

(2010) 01 AHC CK 0222

In the Allahabad High Court

Case No : Civil Miscellaneous Application No. 207667 of 2008

Ing. Vysya Bank Ltd.

APPELLANT

Vs

Asset Reconstruction Company India Ltd. and Others

RESPONDENT

Date of Decision : 18-01-2010

Acts Referred:

Companies Act, 1956 — Section 391, 394

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1), 25

Citation : (2010) 01 AHC CK 0222

Hon'ble Judges : R.K.Agrawal, J

Final Decision : Dismissed

Judgement

R.K. Agrawal, J.—M/s. Shamken Spinners Limited (hereinafter referred to as the Company) filed an application under sections 391 and 394 of the Companies Act, 1956 (hereinafter referred to as the Act) for a direction to convene a meeting of the secured creditors of the company for approving the proposed scheme of arrangement between the Company and Mr. Rajiv Raina, strategic investor of M/s. SDR Capital Ltd. The Court vide order dated 15.5.2008 convened the meeting of the secured creditors on 28.6.2008 at 4:00 P.M. at the registered office of the company and also appointed Chairman and alternate Chairman to conduct the meeting. Necessary directions were also issued for publication in two daily Newspapers namely, "Times of India" (English) published from Delhi and "Amar Ujala" (Hindi) published from Agra. Individual notices were also directed to be sent under certificate of posting to each of the secured creditors.

2. On an application being made by the company, the date of the meeting was refixed for 6.9.2008 and notices were directed to be published in the Newspaper "Indian Express" published from Delhi instead of Times of India".

3. The scheme of arrangement in the meantime, was modified by the company and, this Court permitted the modified scheme of arrangement to be considered in the proposed meeting of the secured creditors.

4. Before the meeting could be held, an application was filed by ING Vysya Bank

Ltd. seeking recall of the order directing convening of the meeting of the secured creditors and dismissing the company application as not maintainable. The application was filed on the ground that ING Vysya Bank Ltd. is a secured creditor and the company had filed a reference before the Board for Industrial and Financial Reconstruction (in short BIFR) under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as the SICA). The reference was registered as BIFR Case No. 181 of 2004. This reference was rejected by the BIFR as not maintainable against which the company had preferred an appeal before the Appellate Authority for Industrial and Financial Reconstruction (in short AAIFR) and the matter is pending adjudication. In the meantime, the company filed another reference before BIFR, which was registered as Case No. 114 of 2006, which was also rejected by the BIFR and, in appeal, the AAIFR vide order dated 29.9.2007 had remanded the matter back to the BIFR, which order has been challenged by one of the secured creditors before the Delhi High Court and is pending adjudication. As the matter is before the BIFR, the present application filed under sections 391 and 394 is not maintainable.

5. Counter affidavit has been filed by the company in which it has been stated that as on date no reference is pending before the BIFR and thus, the application filed under sections 391 and 394 of the Act is maintainable.

6. A short affidavit has been filed on behalf of M/s. Asset Reconstruction Company India Ltd. stating that it has acquired 38% of the secured debt of the company from the various financial institutions and it has also stepped into the shoes of the secured creditors. As, there is no reference pending before the BIFR, the application filed by the company is maintainable.

7. I have heard learned counsel for the parties.

8. The learned counsel appearing for the ING Vysya Bank Ltd. submitted that as the matter relating to the proceedings under the SICA is still subjudice, this Court has no jurisdiction to entertain the application filed by the company and to give directions for convening of the meeting of the secured creditors and also consider the proposed scheme of arrangement. Reliance has been placed by the learned counsel on a Division Bench decision of the Bombay High Court in the case of *Ashok Organic Industries Ltd. v. Asset Reconstruction Company (India) Limited*, (2008) 3 Comp. LJ 61 (Bom), for the proposition that once the industrial company makes a reference under Section 15 of SICA, the Company Court would neither have any jurisdiction for sanctioning the scheme of arrangement of compromise with its creditors and shareholders nor will it have jurisdiction to take cognizance of such an application during the pendency of the reference. He also invited the attention of the Court to the decision of the Apex Court in the case of *Tata Motors Ltd. v. Pharmaceutical Products of India Ltd.* and another, (2008) 3 Comp. LJ 91 (SC), wherein the decision of the Bombay High Court referred to above has impliedly been approved.

9. Learned counsel for the company in reply submitted that the reference has not yet been registered by the BIFR as the Delhi High Court has restrained the BIFR from passing any order and, the reference can only be said to be pending only after it has been registered and not before that. Reliance has been placed upon a decision of the Apex Court in the case of *Real Value Appliances Ltd. v. Canara Bank and others*, (1998) 5 SCC 554.

10. Learned counsel appearing for the Asset Reconstruction Company (India) Ltd. while supporting the case of the company submitted that it has taken over 38% liability from the secured creditors and the scheme of arrangement would be beneficial for all concerned.

11. By means of the Company Application No. 275830 of 2009, the company has brought on record the order dated 16.9.2009 by which the AAIFR, New Delhi has dismissed the appeal preferred by the company and has upheld the order of the BIFR rejecting the reference as not maintainable.

12. A counter affidavit has been filed by the ING Vysya Bank Ltd. in which it has been stated that the applicant had filed another reference before the BIFR, which is still pending being Case No. 114 of 2006.

13. I have given my thoughtful consideration to the various pleas raised by the learned counsel for the parties and I find that as a matter of fact that admittedly, the company had filed two reference before the BIFR, which has been registered as Case No. 181 of 2004 and Case No. 114 of 2006. With regard to Case No. 181 of 2004, the position as of date is that the same stands rejected by the BIFR as upheld in Appeal by AAIFR. So far as Case No. 114 of 2006 is concerned, the same was rejected by the BIFR, which order has been set aside by the AAIFR vide order dated 29.09.2007 and the matter has been remanded to the BIFR for deciding the same afresh. The aforesaid order of AAIFR has been challenged before the Delhi High Court by one of the secured creditors wherein, the Delhi High Court has restrained the BIFR from passing any orders. In view of the settled legal position, it can not be said that the reference is not pending before the BIFR. [See. *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association*, (1992) 3 SCC 1; *Kanoria Chemicals & Industries Ltd. v. UP. SEB*, (1997) 5 SCC 772; *BPL Ltd. v. R. Sudhakar*, (2004) 7 SCC 219.]

14. The company can not be made to suffer for no fault of it. It appears that the company is keen for the revival and rehabilitation. At present forum provided under the SICA is not available to the company and, therefore, the only remedy available to it is to approach this Court under sections 391 and 394 of the Act.

15. The Apex Court has held in the case of *Tata Motors Ltd.* (supra), that SICA is a special statute and is a self contained Court and the jurisdiction of the Company Judge in a case where reference has been made to BIFR would be subject to the provisions of SICA and its jurisdiction in a case of this nature is very limited.

16. However, in view of the decision of the Apex Court in the case of Chembra Orchard Produce Ltd. v. Regional Director of Company Affairs, JT 2009 (1) SC 412, wherein it has been held that the scheme of the Act and the Company Court Rules, 1959 would become unworkable if at the threshold stage of directions to convene a meeting, hearing is required to be given to the members. The Apex Court approved the judgment and decision of the Bombay High Court in the case of Sakamari Steel & Alloys Ltd., 51 Company Cases 266 and disapproved the decision of this Court in the case of Hind Auto Indo Ltd. v. M/s. Premier Motors (P) Ltd.,MR 1970AI1165.Thus, at the stage of issuing directions for convening a meeting of the creditors under Section 391 of the Act, the Court is not required to give hearing to any other party.

17. In view of the foregoing discussions it is held that the jurisdiction of this Court under the provisions of the Companies Act, 1956, can not be said to be ousted by the provisions of SICA. I am of the considered opinion that the present application filed by the ING Vysya Bank Ltd. is not maintainable and is hereby rejected.

18. The matter may now be placed before the appropriate Company Judge. It shall not be treated as tiedup or parheard.