
(2012) 10 CAL CK 0075

In the Calcutta High Court

Case No : F.M.A. No. 169 of 2012 and C.A.N. No. 5773 of 2012 and F.M.A. No's. 171, 172 and 173 of 2012

Namakar Vinimay Pvt. Ltd.

APPELLANT

Vs

Yashdeep Trexim Pvt. Ltd.
 Baranagar Jute Factory Pld
Vs Baranagar Jute Factory Pvt. Ltd. Workers" and
Employees" Union (INTUC)
 Secretary, Baranagar Jute
Factory Pld Workers" and Employees" Union Vs Baranagar
Jute Factory Plc
 Daksh Vyapar (P) Ltd. Vs Board of
Industrial and Financial Reconstruction

RESPONDENT

Date of Decision : 19-10-2012

Acts Referred:

Companies Act, 1956 — Section 11, 13, 14, 15, 16
Constitution of India, 1950 — Article 226, 38, 39, 39(b), 39(c)
Criminal Procedure Code, 1973 (CrPC) — Section 5
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 15(1), 22, 25, 3

Citation : (2013) 1 CHN 82

Hon'ble Judges : Kalyan Jyoti Sengupta, Acting C.J.;Asim Kumar Mondal, J

Bench : Division Bench

Advocate : HIRAK MITRA, Partha Sarathi Sengupta, Nilendu Bhattacharya, Suchismita Chatterjee, Rudrajit Sarkar and Prasanta Kumar Naskar and Ashok Banerjee, Partha Sengupta, Joy Saha, Prasanta Naskar, Biswajit Ghosh, Nilendu Bhattacharyya, Rudrajit Sarkar, Amit Agarwalla, B.N. Joshi, Suchisita Ghosh and Debosree Saha in FMA 171 of 2012, for the Appellant;Tilak Mitra for ESI Standing Counsel, Joydeep Kar and Jayashree Chakraborty for Respondent No. 1, Ashok Banerjee and Jay Kumar Surana for Respondent No. 13, P.C. Sen and Rajratna Sen for Respondent Nos. 3 and 4, Bimal Chatterjee, Manju Agarwal, Bajrang Manot and Deepak Jain for Respondent Nos. 18 to 21, S.C. Prasad for P.F. Authority and Debasish Kundu and Raghunath Chakraborty for Respondent Nos. 16 and 17 in FMA 170 of 2012, for the Respondent

Final Decision : Dismissed

Judgement

Asim Kumar Mondal, J.—In all the above appeals judgment and order of the learned Single Judge dated 25th January, 2001 has been impugned. The

impugned judgment and order was rendered while disposing of three writ petitions being W.P. No. 12377 (w) of 2010, W.P. No. 12406 (w) of 2010 and W.P. No. 12412 (w) of 2010. By the impugned judgment and order the learned Single Judge decided only one legal issue namely whether Board of Industrial and Financial Reconstruction (for short BIFR) has jurisdiction to entertain any application for reference made by the Baranagar Jute Factory Plc. which is described to be a foreign company or not. It is held by the learned Trial Judge that the above appellant being a company incorporated and further registered in England cannot maintain any application for reference before the BIFR under the provision of Sick Industrial Companies (Special Provision) Act (hereinafter referred to as "SICA"). The short background fact leading to filing the above writ petition consequently preferring appeal is required to be recorded as follows:-

The above company was incorporated in England in or about 1867. The prices of all shareholding is in pound sterling not in Indian Rupees. Admittedly, the aforesaid company incorporated for manufacturing of jute and jute textile products and as such it has got only factory and/or manufacturing unit in India namely at Baranagar which is an outskirts of city of Kolkata. The company was doing well till sometimes 1986 without any difficulty. Thereafter in the year 1987 a winding up petition was filed by one Shree Krishan Omprakash in C.P. No. 2 of 1987. On 28th October, 1987 an order of winding up was passed by the Hon'ble High Court at Calcutta. On 15th September, 1988 one Raj Kumar Nemani and R.S. Ajitsaria moved an application in the aforesaid winding up petition suggesting a scheme for revival of the company and the same was accepted by the Company Judge. Thereafter in between 2000-01 workers of the said Company entered into an agreement with one M/s. Namakar Vinimay Pvt. Ltd. and another company which has also preferred separate appeal as above. Pursuant to such understanding it was decided that Namakar Vinimay Pvt. Ltd. and another company purchased shareholding of Baranagar Jute Factory. One Rishi Karan Rakecha and one Chaitan Chowdhury were appointed as Directors of the Baranagar Jute Factory (hereinafter in short "BJF"). In 2004 both the said Rishi Karan Rakecha and Chaitan Chowdhury filed an application before BIFR being reference No. 209 of 2004. However, BIFR did not proceed with the same hence the writ petition was filed in this Court and the learned Single Judge by an order dated 20th February 2006 while disposing of the said writ petition directed, the BIFR to dispose of the reference application within 18 months. It appears that the Company Court thereafter stayed the order of winding up by the Division Bench of this Court and appointed Special Officers and the same was affirmed by the judgment and order dated 24th May, 2006 by the Hon'ble Supreme Court and winding up proceeding has been permanently stayed and the company has been functioning as going concern. In the meantime three petitions were filed by three alleged creditors including M/s. Steel Emporium and Daksh Vyapar (P) Ltd for revival of the winding up order. The said three applications were dismissed by an order dated 5th August, 2008. On 2nd December 2008 in terms of the aforesaid order of the learned Single Judge approved the scheme of revival of the

BJF. The notice inviting petition was published on 13th December 2009. On 17th December 2008 Chaitan Chowdhury and Ridh Karan Rakecha resigned from the office of Director of the Company. On 11th November, 2009 the said two persons challenged the resignation unsuccessfully before the Appropriate Court in London. On 17th November, 2009 BIFR sanctioned the scheme of revival of the BJF. In December 2009 on M/s. Sohanlal Chandanmul and company filed a writ petition No. 1166 [later renumbered as W.P.5535 (w) of 2010] challenging the authority of BIFR to entertain the reference in proceeding No. 209/2004. However the said writ petition was withdrawn. Thereafter the above writ petition being W.P.12377(w) of 2010 instituted by Yashdeep Trexim Pvt. Ltd.

Writ petitions being W.P.12377 (w) of 2010, instituted by Yashdeep Trexim Pvt. Ltd. W.P. No. 12406 (w) of 2010 was instituted by Baranagar Jute Company Private Limited Workers" and Employees" Union, W.P. No. 12412 (w) of 2010 was instituted by Daksh Vyapar Pvt. Ltd. In all the aforesaid writ petitions the common and cardinal ground was taken that the BIFR has no jurisdiction to entertain the application for reference under SICA made by and on behalf of the said BJF which is a foreign company. The learned Trial Judge allowed two of three writ petitions and one being W.P.12412 (W) of 2010 was dismissed.

2. Mr. Hirak Mitra, learned Senior Counsel appearing on behalf of the Baranagar Jute Company Plc (FMA 170 of 2010) appearing for the appellant submits that the SICA has jurisdiction to entertain the application not only in terms of the law and but also on fact as almost 99% of the shareholders of the company are Indians. Company"s main and only activity is in India being the Jute Mill with 3,700 strong Indian workers". The appellant has to spend about Rs. 100 crores in every year to meet the salaries of the workers, make payment to the suppliers of stores, to the jute growers and to the Government by payment of excise, cess sales tax etc. None of the foreigners is involved in the affairs of the BJF because all the secured, unsecured creditors are of Indians and the only unit of the company is situated in West Bengal, India. Legally he submits that the provision of SICA is applicable to this company though it is incorporated in England but it was registered under the Companies Act in India also. The legislative intent of the SICA will appear from its preamble and its statement of objects and reasons of the Act. It will be clear from section 3 of the SICA and that of the Companies Act, 1956 both of which starts with the phrase "unless the context otherwise requires". The definition of the company is an inclusive and not an exclusive one. Thus it cannot be said that the meaning of the word company can have no other imputation. To strengthen his aforesaid legal argument he has relied on following Supreme Court decisions:

Smt. Leelabai Gajanan Pansare and Others Vs. The Oriental Insurance Co. Ltd. and Others, National Insurance Co. Ltd. Vs. Deepa Devi and Others, , Ramanlal Bhailal Patel and Others Vs. State of Gujarat, N.K. Jain and others Vs. C.K. Shah and others,).

Thus the strict interpretation cannot be attached to the definition of the term

"Company" in SICA. Section 591 of the Companies Act provides that sections 592 and 602 both inclusive, shall apply to call foreign companies to have established place of business in India at the commencement of this Act. Section 34(2)(a) of the SICA has defined the word Company which says a body corporate, firm or association of individuals and not in terms of section 3 of the Companies Act. According to him the provisions of sections 13, 14, 15, 16, 17 and 18 of the Companies Act are similar to the provisions of section 592 of the said Act. The statute does not differentiate between a company which has its registered office in India and a company which has registered office outside India. Having regard to the purpose of SICA definition of term "company" in section 3(d) of the Companies Act cannot be restricted to exclude company incorporated outside India, but registered in India. This would deprive its Indian shareholders, creditors and workers from the protection of SICA, offers, SICA has to be interpreted to extend the foreign company having regard to the public interest it proposes to serve to revive the company in the interest of its workers and creditors. The company was initially wound up by order dated 28th October, 1987 thereafter by an order dated 16.6.1989 winding up order was stayed approving the scheme to run the company. Thereafter the Appeal Court by judgment and order dated 18th November 2004 upset the judgment and order of the learned Single Judge dated 19th December, 2002 by which direction was given to the official liquidator to take up the winding up proceeding and also take over possession and control of the affairs of the company and to represent the company. The said Division Bench also stayed the winding up. The said Division Bench judgment dated 24th May 2006 was affirmed by Hon''ble Supreme Court holding that winding up proceeding is not in force and also directing the Joint Special Officers to continue to oversee the management and the affairs of the company. Thus it cannot be said at the time of commencement of the SICA Amendment Act winding up proceeding was pending. That apart section 22 of the SICA provides that winding up proceeding cannot be proceeded except with the consent of the BIFR. He with the support of the Supreme Court judgment reported in M/s. Rishabh Agro Industries Ltd. Vs. P.N.B. Capital Services Ltd., submits that even if the winding up proceeding is pending, BIFR can entertain proceedings. He contends that the writ petition filed by the Yashdeep Trexim Pvt. Ltd is collusive action. This company is a shareholder of the BJB Ridh Karan Rakecha and Chaitan Chowdhury formed a composite group and they approached the Court in United Kingdom together. Yashdeep was all along aware about the proceedings before BIFR. However till Ridh Karan Rakecha and Chaitan Chowdhury were in the Board of BJB, Yashdeep did not approach this Hon''ble Court challenging the proceedings and for the first time in June 2010 challenged the proceeding after the scheme had already been sanctioned by the BIFR. Yashdeep owes Rs. 2.69 crores as interest and is thus interested in ensuring the BJB does not revive. The reference to the BIFR was made on 16th September 2004. Writ petitions were filed after six years from September 2004 till June 2010 to challenge the scheme on ground of lack of jurisdiction of the BIFR, after contesting the proceedings before the BIFR filing objection. It was Chaitan

Chowdhury and Ridh Karan Rakecha who had filed the reference before the BIFR and it was at their instance an order was passed by His Lordship Hon"ble Justice Soumitra Sen (as His Lordship then was) on 20th February, 2006. These persons having obtained such orders cannot now support the case of Daksh and/or Yashdeep and challenge the jurisdiction of the BIFR. Moreover, it is the specific case of the BJF that Daksh has been set up by Chaitan Chowdhury and Ridh Karan Rakecha. The BIFR by order dated 2nd December 2008 directed publication to invite objections to the scheme. In spite of such advertisement on 13th December 2009 the writ petitioners did not challenge the jurisdiction of BIFR by challenging the reference. He contends that SICA speaks about sick industrial companies and not its unit. SICA comes into play when net worth of a company becomes negative. BJF has only one unit, and all its shareholders and directors are in India. The entire net worth of BJF is fully eroded. Section 25 of the SICA provides that any person aggrieved by an order of BIFR may within 45 days prefer appeal to the Appellate Authority.

3. Learned counsel appearing for Namakar Vinimay Pvt. Ltd. in its own appeal as well being the respondent No. 21 in F.M.A. 170 of 2012 while supporting the argument of Mr. Hirak Mitra contends additionally that in a proceeding concerning BJF instituted by Chaitan Chowdhury against Bhattar and others English Court by a judgment reported in (2010) 10 AER 1031 held that dispute concerning BJF is to resolve by Indian Court for the sake of convenience. Moreover, section 32 of SICA provides that provisions of the SICA and/or any rules and schemes made therein shall have effect notwithstanding anything contained in any other law. In support of his submission he has relied on the decision reported in case of Navnit R. Kamani and Others Vs. R.R. Kamani, and Testeels Ltd. Vs. Radhaben Ranchhodlal Charitable Trust, . He contends that learned Trial Judge has totally ignored section 1(4), preamble, objects and reasons and whole Act which provides context of the whole Act. Section 3 of the SICA and section 3 of the Companies Act starts with the phrase "unless the context otherwise requires" and this has been ignored. This provision has to be read in the light of the Article 39 of Constitution. The definition of the Company given in RBI and payment of bonus Act have no manner of application as this Acts are not pari materia with SICA. His further contention is that definition of statute cannot be used to understand the legislative intent behind another statute unless both are pari materia. This incorporation is possible only when it is registered, section 34 of the Companies Act has been ignored. Even effect of sections 591, 592 to 609 of the Companies Act has been ignored, a company registered u/s 592 cannot be treated as unregistered except when factors provided in section 584 are fulfilled that is the company has stopped business in India and that it has been wound up in its country of origin. The context, background and the purpose of SICA has been ignored. Indian workers, business shareholders etc of BJF are important in deciding the applicability of SICA. This has not been considered. The BJF had only one undertaking and that is in India has been overlooked also. A foreign company may have other undertakings, but both under SICA and under the

Companies Act only its Indian business was to be considered. The bar alleged was not expressed bar on the face of the statute. Thus, whether the petitioners had raised the issue before the BIFR was not enquired which was required. The contention on behalf of Sri Chaitan Chowdhury and Sri Ridh Karan Rakecha has to be rejected as they themselves filed the application before BIFR for reference case. They thereafter approached various statutory authorities and creditors and took advantage of the fact that a reference was pending before BIFR. The said persons also filed an application under Article 226 of the Constitution of India wherein the Hon''ble High Court directed the BIFR to dispose of the reference expeditiously.

4. It is submitted on behalf of this appellant that Daksh Vyapar filed an application being C.A. 434 of 2005 in Company Petition No. 2 of 1987 seeking winding up of the company. By order dated 5th August 2008 Her Ladyship Hon''ble Justice Indira Banerjee did not pass any order in its favour rather the alleged claim of this writ petitioner was relegated to the suit. It is further submitted that no suit has yet been filed as such Daksh has no locus to challenge the order of BIFR, Daksh however filed an appeal against said order dated 5th August 2008 which was dismissed for default. Hence this writ petitioner/appellant is not a person aggrieved in as much as its alleged right has been protected by granting liberty to file suit. In connection with his submission a decision of the Supreme Court reported in *Adi Pheroazshah Gandhi Vs. H.M. Seervai*, Advocate General of Maharashtra, Bombay, had been cited. BIFR passed an order on 4th November, 2009. Daksh was a party before the BIFR and also filed an affidavit before it on 15th February, 2009. Daksh did not prefer any appeal against the order of BIFR. The appeal having become time barred. Daksh could not be permitted to save the period of limitation by filing writ petition against the order of BIFR. Hence the impugned judgment and order must be set aside.

5. Learned counsel for the BIF Workers'' Union (UTUC) submits that STCA being a social and beneficial piece of legislation and the same has to be interpreted in the light of Article 39 of the Constitution of India hence liberal and purposive interpretation has to be given. In support of his contention he has relied on the following decisions:

Bharat Prasad and Others Vs. The State of Bihar and Others,

He further contends that SICA being a special Act will in any event override the provision of a general Act, such as the Companies Act 1956. Whenever there is any inconsistency between two acts, SICA will prevail. According to him the provision of SICA being the special enactment should be given primacy because of its higher public purpose. In this context learned counsel has relied on a Supreme Court decision rendered in case of *Tata Motors Limited vs. Pharmaceutical Products India Limited* reported in *Tata Motors Ltd. Vs. Pharmaceutical Products of India Ltd.* and Another, He further submits with the support of the decision of the Supreme Court reported in *NGEF Ltd. Vs. Chandra*

Developers Pvt. Ltd. and Another, that SICA will prevail over the Companies Act and BIFR cannot exercise concurrent jurisdiction as the Company Court cannot sell the assets of the company. It is further submitted that BIFR has jurisdiction even after the company has been wound up referring to Supreme Court decision reported in M/s. Rishabh Agro Industries Ltd. Vs. P.N.B. Capital Services Ltd., . Hence respondent submits that the impugned judgment and order should be set aside.

6. Learned counsel for the BJF Union, respondent No. 12 in F.M.A.170 of 2012 supports the argument of Mr. Hirak Mitra and the learned counsel for the Namakar Vinimay Pvt. Ltd. In addition thereto he has contended that legislative intent of SICA will appear from its preamble and its statement of objects and reasons mentioned therein. It will appear that it is for the benefit of the sick companies owing industrial undertaking. Section 3 of the SICA and section 3 of the Companies Act, 1956 both starts with the phrase "unless the context otherwise requires" which have been interpreted to mean that definition provided under such a phrase would be an inclusive and not an exclusive definition. Thus it cannot be said that meaning of the word "company" can have no other connotation. In support of his submission he has referred to the following decisions of the Supreme Court:

Smt. Leelabai Gajanan Pansare and Others Vs. The Oriental Insurance Co. Ltd. and Others, National Insurance Co. Ltd. Vs. Deepa Devi and Others, Ramanlal Bhailal Patel and Others Vs. State of Gujarat, , N.K. Jain and others Vs. C.K. Shah and others,

He submits that SICA is social welfare legislation made to protect the interest of the workmen of a sick industrial unit and its creditor particularly the unsecured creditors. The provisions of SICA has to be read in harmony with the provisions of Article 39(b) and 39(c) of the Constitution of India. From such context, SICA must be interpreted to include an industrial undertaking belonging to a body corporate incorporated outside India and owning an industrial undertaking in India. According to him on conjoint reading of sections 2, 3(1), 11, 35, 36, 37, 38, 59(1), 592 and 593 to 609 of the Companies Act 1956 that company registered u/s 592 would also be deemed to be company u/s 3(1) of the Act. Having regard to the purpose of SICA definition of the term "company" in section 3(d) therein cannot be restricted to exclude a company incorporated outside India, but registered in India. This would deprive its Indian shareholders, creditors and workers from the protection of SICA offers. He further contends that having regard to the date of filing of the winding up petition amended provision of section 31 of the SICA has no manner of application on fact as no Receiver nor any Official Liquidator was appointed in any proceeding immediately before the commencement of this Act in this matter for winding up of industrial company.

7. Mr. Ashok Banerjee, learned Senior Counsel appearing for one of the respondents has supported the submission of Mr. Hirak Mitra and the learned

counsel for the Namakar Vinimay Pvt. Ltd and other respondents.

8. Mr. Kalyan Bandyopadhyay, learned Senior Advocate appearing for the Yashdeep Trexim Pvt. Ltd being the first respondent in F.M.A.169 of 2012 while highlighting the facts regarding his client's status in the company and also regarding development and affairs of the, namely, change of management and etc. which in our view are not relevant. The relevant portion of his argument is noted by the Court, and summarised as hereunder:-

The BJB is a company which has been incorporated under the Companies Act, 1872 in England. As such it is a foreign company and does not come within the ambit of section 3(1) of the Companies Act 1956. The mere fact that under Part II of the Act, foreign company requires to be registered u/s 591(2) of the Act will not make it company within the meaning of section 3 of the Act and thus cannot be said that a foreign company which is registered u/s 591(2) of the Act, 1956 comes within the purview of definition of section 3(1)(d) of the SICA. He submits that certain selected provisions of the Companies Act have been made applicable to the companies incorporated outside India but having establishment of place of business in India. This kind of companies though registered under the Companies Act is given status of unregistered company. He submits that language of SICA particularly the definition of the term "company" u/s 3 of the Companies Act, 1956 is clear and unambiguous and does not require any support or extraordinary aid to understand its meaning. While incorporating the provision of the SICA the Parliament was fully aware of the fact that the foreign company in India does not fall within the ambit of SICA. His next contention is that section 15 of SICA speaks of sickness of an industrial company. It does not refer either to an unregistered company or a foreign company, which are dealt in different chapters under the Companies Act. When wisdom of the legislature is clear in its thought and expression as contained in the statute, no other meaning should be attributed and nothing else should be brought within its fold that is the golden rule of literal interpretation and the mischief rule and/or purposive construction rule cannot be applied. Under the literal rule word of a statute must prima facie be given their ordinary meaning, whereas for application of purposive construction/ mischief rule the precondition are -

- (i) when plain words of statute are ambiguous;
- (ii) leads to no intelligible results and
- (iii) if read literally, would nullify the very object of the statute.

In support of his aforesaid submission relating to the rule of interpretation he has referred to the following decisions of the Supreme Court Paul Enterprises and Others Vs. Rajib Chatterjee and Co. and Others, , Sri Jeyaram Educational Trust and Others Vs. A.G. Syed Mohideen and Others, , Joint Commissioner of Income Tax, Surat Vs. Saheli Leasing and Industries Ltd., Gurudevdatla VKSSS Maryadit and Others Vs. State of Maharashtra and Others, , Jinia Keotin and Others Vs. Kumar Sitaram Manjhi and Others, , Dayal Singh and Others Vs. Union of India

(UOI) and Others, . He submits that aforesaid legal propositions can be applied in the instant case in reading provision of the Companies Act and the SICA. Note of caution is given by the Supreme Court that while applying the rule of purposive construction of a statute, the Court cannot supply the words, which the Parliament has deliberately excluded while enacting the statute. It is the fact that Parliament has intended to bring scheduled industries in its fourfold and it has excluded the industries which are owned by firms and/or individuals and has confined to the scope of the Companies Act only. Similarly, various types of companies have also been excluded from the purview of the Act such as banking company etc. The provisions of SICA do not apply to a company, which is under liquidation. BJB has gone into liquidation by the order passed by Hon''ble Court dated 28th November, 1987 and the official liquidator has taken possession of its assets and still continued to be in possession thereof. The said order of winding up still subsists. However its operation has been kept under suspended animation due to operation of its scheme which has been approved by the Hon''ble Supreme Court and has been formulated by the Company Court which is in seisin of the entire matter. The entire property of the company including the mill and its assets are custodia legis. In terms of the order dated 18th November 2004 management constituted by this Hon''ble Court has been running the said company. Thus SICA cannot have any application in view of the provisions contained u/s 31 inasmuch as by virtue of section 441(2) of the Companies Act winding up order would relate back to the date of its presentation.

9. Mr. P.C. Sen, learned Senior Counsel appearing on behalf of the respondents No. 3 and 4 in F.M.A. 170 of 2012 highlighted the fact relating to the change of management and affairs of the company and also the orders passed from time to time in the company petition initiated in 1987. According to him this Hon''ble Court has exclusive jurisdiction to oversee with affairs and management as well as assets and properties of the company by virtue of the Division Bench judgment and order dated 18th November, 2004, and the BIFR has no jurisdiction to deal with anything else on the face of said Division Bench judgment and order under which committee of management has been formed. His submission that needs attention of the Court is summarized hereunder:

10. The foreign company does not fall within the purview of definition of company in the Companies Act and therefore, basis of the scheme sanctioned by BIFR is wholly without jurisdiction as such it is unacceptable. The statute should not be given liberal interpretation as it is clear that company is defined u/s 3 of the Companies Act, 1956 which has been adopted by and u/s 3(1)(d) of SICA 1985, relates to companies formed and registered in India and does not include companies formed and registered in foreign countries. There have been two amendment in SICA whereby all those companies which were included earlier have been included in SICA.

11. Mr. Debasish Kundu, learned Advocate appearing on behalf of the Baranagar Mazdoor Sangha, respondent No. 1 in F.M.A.172 of 2012 and the respondent No.

17 in F.M.A. 170 of 2012 supports the argument of Mr. P.C. Sen and also Mr. Kalyan Bandyopadhyay. In addition thereto he submits what was not submitted before learned Trial Judge contends, for the first time as follows:-

That SICA does not apply to a foreign company principally because the paid up capital, and free reserves, share premium account of a foreign company cannot be taken into consideration by BIFR as they are in foreign currency and not in Indian currency. It is to be noted that accounts of foreign companies like BJB filed in UK. Section 3(1)(ga) defines net worth which consists of paid up capital and free reserves. Definition of Sick Industrial Company will be found in section 3(1)(o) which is registered for not less than 5 years and at the end of any financial year accumulated losses equal to or exceeding the entire net worth. Section 15(1) stipulates what is required when an industrial company becomes a sick industrial company. Once a company become sick industrial company, it has to make a reference under Rule 19 of the Board for Industrial and Financial Regulations, 1987. Form "A" has been framed for industrial companies, other than Government companies and Form "AA" has been framed for Government companies. SICA since its inception had undergone many amendments. Despite the same legislature did not feel it necessary to have a specific form for foreign companies. It will appear from Form "A" filed by the appellant company that there was no details of the paid up share capital and reserves of the Company recorded in such form. Unlike the Companies Act, which has special chapter being Chapters X and XI thereof for foreign companies, SICA does not have so. Even section 584 of the Companies Act, 1956 clearly mentions that the balance-sheet and profit and loss account of foreign company should have in form or containing such particulars included or having annexed thereto such documents included in particular documents to every subsidiary of foreign company under the provisions of this Act. He further contends that in so far as Indian companies are concerned, however, the provisions of section 211 of the Companies Act, 1956 clearly stipulates that the Balance- Sheet and Profit and Loss Accounts of a company shall be in the form set out in Part-I or schedule VI or as near thereto as circumstances admit. Therefore, the Act Regulations, statutory Forms clearly show that the foreign companies are outside the purview of SICA. He for the first time before this Court has said that BIFR itself has decided in the case No. 150 of 1988 In Re: M/s. Samnuggar Jute Factory Co. Limited (SFJC) that it does not have jurisdiction over a foreign company. He is candid enough to say that above judgment of course was not placed before BIFR in this case nor even before the learned Trial Judge. Even otherwise at the time of scrutiny of the reference once the Registrar had discovered that BJB is a foreign company it should have declined to register reference at the very inception. Even if this Hon"ble Court had given direction in writ petition asking BIFR to consider the reference proceedings, it was incumbent upon BIFR to forthwith dismiss the reference on the ground that the same related to a foreign company. He fairly submits that the aforesaid points were not argued before the learned Trial Judge. He however says having regard to the fact that point goes to the root of the jurisdiction of

BIFR over a foreign company, as such it is fundamental and well established principle that order and judgment passed by the Court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be embraced or relied upon even in the stage of execution and even in collateral proceedings. In support of his legal proposition he has placed reliance upon following Supreme Court decision:

Kiran Singh and Others Vs. Chaman Paswan and Others, , Chhotobhai Jethabhai Patel and Co. Vs. The Industrial Court, Maharashtra Nagpur Bench, Nagpur and Others, , Harshad Chiman Lal Modi Vs. DLF Universal and Another, , Ram Kristo Mandal and Another Vs. Dhankisto Mandal, , Nathi Devi Vs. Radha Devi Gupta,

Rest portion of his argument relate to repetition of argument advanced by other learned counsels for the respondents in relation to interpretation of definition of Company under SICA referring to other enactments Merchant Shipping Act, 1958, Bankers' Book Evidence Act, Agricultural Income Tax Act, Banking Regulations Act, Land Acquisition Act and Payment of Bonus Act and further on merit with regard to acceptability of reference.

12. We have carefully considered the submissions advanced by learned counsel for the parties as well as citations placed before us in support of their respective submissions and arguments. Only issue in this matter is whether "Company" defined in the Act SICA can be interpreted as has been given by the learned Trial Judge. From the preamble of the Sick Industrial Companies (Special Provisions) Act, 1985 it appears that the very intention of the Parliament to enact the said Act is "an act to make, in the public interest, special provisions with a view to securing the timely detection of the sick and potentially sick companies owing industrial undertakings, the speedy determination by 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 thereto.

"Company" u/s 3(i) of the Companies Act, 1956 defined as follows:

In this Act, unless the context otherwise requires, the expression "Company" shall subject to the provisions of sub-section (2) have the meanings specified-"Company" formed and registered under this Act or an existing company as defined in Clause (ii).

13. The definition "Company" has been borrowed from the Companies Act as defined u/s 3(1)(i) in Sick Industrial Companies (Special Provisions) Act, 1985 u/s 3(d) of the said Act as follows:

In this Act, unless the context otherwise requires "Company" means that a Company as defined in section 3 of the Companies Act, 1956.

14. The phrase "unless the context otherwise requires" is to be interpreted to mean that the same would be an inclusive and not an exclusive definition. This

phrase in our view denotes context of Act get primacy over wordings of the definition.

15. So, it cannot be said that the Company as defined in SICA has got no other connotation. SICA is a welfare legislation made to protect the interest of the workers of a sick industrial unit and its creditors, banks as well as unsecured creditors if necessary to revive industrial undertakings. SICA being a special Act will override the provisions of the Companies Act. Whenever there is any inconsistency between the two acts SICA will prevail u/s 31 of the Act. The strict interpretation cannot be attached to the definition of the term "Company" in SICA. Baranagore Jute Factory PLC undisputedly registered in UK under the provisions of Companies Act of the said country but it is also not disputed that the company has it's the only business unit in India i.e. at Baranagore, Kolkata. The Company's main and only activity is in India being the Jute Mill having approximately 4000 workers. The Company pays about 100 crore every year to workers, suppliers of stores, jute growers and to the government by way of excise duties, sales tax, income tax etc. All creditors secured and unsecured are also Indian establishment or Indian firms. The 95 % shareholders of the company are Indian. The company is running and doing its business following the provisions, rules and regulations as enacted and applicable in India.

16. If we look into the provisions "Company" as defined in the Companies Act, 1956 it appears that it includes an existing company as defined in Clause (ii). Thus the Companies Act includes the existing companies registered any act or acts relating to companies in force before the Companies Act, 1956 came into force. Section 592 of the Companies Act provides for the documents etc. to be delivered to register by Foreign Companies carrying on business in India. The provisions of Companies Act contained in sections 593, 594, 595, 596, 597, 599, 600 and 601- 602 deal with the provisions for filing of return documents and audited accounts of foreign company, obligation to name the State where such company incorporated, service on foreign company where is to be made, office where documents to be delivered, registration charges, and Books of Account. Interpretation of foregoing sections clearly indicate that statutory control over the foreign companies like as companies registered in India is ensured. So, the foreign company would also be deemed to be a company u/s 3(1) of the Act.

17. Considering the very purpose of SICA which is a social welfare legislation intended to protect the interest of weaker section under society i.e. the workers employed in factories and other establishments, it is imperative for a Court to give a purposive interpretation to the provisions contained therein keeping in view the directive principles enacted therein, the definition of the term "Company" in section 3(d) therein cannot be restricted to exclude a company incorporated outside India, but registered in India. In fact if we restrict our view to define company as defined in Companies Act, this would deprive the Indian shareholders, creditors and workers from the protection SICA offers. In this context the decision of the Supreme Court in the case of Maharashtra State Co-

operative Bank Ltd. Vs. The Assistant Provident Fund Commissioner, is very appropriate. The Apex Court held in paragraph 30 as follows:

30. Since the Act is a social welfare legislation intended to protect the interest of a weaker section of the society i.e. the workers employed in factories and other establishments, it is imperative for the Courts to give a purposive interpretation to the provisions contained therein keeping in view the Directive Principles of State Policy embodied in Articles 38 and 43 of the Constitution.

18. In view of the principles laid down by the Apex Court in the case of Bharat Prasad and Others Vs. The State of Bihar and Others, the provisions of socio economic legislation is to be interpreted for furtherance of purpose of enactment but not to frustrate it. The Hon"ble Apex Court while laying down the interpretation of statute has been pleased to observe as follows:

17. The legislative purpose in enacting the provisions of section 48-E of the said Act is to ensure that the disputes between raiyats and under-raiyats are settled as amicably as possible and for that, detailed machinery has been provided u/s 48-E of the said Act. In continuation of such legislative scheme section 48-E(13) has provided as follows:

48-E (13) Save as expressly provided in this Act, no Civil or Criminal Court shall have any jurisdiction over the subject-matter of a dispute after a proceeding is initiated under sub-section (1) by the Collector" Provided that nothing in this sub-section shall be deemed to affect the power of a Criminal Court to take such action as may be necessary for preventing breach of the peace pending the final disposal of the proceeding by the Collector.

18. In this context section 5 of the Code of Criminal Procedure, 1973 may also be noticed and which provides as follows:

5. Saving.--Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

19. Hon"ble Apex Court in the case of Smt. Leelabai Gajanan Pansare and Others Vs. The Oriental Insurance Co. Ltd. and Others, interpreting the very purpose of a provision of beneficial law has been pleased to observe as follows:

31. In order to give purposive interpretation to section 3(1)(b) of the said Rent Act one has to go back in history to the object behind enactment of the Bombay Rent Act, 1947 (1947 Act). The Act was passed to amend and consolidate the law relating to rents, repairs, eviction of tenants control of rates of hotels and

lodging houses and to control charges of licensed premises since 1.2.1973. The Act was passed to control the rents so as to prevent the landlords from exploiting the tenants by charging exorbitant rents with a view to take wrong advantage of growing acute shortage of accommodation in urban areas. Thus, that Act was also enacted to give further protection to the tenants, it intended to provide for responsibility of carrying out usual tenable repairs by transferring the duty of the tenants to carry out such repairs under the Transfer of Property Act to the landlord and thereby compelling him to keep the premises let out in good condition at his costs. In short, the said 1947 Act stood enacted with the intention to control rents, repairs, rates of hotels and eviction of tenants.

20. It appears from the record that by an order dated 19th December, 2002 His Lordship the Hon''ble Justice M.H.S. Ansari (As His Lordship then was) directed the Official Liquidator to take up the winding up proceedings and finalised the same in accordance with law. Further it appears from the record that by an order dated 18th November, 2004 the Appeal Court comprising of Their Lordships the Hon''ble Justice Altamas Kabir and Hon''ble Justice Alok Kumar Basu (As Their Lordships then were) have been pleased to set aside the said order and directed the Joint Special Officer to continue to oversee the management and affairs of the company. The Hon''ble Division Bench also appointed the then directors of the company to function as a "Committee of Management" for six months.

21. The Hon''ble Apex Court in the case of Radheshyam Ajitsaria and Another Vs. Bengal Chatkal Mazdoor Union and Others, , while disposing of the application observed as follows:

46. In any event since the Company is functioning as a going concern on and from the date of implementation of the scheme of arrangement as formulated and approved by the High Court as well as this Court, the question of the workers at this stage when the winding-up proceedings have been permanently stayed u/s 466 of the Companies Act, 1956 to 1956 does not and cannot arise. The workers having a priority over creditors can come into play only when the winding-up process is in motion and the Official Liquidator takes steps to formalise winding up. In the instant case, after the scheme had been sanctioned, the question of winding up would arise only if the order of permanent stay granted was to be lifted on any party's complaining of failure of the scheme or inability on the part of the Company to make payments either in terms of the scheme or otherwise. The contention to the contrary raised by Mr. Nariman has no force.

49. In our view, the provisions as contained u/s 529-A of the Companies Act, 1956 are not applicable in the facts and circumstances of the case as the order of winding up has been stayed and the Company is being run under the scheme as a going concern.

22. So, in view of the aforesaid observations of Hon''ble Apex Court it cannot be said that BJF is in liquidation rather the said company was allowed to continue as a going concern.

23. In view of above discussions and findings and also relying upon the abovereferred decisions/principles laid down by the Hon''ble Apex Court we may sum up our findings as follows:

(a) Admitted position is that Baranagore Jute Factor PLC is a foreign company having its only factory in India at Baranagore, Kolkata;

(b) Almost 95% share holders are Indians;

(c) About 3700 workers are working in the Jute Factory in West Bengal;

(d) The company is still continuing its business/activities as a going concern as observed by the Hon''ble Apex Court;

(e) The company pays about 100 crore every year to workers, suppliers of stores, jute growers and to the government by way of tax;

(f) All the creditors secured and un-secured are also Indian establishments and Indian firm; and

(g) English Court have declined to accept the jurisdiction on the basis that Indian Courts were the proper and convenient forum for the determination of this dispute.

24. Hon''ble trial Court has been pleased to consider that the provisions of SICA cannot be strained to meet justice of an individual case it is absolutely a matter of coincidence that the majority shareholders of BJC are Indians and its only functional unit is at Baranagar.

25. We are unable to subscribe the findings and observations made by learned Single Judge in the impugned judgment as regards the applicability of SICA in case of a foreign company registered in UK but functioning in India following and observing all the Indian Rules and Regulations as well as laws applicable time to time as framed by Indian legislature. We are also of the view that SICA is a special Act enacted for the purpose of public interest which should be viewed as beneficial legislation and also special enactment having overriding power over the provisions of Companies Act specially in an interpretation the term "Company" as defined in Companies Act as well as SICA.

26. We emphasize very word in this Act "unless the context otherwise requires" and accept the submission of learned counsel appearing on behalf of the BJC that it is not mandatory wherever the word "Company" occurs in SICA one should

mechanically attribute to it the meaning assigned in section 3(1)(d) thereof. Ordinarily, to understand the meaning "Company" the definition of same in the SICA ought to apply but where the context does not permit or the context otherwise requires, meaning assigned "Company" need not be applied by way of restrictive interpretation to mean only a company as defined in section 3(1)(i) of the Companies Act.

27. We also accept the submissions made by learned counsel appearing on behalf of the BIFR relying upon the decision of Hon'ble Apex Court reported in B. Premanand and Others Vs. Mohan Koikal and Others, wherein the Apex Court opined that departure can be made from the literal rule of interpretation by adopting purposive construction.

28. We, therefore, of the view that the provisions contained in SICA is applicable to a foreign company having its activities in India and also guided by the Indian Rules and Regulations as applicable time to time.

29. We, therefore, allow the appeal being F.M.A. No. 170 of 2012 and set aside the judgment and order under appeal except the portion of dismissal of W.P. No. 12412(W) of 2010 filed by Daksh Vyapar Pvt. Ltd. Therefore appeal being FMA No. 173 of 2012 filed by Daksh is dismissed without any order as to costs. This appeal is dismissed for the reasons as follows:-

Daksh has no locus to challenge the proceedings before BIFR as its claim is yet to be adjudicated because of dismissal of its action before the Company Court. This creditor is free to approach Civil Court in accordance with law.

30. In view of the above judgment we dismiss the appeal being FMA No. 1115 of 2011 preferred by Chaitan Chowdhury and Ridh Karan Rakecha who are instrumentals for activating BIFR by filing writ petition as quoted above. They have taken full benefit of pendency of the proceeding before BIFR as Directors of the Company. Now having gone out of management of the Company they have taken completely reverse stance to challenge the order of BIFR now. Their shifting stand is sheer abuse of the process of the Court, and is absolutely mala fide so much so that their version has now become thoroughly unbelievable to this Court. We make it clear that we have decided these appeals only on the point quoted above not on merit.

31. There will be no order as to costs.

Later:

32. After judgment is delivered the learned counsels for the contesting respondents in FMA 170 of 2012 have prayed for stay of operation of judgment and order delivered today. Such prayer is opposed by the learned counsels for the appellants. Having considered the contention we grant stay of operation for a period of three weeks after Puja Vacation. However, the interim order granted by this Court earlier will continue till then.

Kalyan Jyoti Sengupta, A.C.J.

I agree.