

(2012) 09 DEL CK 0080
In the Delhi High Court
Case No : CO. App. 74 of 2012

Juhi Investment Pvt. Ltd.

APPELLANT

Vs

Official Liquidator and Others

RESPONDENT

Date of Decision : 03-09-2012

Acts Referred:

Companies Act, 1956 — Section 391, 392, 393, 394
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 3(i)(o)

Citation : (2012) 7 AD 481

Hon'ble Judges : Sanjiv Khanna, J;S.P. Garg, J

Bench : Division Bench

Advocate : Arun Kathpalia, in Co. app. 74/2012 and Mr. Sandeep Sethi with Mr. M. Dutta, in Co. app. 75/2012, for the Appellant; Rajiv Bahl, for OL. Mr. Ashwani Matta, with Mr. Dinakar Singh and Mr. Suresh Dobhal for IFCI Ltd in Co App. 74/2012 and Mr. Arun Kathpalia, for R-3 in Co. App. 75/2012, for the Respondent

Final Decision : Dismissed

Judgement

Sanjiv Khanna, J.—Bharat Steel Tubes Ltd., (hereinafter referred to as the company) Satinder Pal Singh and Juhi Investment Pvt. Ltd. have filed the present appeals impugning the order dated 8th August, 2012 passed by the learned Single Judge disposing of CA Nos.1159/2009 and 2470/2010 in company Petition No.55/2000 and, inter alia, holding that the Scheme proposed in 2005 was no longer viable and relevant and the order staying the winding up proceedings should be recalled. Citations have been directed to be published in the newspapers and the Official Liquidator was directed should take over the assets. The company was incorporated in the year 1967. It became a sick industrial company on 2nd September, 1990 in terms of Section 3(i)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985. Matter was referred to Board for Industrial and Financial Reconstruction (BIFR). Industrial Finance Corporation of India (IFCI) was appointed as the operating agency.

2. A rehabilitation scheme was proposed before the BIFR in 1996. As per the

scheme, the total costs involved was Rs.78.44 crores, which required the promoters bringing in fresh funds to the tune of Rs.26 crores. Thereafter, several proposals were examined and after consideration, the consortium required the promoters to bring in funds to the extent of Rs.53 crores. At the time of approval, BIFR felt that the scheme could be fruitfully implemented in case the promoters increased their contribution to Rs.73.47 crores.

3. BIFR finally vide order dated 23rd February, 2000 recommended winding up of the company. Appeal filed against the said order was dismissed by the AAIFR vide order dated 21st June, 2000. A writ petition was preferred by the company against the order passed by the AAIFR but was subsequently withdrawn. The order passed by the BIFR attained finality.

4. Company Petition No.55/2000 was registered on the basis of the recommendation for winding up. By order dated 14th August, 2003, the company was directed to be wound up and the Official Liquidator was directed to take over assets of the company. An appeal was preferred against this order of the learned Single Judge. During the pendency of the appeal before the Division Bench, the ex-directors of the company filed an application stating that they have taken steps to settle the matter with the creditors and workers.

5. On the basis of the settlement, on 9th February, 2005 the following order was passed by the company Judge:-

....In view of the aforesaid steps taken by the ex-Management whereby most of the claims are settled, it would be fair to give one chance to the applicants to revive the company and this would be possible only if the production in the factory unit is allowed to resume. At the same time while giving the opportunity, to the ex-Management, conditions can be imposed to ensure that the unit functions properly and the assets of the company are duly protected. With this objective in mind, following directions are given:

A. Winding up proceedings are hereby stayed. However, the Official Liquidator shall continue to be the liquidator and shall oversee the functioning of the unit.

B. The official liquidator shall de-seal the factory premises and give possession thereof to the applicants within two weeks. The applicants shall file the returns of production, sales receipts and expenditure etc. every two months.

C. Before giving possession, inventory of all the assets including plant and machinery etc. shall be made by the Official Liquidatory.

D. Mr. Sumant Batra, Advocate is appointed as the Administrator. He shall be paid a sum of Rs. 25,000/- per month as fee. He shall be invited in all the meetings of the Board of Directors. He shall also be consulted whenever important policy decision is to be taken. The Administrator shall submit monthly reports about the functioning of the company.

E. The expenditure incurred by the Official Liquidator upto now towards security

and other administrative expenses etc. shall be informed to the applicants within two weeks and these expenses shall be reimbursed by the applicants to the Official Liquidator within two weeks thereafter.

The detailed scheme of Revival u/s 391 shall be filed, as stated by learned counsel for the applicants, within two months from the date of possession of the unit is given to them.

These applications are accordingly disposed of in the aforesaid terms...".

(emphasis supplied)

6. A Scheme was propounded by Mr. Satinder Pal Singh as a contributory and application CA No.757/2005 was filed under Sections 391 to 394 of the Companies Act, 1956 (for short "the Act") for consideration of the scheme and approval by the creditors and the workers. The Chairmen appointed for the meetings of the creditors and shareholders had submitted their reports to the court. In the meanwhile, some of the workers filed CA No.117/2004 before the company court stating that a sum of Rs.5.45 crores was due and payable to 181 workers and they were also entitled to certain other benefits. The settlement was not acceptable to them.

7. The company filed second motion u/s 391-394 of the Act in form of CA No. 1118/2005 which vide order dated 17th August, 2005 was converted and treated as a Company Petition No. 268/2005.

8. The said petition remained pending before the Company Judge till the impugned order dated 8th August, 2012 was passed. In the impugned order, the learned Company Judge has recorded that the management had not made any payment to the workers after the order dated 9th February, 2005. It is also stated by the learned Company Judge that the company had entered into one time settlement or Memorandum of Understanding with Punjab National Bank (PNB) for payment of their dues of Rs.26.16 crores out of which Rs.13.80 crores was paid and the balance amount was not paid. In the meanwhile, PNB vide Deed of Assignment dated 15th July, 2008 assigned their debt in favour of Assets Care Enterprises Ltd. (ACE Ltd.). Thereafter, the ACE Ltd. vide Assignment Deed dated 17th April, 2009 assigned their debts to IFCI Ltd. IFCI Ltd. have raised their claim against the appellant company.

9. Learned counsel for the appellant has submitted that they are and were always ready and willing to abide by the commitments and make payment in terms of Memorandum of Understanding (MOU) dated 5th March, 2008 with the ACE Ltd. He further states that they had also complied with the OTS as contained in the letter dated 28th March, 2008 issued by the PNB and the dues of PNB stand settled. He states that they were 710 workers in all. Over 500 workmen have already settled their claims and have been paid their dues. About 200 workmen have resiled from the settlement and have been pursuing their claim before the Labour Court. In fact, they are not ready and willing to vacate the

accommodation provided to them, which has resulted in the dispute with the workmen. He states that the appellant company has always been ready and willing to pay the dues of the workmen and the creditors.

10. We have considered the contentions but do not find any merit in the said contentions.

11. The scheme propounded had postulated and stated that the company had entered into one time settlement for payment of dues with PNB on the following terms:-

b. PNB: In terms of the OTS proposal sanctioned by PNB vide their letter dated 02.09.04 the entire dues were settled for an amount of Rs.2616.33 Lacs as full and final payments with payment of Rs.875.00 Lacs paid before December 2004 and Rs.500.00 lacs each on or before 31st Dec. 2005 and Dec 2006 and balance amount to be paid by 31st December 2007. Simple interest is to be charged @ of 6% on reducing balance from 31st March 2005 and is payable in 2007. The promoters / Ex-directors have already paid Rs.875.00 lacs as per the terms of the compromised settlement with PNB.

12. Thus as per the scheme Rs.26.16 crores had to be paid to Punjab National Bank in installments and last installment was to be paid on or before 31st December, 2007. The company was also to pay interest @ 6% p.a. on reducing balance. At this stage we note that total dues of PNB as claimed by them in the original application filed before the Debt Recovery Tribunal (DRT, for short) on 21st February, 2003 was Rs. 326 crores. The company got substantial reduction of the dues in terms of the OTS.

13. The company paid a sum of Rs.13.80 crore only and the balance amount, including interest, was not paid. PNB revoked the OTS by letter dated 14th June, 2007.

14. Subsequently in terms of the MOU dated 5th March, 2008, ACE Ltd. agreed and paid PNB Rs. 15.01 crores. PNB in turn executed a deed of assignment dated 15th July, 2008, in favour of ACE Ltd.

15. The details of debt assigned to ACE Ltd. as stated in Schedule I of the MOU dated 5th March, 2008 is as under:-

Particulars

Total Rs/Lacs.

Paid Rs/Lacs.

Balance Rs/Lacs.

A) SECURED LIABILITIES

Punjab National Bank

2616.33

1375.00

1241.33

14% Debentures

120.00

12.94

107.06

13.5% Debentures

296.39

5.40

290.99

Interest Punjab National Bank

236.03

0.00

236.03

Upto 31.12.2007 Estimated Interest till 31.03.08

130.00

Exim Bank Loan (originally Unsecured and assigned to ACE Through Juhi Investments)

130.00

TOTAL (A)

3458.70

1579.25

2135.41

B) UNSECURED LIABILITIES

Preference Shares

65.00

0.00

65.00

General Insurance Corporation

35.00	
35.00	
Balance Worker dues (estimated)	
171.10	
110.00	
Punjab Govt. Pref Shares	
23.98	
23.98	
Haryana State Electricity Board	
22.79	
22.79	
Municipal Committee Ganaur	
6.32	
6.32	
Sales Tax	
4.67	
4.67	
Transporters	
7.18	
7.18	
TOTAL (B)	
105.94	
301.10	
280.94	
Total Financing (A)	
2140.00	

16. It is admitted position that ACE Ltd. paid Rs.15.01 crores to PNB, Rs.1.30 crores to Juhi Investment Ltd. and Rs.30 lacs to debenture holders. Thus Rs. 16.61 crores was paid by ACE Ltd. in respect of debt mentioned in Schedule I.

17. The company was to repay the amount paid by ACE Ltd. in terms of clause 9 of the MOU, which reads:-

9. BST agrees to commit to repay to ACE, the Debt within a maximum period of twelve (12) months from the date of execution of this MoU and pay interest of 24% p.a. with quarterly rests. Upon a written request of BST the period of repayment may be extended by ACE at its sole discretion upto six (6) months for which the rate of interest would be of 2% per month.

18. It is clear from clause 9 above that the company was to pay the entire debt amount within 12 months from the date of execution of MOU with 24% interest with quarterly rests. Upon a written request of the company, the period of repayment could be extended by ACE Ltd., at its sole discretion upto 6 months for which the interest rate would be 2% per month.

19. Thus the company got a life line for the third time. The first one was before the BIFR; the second one was when they entered one time settlement with the PNB and the third when they entered into agreement with ACE Ltd. The company again defaulted. It is an accepted position that the company made payment of Rs. 2.09 crores only within a period of 12 months. They sought extension of time for payment of the principal amount and interest. No letter or communication was written by ACE Ltd. granting extension or agreeing to extension. ACE Ltd revoked the MOU in view of the non-payment vide letters dated 27th March, 2009 and 2nd April, 2009. Subsequently they entered into deed of assignment dated 17th April, 2009 with IFCI and received an amount of Rs.18.63 crores.

20. It is too late in the day now for the company or the propounders to say that they are ready and willing or were ready and willing to make payment in 2009 to ACE Ltd. These are empty promises or statements as no amount whatsoever has been paid since 2005 to any of the creditors and only Rs.2.09 crores paid to ACE Ltd. in 2008. Nothing prevented the company from making the payment or depositing the same with the Court to show their bonafide and desire. BIFR had recommended winding up in the year 2000. Winding up order was passed in 2003 and then kept in abeyance. It is time that the winding up proceeding proceed and are not stalled.

21. After assignment of debts to IFCI, they initiated proceedings under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, for short). The company initially filed a civil suit but the plaint was returned. Thereafter the company filed proceedings u/s 17 which are stated to be still pending before the Debt Recovery Tribunal (DRT). Pursuant to certain interim orders and orders in a writ petition, SLP(C) No.29421/2010 was filed before the Supreme Court. By judgment dated 30th November, 2010, the following operative directions were issued:-

30. We, therefore, dispose of the SLP with a direction upon the Debts Recovery Appellate Tribunal to dispose of the pending appeal as early as possible since it would not be proper on our part to express any definite view with regard to the pending proceedings before the said Tribunal. Till a decision is arrived at by the Debts Recovery Appellate Tribunal in the matter, the auction proceedings being

conducted under the SARFAESI Act shall remain stayed.

22. We are informed that another order has been passed by the Supreme Court, pursuant to which the proceedings before the DRT have been stayed.

23. We may now notice the other concessions or reliefs which were prayed for in CP No. 268/2005:-

(i) Government of Haryana shall waive electricity dues for seven years.

(ii) There shall be exemption of purchase tax/Value Added Tax for seven years.

(iii) There shall be exemption for local development tax for seven years.

(iv) There will be un-interrupted power supply during seven years.

(v) Preferential shareholders shall agree to waive all arrears of dividend and accept the principal as the redemption amount, free from dividend, repayable over a period of 2 years from the cut off date in two yearly installments.

(vi) The debenture holders shall waive all arrears of interest and accept principal amount free from interest, to be repaid over a period of 4 years from the cut off date in 4 yearly installments.

(vii) Promoters shall arrange Rs.12 crores in the form of equity, unsecured loan and/or mobilization advances to partly meet the cost of scheme.

24. As noticed above, the scheme was propounded way back in 2005. The scheme original propounded was based on OTS payment for PNB. The said OTS payments were not made. Payments were ultimately made to PNB by ACE Ltd. in terms of the deed of assignment.

25. As per MOU dated 5th March, 2008, the company had to make payment of Rs.16.61 crores with interest @ 24% with quarterly rests, within 12 months. Payment of Rs.2.09 crores was made within the said period and no further payment was made. It is obvious that the company had agreed to payment of interest @ 24% as they were not able to secure credit from any other third sources and wanted payment to be made to PNB who were ready to write off debt of Rs.326 crores as claimed in the original application before DRT for merely Rs.26 crores. The company and the propounders have been delaying, pushing and postponing payment to the creditors. The wait cannot be endless. The interest of creditors is paramount and has to be protected. The debenture holders and preferential shareholders have not been paid. The period of four years and two years for payment to debenture holders and preferential shareholders in 2012 cannot be accepted. Rs.12 crores in form of equity, unsecured loans etc. have not been brought in the books and paid or arranged by the propounders. The scheme which was propounded and made subject matter of CP 268/2005, was with regard to the then prevailing factual matrix. It appears that Directors of the company are in occupation of the residential accommodation belonging to the company in Delhi measuring 3000 square

yards. They are using and residing in the said residential property without making any payment. The workers in their application CA 117/2004 had made a claim of more than R.5.45 crores along with details. We do not think the scheme as propounded can be implemented and enforced today.

26. In view of the aforesaid factual position, we do not see any reason to interfere in the impugned order and the appeal is dismissed. No costs. During the course of hearing, certain issues regarding interpretation of MOU dated 5th March, 2008, on the amount payable on default were raised. We clarify that we have not expressed any opinion in this regard. Learned counsel for the appellants submits that ex-management wants to contest the proceedings before the DRT. We express no opinion in this regard and it is open to parties to approach the Company Judge.