(2011) 05 DEL CK 0178

In the Delhi High Court

Case No : Writ Petition (C) No. 8271 of 2010

Lords Chloro Alkali Limited — APPELLANT

Vs

Bharat Heavy Electricals Limited and Another — RESPONDENT

Date of Decision : 27-05-2011

Acts Referred:

Companies Act, 1956 — Section 1
Constitution of India, 1950 — Article 12, 226
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 18(3), 19(1), 19(2), 3(1)
State Financial Corporations Act, 1951 — Section 3, 3A, 46

Citation : (2011) 4 BC 63 : (2011) 105 CLA 95 : (2011) 166 CompCas 46 : (2011) 181 DLT 46 : (2011) 124 DRJ 397 : (2011) 108 SCL 64

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : Purti Marwaha, Jayashree Shukla and Varsha Banerjee, for the Appellant; Bhaskar P. Gupta A.K. Roy, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—The present writ petition raises the following question of law:

Whether a Public Sector Enterprise/Undertaking (for short "PSU") having dues outstanding in respect of a commercial transaction from a sick company within the meaning of The Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "the SICA") falls within the definition of "other authority" for purposes of Section 19(1) of the SICA and is entitled to the benefit of Sub-section (2) of Section 19 of the SICA of circulation of the scheme and entitlement to obtain its consent?

2. Respondent No. 1 Company supplied one unit of 12KA, 360V DC 6 Pulse Tyristor Converter System to the Petitioner Company against a purchase order dated 10.4.1996 for a plant at Alwar. Only some part payments were made when

the net worth of the Petitioner Company was wiped out and, thus, proceedings were initiated by the Petitioner Company under the SICA for being declared as a sick company. These proceedings resulted in examination of a scheme for revival of the Petitioner Company and the final approved scheme in terms of the order dated 30.11.2006 of the BIFR envisaged settlement of dues of secured and unsecured creditors at 26.50 per cent and 10 per cent of the principal amount respectively.

3. It is the case of Respondent No. 1 Company that it did not come to know of these proceedings, and it is only after about two (2) years when an appeal was filed before the AAIFR (aggrieved by the fact that Respondent No. 1 Company was being treated under the head of "unsecured creditors", which would entitle it only to 10 per cent of the principal amount) did it become aware of the said proceedings. It is the case of Respondent No. 1 Company that the said Company is a Central PSU and has to be treated as "State" within the meaning of Article 12 of the Constitution of India and would, thus, be covered within the meaning of "other authority" u/s 19(1) of the SICA which would entitle it to a prior notice u/s 19(2) of the SICA.

4. In order to appreciate the controversy, the relevant provisions are reproduced as under:

19. Rehabilitation By Giving Financial Assistance. (1) Where the scheme relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial company, the scheme may provide for financial assistance by way of loans, advances or guarantees or relief''s or concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution or any institution or other authority (any Government bank, institution or other authority required by a scheme to provide for such financial assistance being hereafter in this section referred to as the person required by the scheme to provide financial assistance) to the sick industrial company.

(2) Every scheme referred to in Sub-section (1) shall be circulated to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation or within such further period, not exceeding sixty days, as may be allowed by the Board, and if no consent is received within such period or further period, it shall be deemed that consent has been given.

5. The plea of Respondent No. 1 Company found favour with the AAIFR in terms of the impugned order dated 12.10.2010 on the premise that the term "other authority" used in Section 19(1) of the SICA will take its colour from Article 12 of the Constitution of India. Respondent No. 1 being a PSU was, thus, covered within the meaning of "other authority" under Article 12 of the Constitution of India and consequently u/s 19(1) of the SICA.

6. Another fact taken note of by the AAIFR is that a subsequent order was

passed by the BIFR on 26.3.2010 in terms whereof the Petitioner Company was discharged from the purview of SICA/BIFR as its net worth had become positive as on 31.3.2009 but simultaneously directions were issued by the same order that the unimplemented provisions of the sanctioned scheme, if any, should be implemented by the concerned agencies and their implementation would be monitored by the Petitioner. The final directions, as pointed out by learned senior counsel for Respondent No. 1, are, however, limited in their scope as the scheme is not sought to be reopened, the provisions of which are to remain unchanged. The only change in the sanctioned scheme that may need to be effected would be on the basis of the decision of the BIFR taken after notice to Respondent No. 1 and considering the response of Respondent No. 1 in respect of its claims.

7. We have had the benefit of submissions of both the learned Counsels for the parties. The counsels have submitted before us that the exact proposition of law as framed above is an unexplored terrain as there is no direct pronouncement of the High Court or the Supreme Court in this behalf though some Judgments were referred to which may have indirectly commented on the aspect in issue. It is also the common cause of the parties that the AAIFR actually did not appreciate the purport of the submissions and the correct question raised before it as the issue was not one of applying the principles of Article 12 of the Constitution of India to Section 19 of the SICA but the question to be examined is as framed by us aforesaid.

8. The aforesaid being the position, we considered it appropriate to first to hear the submissions of the learned senior counsel for Respondent No. 1 as to his plea that on a reading of Section 19 of the SICA, Respondent No. 1 would be covered within the definition of "other authority". Learned Counsel fairly submitted before us that he was conscious of the fact that the scope within the meaning of Article 12 of the Constitution of India would be limited and the scope within Article 226 of the Constitution of India would be wider in this behalf. It was, thus, submitted that the question was not one as to whether the transaction in question was in furtherance of any public duty but on the interpretation of Section 19(1) of the SICA.

9. Learned senior counsel for Respondent No. 1 submitted that Section 19(1) of the SICA envisages a scheme for rehabilitation of the sick company to be provided with financial assistance or sacrifices from:

(a). Central Government, State Government,

(b). Any scheduled bank or other bank,

(c). A public financial institution or State level institution or any institution, or

(d). Other authority.

10. Learned Counsel also referred to the provisions of Section 3(1)(p) of the SICA, which read as under:

3. Definitions.

(1) In this Act, unless the context. otherwise requires, -

....

(p) State level institution" means any of the following institutions, namely:

(i) State Financial Corporations established u/s 3 or Section 3A and institutions notified u/s 46 of the State Financial Corporations Act 1951 (63 of 1951);

(ii) State Industrial Development Corporations registered under the Companies Act, 1956 (1 of 1956);

(iii) such other institutions, being companies and not being public financial institutions, engaged in the development or financing of industrial undertakings, as the Central Government may, by notification, specify:

Provided that no institution shall be so specified unless not less than fifty-one per cent of the paid-up share capital thereof is held by any State Government or Governments or by any institution or institutions mentioned in Sub-clauses (i) and (ii) or partly by one or more public financial institutions or institutions mentioned in Sub-clauses (i) and (ii) and partly by one or more State Governments.

11. It was, thus, submitted that while the expression "State level institution" used in Section 19(1) of the SICA had been clearly defined, and the expression "or any institution" must, thus, take colour from it, the expression "other authority" has no similarity with the expression used in Section 3(1)(p) of the SICA.

12. All these entities aforesaid are collectively described as "the person required by the scheme to provide financial assistance?. (In order to indicate that the use of the phraseology "person" in other parts of Section 19 of the SICA would include all these entities). Section 19(1) of the SICA makes no distinction between a secured and an unsecured creditor. It gives certain special rights to a category of institutions as set out therein irrespective of the fact that they have advanced any secured or unsecured loans or carried out any other transaction.

13. Learned Counsel submits that this Section is required to be broken into four parts mentioned aforesaid. The expression "other authorities" would have to have a reference to an entity other than an entity mentioned in (a), (b) & (c) above and cannot stand alone. The expression "other authority", it was submitted, will have to take colour (a), i.e., the Central Government or State Government, as it does not fit into the scheme of (b) or (c). It is in that context that the submission was advanced that the expression "other authority" u/s 19(1) will have the same meaning as in Article 12 of the Constitution of India. The test whether a person or authority is discharging a public duty was stated to be relevant in the context of maintainability of a remedy under Article 226 of the Constitution of India but was not relevant in the context of the meaning to be

given to the expression "other authority" and Respondent No. 1 being a creditor of a large amount of public money was, thus, an "other authority" for purposes of Section 19(1) of the SICA and thus entitled to notice u/s 19(2) of the SICA.

14. Learned Counsel referred to the observations of the Constitution Bench of the Supreme Court in Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, to emphasise the expansion of the functions of the Government in a welfare State resulting in forging of a new instrumentality or administrative device for handling these new problems which resulted in creation of public corporations as observed in Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, Thus, it was held that neither the form of the corporation, nor its ostensible autonomy would take away from its character as "State" and its constitutional accountability under Part III vis-?-vis the individual. In para 40 it was observed as under:

40. The picture that ultimately emerges is that the tests formulated in Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.

15. We may note at this stage itself that the emphasis is on an accountability of such a State authority to rights conferred in Part III of the Constitution of India.

16. Learned Counsel for the Petitioner, on the other hand, canvassed before us that Respondent No. 1 Company despite being a Government Company was not covered within "other authority" in Section 19(1) of the SICA as it had entered into a mere commercial transaction in pursuance to a purchase order. There were other companies sailing in the same boat. A transaction which is purely commercial in nature without any public function or duty attached to it does not entitle Respondent No. 1 Company to interfere into the revival scheme of a sick industrial company merely on the ground that it is a Government Company and thus while entering into such a commercial transaction a Government Company cannot seek a better dispensation by virtue of being a PSU. Learned Counsel sought to draw strength from the observations made in WP (C) No. 7341/2009 titled National Small Industries Corporation Limited v. Singer India Limited and Anr. decided on 30.8.2010 (reported in 2010 (103) SEBI & Corporate Law 385 Delhi), which is a judgment of the Division Bench of this Court. It could, however, not be disputed that the issue which was adjudicated upon in that case is slightly different. A PSU had invested money in the sick company in the form of share

capital and it was held that such investment could not be said to be a financial assistance to a sick company by way of loan, advance, guarantee, sacrifice, relief or concession by a financial institution. Such a PSU which invests in the share capital would not come within the meaning of Section 19(1) of the SICA. The case being one of dilution of shareholding of the Petitioner therein in the sick company was held not to come within the purview of Section 19(1) of the SICA.

17. Learned Counsel for the Petitioner also referred to the judgment of the Supreme Court in Life Insurance Corporation of India Vs. Escorts Ltd. and Others, wherein it was observed in para 102 as under:

102. For example, if the action of the State is political or sovereign in character, the court will keep away from it. The court will not debate academic matters or concern itself with the intricacies of trade and commerce. If the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management, by a resolution of the Company like any other shareholder.

(emphasis supplied)

18. Learned Counsel submitted that undisputedly Respondent No. 1 is a creditor of the Petitioner Company having a claim of Rs. 73.49 lakh. As to how such a creditor is to be treated has to take its colour from Section 18(3)(b) of the SICA which mandates circulation of the draft rehabilitation scheme for knowledge of the creditors. There is no mention of creditors in Section 19(1) of the SICA. Respondent No. 1 Company being an unsecured creditor would, thus, have to stand at the end even in the event of winding up of the Petitioner Company under the provisions of the Companies Act, 1956. Out of the total dues which were outstanding from the Petitioner Company, the extent of dues payable to Respondent No. 1 were 11.47 per cent and thus the sanctioned scheme could not be interfered with on the pretext of a minority stake qua the dues.

19. We may, once again, at this stage point out that the aforesaid plea is really

not of much relevance as the expressions used in Section 19(1) of the SICA are not in respect of unsecured or secured creditor but the benefit of Section 19(2) of the SICA being made available to the entities envisaged u/s 19(1) of the SICA.

20. We have given our thoughtful consideration to the submissions advanced by learned Counsels for the parties. We are also conscious of the fact that the impugned order does not reopen the chapter of the sanctioned scheme which stands partly implemented and the Petitioner Company having come out of the woods. The rights in terms of the impugned order have been given to Respondent No. 1 Company limited to a hearing before the BIFR to examine as to how its debts are to be treated keeping in mind that it is a PSU. However, the issue is not whether a limited right is given or not but as to whether Respondent No. 1 could fall within the definition of "other authority" as used in Section 19(1) of the SICA for it to enjoy certain special rights u/s 19(2) of the SICA even though it is an unsecured creditor. Another connected question which would arise for consideration would be whether the unpaid balance price for goods supplied would fall within the definition of "Financial Assistance" by way of loans, advances, or guarantees or reliefs or concessions or sacrifices. For the said purpose construction would have to be given to Section 19 of the SICA.

21. In our view the provisions of Section 19 of the SICA are clear in their terms reflecting the intent of the legislature and there is no need to give it an extended meaning by seeking resort to provisions of Article 12 or Article 226 of the Constitution of India. The principles of literal construction would apply in such a case. The plain, literal and grammatical meaning have to be given effect to and if that is so done it is not inconsistent with any expressed intention or declared purpose of the SICA. The species specify in one category "a public financial institution or State level institution or any institution or other authority?. The expression "any institution or other authority", thus, take their colour from a "public financial institution or State level institution?.

22. We may also clarify that learned senior counsel for Respondent No. 1 was right in his contention that the bracketed portion of Section 19(1) of the SICA is for purposes of defining the expression "the person" required by the scheme to provide financial assistance when used in other parts of the Section so that repeatedly it is not necessary to use "any Government bank, institution or other authority required by a scheme to provide such financial assistance". It is, thus, a defining clause for the expression "the person".

23. Section 19(1) of the SICA envisages the issue of financial assistance by way of concession or sacrifices from certain entities and those entities are, thus, required to have the benefit of the scheme being circulated and the consent obtained u/s 19(2) of the SICA. Thus, Central Government and State Government are specifically mentioned in it. Similarly, there is a mention of scheduled bank or other bank. After "Central Government" there is a comma (,) where after the expression "a State Government" is used, again breaking the sentence by a comma (,) and thereafter "any scheduled bank or any other

bank?, which again is followed by a comma (,). Thereafter the expression used in continuity is "a public financial institution or State level institution or any institution or other authority?. We are, thus, unable to accept the plea of learned Counsel for Respondent No. 1 that the financial assistance by way of concessions or sacrifices is from four different nature of entities as canvassed. The different entities are broken up by inserting a comma (,) and wherever similar nature of entities are there the expression used is "or". Thus, the concessions or sacrifices are sought from:

(a). Central Government,

(b). State Government,

(c). any scheduled bank or other bank,

(d). a public financial institution or State level institution or any institution or other authority.

24. The Petitioner cannot be permitted to break and create a separate category of "other institution" when the word used is "or" prior to it. The expression "other authority", thus, has to take a cue from the prior expressions "a public financial institution or State level institution?, which is followed up by "or any institution or other authority" and must be read ejusdem generis. The particular words in respect of the class, category or genus are followed by the general words and thus must be limited to things of the same kind as those specified. It is these nature of institutions which fall within one category. The objective is also very clear - these are institutions which may be providing financial assistance in more manner than one to a sick company and may be called upon to give concessions or sacrifices at the stage of rehabilitation scheme.

25. Section 19(1) of the SICA deals only with a provision made for financial assistance by way of "loans, advances or guarantees or reliefs or concessions or sacrifices" from the relevant entities. Thus, the words "financial assistance" are qualified by such financial assistance only by way of loans, advances or guarantees or reliefs or concessions or sacrifices. The unpaid price for goods supplied certainly does not fall within the definition of a loan or an advance or a guarantee. The question arises as to whether it would fall within a relief or concession or sacrifice. In our view, the mode and manner of use of these words in the provision make it clear that the last three words take their colour from the nature of transactions reflected specifically in the first three words, i.e., they have to be read in ejusdem generis. A financial assistance by way of loans, advances or guarantees is a positive act by which some more amount is given or guarantee is given for rehabilitation of the company. On the other hand, reliefs, concessions, sacrifices are acts where something is given up, i.e., in respect of loans, advances, or guarantees by way of relief, concession or sacrifice. The entity, thus, takes a lesser amount than due towards the loan, advance or a guarantee. A pure commercial transaction of supply of goods and the corresponding entitlement to recover the balance unpaid price would, thus, not

fall within this category and thus even otherwise the benefit of the provisions of Section 19(2) of the SICA are not available to Respondent No. 1.

26. There is no doubt that Respondent No. 1 is a PSU. There is also no doubt that there is no character of a public function attached to the transaction in question which is a pure commercial transaction of sale of goods for a price where part payment has been made and the remaining payment undisputedly remains due. It is in that context that for the remaining unpaid price Respondent No. 1 has been treated as an unsecured creditor as it was not an entity which had lent any money against security. This categorization of Respondent No. 1 under the heading of "unsecured creditors" can, thus, not be doubted. It will make no difference that in Respondent No. 1, being a PSU, the funds, control and management are of the Central Government. The expression "other authority" cannot be construed by clubbing it with "Central Government" or "State Government" as it sought to be done by learned senior counsel for Respondent No. 1 and thus there cannot be any question of taking any colour from the meaning attached to "other authority" where that expression follows a different nature of expression used in Article 12 of the Constitution of India for purposes of adjudication of rights in Part III of the Constitution of India. In Article 12 of the Constitution of India the expression "the State" has been included to define "Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India? and the same have been construed to include PS Us for that purpose. Similarly, the unpaid price will not also fall within the definition of a financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices.

27. The pronouncements of the Supreme Court cited by both the learned Counsels for the parties in Pradeep Kumar Biswas v. Indian Institute of Chemical Biology and Ors. case (supra) and Life Insurance Corporation of India v. Escorts Limited and Ors. case (supra) have, in fact, a common thread running through it which distinguishes the nature of commercial transactions which may be carried out by PS Us merely as a contracting party which are distinguishable from actions which have a State character or where the rights under Part III of the Constitution of India are enshrined.

28. We are, thus, of the considered view that Respondent No. 1 is not entitled to be covered within the definition of "other authority" within the meaning of Section 19(1) of the SICA nor can the unpaid price be categorized as financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices and thus is not entitled to the notice u/s 19(2) of the SICA. Respondent No. 1 is, thus, liable to be treated as an "unsecured creditor", as has been done by the BIFR, and in view of the scheme which has been duly approved in accordance with law the entitlement is restricted to 10 per cent of the principal amount being in the category of an unsecured creditor. We may notice that it was pointed out to us that the Petitioner has not paid even that amount but then

learned Counsel for the Petitioner pointed out that the said amount had to be paid at certain stages and the installment of the same has been brought to the Court by learned Counsel for the Petitioner.

29. The writ petition is accordingly allowed and the impugned order of the AAIFR dated 12.10.2010 is set aside making the rule absolute.

30. Parties are left to bear their own costs.

