

(2016) 03 DEL CK 0184
In the Delhi High Court
Case No : W.P. (C) 832/2016

Singer India Ltd.

APPELLANT

Vs

TVS Sewing Needles Limited and Others

RESPONDENT

Date of Decision : 02-03-2016

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 13, Section 15, Section 18, Section 18 (9), Section 18(1)(a), Section 18(1)(e), Section 18(2), Section 18(3)(b), Section 18(8), Section 19, Section 19(1), Section 19(4), Section 20, Se

Citation : (2016) 6 ADDelhi 332 : (2016) 155 DRJ 601

Hon'ble Judges : Pradeep Nandrajog and Mukta Gupta, JJ.

Bench : Division Bench

Advocate : Rajeeve Mehra, Sr. Advocate instructed by Amar Gupta, Ritika Gambhir, Divyam Agarwal and Shruti, Advocates, for the Appellant; K.N. Bhat, Sr. Advocate instructed by D.P. Mohanty, Aditya Sharma and Nandita Bajpai, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Pradeep Nandrajog, J.—1. Whether the decision dated July 31, 2012 pronounced by a Division Bench of this Court, reported as , 2012 (131) DRJ 294 (DB) Continental Carbon India Ltd. Vs. Modi Rubber Ltd. reached the wrong destination on account of the learned Judges of the Division Bench missing out some light houses is the question which was debated on February 17, 2006, when we reserved the matter for a pensive reflection on the journey chartered by the Division Bench. The decision posed the question : "Whether on approval of a scheme by the BIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as the "SICA"), an unsecured creditor has the option not to accept the scaled down value of its dues, and to wait till the scheme for rehabilitation of the respondent-Company has worked itself out, with an option to recover the debt with interest post such rehabilitation". The answer was in the affirmative. The facts before the Division Bench were that Continental Carbon had supplied carbon black to Modi Rubber

and had dues to be recovered. Settlement eluded the parties. A scheme of rehabilitation of Modi Rubber was approved on April 08, 2008 by BIFR and dues of unsecured creditors were dealt with in para 5.1.3 of the sanctioned schemes. The unsecured creditors could exercise one of the three options : "(a) To accept 30% of the principal outstanding as full and final payment. The payment shall be made within 3 months of the sanction of the scheme by the BIFR; or (b) To accept 40% of the principal outstanding as full and final payment. The payment shall be made in 3 equal installments from the cut off date (i.e. 31.3.2008). The first installment shall be payable within 3 months of the sanction of the Scheme by the BIFR; or (c) To accept 50% of the principal outstanding as full and final payment. The payment shall be made in one go at the end of 3rd year from the sanction of the Scheme." Continental Carbon was aggrieved by the dispensation for payment of unsecured creditors compelling them to opt for one of three options. View taken by BIFR and AAIFR was that unsecured creditors cannot be allowed to put the entire sanctioned scheme of revival in jeopardy. BIFR and AAIFR recognized that since unsecured creditors were not required to give any financial assistance, Section 19(1) of SICA, 1985 would have no application in view of the law declared by a Division Bench of this Court reported as , 181 (2011) DLT 46 (DB) Lord Chloro Alkali Ltd. Vs. Bharat Heavy Electrical Ltd. & Anr., but held that BIFR retains jurisdiction over a company declared sick till the end of rehabilitation period envisaged in the scheme in terms of provisions of Section 18(2) and 18 (9) of SICA, 1985 holding that the law declared by Division Benches of this Court and the Supreme Court in the decisions reported as , (2010) 103 SCL 385 (Delhi) National Small Industries Corporation Ltd. Vs. Singer India Ltd. & Anr., (1997) 89 Comp.Cas. 842 (Delhi) Sarin International (P) Ltd. Vs. AAIFR, 169 (2010) DLT 618 (DB) Oman International Bank SAOG Vs. AAIFR and , (2008) 7 SCC 619 Tata Motors Ltd. Vs. Pharmaceutical Products of India Ltd. & Anr. was on slightly different questions the Division Bench noted Section 22 of SICA and especially sub-Section (5) thereof which suspended the period of limitation while calculating limitation for enforcement of rights by creditors against a sick company. The Division Bench noted Section 18(2) of SICA, 1985 and the commentary "The Law of Sick Industrial Companies (Law Practice and Procedure) 2nd Edition, 1999 by S.A. Naik to highlight that the word "liabilities" does not appear in clause (a) of Section 18(2) of SICA and that the omission was neither unintentional nor accidental. The Division Bench noted that even clause (f) of Section 18(2) of SICA does not refer to reduction of interest or rights of creditors of a sick company unlike clause (f) of the relevant provisions in three complementary Acts : (i) The Industrial Reconstruction Bank of India Act, 1984, (ii) The Banking Regulation Act, 1949, and (iii) The Industries Development and Regulation Act, 1951. The Division Bench highlighted that there was no provision in Section 18(2) of SICA for payment to creditors in satisfaction of their claim "as so reduced" unlike clause (g) in the other three Acts. The Division Bench noted that Section 18(8) of SICA had been amended by the Amendment Act of 1993 to make the scheme binding on the creditors of the sick company. The Division Bench opined that the inference drawn from all this would be that a scheme

made under Section 18 of SICA cannot provide for discharge of any encumbrance created by the sick company (except by payment in full) or for reduction or scaling down of its liabilities to the unsecured creditors, except with their consent. The Division Bench kept in mind the objective with which SICA was enacted i.e. public interest underlining the provisions of the SICA to secure the timely detection of a sick and potentially sick companies owning industrial undertaking and for an expert body to take ameliorative steps. The Division Bench highlighted that whilst it may be true that under SICA it is not incumbent for BIFR to obtain consent of unsecured creditors while sanctioning a scheme for revival but immediately emphasize that there was no provision in SICA to compel unsecured creditors to provide concession. The Division Bench found no quarrel with the proposition that BIFR retains jurisdiction over a sick company in terms of sub-Sections (9) and (12) of Section 18 of SICA till the end of the rehabilitation period as envisaged in the scheme, but opined that there was a distinction between the absence of the requirement of consent by an unsecured creditor and compelling an unsecured creditor to write off a part of its dues. The Division Bench held that it was not necessary for an unsecured creditor to accept the scheme, but the right of such unsecured creditor to claim the debt would stand postponed by reason of the scheme being approved. It was only when the net worth of the company became positive and the scheme had worked itself out could the unsecured creditor claim the debt as per Section 22 of SICA, 1985. The Division Bench has terminated its reasoning by anchoring the same in para 37 in the following words : We are unequivocally of the view that the contract inter se the parties arrived at whereafter the company has become sick cannot be compulsorily overridden by the provisions of the SICA if the creditor is willing to wait till such time as the company is financially rehabilitated to claim its dues. There would be only suspension of legal proceedings as envisaged under Section 22 of the SICA. In fact, it is only such an interpretation which could give meaning to Section 22 of the SICA as otherwise this provision would really become otiose. The enforcement of the remedy remains suspended and that is why even in computing period of limitation, the period is excluded as per sub-Section (5) of Section 22 of the SICA.

2. As noted above, the Division Bench has noted various decisions and has distinguished the same simply observing that the point considered therein was on slightly different questions.

3. Is that so?

4. The first decision noted by the Division Bench is , 1996 (39) DRJ 380 Sarin International Pvt.Ltd. vs. AAIFR. In said case, the scheme for rehabilitation pertained to revival of the company M/s. Stallion Shox Ltd. It was promoted by one Ajeet Sarin who had also promoted Sarin International Pvt. Ltd. The sanction scheme not only reduced the share capital of the existing shareholders but also waived, wholly or in part, the debts due of unsecured creditors without their consent. As an unsecured creditor Sarin International Pvt. Ltd. was aggrieved by

the reduction of its dues as an unsecured creditor. The Division Bench upheld the scheme; and qua the unsecured creditors observed, in para 11, as under:-

"11. In the case of a Sick Industrial Company where the accumulated losses are more than the net worth, the unsecured creditors and share-holders ordinarily do not get anything in the event of winding up. The question of compensation for deprivation of property could only arise if there is any real property. In these circumstances, the shareholders and creditors can be assumed to have no property in respect of the investment or dues from a sick industrial company whose accumulated losses are more than the net worth."

5. In *Oman International Bank case* (supra), which has again been noted by the Division Bench and has been distinguished by observing that it was on a different point. The case concerned a situation where one secured creditor refused to give consent to the scheme. The argument was that in such a situation BIFR could not sanction a scheme for the rehabilitation of a sick company by scaling down the debt. With reference to the statement of objects and reasons, elaborating further with reference to Sections 18, 19 and 20, the Division Bench observed in paras 7 to 11 as under:-

"7. The Statement of objects and reasons of SICA may be referred to at this stage, and which reads as follows:

Statement of objects and reasons-

The ill effects of sickness in industrial companies such as loss of production, loss of employment, loss of revenue to the Central and State Governments and locking up of investible funds of banks and financial institutions are of serious concern to the Government and the society at large. The concern of the Government is accentuated by the alarming increase in the incidence of sickness in industrial companies. It has been recognized that in order to fully utilize the productive industrial assets, afford maximum protection of employment and optimize the use of the funds of the banks and financial institutions, it would be imperative to revive and rehabilitate the potentially viable sick industrial companies as quickly as possible. It would also be equally imperative to salvage the productive assets and realize the amounts due to the banks and financial institutions, to the extent possible, from the non-viable sick industrial companies through liquidation of those companies.

It has been the experience that the existing institutional arrangements and procedures for revival and rehabilitation of potentially viable sick industrial companies are both inadequate and time-consuming. A multiplicity of laws and agencies makes the adoption of coordinated approach for dealing with sick industrial companies difficult. A need has, therefore, been felt to enact in public interest a legislation to provide for timely determination by a body of experts of the preventive, ameliorative, remedial and other measures that would need to be adopted with respect to such companies and for enforcement of the measures considered appropriate with utmost practicable dispatch.

The salient features of the Bill are-

- (i) application of the legislation to the industries specified in the final schedule to the Industries (Development and Regulation) Act, 1951, with the initial exception of the scheduled industry relating to ships and other vessels drawn by power, which may however be brought within the ambit of the legislation in due course;
- (ii) identification of sickness in an industrial company, registered for not less than seven years, on the basis of the symptomatic indices of cash losses for two consecutive financial years and accumulated losses equaling or exceeding the net worth of the company as at the end of the second financial year;
- (iii) the onus of reporting sickness and impending sickness at the stage of erosion of fifty per cent or more of the net worth of an industrial company is being laid on the Board of Directors of such company; where the Central Government or the Reserve Bank is satisfied that an industrial company has become sick, it may make a reference to the Board, likewise if any State Government, scheduled bank or public financial institution having an interest in an industrial company is satisfied that the industrial company has become sick, it may also make a reference to the Board;
- (iv) establishment of Board consisting of experts in various relevant fields with powers to enquire into and determine the incidence of sickness in industrial companies and devise suitable remedial measures through appropriate schemes or other proposals and for proper implementation thereof;
- (v) constitution of an Appellate Authority consisting of persons who are or have been Supreme Court Judges, senior High Court Judges and Secretaries to the Government of India, etc., for hearing appeals against the order of the Board.

(Emphasis added)

8. A reading of the aforesaid Statement of objects and reasons shows that the effect of sickness in industrial companies is of serious concern not only to the government but also to the society at large. The objects and reasons further show that there is a need to fully utilize the productive industrial assets and afford maximum protection to employment and it is imperative to revive and rehabilitate the potentially viable sick industrial companies. When we read the aforesaid Statement of objects and reasons alongwith Section 20 of the Act, it becomes clear that winding up of a company is to be resorted to only as a last eventuality and only when it becomes just and equitable to wind up the sick industrial company. That the proposition as was very vehemently canvassed on behalf of the petitioner has no legs to stand upon becomes clear also from the expression "one or more" as found in Section 18 of the Act. The expression "one or more" includes "all" i.e. all measures including financial concessions. This expression "one or more" indicates that more than one eventuality can be adopted and acted upon by BIFR to rehabilitate and revive a sick industrial company and not only one eventuality of resorting to other Sub-sections of

Section 18 except its Sub-section (1) (e). Section 19(4) will have to be harmoniously construed with the expression "one or more" as found in Section 18 so as to further the object of the Act. There cannot be a reading of the provisions of Section 19(1) and 19(4) of the Act in the manner as is suggested by the learned senior counsel for the petitioner further becomes abundantly clear when we read Section 18(3)(b) of the Act along with the expression "the Board may adopt such other measures" as found in Section 19(4). In our opinion, this expression "the Board may adopt such other measures" cannot be restricted to only measures other than those prescribed under Section 18(1)(a) and 18(1)(e) of the Act. Section 18(3)(b) states categorically that the Board would make modification to a scheme of revival and rehabilitation of a company in case of any objection from a creditor, therefore, a conjoint reading of Section 18(3)(b), Section 19(1) and Section 19(4) shows that the other measures which are talked of in Section 19(4) would be the modification of a scheme in the light of the objections of a secured creditor, however, the same cannot mean that the objections can prevent the drawing up and implementation of a sanctioned scheme by an obdurate minority secured creditor. In fact, we must point out that a company becomes sick only because its net worth is eroded and it is unable to pay its creditors and when we talk of revival and rehabilitation of sick company as a first step and measure ordinarily and in a vast majority of cases, at the outset, BIFR has necessarily to bring about a composition between the creditors by bringing about reduction of their claims and dues of the sick company towards the creditors by adopting a principle which would treat the secured creditors fairly and equally, depending of course on the facts and circumstances of each case.

9. There is yet another reason why we cannot accept the arguments as urged on behalf of the petitioner that a single creditor can prevent BIFR in bringing about a scheme which envisages reduction in the dues payable by the sick company to its secured creditors. This additional reason is the amendment which has been brought about to SICA by Section 41 and schedule of the Act 54 of 2002 which amended Section 15 of SICA after promulgation of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. As a result of this amendment, a third proviso has been brought about in sub Section (1) of Section 15 that the secured creditors who represent not less than 3/4th in the value of the amount outstanding against financial assistance disbursed to the sick company can bring about an abatement of proceedings pending before BIFR. This proviso reads as under:

"Provided also that on or after the commencement of Securitisation 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"

A plain reading of this proviso added by the Act 54 of 2002 shows that the consent of at least 3/4th of the secured creditors is necessary for the proceedings before BIFR to abate. This proviso further brings into focus the legislative intent that a minority creditor cannot frustrate the proceedings before BIFR for rehabilitation and revival of the sick industrial company. The Legislature has thought it fit that at least 75% of the secured creditors must join hands to bring about an abatement to the proceedings before BIFR. If that be so, it cannot be understood as to how one secured creditor can in fact bring about an abatement of the proceedings before BIFR because giving of financial concessions by reducing the dues payable by a sick industrial company is always the heart and basic structure of any scheme for revival and rehabilitation of a sick industrial company. After all, if no financial concession in the form of reduction of dues payable by a sick company to its creditors is given, then, what will be the use of other measures under Section 18 such as change of management or sale/lease of assets of a sick company and so on. None of these other measures would in themselves help in rehabilitation and revival of the sick industrial company and which measures could have been adopted by the sick company without being a sick company governed by SICA. It is for this reason that the Legislature has advisedly and intentionally used the expression "one or more" as found in Section 18, and which aspect we have already adverted to above that the Board may take one or more measures i.e. it is not confined only to one measure of refusing financial assistance by means of concession to a sick industrial company. Revival of a sick industrial company is a complex process involving discussions with secured creditors, other creditors, labour and other personnel employed with the company, dues of the revenue authorities and so on. If such complex procedure can be frustrated and set at naught by a single secured creditor, then, what is the purpose and use of enactment of SICA.

10. That the Statement of objects and reasons of SICA ought to be referred to for interpreting the provisions of the Act is clear from various judgments of the Supreme Court including the judgments reported as *KSL and Industries Ltd. v. Arihant Threads Ltd. and Ors.* 2008 (12) SCR 702, *Morgan Securities and Credit Pvt. Ltd. v. Modi Rubber Ltd.* , AIR 2007 SC 683 : and *Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Limited* , AIR 2000 SC 1583:

11. There are two other aspects which we must note in support of the interpretation which we seek to give to Section 19(4) of the Act. The first aspect is that even when a company is not sick and proceedings are resorted to by the company under Section 391 - 394 of the Companies Act, 1956 to ring about a composition and settlement with its creditors, it is the majority of the secured creditors who do prevail, meaning thereby minority secured creditors cannot frustrate a scheme which is propounded by the majority of the secured creditors. If a minority secured creditor cannot frustrate a scheme of composition under Section 391 - 394 of the Companies Act, 1956, there is no reason why a minority

shareholder should be able to frustrate the revival and rehabilitation of a sick industrial company by refusing to accept a reduced amount and a statutory settlement which is brought about by approval of a rehabilitation scheme by BIFR as per the proposal of the operating agency and arrived at after duly considering the suggestions and objections of all the concerned stake holders including the creditors under Section 18(3)(b) of the SICA. SICA after all is for imposition of a valid statutory settlement which forms part of a sanctioned scheme. The second aspect is that by virtue of Section 529-A of the Companies Act, the dues of the workers are to be treated as equal to the dues payable to a secured creditor. Therefore, dues of even one of the workers can be in a manner of speaking be said to be the dues claimed by a secured creditor, but can it be contended that one worker can frustrate a rehabilitation and revival scheme as proposed by BIFR after duly taking into consideration the views, suggestions, objections and contentions of the majority of the workmen? Surely not. Therefore, in our opinion, a minority creditor or any minority group cannot frustrate the majority by putting a spoke in the wheel by objecting to the sanction of a rehabilitation and revival scheme of a sick industrial company so as to cause the frustration in the object of revival of a sick company."

6. In *Singer India case* (supra), which has again been distinguished, on the reasoning that the point was slightly different, the facts were that NSIC holding stake of about 7.76% in the equity of Singer was aggrieved by the reduction in the value of the shares and dilution of the holdings in the sanctioned scheme, and thus no doubt the point was quite different, the reasoning given to repel the argument concerning preventive, ameliorative and remedial measures which could be taken by BIFR, the Division Bench drew the analogy with unsecured creditors and observed as under:-

"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 under Section 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."

7. Relying upon the decision in *Sarin International case* (supra), in WP(C) 8154/2010, *M/s. OCL India Ltd. vs. M/s. Andrew Yule & Co.Ltd.* dismissing the same on December 06, 2010, the Division Bench upheld a scheme reducing the amount payable to an unsecured creditor on the reasoning that the question of compensation for deprivation of property could only arise if there was any real property and thus no grievance could be made to the sanctioned scheme by

them.

8. In *Lords Chlro Alkali* (supra), again distinguished by the Division Bench on the reason that a slightly different point was raised, BHEL a Government company was an unsecured creditor and contention by it on the reasoning that its consent was necessary because it was an other authority within the meaning of Section 19(1) of SICA was repelled on the reasoning that the other authority contemplated was a public financial institution. The other contention that being an unsecured creditor the scheme could not be sanctioned without its consent because its dues were scaled down was noted and rejected, but we find sans any reasoning.

9. After the decision in *Modi Rubber* case was pronounced, another Division Bench of this Court in the decision reported as , (2015) 193 Comp. Cas 289 UOI Vs. Cimmco Ltd. & Ors. has posed five questions, and the first was whether BIFR can sanction a scheme of rehabilitation to bind only those entities which are referred to in Section 18(8) of SICA. Noting the purpose of enactment SICA, as was expounded in *Sarin International* case (supra), answered the first question along with the second which related to clause 11.6 binding railways, as under:-

"As regards the first two questions, the court notes that the provisions of Sections 18 and 19 are complementary, and dealing with different spheres of action. Section 18(8) states that the scheme sanctioned by the BIFR will be binding on the sick company, its creditors, employees, guarantors, etc. Indeed, these are the only entities which the BIFR can unilaterally bind. The scope of application of Section 19, however, is different. In the words of the section, as regards "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", the BIFR does not have the authority to bind these entities by its orders and thus modify the obligations and rights owned between the sick company and these entities. However, the scheme for rehabilitation may - in the interests of ensuring that the sick company returns to a profitable state as soon as possible - envisage "financial assistance by way of loans, advances or guarantees or relief"s or concessions or sacrifices from" any of the above entities. These provisions in the DRS will not be binding on these entities, unless their consent is obtained. Thus, these entitles - the Railways in this case - may determine whether the concessions envisaged in the DRS will be provided by them and either to consent or reject the provision. If the entity rejects the provision, unlike in the case of the entities covered under Section 18(8), they will not be bound by the scheme sanctioned subsequently. This is made clear by clause 2 of section 19, which states that the DRS is to be circulated in order to obtain consent. Once consent is obtained, however, the provision becomes binding for the period of the sanctioned scheme. Crucially, in this regard, section 19(2) categorically provides that "if no consent is received within such period or further period, it shall be deemed that consent has been given."

10. Prima-facie, the view taken in *Modi Rubber* case (supra), is not in sync with

the view taken by the various Division Benches of this Court, which have been distinguished by the Division Bench in Modi Rubber with a simple observation that the point therein was on a slightly different question. The decision in Modi Rubber comes into conflict with the other decisions with respect to Section 18(8) of SICA, 1985 for the reason the other decisions bring out that there is no distinction between secured and unsecured creditors except those creditors who have to give financial assistance under a scheme to a sick company. In other words, every creditor stands on a same footing with respect to the power of the Board to sanction a scheme. Those creditors which have to provide financial assistance would form a sub-category and their consent alone would be necessary with respect to the financial assistance to be provided.

11. We are therefore of the opinion that prima-facie case is made out to refer the matter to a Larger Bench on the following questions:-

Whether the decision in Modi Rubber case has not properly appreciated the mandate and scope of Section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA"). Which would subsume the questions; Whether the Section vests BIFR with broad and extensive powers to take such measures as are necessary for revival of a sick company; and Whether without consent of unsecured creditors, the scheme for rehabilitation envisaging reduction of their debt is binding on them.

12. The matter be placed before the Hon'ble Chief Justice for necessary directions.

13. Pending adjudication of the writ petition the unsecured creditors who have not opted under the scheme are restrained from taking or proceedings ahead with any coercive action to recover their dues.