedient in the public interest to adopt all or any of the measures specified in Section 16, it may by a written order direct any operating agency to prepare a scheme providing for such measures in relation to such company. Section 18 provides for preparation and sanction of the schemes. Section 19 provides for rehabilitation by giving financial assistance. The cessation of proceedings for winding up of the industrial company or for execution, distress or like against any of the properties of the industrial company or for appointment of Receiver etc. is provided for in Section 22 of the Act. Section 25 which is in Chapter IV of the Act provides for an appeal being filed by any person aggrieved by an order of the Bifr made under the Act. In view of the unambiguous and clear language of Sections 15, 16, and 22 of the Act, it is not possible to accept the contention of Mr. Rawal that once the reference has been found to be in order, registered and assigned a Serial number and put up before the Bench, automatically Section 16 would come into operation and enquiry would be deemed to be pending and Section 22 would apply resulting in the orders being made for dismissal of the proceedings for winding up of the industrial company. Section 22 to the extent relevant in clear terms provides for the cessation of the winding up proceedings where an inquiry u/s 16 is pending. It cannot be held that Section 22 would apply where reference u/s 15 is pending but an enquiry u/s 16 is not pending. It is also not possible to accept the contention that on registration of reference under Regulation 19(6), an enquiry u/s 16 is deemed to be pending. In any case, in the present case, the Bifr has clearly held in the orders dated 4th March, 1993 and 18th August, 1993 that no inquiry has been initiated u/s 16 of the Act. The reference has been held to be not maintainable.

It is not for this court, in these proceedings, to go into the question of correctness or otherwise of the order of the Bifr dated 18th August, 1993. As noticed hereinbefore, the question of correctness of the order dated 18th August, 1993 is subject matter of appeal which is pending before the appellate authority. For the present purposes, this court has to proceed on the basis that the Bifr has not initiated an inquiry as contemplated by Section 16 of the Act.

(6) MR.RAWAL contends that assigning though not admitting that inquiry u/s 16 is not pending, still Section 22 would apply as reference u/s 15 was pending on 30th April 1993. In my view, the applicant Company is estopped from urging this ground. The appeal against the order dated 30th April 1993 has been dismissed by a Division Bench of this Court and the applicant Company has only been granted leave to seek appropriate orders on account of supervening facts which came into being during the pendency of the appeal before the Division Bench. The contention that reference u/s 15 was pending when the order was made on 30th April 1993 cannot be said to be a supervening fact which came into being during the pendency of the appeal. It was open to the appellant company to urge before the Division Bench that as reference u/s 15 was pending, in law, the order dated 30th April 1993 could not be passed.

(7) Now let me examine the ratio of the decision of the Supreme Court in the case of Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another, on which strong reliance was placed by Mr.Rawal. The Supreme Court has held where an inquiry is pending u/s 16/17 or an appeal is pending u/s 25 of the Act there should be cession of coercive activities of the type mentioned in Section 22(1) to permit the Bifr to consider what remedial measures it should take with respect to sick industrial companies. Mr.Rawal contends that the Supreme Court has held that Section 22 would apply even when reference u/s 15 is pending. It would be useful to extract here Para 14 of the decision on which reliance is placed by learned counsel, It reads:-

"now we come to the impugned decision. The High Court was considerably influenced by the fact that the appellant-company owed crores of rupees to banks and felt that so far as such creditors are concerned, different considerations may come into play but the High Court with respect failed to appreciate that the 1985 Act was enacted primarily to assist sick industrial undertakings which inter alia failed to meet their financial obligations, it is, therefore ,difficult to accept the view of the High Court that where the creditors of a sick industrial concern happen to be banks or State Financial Corporations different considerations would come into play. It must be realised that in the modern industrial environment large industries are generally financed by banks and statutory corporations created specially for that purpose and if they are permitted to resort to independent action in total disregard of the pending inquiry under Sections 15 to 19 of the 1985 Act the entire exercise under the said provisions would be rendered nugatory by the time the Bifr is able to evolve a scheme of revival or rehabilitation of the sick industrial concern by the simple

device of the Financial Corporation resorting to Section 29 of the 1951 Act. We are, therefore, of the opinion that where an inquiry is pending under Sections 16/17 or an appeal is pending u/s 25 of the 1985 Act there should be cessation of the coercive activities of the type mentioned in Section 22(1) to permit the Bifur to consider what remedial measures it should take with respect to the sick industrial company. The expression "proceedings" in Section 22(1). Therefore, cannot be confined to legal proceedings understood in the narrow sense of proceedings in a court of law or a legal tribunal for attachment and sale of the debtor's property." (Emphasis is mine).

The words "pending inquiry under Sections 15 to 19 of 1985 Act" as used in above passage have to be understood in the context of clear verdict that cessation of activities of the type mentioned in Section 22(1) of the Act has to take place where inquiry is pending under Sections 16/17 or an appeal is pending u/s 25 of the Act. The Supreme Court has not held that there can be cessation of the proceedings even where reference u/s 15 is pending but no inquiry u/s 16 is pending. While noticing Sections 15 to 19 in the afore quoted passage, the Supreme Court opined that the banks and statutory corporations cannot be permitted to resort to independent action in total disregard of the "pending inquiry." In my view, therefore, the cited decision is not an authority for the proposition that Section 22 would apply when reference u/s 15 is pending even though enquiry u/s 16 may not be pending. In the present case, the Bifur has held that no inquiry u/s 16 is pending and that order is now subject matter of the appeal.

(8) NEXT. Mr. Rawal contends that, in any case, Section 22 of the Act would apply as an appeal u/s 25 of the Act is now pending. The submission of learned counsel is that Section 22 stipulates that where an appeal u/s 25 is pending winding up proceedings cannot be proceeded with. There is a fallacy in this argument as well. If the argument of Mr. Rawal is accepted that would mean that although Section 22 would not apply when only reference u/s 15 is pending but it would apply on dismissal of the said reference in case an appeal u/s 25 is filed against the order rejecting the reference. That cannot be the intention of the Legislature. The plain meaning of Section 22 to the extent, relevant for the present purpose is that where an inquiry u/s 16 is pending or any scheme referred to u/s 16 is under preparation or consideration or a sanctioned scheme is under implementation and in connection with the said aspects where an appeal u/s 25 relating to industrial company is pending, then Section 22 would come into play. Section 22 will not come into operation where an inquiry u/s 16 has not commenced and where the reference u/s 15 itself has been rejected. Further, Section 22 to the extent applicable here provides that where an appeal u/s 25 relating to industrial company is pending there would be cessation of proceedings of winding up etc. The term "industrial company" and "industrial undertakings" have been defined in Section 3(e) and (f) of the Act respectively. It is not disputed that to come within the definition of the term the "industrial company" it is necessary that the company shall have 50 or more workers. In the present

case, by the order dated 18th August, 1993, the Bench has held that the Company could not convincingly establish that 50 or more workers are engaged in any manufacturing process in the Company. If that view, the applicant Company would not be an "industrial company" within the meaning of the Act and as such too Section 22 of the Act will have no applicability. It is not for this court to go into the question whether the applicant Company had in fact 50 workers or less or that the order dated 18th August, 1993 was correctly passed or not since that order is the subject matter of appeal pending before the appellate authority under the Act.

(9) In view of my decision on the aforesaid contentions of Mr. Rawal, it is not necessary to decide the question that where Section 22 of the Act applies, the proceedings are liable to be dismissed and not kept in abeyance. In this connection it may also be noticed that in the application there is no prayer for dismissal of the winding up petition though it was so argued by Mr. Rawal. I may also notice that no submission was made by the learned counsel for the applicant on prayer (c) of the application.

(10) In the result, I do not find any substance in this application. The same is, accordingly.