

(2008) 05 DEL CK 0052

In the Delhi High Court

Case No : Writ Petition (C) No's. 12097-12100 of 2006 and CM No. 9262 of 2006 & Writ Petition (C) No. 12097-12100 of 2006 and CM No. 9262 of 2006

Punjab National Bank and Others

APPELLANT

Vs

AAIFR and Others

RESPONDENT

Date of Decision : 26-05-2008

Acts Referred:

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 15
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(4), 13(8), 41, 5(1)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2004 — Rule 8
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 14(1), 15, 15(1), 16, 22

Citation : AIR 2008 Delhi 192 : (2009) 149 CompCas 390 : (2010) 3 CompLJ 125

Hon'ble Judges : V.K. Shali, J; Mukul Mudgal, J

Bench : Division Bench

Advocate : Mohit Chaudhary, Pradeep Chandal and Manish Jain, for the Appellant; Maneesha Dhir and Preeti Dalal, for the Respondent

Final Decision : Allowed

Judgement

Mukul Mudgal, J.—This writ petition involves the interpretation of Section 15(1), 2nd Proviso of Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as SICA), which reads as follows:

15. Reference to Board.-- (1) When an industrial company has become a sick industrial company, the Board of Directors of the company, shall, within sixty days from the date of finalisation of the duly audited accounts of the company for the financial year as at the end of which the company has become a sick industrial company, make a reference to the Board for determination of the measures which shall be adopted with respect to the company:

...

...

Provided also that on or after the commencement of the Securitisation and Reconstruction of Financial and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 where a reference is pending before the Board for Industrial and Financial Reconstruction such reference shall abate if the secured creditors, representing not less than three fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors have taken any measures to recover their secured debt under Sub section (4) of Section 13 of that Act.

2. This writ petition challenges the order dated 20th April, 2006 passed by the Appellate Authority for Industrial & Financial Reconstruction (AAIFR), New Delhi.

3. The facts of the case briefly stated are as follows:

(a) The respondent No. 2 company was manufacturing television sets and accessories and availed of loan advances and other credit facilities from the petitioner Punjab National Bank and other financial institutions and on the basis of its audited balance sheet of the financial year ending 31st March, 1999, the company sought a reference before the Board for Industrial and Financial Reconstruction (BIFR) u/s 15(1) of the SICA leading to registration of case No. 183/2000. By order dated 15th November, 2000, the BIFR rejected the reference as not maintainable. The operative portion of the said order reads as follows:

5. Having regard to the forgoing analysis, it is clear that M/s BEL have indulged in serious manipulation of accounts. It is also clear that they have been trying to deceive the banks/FIs by providing misleading financial statements and stock statements. The company has also furnished misleading figures of performance for the quarter ended 30.6.1999 to its shareholders. The Bench, Therefore, concludes that the company's financial statements are not reliable and the promoters have approached the Board with unclean hands. The reference filed by the company u/s 15(1) is, Therefore, dismissed as non-maintainable.

(b) In the meanwhile, the petitioner No. 1/PNB had preferred two Original Applications being OA Nos. 121/2000 and 641/2000 u/s 15 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

(c) The order dated 15th November, 2000 passed by the BIFR was challenged by the respondent No. 2 company before AAIFR, which appeal was dismissed on 10th August, 2001.

(d) Another reference was made by the respondent No. 2 company on the basis of audited balance sheet ending the year 31st March, 2001 u/s 15(1) of SICA and consequent thereto during the pendency of the inquiry u/s 16 of the SICA, proceedings in OAs No. 121/2000 and 641/2000 filed by the petitioner before the DRT remained stayed u/s 22 of the SICA.

(e) Another application was made on the basis of the audited balance sheet of the financial year ending 31st March, 2002 u/s 15(1) of the SICA and a case No. 741/2002 was registered.

(f) On 4th August, 2004, in a meeting of the Consortium of lender Banks, the petitioner Punjab National Bank as a Bank was authorised to take steps u/s 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as SARFAESI Act). On 18th September, 2004, the petitioner took the possession of secured assets of the company u/s 13(4) of SARFAESI Act read with Rule 8 of the Security Interest (Enforcement) Rules, 2002.

(g) on 1st November, 2004, the reference case No. 334/2001 and 740/2002 filed u/s 15(1) of the SICA came up for hearing and in view of Section 13(4) of the SARFAESI Act and Section 15, 3rd proviso, proceedings before the BIFR were held to have abated by its order. The said order dated 1st November, 2004 led to the appeal before the AAIFR, which according to the petitioner was beyond 8 months and thus beyond the statutorily prescribed maximum period of 60 days u/s 25 of the SICA permitting the appeal within the said period. The petitioner bank filed its reply inter alia pleading for the dismissal of the appeal on the ground of delay. On 20th April, 2006, the AAIFR allowed the appeal filed by the respondent No. 2, remanding back the case to the BIFR. The said order of the AAIFR has led to the challenge before this Court in the present writ petition. The impugned order reads as follows:

1. This appeal is filed by M/s Bestavision Electronics Limited (BEL) is directed against the impugned order dated 1/11/2004 passed by BIFR in case No. 740/2002. By the aforesaid order, the reference filed by the appellant company was abated on the ground that Punjab National Bank (PNB) on behalf of the Consortium of Banks, had taken possession of one of the properties charged to the Banks u/s 13(4) of SARFAESI Act 2002.

2. During the pendency of this appeal, the Ld. Counsel brought to our notice that the company has successfully negotiated the settlement of its dues with its secured creditors; namely, PSIDC, OBC, IOB, PICUP and PNB. The appellant company is now in the process of effecting payment to its secured creditors in accordance with the terms of settlement. Section 13(4) of SARFAESI Act has become infructuous. We, Therefore, set aside the impugned order dated 1/11/2004 and remand the case to BIFR to take further action in respect of the reference filed by BEL u/s 15(1) of SICA based on its Audited Balance Sheet for FY ended 31.3.2001.

4. The main plea advanced by the learned Counsel for the petitioner Punjab National Bank Shri Mohit Choudhary proceeds on the 2nd proviso of Section 15(1) where it had been stipulated that after the commencement of SARFAESI Act, 2002, where the reference is pending before the BIFR, such reference shall abate if the secured creditors lending not less than 3/4th in value of the amount

outstanding against the financial assistance disbursed to the borrower of such secured creditors have taken any measures to recover their secured debt under Sub-section 4 of Section 13 of the Act. The petitioner has submitted a table of dues which reads as follows:

Bank	Date of Pro-rata share	Date of last Full amount	Date of issuance	Approval
(In %)	payment paid	as per of	No Dues	OTS Certificate
Indian	07.03.2006	13.86	30.03.2007	152.46 lakhs
Overseas Bank	20.07.2007	15.00	18.07.2007	165.00 lakhs
Bank of Commerce	19.07.2007	07.09.2006	7.84	05.09.2007
State Bank	95.04 lakhs	10.09.2007	of Bikaner and Jaipur	
Punjab	24.01.2006	62.5	30.03.2007	687.50 lakhs
---	National	(The approval	Bank was modified on	10.10.06 for payment of
OTS to be made by	15.03.2007)			

5. It is not in dispute that the Punjab National Bank, the Oriental Bank of Commerce and the State Bank of Bikaner and Jaipur, admittedly represented the secured creditors of more than 3/4th of the value and had taken measures to recover their secured debt u/s 13(4) of the SARFAESI Act. The petitioner Therefore, submitted that since action had been taken u/s 13(4) of the SARFAESI Act measures contemplated by Section 15 2nd proviso SICA had been adopted and the BIFR/AAIFR were divested of their jurisdiction to carry on any further proceedings.

6. In supporting the above construction of Section 13(4), the petitioner bank has also relied upon the following judgment of the Madras High Court, delivered in Writ Petition (C) No. 32594/2003 and 4481 of 2005, dated 19th July 2005, titled as Triveni Alloys Ltd. v. Board for Industrial and Financial Reconstruction and Ors. The relevant portion of the said judgment reads as follows:

6. Learned Counsel for the petitioner submitted that the intention of the Parliament is that the second proviso to Section 15(1) applies only when a reference is pending before the BIFR and not before the Appellate Authority and hence only BIFR is mentioned therein. As already stated above, appeal is a continuation of the original proceedings and very often something which is not mentioned can be implied by necessary implication. Moreover, the very purpose of the Securitization Act is for speedy recovery of dues against defaulting borrowers and hence we should take an interpretation which furthers that object.

7. There is no dispute that more than three fourth of the secured creditors resolved to take action under the Securitization Act and gave their consent for that purpose. In our opinion, once a decision has been taken by the secured creditors representing not less than three fourth in value of the amount outstanding and consent has been given, it will amount to a measure taken to recover the secured debt u/s 13(4) of the Securitization Act.

In our view, while agreeing with the conclusion in the above judgment, with respect we are not entirely in agreement with the judgment of the Madras High Court. In our view, a mere decision in the meeting of the secured creditors

representing three fourth in value of the amount outstanding may not amount to a measure taken to recover a secured debt u/s 13(4) of the Securitization Act and something more concrete has to be done by the secured creditors. In any event, the above judgment arose from the plea whether the second proviso to Section 15(1) applies before the Appellate Authority and not only BIFR and this provision has also been rightly construed by the Madras High Court to hold that appeal is a continuation of the original proceedings. It is evident that the bar of Section 15 second proviso applies to not only original proceedings but also to the appeal emanating there from and the bar stipulated by the 2nd proviso to Section 15 SICA applies not only to the BIFR but also the AAIFR.

7. The Division Bench of High Court of Bombay at Nagpur, in Writ Petition(C) No. 5140/2005, decided on 21st October 2005 ,in the matter of Ravi Spinning Ltd. and Others Vs. Union of India (UOI) and Another, , held as follows:

The plain reading of the above referred proviso makes it implicitly clear that after the commencement of the Securitization Act, 2002 which came into force on 21st June 2002, reference u/s 15 if was pending before the Board of Industrial and Financial Reconstruction, the said reference stands abated in view of the above referred proviso.

We agree with above conclusion of the Bombay High Court though we are giving reasons for arriving at the above conclusion as reasons in support thereof were not discernible from the Bombay High Court's judgment.

8. The counsel for the respondent No. 2 mainly submitted that the repayment of a substantial part of the loan to all creditors except the petitioner divested the jurisdiction under the SARFASI Act and no useful purpose would be served by resort to SARFASI Act. It is submitted that the sine qua non for the exercise of jurisdiction, i.e., three fourth of the creditors in value of the outstandings of the disbursed amount, were not available to pursue the proceedings. Upon conclusion of arguments on 30th April 2008 the following order was passed:

Arguments heard.

Parties are directed to file their written notes of arguments advanced in the Court not later than one week from today. In the meanwhile, it is not disputed that the amount of Rs.6.87 crores has been paid by respondent No. 2 to the petitioner No. 1/bank and a further sum of Rs. 11 crores to the other three banks who are the petitioners have also been paid. The learned Counsel for petitioner No. 1 states that according to him a further sum of Rs.83 lakhs as per the OTS offer still remains to be paid. Parties to seek instructions on this aspect and inform this Court along with the written notes within a weeks. Orders reserved.

9. The counsel for the respondent No. 2 has apart from the pleas advanced in court has added certain other pleas not urged in court in her written submissions and has not answered the query raised in the above order. Accordingly, we are only dealing with the pleas advanced during the course of hearing.

10. The learned Counsel for the respondent No. 2 submitted that the action taken on the petitioner u/s 13(4) of the SARFAESI Act has become infructuous in the light of Section 13(8) of the SARFAESI Act which reads as follows:

If the dues of the secured creditors together with all costs, charges and expenses incurred by him are tendered to the secured creditors at any time before the date fixed for sale or transfer, the secured assets shall not be sold or transferred by the secured creditors, and no further steps shall be taken by him for transfer or sale of that secured asset.

In our view, even if the above submission is accepted the divesting of the jurisdiction of the BIFR and AAIFR cannot be based upon the above provision which only stipulates the conditions precedent for the operation of the SARFAESI Act. Such pleas can indeed be raised in the proceedings under the SARFAESI Act but are not the pleas which can arise and be raised in proceedings under the SICA. The learned Counsel for the respondent No. 2 has also submitted that the Appellate power u/s 25 gave all jurisdiction to the AAIFR to make such enquiries as it deems fit which included the power to confirm, modify or set aside the order appealed against and this certainly stipulated that the subsequent events could be taken into account while deciding the appeal. We have no doubt that the subsequent events indeed can be taken into account by the appellate forum. However, that has nothing to do with the basic existence of the jurisdiction in the BIFR and appellate forum of the AAIFR pursuant to the mandate of second proviso to Section 14(1) of the SICA. The reliance on the judgment of the Hon'ble Supreme Court in the case of Transcore Vs. Union of India (UOI) and Another, is of no avail to the petitioner because it only deals with the jurisdiction of the SARFAESI Act as stipulated by Section 13(8) and cannot have any bearing on the interpretation of SICA. Reliance has also been placed on the judgment of the Orissa High Court in the case of Noble Aqua Pvt. Ltd. and Ors. v. State Bank of India and Ors. WP(C) 4815/2007, decided on 21st February 2008. The above judgment has dealt with the impact of Section 22 of the of the SICA vis-a-vis Section 13(b) of the Securitisation Act. This plea has been dealt with by the Orissa High Court in the following terms:

19. In support of such contention learned Counsel relied on amendment to Securitization Act u/s 41 thereof to certain enactments, and one of such enactment is SICA. Such amendments have been given in the Schedule to Section 41 of SICA. From a perusal of the said Schedule it appears that to Section 15 of SICA the following amendments have been introduced in Section 41 of the Securitization Act. The said amendment is as follows:

In Section 15, in Sub section (1), after the proviso, insert the following:

Provided further that no reference shall be made to the Board for Industrial and Financial Reconstruction after the commencement of the Securitization and reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 where financial assets have been acquired by any securitization company or

reconstruction company under Sub-section (1) of Section 5 of that Act.

Provided also that on or after the commencement of the Securitization and reconstruction of financial Assets and Enforcement of Security Interest Act, 2002 where a reference is pending before the Board for Industrial and Financial Reconstruction such reference shall abate if the secured creditors, representing not less than three fourths in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under Sub-section (4) of Section 13 of that Act.

Relying on the proviso to the said amendment, learned Counsel submitted that in the instant case since the notice u/s 13(4) of the Securitization Act has been issued reference before BIFR has abated.

20. This Court is unable to appreciate the aforesaid contention. The proviso makes it very clear that same will come into force where a reference is pending before the BIFR. Such reference will abate if the secured creditors representing not less than three fourths in value of the amount outstanding against financial assistance disbursed to the borrower, have taken any measures to recover their secured debt under Sub-section (4) of Section 13 of the Securitization Act.

21. In the instant case, admittedly the notice under subsection (4) of Section 13 of the Securitization Act has been issued on 7.4.2000. But long before that, the company has been declared a sick industrial company by an order of the BIFR dated 14.11.2006. Therefore, the proceeding under the SICA was not at the stage of reference. The proceeding has gone far ahead of that and culminated in an order by which the company was declared sick on 14.11.2006. The said order was passed by the BIFR after hearing the bank and by the said order the bank was appointed an operating agency with a direction to prepare the revival scheme. Therefore, in the facts of this case, the reference cannot abate since the matter under SICA is not pending in reference before the BIFR. Even though the bank is a party to the said order, it has neither filed any appeal there from nor has it asked for consent u/s 22 to proceed against the petitioner company. Therefore, this argument raised by the learned Counsel for the Bank cannot be accepted.

Relying on the above judgment it has been submitted that by issuance of the notice u/s 13(4) of the Securitization Act proceedings before the BIFR could not abate when a scheme was formulated. In our view, the judgment has proceeded on the basis of the distinction drawn between the pendency of reference and the existence of the scheme. In our view, the 2nd proviso stipulates the pendency of the reference and the reference would include even the preparation of the revival scheme pursuant to the reference, i.e., taking of any action by the BIFR including preparation of a scheme pursuant to the reference. Furthermore, in order to avail of the principles of law laid down in the above judgment it will have to be demonstrated that a scheme had been framed in the present case. No such

framing of scheme was brought to our notice by the respondent No. 2. However, even if a scheme had been framed in our view that would make no difference to the import of the 2nd proviso to Section 15 of SICA. To this extent we are respectfully unable to concur with the view taken by the Orissa High Court.

10(a) We are also of the view that once the jurisdiction of the BIFR was divested by the mandatory impact of the 2nd proviso to Section 15(1), the BIFR could not pass any orders under the SICA notwithstanding the subsequent developments. Orders sought by the petitioner from the BIFR could have been passed either under the SARFEASI or by a writ court exercising jurisdiction under Article 226 of the Constitution.

10(b) The phrase have taken measures obviously contemplates a measure already adopted and cannot be construed to mean that the jurisdiction of the BIFR would depend upon subsequent alteration in the composition of the consortium of the creditors once such measures are taken. The submission of the petitioner that subsequent events such as the reduction in the percentage of creditors, could enable continuance of the proceedings in the BIFR would mean that there would be a constant reshuffling of jurisdictions between the SARFAESI Act and SICA depending entirely upon the varying percentage of debtors based upon subsequent satisfaction of such debts by the debtor. Such a meaning could never have been intended by the legislature and the jurisdiction of the BIFR/AAIFR once divested by the operation of the 2nd proviso to Section 15(1) could not resuscitate by virtue of subsequent developments. We, Therefore, agree with the conclusion of the Bombay High Court but for the reasons enumerated above.

11. Ms. Maneesha Dhir also pleaded for a harmonious construction so as to harmoniously permit the operation of the two statutes in the present instance the deeming provision to Section 15(1) 2nd proviso was inserted to the SICA itself in 2002 after the SARFAESI Act was enacted. Since the deeming proviso divesting the jurisdiction of the BIFR being incorporated in the SICA itself, the plea of harmonious construction between SICA and SARFEASI Act does not arise.

12. It is also not in dispute that the petitioner bank has fairly admitted that it has received the amount of Rs.687.50 lakhs but after a delay of 65 days which is in contravention of stipulation of the OTS scheme. Consequently, as per the petitioner for the delayed payment the respondent No. 2 is liable to pay a sum of Rs.83,06,715/- being interest under the OTS Scheme relied upon by the petitioner. The order of this Court dated 30th April 2008 specifically directed the respondent to take instructions on the payment of this balance amount. The written submissions instead of a written note of arguments, advanced by the respondent does not mention anything on this aspect. We are, accordingly, of the view that while dismissing the writ petition on the basis of interpretation of second proviso to Section 15(1) of the SICA, we nevertheless in the interest of justice hold that if balance amount of Rs.83,06,715/- is paid by the respondent not later than 30th June 2008, the proceedings before both BIFR and AAIFR shall stand abated. We are passing this order in public interest by involving our power

in our writ jurisdiction to ensure that a company which is on the way of revival is given adequate opportunity to revive itself. However, this does not in any manner affect the ousted jurisdiction of the BIFR and AAIFR in view of the impact of 2nd proviso to Section 15(1) of the SICA.

13. We have also noted the plea that the appeal being time barred was specifically taken before the Appellate Authority by the petitioner and prima facie appears to be correct. The Appellate Authority has chosen not to address this issue at all and judgment of the AAIFR cannot be sustained on this ground also. The writ petition is accordingly allowed and the order of AAIFR dated 20th April, 2006 in Appeal No. 70/2005 is quashed and set aside.