
(2010) 08 DEL CK 0329

In the Delhi High Court

Case No : Writ Petition (C) No. 7341 of 2009

National Small Industries Corporation Ltd.

APPELLANT

Vs

Singer India Ltd. and Another

RESPONDENT

Date of Decision : 30-08-2010

Acts Referred:

Companies Act, 1956 — Section 100, 101, 102, 103, 81
Constitution of India, 1950 — Article 226, 227
Income Tax Act, 1961 — Section 41, 72A
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 18(1), 18(2), 18(3), 19, 19(1)

Citation : (2011) 161 CompCas 103 : (2010) 103 SCL 385

Hon'ble Judges : Valmiki J Mehta, J; Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : T.K. Ganju, A.K. Thakur, R.K. Mishra, Anesh Paul and Rajiv Arora, for the Appellant; Maneesha Dhir, Geeta Sharma, Purti Marwah, Jayshree Shukla and Preeti Dalal, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.—The petitioner is a Government Corporation duly incorporated and registered under the provisions of the Companies Act, 1956 engaged in the business of promotion and development of small-scale industries. The petitioner was holding a stake of about 7.76% of the equity capital of respondent No. 1 company which went into financial difficulties resulting in proceedings under The Sick Industrial Companies (Special Provision) Act, 1985 (for short, "the SICA"). Respondent No. 1 was registered as a sick company as its net worth stood eroded and respondent No. 2 bank was appointed as the operating agency. The background of the investment in share capital of respondent No. 1 company by the petitioner has been set out. Respondent No. 1 company is the successor-in- interest of Indian Sewing Machine Company, Indian arm of Singer, USA. In view of the provisions of the Foreign Exchange Regulation Act, 1973 (for short, "the FERA"), 30% of the share capital of respondent No. 1

company was offered to the petitioner at a cost of 60 lakhs. There have been subsequently bonus and rights issue of respondent No. 1. The bonus shares were enjoyed by the petitioner while the rights shares were declined. The petitioner claims that in view of respondent No. 1 company not performing well, the petitioner diluted its holding leaving a balance of about 7.76% of the total share / equity capital.

2. The petitioner claims that it had no knowledge of respondent No. 1 company approaching the Board for Industrial & Financial Reconstruction (for short, "BIFR") till the representative of the petitioner collected the annual report from the office of respondent No. 1 company on or about 06.08.2008. It is only then the factum of respondent No. 1 company being declared sick by the BIFR in terms of an order dated 11.09.2006 came to light. The petitioner also came to know that a draft rehabilitation scheme had been prepared without consultation of the petitioner and the same was sanctioned by the BIFR on 28.04.2008. The effect of the scheme, insofar as the petitioner as a shareholder was concerned, was that in view of the subscribed and paid-up capital of respondent No. 1 company being reduced by 90% by reduction of the value of the share to 1/- of face value of 10/-, there would be dilution of the holding of the petitioner. Annual General Meeting (AGM) of respondent No. 1 company was proposed to be held on 19.08.2008, but it is claimed that no notice of the same was received by the petitioner. The equity shares were sought to be increased on preferential basis to the promoter company and its associates which also affected the rights of the petitioner as a shareholder.

3. The petitioner sought to challenge the aforesaid aspects in W.P. (C) No. 5917/2008 before this Court, but the writ petition was dismissed on 14.08.2008 on the ground of there being an alternative remedy available to the petitioner of preferring an appeal before the Appellate Authority for Industrial & Financial Reconstruction (for short, "AAIFR"). The petitioner also sought to challenge the notice dated 27.06.2008 of holding of the AGM on 19.08.2008 in CS (OS) No. 1697/2008 filed on the Original Side of this Court. Initially, interim orders were granted in favour of the petitioner company restraining respondent No. 1 company from giving effect to the resolution to be passed in the AGM, but on an appeal being filed by respondent No. 1 company, the Division Bench of this Court disposed off the appeal on 23.09.2008 in terms whereof the interim orders were to continue to operate only for two weeks to enable the petitioner to approach the AAIFR. It is in these circumstances that the petitioner preferred the appeal before the AAIFR against the order dated 28.04.2008 passed by the BIFR in Case No. 119/2005. The appeal was registered as Appeal No. 203/2008. This appeal was dismissed on 20.02.2009, which order is now sought to be assailed in the present writ petition under Articles 226 and 227 of the Constitution.

4. A perusal of the impugned order of the AAIFR dated 20.02.2009 shows that only three aspects were urged by the petitioner and those are also the aspects sought to be urged consequently in the present writ petition as the findings are

against the petitioner on all the three aspects. These three aspects are:

(i) The BIFR has no power to provide for dilution of equity u/s 18(2)(f) of the SICA without following the procedure prescribed u/s 81, 100 - 103 of the Companies Act.

(ii) The petitioner is a public financial institution within the meaning of Section 19(1) of the SICA and, thus, there can be no dilution of equity without consent of the petitioner in view of Section 19(2) of the SICA.

(iii) The non-compliance by respondent No. 1 of Section 18(3)(a) of the SICA requiring the publication of the draft scheme as per the directions of the BIFR to enable the stakeholders to file their objections.

First Aspect:

5. A perusal of the approved scheme shows that a multi- pronged strategy for rehabilitation forms basis of the same as reflected in para 9.2 as under:

(1) One Time Settlement (OTS) of the dues of FIs / Bank.

(2) Infusion of fresh funds by the promoters.

(3) Relief and concessions from various concerned parties.

(4) Capital Restructuring.

6. The One Time Settlement (OTS) with the secured creditors was negotiated with four banks and all the secured creditors accepted the scheme. The scheme also envisaged promoters' contribution of 8.35 crores for unding of the scheme. By way of reduction of share capital, the promoters were expected to sacrifice as shareholders. The unsecured creditors were to accept 10% of the principal outstanding dues as on 31.03.2007 as the settlement amount. As per Clause 11.9(ii)(a), the existing equity share capital of the company was to be reduced by 90% and then every ten equity shares of 1/- were to be consolidated into one equity share of 10/- each fully paid- up.

7. The controversy revolves around Section 18(2)(f) of the SICA, which reads as under:

18. Preparation and sanction of schemes.

... ..

(2) The scheme referred to in Sub-section (1) may provide for any one or more of the following, namely -

... ..

(f) the reduction of the interest or rights which the shareholders have in the sick industrial company to such extent as the Board considers necessary in the interests of the reconstruction, revival or rehabilitation of the sick industrial

company or for the maintenance of the business of the sick industrial company;

8. Section 81 of the Companies Act deals with the further issue of capital, while Sections 100 - 103 deal with the special resolution for reduction of share capital. The SICA has been enacted in public interest making special provisions with a view to have remedial measures in respect of a sick company. It is in view thereof that primacy has been given to the provisions of the SICA in terms of Section 32 of the said Act, which reads as under:

32. Effect of the Act on other laws.

(1) The provisions of this Act and of any rules or schemes made there under shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976) for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act.

(2) Where there has been under any scheme under this Act an amalgamation of a sick industrial company with another company, the provisions u/s 72A of the Income Tax Act, 1961 (43 of 1961), shall, subject to the modifications that the power of the Central Government under that Section may be exercised by the Board without any recommendation by the specified authority referred to in that Section, apply in relation to such amalgamation as they apply in relation to the amalgamation of a company owning an industrial undertaking with another company.

Thus, the basis for rejection of the argument of the petitioner in the impugned order is the power of the Board (BIFR) conferred u/s 18(2)(f) of the SICA read with Section 32 of the SICA.

9. We find no fault with the aforesaid reasoning. We are fortified in our view by the observations made by a Division Bench of this Court in *Sarin International (P) Ltd. Vs. Appellate Authority for Industrial and Financial Reconstruction*, . A grievance was sought to be made in that case about an approved scheme where dues of some unsecured creditors had been waived wholly or partially without their consent and the shareholding of the existing shareholders had been written down by 90% and their shares had been compulsorily transferred at 10% face value to another entity. We may also note at this stage itself that another aspect touched upon in that case was that in the event of winding up, where the net worth stands eroded, the secured creditors and shareholders practically get nothing. The question of compensation for deprivation of property would, thus, only arise if there was any real property and since the net worth stands eroded, the shareholders and creditors can be assumed to have no property in respect of the investment.

10. The power being specifically conferred u/s 18(2)(f) of the SICA and the BIFR

having wide and ample powers for restructuring with the SICA playing an overriding role in view of Section 32, the BIFR was within its power to have directed the reduction of share capital and issue of further capital at specified rates without going through the process of the special resolution. We may also note that the AGM was actually held where except the petitioner, who is stated to be absent, the others were with the scheme.

Second Aspect:

11. The petitioner claims that its investment in the form of share capital has to be appreciated in the context of how it was made to invest in respondent No. 1 company which was as per the directions of the Government of India in view of the provisions of the FERA coming into force. It was, thus, pleaded that there is no difference between the provision of financial assistance to a sick company by way of loan, advance, guarantee, sacrifice, relief or concession by a financial institution and a sacrifice by the petitioner as a shareholder. It is, thus, pleaded that the consent of the petitioner was required u/s 19 of the SICA, which was admittedly not obtained. The relevant provisions of Section 19 read 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 reliefs 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 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.

... ..

(emphasis supplied)

12. We are unable to accept the aforesaid plea and once again find no fault with the reasoning contained in the impugned order. Merely because the petitioner is a Government Company within the meaning of the Companies Act, which has invested in the share capital of respondent No. 1 company, does not imply that the petitioner is covered u/s 19(1) of the SICA. If this submission of the petitioner was to be accepted, then equally an unsecured creditor is making the so-called sacrifice as he would not get the full amount of his dues nor interest.

The provisions of Section 19(1) of the SICA are specific as the financial assistance has to be provided by way of loans, advances or guarantees or reliefs or concessions or sacrifices. The present case is one only of dilution of shareholding of the petitioner in respondent No. 1 company.

13. Our attention has been drawn by learned Counsel for respondent No. 1 to a judgment dated 04.08.2008 of the Division Bench of the High Court of Judicature at Madras in W.A. No. 508 of 2008 titled "Tamil Nadu Industrial Development Corporation Limited v. Board for Industrial and Financial Reconstruction and Ors.". A similar plea was sought to be advanced by the appellant therein, which was a State level institution and had invested in the share capital of the sick company. It was pleaded that lending of loan and making financial investment by way of equity cannot be treated differently and, thus, the consent of the petitioner therein was required. The aspect of investment of public money was also urged. The Division Bench held that as per Section 19(2) of the SICA, the draft scheme has to be circulated to a person for objection / consent, who is required to provide financial assistance for revival of other company. Such financial assistance has to be by way of loans, advances or by way of guarantees or by way of reliefs or concessions or sacrifices. Reduction of equity capital does not fall in this category. The power of reduction u/s 18(2)(f) of the SICA was also simultaneously discussed.

14. In our considered view, the issue is no more res integra in view of our judgment in *Oman International Bank S.A.O.G. v. Appellate Authority for Industrial and Financial Reconstruction* 2010 (169) DLT 618 : 2010 (5) AD (Delhi) 566 wherein it was observed that in view of the provisions of Section 19(1) read with Section 19(4), the BIFR has the power to adopt such measures as may be necessary in view of Section 18(3)(b) of the SICA and those measures are not restricted to the ones prescribed u/s 18(1)(a) to Section 18(1)(e) of the SICA. Section 19(4) of the SICA has been introduced by Act 54 of 2002 and the objective is that secured creditors of not less than 3/4th should not be able to prevent rehabilitation by the BIFR.

15. The petitioner, who was originally holding 30% of the share capital, itself diluted it to 7.76% and is currently holding 1.31% of the equity capital. We may also note at this stage that though the investment of the petitioner had almost become worthless by erosion of the net worth of respondent No. 1 company, we are informed that currently the share of respondent No. 1 company is being traded in the range of 28/- per share of face value of 10/-. This result has been possible because of the rehabilitation scheme with the co-operation of the secured creditors and the funds infused by the promoters. New share certificates after capital reduction already stands dispatched to all the shareholders.

16. Learned senior counsel for the petitioner did seek to rely upon the judgment of a Division Bench of this Court in *Mewar Sugar Mills Ltd. v. Chairman, Central Board of Direct Taxes* and Anr. 1998 VI AD (Delhi) 309, but that was in the context of the relief from operation of Section 41 of the Income Tax Act, 1961,

which would be a sacrifice from the Central Government and, thus, would have no application to the facts of the present case.

17. We, thus, find no merit in the aforesaid plea.

Third Aspect:

18. The third aspect emanates from a direction of the BIFR requiring respondent No. 1 to publish the salient features of the scheme in terms of Section 18(3)(a) of the SICA in one leading newspaper and one State level vernacular newspaper for information of the shareholders. The admitted position is that the publication has taken place only in Jammu & Kashmir Times. Thus, learned senior counsel for the petitioner contends that the absence of the publication about the aspect of reduction of share capital as a salient feature of the scheme in the advertisement coupled with the publication not being in conformity with the directions of the BIFR passed in this behalf on 12.02.2008 negates the approval of the scheme.

19. In order to appreciate the controversy, we reproduce Section 18(3)(a) as under:

18. Preparation and sanction of schemes.

... ..

(3) (a) The scheme prepared by the operating agency shall be examined by the Board and a copy of the scheme with modifications, if any, made by the Board shall be sent, in draft, to the sick industrial company and the operating agency and in the case of amalgamation, also to any other company concerned, and the Board shall publish or cause to be published the draft scheme in brief in such daily newspapers as the Board may consider necessary, for suggestions and objections, if any, within such period as the Board may specify.

20. Learned Counsel for respondent No. 1 has urged that, though there may be a technical defect, the fact remains that the AGM was held where the petitioner as a shareholder has had the full right to participate, but did not even participate while all other shareholders were overwhelmingly in favour of the scheme. It is also submitted that the requirement of the aforesaid Sub-section is only publication of the draft scheme in brief in such daily newspaper as the Board (BIFR) may consider necessary and, thus, there is no mandate that it must be in a national newspaper or in a vernacular newspaper, though such a direction has undisputedly been passed by the BIFR on 12.02.2008.

21. A reading of the impugned order shows that what has weighed with the AAIFR is the non-participation of the petitioner in the process of the draft scheme.

22. We find that undisputedly there has been a violation of the direction passed by the BIFR on 12.02.2008. The publication has taken place in terms of Section 18(3)(a) of the SICA, but not as per the aforesaid direction. There is, thus, a technical defect. The question is whether such a technical defect should be made

to now negate the scheme when various parties have altered their position in terms of the aspect of reduction of shareholding and the consequential acts. In our considered view, the answer to the same is in the negative.

23. We cannot lose sight of the fact that the petitioner is only a shareholder. The petitioner could undoubtedly have put forth its views in the AGM which provided the avenue for the petitioner to put forth its views where the petitioner did not participate. The shareholding of the petitioner was only 7.76% and all the other shareholders have overwhelmingly voted in favour of the draft scheme.

24. Learned senior counsel for the petitioner has brought to our attention an order passed by the AAIFR in Appeal No. 226/2008 and other connected matters on 21.05.2010 where non-compliance of order dated 12.02.2008 of the BIFR had been noticed, but considering the publication did take place in Jammu & Kashmir Times, which is a State level newspaper, an opinion was formed that the provisions of Section 18(3)(a) of the SICA can be said to have been complied with. However, since the principles of natural justice were violated, an opportunity of hearing to the appellants therein was provided, who are unsecured creditors. Learned Counsel submits that at least this course of action should be followed.

25. In our considered view, this would be a fruitless exercise and the mere completion of formality as if the plea of the petitioner that dilution of share should not take place was to be accepted, the complete restructuring process would be affected. The company stands revived and various parties have acted in pursuance to the scheme and shares traded. It is not as if there are various options or alternatives put forth by the petitioner, but the whole case of the petitioner is predicated on the plea that its shareholdings should not be diluted without its consent. We have already held that the consent of the petitioner is not required. Thus, no useful purpose would be served as the issue of dilution of shareholding cannot be revisited without affecting the whole scheme which in effect stands implemented and the fruits of which are available and are even being enjoyed by the petitioner in terms of a much higher face value of the share at almost three times of the face value as against less than 10% of the face value.

26. We are, thus, not inclined to re-open this chapter.

Conclusion:

27. We are, thus, of the considered opinion that in view of the aforesaid facts and circumstances of the case, the writ petition is liable to be dismissed leaving the parties to bear their own costs. Ordered accordingly.