(2018) 03 MP CK 0003

In the Madhya Pradesh High Court

Case No : WRIT PETITION NO.5616 OF 2006

Rajshri Plastiwood APPELLANT

Vs

State Of Madhya Pradesh & Another RESPONDENT

Date of Decision : 08-03-2018

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Madhya Pradesh Vat Act, 2002 — Section 72(1)(e)
Sick Industrial Companies (Special Provisions) Repeal Act, 2003 — Section 4, 5
Companies Act, 1956 — Section (49A)

Citation : (2018) 03 MP CK 0003

Hon'ble Judges : P.K. JAISWAL, J;VIRENDER SINGH, J

Bench : Division Bench

Advocate : Sumit Nema, Gagan Tiwari, H.Y. Mehta

Final Decision : Dismissed

Judgement

By this writ petition under Article 226 of the Constitution of India, the petitioner has prayed following relief in paragraph No.7 of the writ petition: -

â??7. Relief prayed for:

The petitioner respectfully prays this Honâ??ble Court may kindly be pleased to: -

7.1 to hold that the Sanctioned Scheme dated 20.05.2002 is binding under Section 19 of the Sick Industrial Companies (Special Provisions) Act (SICA)

on the State Government and the Commercial Tax Department and is saved by virtue of Section 5 of the SICA (Appeal) Act and retains its binding

effect and hence exemption under CST shall be available for 9 years w.e.f. 20.05.2002 as envisaged in para 4.7 of the Scheme.

7.2 to hold that the letter dated 04.08.2007 moved on behalf of the Commissioner of Commercial Tax Madhya Pradesh before BIFR to discontinue the benefit of exemption under CST is illegal, void and without any jurisdiction and is contrary to the provisions of SICA Act.

7.3 to quash the demands raised under Central Sales Tax Act, 1956 for the period 2007-08, 200809 and 2010-11.

7.4 to grant any other relief as this Honâ??ble Court may deem fit under the facts and circumstances of the case.â??

2. Facts of the case are that a Scheme of revival of sick company M/s. Rajshree Plastiwood Limited (now merged with M/s. Rajshree Plastiwood â?

A division of M/s. Rajshree Productions Private Limited) was sanctioned by the Board of Industrial & Financial Reconstruction (BIFR) vide its order

dated 20.05.2002 (Annexure P/1).Â Â The sanctioned Scheme envisaged inter alia: -

(i) Merger of erst while M/s. Rajshree Plastiwood Limited with the present petitioner; and (ii) Grant of relief by Government of Madhya Pradesh /

Sales Tax Department of Government of Madhya Pradesh viz:

(a) To declare the Plastiwood Division of M/s. Rajshree Plastiwood as Relief Undertaking for a period of 5 years.

(b) To extend sales tax and purchase tax exemption to the Plastiwood Division for a period of 9 years from the date of sanction of the Scheme by

BIFR to the extent of un-utilized amount of gross quantum of sales tax exemption.

3. On 05.11.2007 (Annexure P/2), BIFR noted that all other aspects of the Scheme were complied with by all agencies namely DGFT / Customs

Authority, ICICI Bank etc. and Government of Madhya Pradesh had complied with the directions of BIFR.Â The BIFR noted from perusal of a copy

of letter dated 01.11.2007 of the Deputy Secretary, Government of Madhya Pradesh and an earlier letter dated 10.06.2002 (Annexure P/3) that

Government of Madhya Pradesh had already declared Plastiwood Division as â??Relief Undertakingâ? for a period of 5 years and further the

Ministry of Industry & Commerce of Government of Madhya Pradesh had already communicated their consent for grant of Sales Tax and Purchase

Tax exemption to the company for a total period of nine years from the date of sanction of the Scheme and the Government of Madhya Pradesh had

also issued a notification dated 21.04.2003 in this regard.

4. The Government of Madhya Pradesh did not continue the exemption granted

vide notification dated 21.04.2003 (Annexure P/4) after introduction of

Madhya Pradesh Value Added Tax Act, 2002 (herein after referred to as the VAT Act) with effect from 01.04.2006 and wrote a letter dated

04.08.2007 (Annexure P/6) to BIFR contending inter alia that after introduction of VAT Act w.e.f. 01.04.2006, the earlier exemption granted vide

notification dated 21.04.2003 ceased to have any effect and thus, after 01.04.2006, no benefit can be given to the petitioner - company.

5. BIFR in Case No.172/1997 vide order dated 25.03.2008 (Annexure P/7) issued the following directions: -

12. (ii) In view of the above, the Board, hereby, issues the following directions for compliance by the concerned agencies: -

(a) As, in terms of para-4.7 (2) & (3) of the SS-02, the Commercial Tax Department, GOMP is to exempt the company from sales tax and purchase

tax for a total period of nine (9) years.Â In pursuance to Notification dated 21.04.2003 already issued by GOMP for this purpose, the GOMP / Sales

Tax Department of GOMP would not levy the taxes on the companyâ??s suppliers in respect of goods purchased up to 31.03.2006, when they

produce declaration given by the company to them.Â As the VAT has been introduced w.e.f. 01.04.2006, the GOMP / Sales Tax Department of

GOMP would also exempt the company from VAT in terms of MP VAT Act, 2002 and Central Sales Tax Act, 1956 for a total period of nine (9)

years or to the extent of un-utilized amount of gross quantum of sales tax and purchase tax, whichever occurs earlier, by way of issuance of a fresh

notification with respect to exemption of applicability of tax on purchases as well as on sales of the unit.

(b) As already directed by the Bench in its last hearing held on 05.11.2007, the DGFT / Customs Authority would also waive interest / penalty on the

principal outstanding amount of customs duty, especially as the company is reported to have already paid the principal outstanding amount of customs

duty.

6. As per the direction of the BIFR in terms of para 4.7 (2) and 4.7 (3) of the Sanctioned Scheme, the Commercial Tax Department of Government of

Madhya Pradesh is to exempt the Company from sales tax and purchase tax for a total period of nine years or to the extent of un-utilized amount of

gross quantum of sales tax and purchase tax, which ever occurs earlier, by way of fresh notification.Â

7. Against order dated 17.02.2011 passed by the BIFR in Case No.48/1994 (MA No.71/BC/10), Appeal Â No.77/2011 (M/s. Saurabh Metals Private

Limited v. BIFR & others) and Appeal No.139/2011 [Commissioner of Commercial Tax (Re: M/s. Saurabh Metals Private Limited) v. BIFR &

others] were filed on 09.07.2015 before Appellate Authority for Industrial & Financial Reconstruction, New Delhi (herein after referred to as the

AAIFR) and both the aforesaid appeals were decided by the AAIFR vide order dated 09.07.2015; relevant paragraphs No.15 to 21 read, as under:-

â??15. On the basis of arguments advanced on behalf of both the parties and the fact available in file, we are of considered view that the order date

12.12.2007 passed by AAIFR in Appeal No.238/2007 and order dated 24.04.2009 passed by Honâ??ble High Court of Madhya Pradesh in Writ

Petition No.1318/2008 have merged and subsumed in the order dated 11.09.2009 passed by the Honâ??ble Supreme Court of India.Â Further, it is

also to be noted that the appellate company M/s. Saurabh Meals Pvt. Ltd. has challenged the jurisdiction and other issues in Writ Petition

No.7682/2010 and the same was dismissed by Honâ??ble High Court of Madhya Pradesh, hence, the company is barred by the principle of res

judicata as the same issues between the same parties have been adjudicated once for all.Â The BIFR was fully competent to adjudicate upon

Miscellaneous Application filed by the Commercial Tax Department in pursuant of the order dated 11.09.2009 passed by Honâ??ble Supreme Court

of India.Â As per the notification No.A-3-24-94-ST-V(108) dated 06.10.1994, the State Government had full power to review the exemption which

was accordingly granted with a monetary limit of Rs.4.10 crores.Â Para 5 of the said notification states: -

5. (i) Dealer who establishes a 1[â?¦] new industrial unit in a growth centre developed by â??Audyogik Kendra Vikas Nigam other than Boral growth

centre in Durg District or who undertakes expansion in [â?¦] existing industrial unit.

(ii) Dealer who establishes a [â?¦] new industrial unit in Boral Growth Centre in Durg District covered by Part-I of the Annexure-I or who undertakes

expansionÂ For a unit established in a growth centre located in a District specified in, -

(i) Part 1 of Annex.I-125%,

&

(ii) In Part-II of Annexure I

â?

Category A â?" 150%

Category B â?" 200%

Category C â?" 250%

Of the capital investment in fixed assets in the new industrial unit or in the expanded capacity of the existing industrial unit, as the case may be, 200%

of the capital investment in fixed assets in the new industrial unit or in the expanded capacity of the existing industrial unit, as the case may be .. 5

years 7 years 8 years 9 years 6 years in [â?¦] existing industrial unit.

(iii) Dealer who establishes a [â?¦] new industrial unit on landÂ within five kilometres of the boundary of a growth centre due to nonavailability of land

in the growth centre or who undertakes expansion in [â?¦] existing industrial unit.Â Â Â For a unit established in a District specified in, -

(i) Part 1 of Annex.I-125%,

&

(ii)Part-II of Annexure I â?

Category A â?" 150%

Category B â?" 200%

Category C â?" 250%

Of the capital investment in fixed assets in the new industrial unit or in the expanded capacity of the existing industrial unit, as the case may be. 4

yearsÂ 6 years 7 years 8 years The dealer shall attach with the application form grant of eligibility certificate, a certificate in the appended form

issued by the Managing Director of the AKVN certifying about the nonavailability of land in growth centre.

16. It is not disputed that the company established its unit only in 2003, hence, the notification dated 16.10.1984 cannot be made applicable on it

because the conditions of eligibility for getting the benefit under the said notification were not there.

17. The State Government has been vested with the power under Section 72 (1)

(e) VAT Act to review the cases in which exemption has been

granted by the State Government under the Repealed Act of 1984 and to decide whether to continue exemption or not.Â In the present case, the

State of Madhya Pradesh decided not to continue the exemption to M/s. Saurabh Metals Pvt. Ltd. beyond 01.04.2006 on the ground inter alia that it

had already availed the exemption to the monetary limit of Rs.4.10 crores.

18. Appeal No.139/2011 has been filed by the Commissioner, Commercial Tax Department against para 26 (9) of BIFR order dated 17.02.2011

wherein the BIFR had directed inter alia that all the reliefs which had been allowed to the company up to 31.03.2006, in accordance with the State

Policy and in compliance with the provisions of SS-96, should not be disturbed.Â It was submitted on behalf of the Commercial Tax Department that

on 31.03.2006, when the VAT Act came into force, the company had already availed the exemption beyond the monetary limit of Rs.4.10 crores and

therefore, any amount of commercial and other taxes collected by it beyond the limit of Rs.4.10 crores should have been directed to be refunded to the

Sales Tax Department.

19. We are in agreement with the submissions made on behalf of the Commercial Tax Department in this regard as already discussed above that the

State Government was fully empowered to impose a limit of Rs.4.10 crores as per the provisions of para 5 of the notification dated 06.10.1994.Â So

far as the last argument of appellant M/s. Saurabh Metals Pvt. Ltd. is concerned, â??that any interference with the terms of sanctioned scheme at

this belated stage would cause great prejudice to the appellant company and defeat the entire purpose and object of SICA as well as the scheme

sanctioned by BIFRâ?, we are of the considered view that relief which the appellant company was not entitled for since beginning or at the time of

sanction of the scheme in 1996, cannot be granted against the established State Policy as per notification dated 06.10.1994.Â We have already held

that â??notificationâ?? dated 06.10.1986 is not applicable on the appellant company for the reasons already discussed and as per notification dated

06.10.1994, the appellant company is not entitled for the concessions beyond a monetary limit of Rs.4.10 crores.

20. On the basis of discussion made above, we are of the view that Appeal No.77/2011 filed by the company M/s. Saurabh Metals Privat Limited is

completely devoid of merits and is accordingly liable to be dismissed while the Appeal No.139/2011 filed on behalf of Commissioner, Commercial Tax

Department, Madhya Pradesh is liable to be allowed in the light of provisions of para 5 of notification dated 06.10.1994.

21. Appeal No.77/2011 filed by the company is accordingly dismissed while Appeal No.139/2011 filed by the Commercial Tax Department is allowed

observations as made in para 26 (g) stand deleted.â??

8. From perusal of the aforesaid order passed by the AAIFR, it is clear that the appeal filed by the appellant (M/s. Â Saurabh Metals Private Limited)

has been dismissed on merit whereas appeal of the Commissioner, Commercial Tax Department has been allowed in part.

9. According to the petitioner, the issue of exemption from payment of VAT was sub judice in Writ Petition No.5616/2006.

10. A demand dated 27.07.2013 (Annexure P/10) for the period 2010-11 was raised against the petitioner under the provisions of the Central Sales

Tax Act, 1956, therefore, fresh Miscellaneous Application (MA No.447/2013) was filed in Case No.172/1997 by the petitioner seeking stay of the

demand.Â Two demand notices dated 30.12.2014 (Annexure P/11 and Annexure P/12) for the assessment years 200708 and 2008-09 were raised

against the petitioner.

11. BIFR vide order dated 03.09.2015 (Annexure P/13) passed in Case No.172/1997 (on Miscellaneous Application No.447/2013 and Miscellaneous

Application No.131/2015) granted stay upon recovery of CST in respect of demand notice dated 27.07.2013 and notices dated 30.12.2014; and further

directed Commercial Tax Department to file its reply within two weeks.

12. Thereafter, Ministry of Finance vide notification dated 25.11.2016 (Annexure P/14) repealed Sick Industrial Companies (Special Provisions) Act,

1985 (herein after referred to as the SICA) with effect from 1st December, 2016. As per Clause (b) of Section 4 of the Sick Industrial Companies

(Special Provisions) Repeal Act, 2003, any appeal preferred to the Appellate Authority or any reference made to the Board or any inquiry pending

before the Board or any other authority or any proceeding of whatever nature pending before the Appellate Authority or the Board immediately

before the commencement of this Act shall stand abated; and as per proviso (i), a company may make a reference under Part-VIA of the Companies

Act, 1956 within one hundred and eighty days from the commencement of this Act in accordance with provisions of the Companies Act, 1956.

13. The contention of Shri Sumit Nema, learned Senior Counsel for the petitioner is that Sanctioned Scheme dated 20.05.2002 is saved by virtue of

Section 5 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 and retains its binding effect; and hence, exemption under the

Central Sales Tax Act, 1956 shall be available for nine years with effect from 20.05.2002, as envisaged in para 4.7 of the Scheme.Â He further

submitted that letter dated 04.08.2007 issued by the Commissioner, Commercial Tax, Madhya Pradesh to discontinue benefit of exemption under CST

is illegal, void and without jurisdiction and is also contrary to the provisions of SICA; and prayed that the demands raised under the Central Sales Tax

Act, 1956 for the periods 2007-08, 2008-09 and 2010-11 be quashed. 14. Per contra, Shri H.Y. Mehta, learned Government Advocate for the

respondent / State of Madhya Pradesh has submitted that as per Section 4 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003,

came into force with effect from 01.12.2016 (Annexure P/14).Â The petitioner â?" company whose proceedings abated due to coming into force of

the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, may make reference under Part VA of the Companies Act, 1956.Â He further

submitted that Part V-A of the Companies Act, 1956 provides for revival and rehabilitation of sick industrial company.Â He has also drawn our

attention to Section 2 (49-A) of the Companies Act, 1956 which provides that the definition of â??Tribunalâ?? means the National Company Law

Tribunal construed under Sub Section (1) of Section 10 F-B, and therefore, the petitioner is having remedy of reference before the National Company

Law Tribunal, which is now constituted under the provisions of the Companies Act, 2013; and is functioning.Â He further pointed out that although

notification dated 25.11.2016 (Annexure P/15) mentions about Chapter VI-A of the Companies Act, 1956, but has now been repealed by Companies

Act, 2013.Â With the aforesaid, he submitted that the petitioner is having efficacious alternative remedy of reference before the National Commission

Law Tribunal and the present writ petition filed by the petitioner is liable to be dismissed; and prayed for dismissal of the writ petition.

15. As per provisions of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, which came into force with effect from 01.12.2016, all

proceedings pending before BIFR shall stand abated, and therefore, any order / interim order granted in favour of the petitioner shall stand

automatically vacated by operation of law.

16. On 04.08.2007 (Annexure P/5), an application was submitted before the BIFR on behalf of the Commercial Tax Department in BIFR Case

No.172/1997 mentioning about the fact â??with the enforcement of the VAT Act, 2002 with effect from 01.04.2006, it was agreed by all the States

that no exemption to any individual industry be granted from payment of VAT.Â It was also agreed that only the unexpired period of industrial

incentives are to be carried over under VAT and that no other exemption is to be allowed.Â The case of the petitioner â?" M/s. Rajshree Plastiwood

Private Limited did not fall under the Policy of the State Government, and therefore, notification dated 21.04.2003 (Annexure P/4) issued pursuant to

the directions of the Board has not been continued.Â It is also not in dispute that the application of the Commercial Tax Department was decided by

the BIFR vide order dated 05.11.2007 (Annexure P/2) and against the aforesaid order, Commercial Tax Department has preferred Appeal

No.46/2008 before the AAIFR, which was decided by order dated 16.08.2010 (Annexure P/8) and allowed in part.Â The aforesaid order had

remained pending till the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 came into force.Â After coming into froce of the Sick

Industrial Companies (Special Provisions) Repeal Act, 2003, all proceeding pending before the BIFR stand abated and interim order passed in favour

of the petitioner stands automatically vacated by operation of law.Â

17. Special Leave Petition against order dated 20.04.2009 passed in Writ Petition No.1318/2008 by a Division Bench of this Court at Principal Seat

Jabalpur in the case of Commissioner, Commercial Tax, MP v. Saurabh Metals Private Limited reported in [2009] 24 VST 520 (MP) was filed by the

State of Madhya Pradesh before the Apex Court.The Honâ??ble Supreme Court by order dated 11.09.2009 in Petition for Special Leave to Appeal

(Civil) No.22009/2009 issued the following directions: -

â??It is the case of the State of Madhya Pradesh that it was not heard by BIFR when it formulated the Scheme of Revival under which tax

exemption is given to the respondent herein even when there is no Rolling Mill.Â This position has been controverted.Â

We make it clear that if so advised the State of Madhya Pradesh may move the BIFR and establish its rights to levy the tax and oppose the exemption

in accordance with law.Â On this BIFR may give reasons while disposing of the Application of the State of Madhya Pradesh after hearing the

assessee.â??

18. In pursuance of the directions of the Honâ??ble Supreme Court dated 11.09.2009, order dated 17.02.2011 was passed by the BIFR through

which the BIFR has reviewed and recalled its order dated 17.05.2007 against which, M/s. Saurabh Metal Private Limited preferred Appeal

No.77/2011 before the AAIFR, New Delhi which was decided by order dated 09.07.2015 in favour of the Commercial Tax Department (Annexure

R/3).

19. In Writ Petition No.13289/2010, the petitioner challenged order dated 16.08.2010 passed by the AAIFR and a coordinate Bench of this Court by

order dated 07.05.2011 dismissed the writ petition.Â Relevant paragraphs No.5 to 10 of order dated 07.05.2011 passed in Writ Petition

No.13289/2010 read, as under: -

5. After hearing the learned counsel for the petitioner at length and on the perusal of the impugned order passed by the AAIFR, we find that the

AAIFR has not expressed any opinion on the merits of the controversy but it has set aside the order of the BIFR because before passing the said

order neither any notice of hearing was issued to the respondent no.3, Commissioner- Commercial Tax Department nor any opportunity of hearing

was given to him. It is not in dispute before us that before the BIFR the principles of natural justice are required to be complied with. The AAIFR

relying upon one of the judgment of the Supreme Court has recorded that the Rules of natural justice are applicable to the BIFR in the proceedings

under SICA. The fact that the AAIFR has not set aside the order of BIFR on merit but only on the short ground of non compliance of principles of

natural justice, is apparent from para 7 of the order of AAIFR quoted below: -

â??We have heard the ld. counsels for the parties and perused the impugned order as well as records of the BIFR and have also considered the rival

contentions of the ld. counsels for the parties. In this appeal, we have only considered the question whether any opportunity of hearing was provided to

the appellant department, while passing the impugned order dated 5.11.07 and whether the impugned order was passed ex parte. Shri R.D. Makheeja,

Advocate has submitted that no notice was given to the appellant for the hearing dated 5.11.07 nor was the appellant heard on its letter/application

dated 4.8.07 which was filed by the appellant Department for review of the orders sanctioning the rehabilitation scheme (SS-02). In this connection,

we have perused the impugned order. In the impugned order, presence of any Counsel or representative of Commissioner, Commercial Tax

Department, Government of Madhya Pradesh has not been marked which shows that nobody was present on behalf of the appellant Department

when the BIFR was considering the letter dated 4.8.07 filed by the appellant before the BIFR. In para 9 of the impugned order, the BIFR has clearly

mentioned that it has considered the submissions made by the concerned agencies 'present in today's hearing' which shows that the order has been

passed by the BIFR on the basis of the submissions made by the parties present in the hearing held on 5.11.07. As no notice was issued to the

appellant, no one appeared for the Commissioner, Commercial Tax Department on that day and consequently no submissions could be made by the

appellant before the BIFR. From para 9 of the impugned order, it is apparent that at the time of declaring and discharging the company from the

purview of SICA, the appellant Department was neither heard nor their objections considered. Therefore, it is clear that the impugned order is an ex

parte order, passed without issuing any notice to the appellant Department and also without hearing them.â??

6. It is worth noting that the respondent no.3, vide communication dated 4.8.07 (para 9), had sought review of the Sanctioned Scheme 2002 on the

ground that the tax concession can not be extended after 1.4.2006 on coming into force of the Madhya Pradesh VAT Act, 2002. It is also not in

dispute that against the said denial of continuance of tax exemption, another writ petition no.5616/06 preferred by the petitioner is pending before this

Court for hearing. Thus the petitioner's entitlement for the tax concession after 1.4.2006 under the M.P. VAT Act is in dispute.

7. Learned counsel for the petitioner has failed to point out any material showing that the respondent no.3 was given notice of hearing, which took

place on 5.11.2007 or the respondent no.3 or his representative was heard at the time of passing of the order dated 5.11.2007. The AAIFR has not committed any error in reaching to the conclusion that the said order was passed by BIFR without notice and without giving opportunity of hearing to

the respondent no.3.

8. On the perusal of the order dated 5.11.2007, it is also noticed that the said order was passed in the review proceedings, therefore, it was all the

more necessary for the BIFR to give notice and hear the respondent no.3, who had sought the review of the Sanctioned Scheme 2002. Therefore, it

can not be said that no prejudice is caused to the respondent no.3 by the said order.

9. By the order dated 5.11.2007 the BIFR has discharged M/s Rajshree Plastiwood Ltd. (RBL) from the purview of SICA, therefore, before passing

the said order the BIFR ought to have given opportunity of hearing to the respondent no.3 on his objections. The objections of the respondent no.3 may

have a bearing on the reliefs, which have been granted to the petitioner in the said order.

10. That apart we also do not find any jurisdictional error or illegality in the exercise of jurisdiction by the AAIFR requiring interference by this Court

under Article 227 of the Constitution of India. The Writ Petition is accordingly dismissed in limine.

20. The order dated 16.08.2010 passed by the AAIFR is affirmed by the learned Writ Court on 07.05.2011 in Writ Petition No.13289/2010.

21. After coming into force of SICA Repeal Act, 2003, as per notification dated 25.11.2016 (Annexure R/1), the proceedings pending before BIFR

stands abated and interim order passed in favour of the petitioner stands automatically vacated by operation of law.Â The order dated 05.11.2007

passed by the BIFR was set aside by the AAIFR on 16.08.2010.

22. On due consideration of the aforesaid, we are of the view that the petitioner is not entitled to get any relief as well as interim relief.Â Â

23. For the above mentioned reasons, Writ Petition No.1450/2017 filed by the petitioner has no merit and is accordingly dismissed.Â No costs.

