

(2008) 11 P&H CK 0147
In the Punjab And Haryana At Chandigarh

State of Haryana

APPELLANT

Vs

Appellate Authority for Industrial and Financial
Reconstruction and Others

RESPONDENT

Date of Decision : 25-11-2008

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 18(4)

Citation : (2010) 4 CompLJ 642 : (2009) 22 VST 210

Hon'ble Judges : L.N. Mittal, J; Adarsh Kumar Goel, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Adarsh Kumar Goel, J.—This petition has been filed by the State of Haryana to quash order passed by the Board of Industrial and Financial Reconstruction (BIFR) dated July 5, 2001, annexure P3 and order passed by the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) dated February 12, 2008 annexure P22.

2. In the course of hearing, learned Counsel for the State, in view of objection raised on behalf of respondent No. 3 that there was no specific prayer to challenge order dated September 18, 2006, annexure P14, dismissing the appeal of the State against the order of BIFR dated July 5, 2001 and order dated December 5, 2006, annexure P15, made a prayer for setting aside the said orders also.

3. Facts set out in the petition are that respondent No. 3-company was declared sick under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) vide order dated June 28, 1999, which was followed by Draft Rehabilitation Scheme dated April 11, 2001. The Scheme was circulated to all concerned including the petitioner. The petitioner by letter dated June 21 2001 annexure P2 raised objections to grant of concessions. It was submitted that concessions/reliefs could be considered only if the same were consistent with the policy of the State subject to approval of the Steering Committee. The policy was

annexed to the said objections. However, the BIFR vide impugned order dated July 5, 2001, annexure P3 sanctioned the Scheme u/s 18(4) of the SICA. With regard to the concessions to be granted by the petitioner-State, following provision was incorporated:

4.5. State Government/other agencies

(i) To declare the company as a relief undertaking and grant all reliefs and concessions applicable to a sick industrial unit.

(ii) To allow the company to utilize the Sales Tax Deferment Loan Scheme to its fullest without imposing any time-limit.

(iii) To exempt HTL from applicability of sales tax instead of deferment scheme from April 1, 1996 onwards when the DOT/MTNL started seeking tender based on composite price.

(iv) To waive minimum demand charges and electricity duty outstanding as on cut-off date as well as payable during the rehabilitation period

(v) To exempt the unit from power cuts.

4. An appeal was filed against the said order by the petitioner, which was dismissed vide order dated September 18, 2006, annexure P14, as barred by limitation and also for non-prosecution. Application for recall of the said order was also dismissed vide order dated December 5, 2006, annexure P15. Before filing the said appeal, the petitioner-State wrote a letter to the BIFR dated October 1, 2002 raising objections to the Scheme. The BIFR, however, issued and reiterated the show-cause notice proposing to take action u/s 33 of the SICA for not implementing the Scheme. The petitioner-State vide letter dated March 31, 2003, annexure P8 stated that the matter was to be considered by the Steering Committee and the Steering Committee vide its order dated August 31, 2003, annexure P10, concluded that the relief contemplated in the Scheme was not permissible. The conclusions of the Steering Committee were as under:

(a) that as per the recommendations of Excise and Taxation Department, reliefs and concession relating to sales tax benefits as envisaged in the sanctioned rehabilitation scheme are of non-implementable in nature.

(b) that the company was sanctioned sales tax deferment benefit to the tune of Rs. 3,103.65 lacs for nine years with effect from May 7, 1993 to May 6, 2002. It availed tax concession by way of deferment of payment of tax to the tune of Rs. 20,75,73,628 from May 7, 1993 to September 29, 2000 under rule 28A. Thereafter, company exercised its option under rule 28C and availed Rs. 65,30,521 from September 30, 2000 to October 16, 2001 as a new unit despite the fact that company had been declared sick by BIFR on June 28, 1999 and its rehabilitation proposal was under consideration with BIFR. Committee further observed that the party has concealed the above facts and not come before the BIFR with clean hands.

(c) as the sanctioned scheme only includes sales tax deferment benefit up to 2002 (annexure V of the Scheme) which was already in operation from May 7, 1993 to February 6, 2002 as a new unit for the period of nine years as such demand/direction for unlimited period is not in conformity with the scheme. As such the State Government is a secured creditor for the interest-free loan granted in lieu of sales tax deferment. Therefore, the outstanding amount of Interest Free Loan (IFL) in lieu of sales tax deferment availed by the company is Rs. 14,02,92,647. Principal as on May 31, 2003 and Rs. 6,48,94,682 interest as on March 31, 2003 is recoverable.

(d) that the changes made in the Central Sales Tax Act and rate notified under the VAT Act has resorted the position regarding applicability of rate of tax on the sale (intra-State as well as inter-State) as it existed before unbundling of Department of telecommunication. Therefore, request of the company may be rejected.

In view of the above facts, M/s. Haryana Telecom Limited, Village and PO Kheri Sadh, District Rohtak was not found eligible for grant of reliefs/concessions as a sick unit by the Committee and therefore, it was decided by the Committee to reject their case and the honourable BIFR may be informed accordingly again with the request to withdraw the show-cause notice u/s 33 of the SICA to Principal Secretary, Industries and also advise the company to clear their outstanding sales tax dues immediately.

5. The said decision was conveyed to the BIFR. The BIFR, however, gave further direction on September 4, 2003, annexure P11. Proceedings for implementation of the Scheme dated July 5, 2001 continued. The respondent No. 3 filed C. W. P. No. 11576 of 2006 in this Court seeking implementation of order of the BIFR. Meanwhile, proceedings for implementation of Scheme dated July 5, 2001 were pending before the BIFR. On October 26, 2006, the BIFR noticed in para 10 of its order that there was conflict in paras 4.5(ii) and 4.5(iii) of the Scheme. Para 4.5(ii) stipulated deferment of tax for indefinite period while para 4.5 (iii) pertained to exemption from tax. Relevant observations are as under:

10. The Bench, on consideration of the facts, merits of the case, materials on record and also the submissions made by the concerned agencies present in the today's notes that the para 4.5(ii) and 4.5 (iii) of SS-01, i.e., the paras relating to reliefs from the "sales tax department" of the GOH are contradictory to each other and, besides this, the para 4.5(ii) stipulates that the sales tax deferment would be permitted to the company for an indefinite period. The Bench further notes that such deferment of sales tax vis-a-vis repayment(s) thereof by the company(ies) are generally permitted for the specific predetermined period(s). The Bench also notes that the company has not submitted the revised modified revival proposal, as was directed by the board in its last RH held on September 4, 2003....

6. The respondent No. 3 challenged the above observations by filing an appeal

before the AAIFR, which was dismissed but in para 15 of the order dated February 12, 2008, the AAIFR set aside observations in order dated October 26, 2006. It was directed that respondent No. 3 was under obligation to repay the amount of sales tax collected under the Sales Tax Deferment Scheme from May 7, 1993 to April 1, 1996. The relevant observations are as under:

14. In our view there is no contradiction between para 4.5(ii) and (iii) of SS(01). The appellant is required to repay the amount collected as sales tax from May 7, 1993 to March 31, 1996 to the Government of Haryana since it exercised the option of exemption from sales tax with effect from April 1, 1996. The appellant-company states that it has collected Rs. 834.71 lacs from May 7, 1993 up to March 31, 1996 and has repaid Rs. 38.60 lacs to the Government of Haryana with effect from April 1, 1996. The appellant states that it availed of sales tax exemption in terms of para 4.5(iii) of SS-01. As per the calculations of the appellant-company an amount of Rs. 796.11 lacs is payable to the State Government of Haryana which the company is willing to remit immediately.

7. During the hearing, it has been pointed out that respondent No. 3 filed W. P. (C) No. 3925 of 2008 in Delhi High Court, which was dismissed on September 29, 2008 *Haryana Telecom Limited v. State of Haryana* [2009] 22 VST 219 (Delhi) [App], with the following observations:

The stay granted by this Court on July 4, 2008 has been enjoyed by the appellant without complying with the pre-condition of deposit. We are satisfied that no ground for interference has been made out specially when the appellant was under a legal obligation to repay the amount of sales tax of Rs. 7.96 crores collected by it, to the Government of State of Haryana. Accordingly, the writ petition has no merits and stands dismissed.

8. Main ground of challenge to the impugned Scheme dated July 5, 2001 against which appeal of the petitioner-State has been dismissed vide order dated September 18, 2006, annexure P14, is that the Scheme was framed u/s 18(4) of the SICA, which could not contemplate giving of financial assistance, which field was covered u/s 19. Scheme u/s 19 stipulating giving of financial assistance required consent of the affected party u/s 19(3) in absence of which only option available before the BIFR was to adopt any other measure including winding up and not to direct the rehabilitation by giving financial assistance. Since the petitioner-State was opposing the proposal requiring the State to give financial assistance, no Scheme could be framed stipulating financial assistance by the State. It was also submitted that the Scheme framed by the BIFR could not cover setting aside of statutory right of petitioner to recover sales tax deferred under the provisions of the State statute, particularly, when respondent No. 3 had already collected the tax under the provisions of the sales tax law. The BIFR could not allow retention of tax collected, which was required to be deposited with the State. For the same reason, the BIFR could not give a direction for exemption from tax liability when such exemption was not permissible under the statute or the Statutory Rules, which submission, the petitioner-State made

before the BIFR. Thirdly, it is pointed out that the order of the BIFR was arbitrary, as the view point of the petitioner-State had not been taken into account. The AAIFR erred in dismissing the appeal and the application for recall.

9. Respondent No. 3 has filed a reply. It has been, inter alia, stated that the State of Haryana was duly represented before the BIFR when order sanctioning Scheme dated July 5, 2001 was passed. Against the order of the BIFR dated July 5, 2001, appeal of the State of Haryana was dismissed and a review petition was also dismissed. It has also been submitted that the order of the BIFR was justified and had attained finality.

10. We have heard learned Counsel for the parties and perused the record.

11. The learned Counsel for the petitioner-State reiterated the submissions put forward in the writ petition, particularly that the impugned Scheme was without jurisdiction in absence of consent of the petitioner when financial assistance was stipulated ; the BIFR could not set aside sales tax demand under the sales tax law when the said amount had already been recovered by respondent No. 3 under the provisions of the State Act relating to sales tax and that the BIFR failed to consider objections put forward by the petitioner in letter dated June 21, 2001, annexure P2 and letter dated August 31, 2003, annexure P10. Appeal and application of the State were wrongly dismissed by AAIFR. Respondent No. 3 was not running the industry and failed to discharge its liability under the impugned Scheme on account of which the Delhi High Court dismissed its writ petition.

12. We allow oral prayer of the petitioner-State to challenge annexure P14, the order of the AAIFR dismissing the appeal against the order dated July 5, 2001 passed by the BIFR and also the order dated December 5, 2006, annexure P15 dismissing the application for recall of order dated September 18, 2006, as allowing such a prayer does not, in any manner, prejudice respondent No. 3. Prayer is only a matter of procedure and in substance, even after allowing the said prayer, question remains mainly to consider validity of scheme dated July 5, 2001 against which specific prayer has already been made.

13. The learned Counsel for respondent No. 3 submitted that jurisdiction of the BIFR was plenary and it could pass such order as it considered appropriate including direction to give financial assistance by the State Government, even if such a direction was contrary to a State statute and even if such a direction resulted in allowing respondent No. 3 to permanently retain amounts collected by way of tax under the sales tax law, irrespective of the policy of the State Government. In support of this submission, reference was made to Sections 18(4), 19(4) and 32 of the SICA. He submitted that once the State Government was represented, mere fact that the BIFR did not consider objections, put forward in letters dated June 21, 2001, annexure P2 and August 31, 2003, annexure P10, was of no consequence. He also submitted that prayer to challenge order of AAIFR, annexures P14 and P15, could not be granted in absence of a specific prayer in the petition. He placed reliance on judgment of

the honourable Supreme Court in *Diamond Plastic Industries etc. Vs. Government of Andhra Pradesh and others*, , order of the Delhi High Court dated November 16, 2005 in *VDCS Enterprises v. Union of India* [2009] 22 VST 220 (Delhi) W.P. (C) No. 4976 of 2003 and judgment of the Andhra Pradesh High Court in *V.S.R. Murthy and Others Vs. Engineer-in-Chief (Irrigation Wing), I and C.A.D. Department, Govt. of A.P. and Others*, , on the question of Scheme of SICA.

14. Question for consideration is whether the impugned Scheme is arbitrary for altogether ignoring objections put forward by the petitioner-State and is hit by Section 19(3) of the SICA and whether dismissal of appeal of the petitioner by the AAIFR calls for interference.

15. As regards the scope of jurisdiction of BIFR, we find that though, the object of a Scheme to be framed by BIFR is to rehabilitate a potentially sick unit by framing an appropriate Scheme contemplating preventive, ameliorative, remedial or other measures, the power of BIFR is circumscribed by the statutory provisions and cannot be held to be plenary. A statute has to be read as a whole and no provision of a statute can be ignored. Section 19(3) envisages consent for framing a Scheme covered u/s 19(1) of the SICA, which may contemplate giving of financial assistance. In absence of such consent, the only course open to BIFR is to frame a Scheme u/s 18(4) by including measures specified in Section 18(1) or other measures than directions for giving financial assistance, including winding up. The impugned Scheme, is thus, clearly ultra vires the powers of the BIFR u/s 19(1) read with Section 19(3). Not only the petitioner did not give its consent to the draft scheme, the petitioner put forward its objections vide letters dated June 21, 2001 and August 31, 2003, which have not been, in any manner, discussed by the BIFR, which cannot be upheld as proper judicial approach. No judicial or quasi-judicial authority or even administrative authority can act arbitrarily and pass an order affecting a party without considering the view-point of such a party. The order of the BIFR is, thus, clearly arbitrary by ignoring altogether objections of the petitioner-State. No doubt, Section 32 of the SICA contains a non obstante clause, even the said provision cannot empower the BIFR to act arbitrarily or to go contrary to the statutory scheme. The operation of non obstante clause will be limited to making provision of the SICA operative in case of conflict. The Act itself contemplates an order stipulating financial assistance to be passed with consent or to prepare a scheme adopting measures as are specified in Section 18 or other measures contemplated u/s 19(1) which may include winding up. Thus, there is no conflict in the sales tax statute and the SICA and such a construction which results in harmonious construction of the two provisions, has to be accepted.

16. We find that the State filed an appeal which was barred by limitation but the State was taking other steps and proceedings before the BIFR for implementation of the Scheme continued. The observations of the AAIFR that in no situation, there could be condonation of delay beyond 60 days u/s 25 of the

SICA, is not a correct interpretation of law. The said provision cannot be read as mandatory, as has been held in several decisions (see Kailash Vs. Nanhku and Others, . In any case, even if the said view is correct, this Court is not debarred from setting aside order of the BIFR. We also take note of the conduct of respondent No. 3 of having not paid the amount of Rs. 796.11 lacs as per direction of the AAIFR in order dated February 12, 2008 reproduced in para 6 above and the statement made on behalf of the State that the unit has not been revived.

17. For the above reasons, we hold that the impugned order passed by the BIFR is not sustainable.

18. Accordingly, we allow this petition and set aside the impugned orders of the BIFR as well as the AAIFR qua the petitioner-State.