
(2010) 08 AHC CK 0051
In the Allahabad High Court
Case No : Company Petition No. 8 of 2010

Shamken Multifab Ltd.

APPELLANT

Vs

Asset Reconstruction Company (India) Ltd. and Others

RESPONDENT

Date of Decision : 09-08-2010

Acts Referred:

Companies Act, 1956 — Section 15, 16, 17, 18, 19
Constitution of India, 1950 — Article 142, 39

Citation : AIR 2010 All 176 : (2011) 2 BC 649 : (2011) 165 CompCas 115

Hon'ble Judges : Pankaj Mithal, J

Bench : Single Bench

Judgement

Pankaj Mithal, J.—This company petition No. 8 of 2010 in the matter of Shamken Multifab Limited is a second motion petition in continuation to the earlier petition No. 10 of 2008 moved u/s 391-394 of the Companies Act, 1956 (hereinafter referred to as "the Act") for sanction of the scheme of arrangement between the Petitioner-company and its secured creditors. The company has prayed here in this petition that the scheme of arrangement which has been considered in the meeting of the secured creditors of the Company held on 6.9.2008, as per the report of the Chairman of the meeting dated 9.2.2010, be accepted

2. The Petitioner-company having its registered office in Mathura, U.P. vide company petition No. 10 of 2008 applied u/s 391-394 of the Act for sanction of the scheme of arrangement which was approved by the Board of Directors of the Company; and for convening a meeting of the secured creditors in that regard. This Court vide order dated 14.5.2008 directed for convening the meeting of the creditors of the Petitioner-company on 28.6.2008 and appointed a Chairman to preside over the meeting. The date of the meeting was however modified vide order dated 9.7.2008 and was fixed for 6.9.2008. Before the meeting could be so held, Respondent No. 11, ING Vysya Bank Ltd., one of the secured creditors applied for recall of the order directing for convening the meeting of the secured creditors on the ground that the petition was not maintainable in view of the proceedings on a reference by the Petitioner-company being pending under the

Sick Industrial Companies (Special Provisions) Act (hereinafter referred to as the "SICA") before the BIFR. This Court vide order dated 5.9.2008 however, permitted the meeting to be held as scheduled and Respondent No. 11 was allowed to participate without prejudice to its recall application but directed the result to be kept in sealed cover. Ultimately, the application of Respondent No. 11 raising objections with regard to the maintainability of the petition was rejected on 18.1.2010. The Petitioner-company as such applied to the Court for direction to the Chairman to submit the report of the meeting held on 6.9.2008. The Court vide order dated 3.2.2010 issued necessary directions as prayed for, and accordingly report of the Chairman was submitted on 9.2.2010. Simultaneously, Respondent No. 11 aggrieved by the order dated 18.1.2010 had preferred special appeal No. 281 of 2010 before the Division Bench and when the said appeal came up for consideration, as the report of the meeting had already been submitted, the Court vide order dated 9.3.2010 without going into the merits of the matter, disposed of the appeal on consensus of the parties, relegating Respondent No. 11 to raise the objections about the maintainability of the proceedings under Sections 391-394 before the Company Judge at the time when the matter comes for confirmation and the Company Judge was permitted to proceed with the matter only after dealing with the objections with regard to the jurisdiction of the Court. It is in pursuance of the order of the Division Bench passed in Special Appeal and on submission of the report by the Chairman when this second motion petition has been moved, Respondent No. 11 and Respondent No. 1 have filed these objections. They have raised an objection that the proceedings under Sections 391-394 of the Act are not maintainable in view of alleged pendency of a reference of the Petitioner-company before the BIFR/AAIFR under the SICA.

3. Sri Anurag Khanna, learned Counsel for the Petitioner-company in response to the objections so raised and filed on behalf of Respondent No. 11 has submitted reply on behalf of the Petitioner-company.

4. Smt. Sushmita Banerjee along with Sri Nitin Srivastava has appeared on behalf of Respondent No. 1 Asset Reconstruction Company (India) Ltd. and has supported the objections of Respondent No. 11 and contended that the proceedings under Sections 391-394 of the Act are not maintainable and the Company Judge has no jurisdiction in the matter in view of the ratio of the decision of the Supreme Court in the case of Tata Motors Ltd. Vs. Pharmaceutical Products of India Ltd. and Another,

5. I have heard Smt. Sushmita Banerjee with Sri Nitin Srivastava on behalf of Respondent No. 1, Asset Reconstruction Company (India) Ltd., Sri Rahul Sharma, with Sri Ashok Srivastava, learned Counsel for ING Vysya Bank Ltd. and Sri Jaideep Mathur, Additional Advocate General, Senior Advocate assisted by Sri Anurag Khanna, learned Counsel for the Petitioner on the aforesaid objections.

6. The moot question which the Court has been called upon to answer is whether a petition for sanction of a scheme of arrangement under Sections 391-394 of

the Act is maintainable before the Company Judge in view of the alleged pendency of a reference u/s 15 of the SICA before the BIFR/AAIFR.

7. Sri Jaideep Mathur refuting the above objection has strongly contended that first of all there is no reference or proceeding pending before the BIFR and, therefore, the objection so raised is misconceived; the jurisdiction of the Company Judge does not stand completely ousted even if SICA being a special statute is permitted to prevail over the Act. The decision of Tata Motors (supra) is upon concession of the parties and the directions issued therein are under Article 142 of the Constitution of India and, as such, its ratio is not a binding precedent.

8. Let me first take up the matter as to whether any reference or proceeding of the Petitioner-company for the purposes of its rehabilitation is pending consideration under the SICA before the BIFR/AAIFR.

9. It is not disputed that the Petitioner-company had applied u/s 15 of the SICA before the BIFR and the said reference was registered as Case No. 182 of 2004. It was rejected on 4.9.2006 as not maintainable as the company had not come with clean hands. The appeal of the company against the said order was also dismissed by the AAIFR. Thus, the rejection of the reference of the Petitioner-company became final and conclusive. However, Petitioner-company again initiated proceedings before the BIFR which was registered as case No. 114 of 2009. It was also rejected but the rejection order was set aside in appeal before the AAIFR vide order dated 29.11.2007 and the matter was remanded for reconsideration to the BIFR. On remand the matter could not proceed before the BIFR as the Respondent No. 1 challenged the order of the AAIFR by filing a writ petition before the Delhi High Court wherein BIFR has been restrained from proceeding further.

10. A reading of the provisions of Sections 15-20 of the SICA demonstrates that the Board of Directors of the Company on being satisfied that the company has become sick may make a reference to the BIFR for determination of the measures to be adopted for the rehabilitation of the company. On such a reference being made, BIFR is obliged to make an enquiry as to whether the company has actually become sick and it is only after such determination that the process of preparing and sanction of the scheme for the nourishment and rehabilitation of the company commences and is formulated, if possible.

11. In Real Value Appliances Ltd. Vs. Canara Bank and Others, Real Value Appliances Ltd. Vs. Canara Bank and Others, and connected matters their Lordships of the Supreme Court held that an enquiry by the BIFR u/s 16 of the SICA commences as soon as registration of reference is completed after scrutiny. Meaning thereby that once a reference has been registered the enquiry commences which connotes that the reference has been entertained commencing the proceedings under the SICA before the BIFR.

12. Admittedly, in the present case, on a second reference by the Petitioner-company, reference has been registered as case No. 114 of 2009. Accordingly,

proceedings before the BIFR are pending though the same may be lying in abeyance on account of interim order passed by the Delhi High Court.

13. It is another thing as to whether second reference by the same company u/s 15 of SICA is maintainable but here I am not concerned with this respect as it has not been raised by any of the parties.

14. Apart from the above, my attention has been drawn to the findings contained in the order of learned Company Judge dated 18.1.2010 wherein it has been held that, "in view of the settled legal position it cannot be said that the reference is not pending before the BIFR". It means that the Company Judge was of the opinion that a reference of the Petitioner-company was actually pending before the BIFR. The aforesaid order of the Company Judge was subjected to special appeal but the said order was neither set aside nor any objection to the above finding was taken by the Petitioner-company. As such it was accepted and allowed to become final.

15. In view of the above finding also, it is not possible to hold that a reference of the Petitioner-company u/s 15 of the SICA is not pending before the BIFR.

16. Once it is found that the Petitioner-company's reference is pending before the BIFR though it may not have been proceeded with, the question which arises is whether in such an event the Petitioner-company is entitle to maintain a petition under Sections 391-394 of the Act for sanctioning a scheme of arrangement. In short, the submission is that two simultaneous proceedings virtually having a same effect cannot be permitted.

17. Undoubtedly, SICA is a special enactment vis-a-vis the Act and, therefore, it shall have priority over the Act as has been held in NGEF Ltd. Vs. Chandra Developers Pvt. Ltd. and Another, In Tata Motors (supra) also it has been observed that the SICA being the special law qua the Act it shall prevail over the latter. It is only this part of the decision which has been recorded on a concession of the counsel. However, this concession in no way alters the position of law that SICA would prevail over the latter, especially in the light of the further observation of the Supreme Court in this connection.

18. The Supreme Court in the aforesaid decision went further in laying down that since SICA was enacted to secure the principles specified in Article 39 of the Constitution of India and it seeks to give effect to the larger public interest, therefore, it should be given primacy over the Act. The Supreme Court further laid down that the preparation of the scheme for rehabilitation of a sick company is within the domain of the BIFR and the jurisdiction of the civil court in respect thereof stands excluded by virtue of Section 26 of the SICA and that the High Court may not be a civil court but its jurisdiction in a case of this nature would be limited and the jurisdiction of the Company Judge in the matter where a reference has already been made to the BIFR would be subject to the provisions of the SICA. In other words, in Tata Motors (supra) the jurisdiction of the civil court in respect of formulation of a revival or rehabilitation scheme of the sick

industries was held to be completely barred but harmonising the provisions of the two Acts as regards to the jurisdiction of the High Court under the Act it was held that it does not completely stand ousted but was held to be limited and subject to the provisions of the SICA or the scheme of the BIFR, if any.

19. The above ratio in Tata Motors (supra) is not as a direction under Article 142 of the Constitution of India and as such is of a binding nature.

20. The object is obviously to avoid conflict between the two schemes; one framed by the BIFR and the other, if any, framed by the Company Court. Such a conflict has been avoided by placing the SICA on a higher pedestal than the Act and by laying down that jurisdiction of the company court in the formation/acceptance of any scheme is limited and subject to SICA or a scheme framed by SICA. In the instance case, there is no such conflict as so far till date BIFR has not proceeded with and made out even a tentative scheme with regard to the Petitioner-company.

21. It may be noted that the scheme for revival or rehabilitation is permissible under SICA only on an enquiry and conclusion that the company is sick, whereas under the Companies Act a scheme can always be framed and sanctioned even if the company is not sick and is running and viable. The spectrum of the Act as such is much wider and quite different in comparison to SICA. Therefore, also the jurisdiction of the company court under Sections 391-394 remains alive irrespective of pendency of any reference or formulation of a scheme for revival of the company before the BIFR provided it is not in conflict with the scheme prepared under SICA.

22. Accordingly, my answer to the question raised is that a company petition Under Sections 391-394 of the Act is maintainable despite pendency of reference by the company u/s 15 of the SICA before BIFR/ AAIFR but exercise of such power by the Company Court is subject to SICA or the scheme, if any framed by BIFR.

23. In view of the aforesaid facts and circumstances, I am of the opinion that the objections on behalf of Respondent Nos. 1 and 11 with regard to the maintainability of the company petition under Sections 391-394 warrants no merit and are overruled.

24. Applications of Respondent Nos. 1 and 11 dated 7.4.2010 are rejected.

25. In the result, the petition is held maintainable.

26. Let the petition be listed after two weeks and in the meantime parties may exchange the pleadings.