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(1995) 09 DEL CK 0037

In the Delhi High Court

Case No : Civil Writ Petition No. 5327 of 1993

Lakshmi Porcelains Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 25-09-1995

Acts Referred:

Constitution of India, 1950 — Article 31C
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 20, 20

Citation : (1995) 4 AD 291 : (1995) 35 DRJ 182

Hon'ble Judges : Dr. M.K. Sharma, J;D.P Wadhwa, J

Bench : Division Bench

Advocate : Vibhu Bhakra, A.K. Dutt, Rupali Chopra, Virender Goswami, Suman Batra, Madan Lokur and Nandini Ramachandran, for the Appellant;

Judgement

D.P. Wadhwa, J.

(1) The petitioner in this petition under Articles 226 and 227 of the Constitution has challenged the constitutional validity of section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short ''SICA'' or ''the Act''). Section 20 of Sica is as under :-

"20.Winding-up of sick industrial company. - (1)Where the Board, after making inquiry u/s 16 and after consideration of all the relevant facts and circumstances and after giving an opportunity of being heard to all concerned parties, is of opinion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof is not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record and forward its opinion to the concerned High Court. (2)The High Court shall, on the basis of the opinion of the Board, order winding-up of the sick industrial company and may proceed and cause to proceed with the winding-up of the sick industrial company in accordance with the provisions of the Companies Act, 1956 (1 of 1956). (3)For the purpose of winding-up of the sick industrial company, the High Court may appoint any officer of the operating agency, if the operating agency gives its consent, as the liquidator of the sick industrial company and the officer so appointed shall for the purpose of the winding-up of the sick industrial company be deemed to be, and have all the powers of, the official liquidator under the Companies Act, 1956 (1 of 1956). (4)Notwithstanding anything contained in sub-section (2) or sub-section (3), the Board may cause to be sold the assets of the sick industrial company in such manner as it may deem fit and forward the sale proceeds to the High Court for orders for distribution in accordance with the provisions of section 529A, and other provisions of the Companies Act, 1956 (1 of 1956)."

(2) Challenge particularly is to sub-section (2) under which the High Court is mandated to order winding up of the sick industrial company. Petitioners say that the word "shall" in that sub-section may be read as "may" to give validity to the provisions of section 20.

(3) As to how this question has arisen we may in brief refer to certain proceedings held under SICA. First petitioner, an industrial company, is engaged in the manufacture of high voltage insulators used in power transmission. Unit of the petitioners was set up in a backward area near Hyderabad in joint sector with Andhra Pradesh Industrial Development Corporation Ltd. The unit is financed by the Idbi, Ifci, Icici, Andhra Bank and the Canara Bank. For various reasons with which we are not presently concerned the first petitioner was declared a sick company under the provisions of SICA. Thereafter, proceedings were held before the Board/BIFR (Board for Industrial and Financial Reconstruction) for revival of the company. Since no scheme could go through, the Bifr issued a show cause notice as to why the petitioner be not wound up. After examining the whole aspect of the matter the Board came to the conclusion that it was just and equitable that the first petitioner be wound up and directed that "its opinion that the unit be wound up be communicated to Hon''ble High Court of Andhra Pradesh." This was by order dated 8 September 1993.

(4) This order is appealable u/s 25 of SICA. From the record it appears that an appeal was filed before the Appellate Authority (Appellate Authority for Industrial and Financial Reconstruction) but it is not clear with what result. However, it has been mentioned that in pursuance to the order of the Board proceedings for winding up of the first petitioner had been initiated in the High Court of Andhra Pradesh. Though the petitioners had asked from this Court stay of the order of the Board directing winding up, no such application had been filed before the Appellate Authority or any interim order obtained. It is, however, mentioned that the Appellate Authority would not be able to adjudicate the issue raised in the present petition inasmuch as the Appellate Authority cannot go into the question of constitutional validity of the provisions of Sica and, Therefore, the necessity of filing the present petition irrespective of waiting for the result in appeal under SICA.

(5) Before we consider the rival contentions it would be more appropriate to

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consider the preamble and scheme of the Act (SICA). Preamble of the Act shows that this is an Act to make in public interest, special provisions with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined and for matters connected therewith or incidental thereof. u/s 2 of the Act, a declaration has been made that the Act is for giving effect to the policy of the State towards securing the principles specified in clauses (b) and (c) of Article 39 of the Constitution. Article 39 is in Part Iv of the Constitution relating to Directive Principles of State Policy. We may reproduce clauses (b) and (c) of Article 39 as under :-

"39.Certain principles of policy to be followed by the State. - The State shall, in particular, direct its policy towards securing - (a) .... (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(6) The Act, as it stands today, applies to all the scheduled industries under sub-section (2) of section 4 of the Act. "Scheduled industry" means any of the industries specified for the time being in the First Schedule to the Industries (Development and Regulation) Act, 1951. A "sick industrial company" has been defined under clause (o) of sub- section (1) of section 3 to mean an industrial company (being a company registered for not less than five years) which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth. "Industrial company", under clause (e), means a company which owns one or more industrial undertakings. Clause (f) defines what the term "industrial undertakings" means. As per clause (ga), "net worth" means the sum total of the paid-up capital and free reserves. "Operating agency" under clause (i) means any public financial institution, State level institution, scheduled bank or any other person as may be specified by general or special order as its agency by the Board. "State level institution" has also been fined under clause (p) of sub-section (1) of section 3 of the Act. Chapter Ii of the Act lays down the constitution of the Board, the Appellate Authority, the terms and conditions of service etc. of Chairman and other members, their removal, salaries, constitution of benches and the procedure of Board and Appellate Authority. Section 4 provides for establishment of Board and sub-section (3) prescribes the qualification of Chairman and other members of the Board and it is as under :-

"(3)The Chairman and other Members of the Board shall be persons who are of have been or are qualified to be High Court Judges, or persons of ability, integrity and standing who have special knowledge of, and professional experience of not less than fifteen years in science, technology, economics, banking industry law, labour matters, industrial finance, industrial management, industrial

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reconstruction, administration, investment, accountancy, marketing or any other matter, the special knowledge of, or professional experience in which, would in the opinion of the Central Government be useful to the Board. "

(7) Section 5 provides for constitution of Appellate Authority and the qualifications of the Chairman and the members are under sub-sections (2) and (3) which are as under :-

"(2)The Chairman shall be a person who is or has been a Judge of the Supreme Court or who is or has been a Judge of a High Court for not less than five years. (3) A Member of the Appellate Authority shall be a person who is or has been a Judge of a High Court or who is or has been an officer not below the rank of a Secretary to the Government of India or who is or has been a Member of the Board for not less than three years. "

(8) Chapter Iii deals with references, inquiries and sanctioning of schemes for revival of a sick industrial company. When an industrial company has become a sick industrial company, reference is made to the Board for determination of the measures which shall be adopted with respect to the company. u/s 16,, the Board may make such inquiry as it may deem fit for determining whether any industrial company has become a sick industrial company. This could be either upon receipt of a reference with respect to such company u/s 15, or upon information received or upon its own knowledge as to the financial condition of the company. Section 16 gives the details as to how the inquiry is to be conducted. Section 17 defines the powers of the Board to make suitable order on the completion of inquiry. This section we may reproduce in full :-

"17.Powers of Board to make suitable order on the completion of inquiry - (1) If after making an inquiry u/s 16, the Board is satisfied that a company has become a sick industrial company, the Board shall, after considering all the relevant facts and circumstances of the case, decide, as soon as may be by order in writing, whether it is practicable for the company to make its net worth exceed the accumulated losses within a reasonable time. (2) If the Board decides under sub- section (1) that it is practicable for a sick industrial company to make its net worth exceed the accumulated losses within a reasonable time, the Board shall, by order in writing and subject to such restrictions or conditions as may be specified in the order, give such time to the company as it may deem fit to make its net worth exceed the accumulated losses. (3) If the Board decides under sub-section (1) that it is not practicable for a sick industrial company to make its net worth exceed the accumulated losses within a reasonable time and that it is necessary or expedient in the public interest to adopt all or any of the measures specified in section 18 in relation to the said company it may, as soon as may be, by order in writing, direct any operating agency specified in the order to prepare, having regard to such guidelines as may be specified in the order, a scheme providing for such measures in relation to such company. (4) The Board may - (a) if any of the restrictions or conditions specified in an order made under sub-section (2) are not complied with by the company concerned or if the company

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fails to revive in pursuance of the said order, review such order on a reference in that behalf from any agency referred to in sub-section (2) of section 15 or on its own motion and pass a fresh order in respect of such company under sub-section (3); (b)if the operating agency specified in an order made under sub-section (3) makes a submission in that behalf, review such order and modify the order in such manner as it may deem appropriate. "

(9) Section 18 provides that where an order is made u/s 17(3) in relation to any sick industrial company, the operating agency shall prepare a scheme with respect to such company providing for one or more of the measures mentioned in sub-section (1). These measures could be the financial reconstruction of the sick industrial company; the proper management of the sick industrial company by change in or take over of, management of the sick industrial company; the amalgamation of the sick industrial company with any other company, etc. Then under sub-section (2) of section 18, the scheme is to provide for one or more of the measures described in clauses (a) to (m). Other provisions of section 18 show as to how the control is to be kept by the Board after the scheme is sanctioned in terms of provisions of the Act. Section 19 provides as to how financial assistance is to be provided by the Government or State agencies for rehabilitation of the sick industrial company. When there is a failure to rehabilitate the sick industrial company by any of the means prescribed then u/s 20 it is to be wound up. For the purpose of safeguarding the interest of the sick industrial company during the pendency of the proceedings before the Board provisions have also been made for the operating agency to prepare complete inventory of all assets and liabilities of whatever nature, etc. (section 21), and suspension of legal proceedings, contracts, etc. (section 22); and issue of direction by the Board not to dispose of assets of the company.

(10) It would be seen that Sica does not apply to all the companies registered under the Companies Act and it is applicable only to a company which becomes sick industrial company within the meaning of the Act. A detailed procedure has been adopted for revival of the sick industrial company and one of the measures to be adopted in the scheme is the transfer and issue of shares in the sick industrial company at the face value or at the intrinsic value which may be at discount value or such other value as may be specified to any industrial company or any person including the executives and employees of the sick industrial company. The scheme can also provide for the sale of the industrial undertaking of the sick industrial company to any person including a co-operative society formed by the employees of such undertaking and fixing of reserve price for such sale.

(11) Mr. Bhakru, learned counsel for the petitioners, submitted that section 20 was discriminatory and arbitrary and, thus, vocative of Article 14 of the Constitution. He said the main object of Sica was to timely detect sickness in industrial undertakings and companies and take ameliorative and remedial measures to curb sickness in respect to these companies, and that section 20 did

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not in any manner further the object of the Act. He said that section 20 was like an interloper and alien to the scheme of the Act itself. He said the Companies Act was a complete code with respect to the corporate entities containing provisions for incorporation, management and winding up of a company. Reference was made to section 433 of the Companies Act which provides grounds on which a company may be wound up by court. It was submitted that in all those cases the court had full discretion in the matter and the remedy for winding up as provided in section 433 was not a matter of right but was entirely within the discretion of the court. It was submitted that that discretion vested in the court had been taken away and/or curtailed by sub-section (2) of section 20 of Sica where the court is left with no option but to wound up the company. It is, thus, submitted that section 20 of Sica creates another clause of companies where the winding up is to be ordered at the discretion of the Board and not the court and the court merely becomes an executing agency. It was then submitted that section 20 was ultra virus the Constitution as once the Board formed its opinion that the sick industrial company was to be wound up the same was binding on the High Court and that such a provision was ex facie arbitrary and unreasonable. It was submitted that the High Court could not be subordinate to the Board which is constituted under an Act of Parliament.

(12) All these submissions were controverter by Mr. Madan Lokur, learned Central Government Standing Counsel. He referred to the preamble of Sica and said the whole Act was geared towards revival of the sick industrial company and that winding up was only the last option to be exercised when it was no longer feasible to revive the company. Reference was made to two decisions of the Supreme Court in Navnit R. Kamani and Others Vs. R.R. Kamani, , which spelled out in detail the objects and reasons for the enactment of Sica, and in Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another, , where the court held that the main thrust of Sica was at revival or rehabilitation of sick industrial undertakings and it was only when it was realised that the same was not feasible that the option of winding up of the unit could be resorted to. Mr. Lokur then referred to various provisions of Sica and contended that to determine if it was just and equitable to wind up the sick industrial company the High Court had in any case to conduct an investigation of sorts even under the Companies Act, and that under Sica a detailed procedure for conducting an inquiry had been laid down in section 16. It was also submitted that the Board consisted of highly qualified and experienced persons from different fields who were competent to carry out their functions effectively. Mr. Lokur said that it was, Therefore, to be assumed that the Board would conduct a proper inquiry as required by law. Yet if aggrieved the party could go to the Appellate Authority whose Chairman is a person who had either been a Judge of the Supreme Court or who had been a Judge of the High for not less than five years. Mr. Lokur said that it was only as a last resort that a company could be ordered to be wound up on the ground that it was just and equitable to do so.

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(13) Sica provides a detailed procedure for rehabilitation of a sick industrial company which includes financial reconstruction, proper management, amalgamation, sale or lease of a part or whole of any industrial undertaking of the sick industrial company, the rationalisation of managerial personnel, etc., and other preventive, ameliorative and remedial measures as might be appropriate. Sica also contains provisions for financial assistance to a sick industrial company by way of loans, advances or guarantees or reliefs or concessions or sacrifices from the Government, any scheduled bank or other bank, a public financial institution or State level institution or any other institution or other authority. It is only after making such a detailed inquiry when the Board forms an opinion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time as mentioned in sub-section (1) of section 20 of the Act it may record and forward its opinion to the High Court saying that the company is not likely to become viable in future and that it is just and equitable that it should be wound up.

(14) A company is creation of the Companies Act, a statute, which statute also provides for winding up of the company by the court under certain circumstances mentioned in section 433 of that Act. The Companies Act also provides for voluntary winding up of a company. Sica adds another ground of winding up of only a sick industrial company to which the Act applies in its winding up u/s 20 of the Act. A sick industrial company is a class by itself and when there is a failure to revive it by adopting various methods it is only then that the expert body like the Board forms its opinion that it is just and equitable that the sick industrial company be wound up. The execution part is left to the High Court concerned, and we do not find that Sica to be invalid on any ground as alleged by the petitioners. Keeping in view the objects of the Act and further that it applies only to companies having industrial undertakings going sick having a great deal of ramifications, all out efforts are sought to be made for revival of the sick industrial company by various methods even by providing financial assistance, which even include granting of concessions and sacrifices by various bodies including the Central and State Governments. As seen above, the Board is constituted of qualified persons. An appeal against the order of the Board lies to the Appellate Authority which again is headed by a Chairman who is or has been a Judge of the Supreme Court or has been a Judge of the High Court for not less than five years. Against the order of the Appellate Authority a High Court exercises jurisdiction of judicial review under Article 226 of the Constitution. It is only that after this whole process is gone into that the High Court comes into picture u/s 20 of Sica to proceed with the winding up of the company. It cannot be said that the High Court is in any way devalued as it was sought to be projected.

(15) All this having been said, it will appear that the real question has escaped our attention which is the effect of declaration made u/s 2 of SICA. Under Article 31C of the Constitution, laws giving effect to certain directive principles have been saved. This Article is as under :-

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"31C.Saving of laws giving effect to certain directive principles. - Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part Iv shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy: Provided that where such law is made by the Legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

(16) Now, as noted above, u/s 2 of Sica a declaration has been made that the Act was for giving effect to the policy of the State towards securing the principles specified in clauses (b) and (c) of Article 39 of the Constitution. In Navnit R. Kamani and Others Vs. R.R. Kamani, , the court noticed the order of Board in that case and observed as under :-

"WE may also mention that the Bifr was wholly right that the provisions of the Act were immune from challenge by virtue of the declaration contained in section 2 of the Act attracting application of Article 31C of the Constitution. "

(17) The court put a stamp of approval on the scheme sanctioned by the Bifr in that case and said as under :-

"Since the Scheme is being framed under the statutory authority and directive in order to revive the same in the larger public interest and inasmuch as there is a necessary declaration contained in S. 2 of the Act which attracts the applicability of Ar. 31C of the Constitution, the decision rendered by the Bifr is unassailable and unimpeachable."

(18) It would be, thus, seen that provisions of the Sica are immune from challenge by virtue of declaration contained in section 2 of the Act attracting application of Article 31C of the Constitution.

(19) We, Therefore, hold that Sica is a valid piece of legislation. This petition is, Therefore, dismissed.

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