
(2010) 09 DEL CK 0017

In the Delhi High Court

Case No : Writ Petition (C) No. 6487 of 2010

Supriya Pharmaceuticals Ltd.

APPELLANT

Vs

Ramesh Dugar and Others

RESPONDENT

Date of Decision : 24-09-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 17(2), 17(3), 18, 18(2), 18(2)(1)

Citation : (2010) 09 DEL CK 0017

Hon'ble Judges : Valmiki J Mehta, J; Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Maneesha Dhir, Geeta Sharma, Jayshree Shukla, Preeti Dalal, K.P.S. Kohli and Abhirup Dasgupta, for the Appellant; Vivek Sibal and Pooja M. Saigal for Respondent Nos. 1 to 3, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.

Caveat No. 216/2010

Learned Counsel for the caveators has entered appearance and thus the caveat stands discharged.

CM No. 12841/2010 (Exemption)

Allowed, subject to just exceptions.

W.P. (C) No. 6487/2010

1. By means of this petition under Articles 226 and 227 of the Constitution of India, the petitioners challenge the impugned order dated 21.6.2010 passed by the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) whereby AAIFR accepted the appeal filed by the respondents No. 1 to 3 herein and set aside the order dated 28.5.2007 passed by Board of Industrial and

Financial Reconstruction (BIFR). By the order dated 28.5.2007 BIFR had permitted, by purely an interim order, the conversion of an unsecured loan of Rs. 95 lacs into shares of the petitioner No. 1 company although no sanctioned scheme was formulated for implementation. Respondents No. 1 to 3 herein are the other group of shareholders than the petitioner No. 2 in the petitioner No. 1 company.

2. AAIFR, in the impugned order framed the following issues:

- (a) Whether the appeal filed by the appellants is barred by limitation; or
- (b) Whether BIFR is vested with powers under the provisions of SICA to convert the unsecured loan of a company into share capital and exempt it from SEBI Guidelines and the approval of the Company Law Board dehors a sanctioned scheme of rehabilitation.
- (c) Whether the impugned order is violative of principles of natural justice.

All the aforesaid issues were answered in favour of the respondents herein i.e. it was held that the appeal filed by the respondent No. 1 before the AAIFR was not barred by limitation, BIFR is not vested with the power to grant exemption to a company from following SEBI guidelines and taking approval of the Company Law Board dehors the sanctioned scheme for rehabilitation and the order of BIFR was in violation of principles of natural justice because the same was passed without issuing notice to the affected persons namely, the respondents No. 1 to 3 herein and the appellants before the AAIFR.

3. On the aspect of limitation, AAIFR has held as under:

6. So far as the first issue is concerned, the appellants have admitted that they came to know of the increased shareholding of respondent No. 8 while going through the website of the Bombay Stock Exchange on 18.8.2008 due to fresh issue of shares. The appellants thereafter lodged a complaint with the Bombay Stock Exchange on 27.8.2008. Thereafter, the appellants did enquiries with the BIFR about the status of respondent No. 2's case and applied on 17.3.2009 for a certified copy of the impugned order passed by the BIFR. Certified copy of the impugned order was received by the appellants on 20.3.2009. From the impugned order, they came to know that the increase in the shareholdings of respondent No. 8 was due to impugned order passed by the BIFR. Thereafter, the appellants filed the appeal on 23.3.2009. However, the Learned Counsel for the respondent company has argued that the limitation in this case will not run from the date of receipt of the certified copy of the impugned order by the appellant, but from 18.8.08, when they came to know about the increase of the shareholdings of the respondent No. 8.

7. It is now well settled that when the appellant is not a party before the BIFR and the impugned order is not communicated to the appellant by the BIFR, the limitation will run from the date of the receipt of the certified copy of the impugned order by the appellant. In the case of Director General of Income Tax

v. BIFR (2001) 5 Com. P.L.J P 19 (DELHI) and in the case of Dewan Bahadur Ramgopal Mills Ltd. Vs. Appellate Authority for Industrial and Financial Reconstruction and others, it has been held that as per provisions of Section 25 of the Act, whether the appellant had knowledge or not of the impugned order, the appeal is maintainable if this is filed within 45 days of the issuance of a certified copy of the order. In the case of Director General of Income Tax cited supra, the Hon"ble Apex Court held that the word "issued" occurring in Section 25 of SICA means "served". The Hon"ble Apex Court held that the expression "issued" and "served" are used as interchangeable terms. The Hon"ble Apex Court held that since the impugned order in that case had not been issued to the petitioner as it was not a party to the proceedings before it the date of obtaining the certified copy of the impugned order, therefore, is to be taken to be the starting point when the order could be said to have been issued by the BIFR to the petitioner. The ratio of the aforesaid case applied with full force to the instant case. First of all, 18.8.08 is not the date on which the appellant company came to know about the impugned order. Even if it is presumed that the appellant had knowledge of the order of 18.8.08, it is of no consequence because limitation u/s 25 of SICA runs from the date of issue i.e. "service" of the order on the appellant and not from the date of knowledge. In this case, since the appellants were not a party before the BIFR, the limitation would run from the date of receipt of certified copy of the impugned order i.e. 20.3.09. This appeal has been filed within the period of limitation and hence is not barred by limitation.

4. We do not find any error in the above finding, in the facts and circumstances of the present case, inasmuch as we do not find that there is such inordinate delay of the respondents No. 1 to 3 in approaching the BIFR, more so considering that the order of BIFR was passed without any notice to these respondents No. 1 to 3. We would not like to exercise our powers under Articles 226 and 227 of the Constitution of India in the facts and circumstances of the present case as also for the reasoning of the AAIFR as reproduced above and we hold that the appeal before AAIFR was not time barred.

5. On the aspect with regard to passing of an order of conversion of the unsecured loan into share capital, AAIFR while setting aside the order of BIFR has held as under:

8. So far as the second issue is concerned, the facts of this case and the subsequent orders of the BIFR passed in this case on 12/11/2008 and 23/9/2009 show that no scheme of rehabilitation has yet been sanctioned by the BIFR and the impugned directions are not part of any rehabilitation scheme sanctioned by the BIFR for the company. Section 17(3) of SICA envisages that if the BIFR is of the view that it is not practicable for a sick industrial company to make its net worth exceed its accumulated losses within a reasonable time and that it is necessary and expedient and in public interest to adopt all or any of the measures specified in Section 18, it may direct any operating agency (OA) to prepare a scheme providing for such measures in relation to such company.

When such an order is made, the OA appointed by the BIFR shall prepare a rehabilitation scheme providing for any one or more of the measures enumerated in Section 18 which, inter alia, includes financial reconstruction, alteration of the capital structure, reduction of interests or rights which the shareholders have in the sick company and allotment to the shareholders of the sick industrial company of shares in the sick industrial company and transfer or issue of shares, etc. Thus, allotment, transfer or issue of equity u/s 18(2)(q) and 18(2)(1) can only be a part of a rehabilitation scheme which can be sanctioned by the BIFR according to the procedure laid down under the provisions of SICA. After a scheme is sanctioned by the BIFR, the scheme shall be binding on the sick industrial company, its shareholders, creditors, guarantors and employees u/s 18(8) of SICA, but such measures cannot be approved by an interim order of the BIFR without the same being part of a rehabilitation scheme. In the instant case, the BIFR has neither formulated a draft rehabilitation scheme (DRS) nor sanctioned a rehabilitation scheme for the respondent company. It is obvious from the impugned order that the direction for conversion of unsecured loan of Rs. 95 lakhs into share capital and issue of the same to some shareholders on a preferential basis has been issued not under a sanctioned rehabilitation scheme but dehors a rehabilitation scheme which in our opinion is beyond the jurisdiction of the BIFR.

(Emphasis added)

6. We do not find that the above reasoning of AAIFR is erroneous. Surely, what has to be achieved only pursuant to a sanctioned scheme cannot be achieved by means of an interim order. If it is permissible by an interim order to pass such orders which would, in fact, amount to exercise of powers in framing and implementing a sanctioned scheme as per Section 18, then, a very peculiar position may result in that and an interim order not having finality will yet have a fait accompli of finality though in reality it was only an interim order. Such a position cannot be countenanced.

7. Learned Counsel for the petitioner sought to draw assistance from Section 17(2) of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) to canvass that in the present case the impugned order of BIFR was capable of being passed pursuant to that provision. We completely disagree with the argument as advanced by the Learned Counsel for the petitioner. The provision of Section 17(2) is applied when a sick company is given opportunity to make its net worth positive without any necessity of interference of orders being passed by the BIFR u/s 18. The passing of an order, which is in fact an order u/s 18, can only be after a company is registered as a sick company and the provision of Section 18 comes into play i.e. an Operating Agency (OA) is appointed for preparing a draft scheme for approval by the Board towards rehabilitation of a sick company and a sanctioned scheme is passed. Learned Counsel for the petitioner canvassed that the only secured creditor namely Canara Bank has been paid off and therefore BIFR was justified in passing the order dated

28.5.2007. It was also contended that the petitioner No. 1 company was acting bonafidely and therefore the order of BIFR was a proper order u/s 17(2) of SICA. As we have already stated above, the provision of Section 17(2) does not come into operation in the facts of the present case where admittedly an OA has been appointed and where after the provision of Section 18 has come into play. The present case is not one falling u/s 17(2). Further, merely because the petitioner No. 1 has paid of its secured creditor cannot mean that orders can be passed by BIFR which clearly are in conflict with the applicable provisions of SICA.

8. In fact, another startling aspect in the facts of the present case is that BIFR passed the order for conversion of the unsecured loan into share capital on a mere oral request of the petitioners i.e. without any written application in that behalf. We find this to be indeed disturbing to say the least. An order so vital in nature pertaining to share capital could not have been passed on an oral prayer, especially, when there are two competing groups of share holders in a company. This aspect of passing of an order of alteration of the share holding pattern becomes further accentuated because the order was passed by BIFR ex-parte i.e. without any notice to the affected persons, namely, respondents No. 1 to 3 herein. Such an action was therefore clearly impermissible in law and consequently AAIFR was wholly justified in quashing the order of BIFR.

9. Learned Counsel for respondents No. 1 to 3 has also drawn our attention to the proceedings of the BIFR dated 14.05.1999 where the Bench has recorded its satisfaction that a package u/s 17(2) of SICA was not possible and accordingly it was considered appropriate in public interest to take measures specified u/s 18 of SICA in relation to the company. The Canara Bank was appointed the operating agency to examine the viability of the company and prepare a study report. These proceedings show that the BIFR found that the petitioner-company could not really do anything to get out of its sickness of its own u/s 17(2) of SICA, albeit at a much earlier stage, and there has been no subsequent application filed u/s 17(2) of SICA on which an order could have been passed by the BIFR.

10. The facts of the present case show the following:

(i) Though, the petitioner No. 1 is a sick company with respect to which OA has been appointed and the provision of Section 18 has come into play, yet, BIFR has passed an order which is the subject matter of Section 18 without formulating a sanctioned scheme.

(ii) The order of BIFR was passed ex-parte i.e. without issuing notice to the affected parties namely, the respondents No. 1 to 3 herein.

(iii) No General Body Meeting of the shareholders of the petitioner No. 1 was called before approaching BIFR or after the order of BIFR for change of share capital for affecting the rights of the respondents No. 1 to 3.

(iv) A petition under Sections 397 and 398 for oppression and mismanagement

was filed by the respondents No. 1 to 3 herein before the Company Law Board, although, after passing of the order of BIFR.

(v) The order of substantial nature affecting the change of share holding pattern was passed by BIFR on an oral application.

(vi) The facts of the case possibly show that an attempt was made to overreach the statutory authorities by granting exemptions from compliance of various requirements of SEBI and Company Law Board without formulating and implementing a sanctioned scheme in terms of Section 18 of SICA.

(vii) A submission was made before BIFR for passing of the order dated 28.5.2007 that on conversion of the unsecured loan into capital, the net worth of the company will turn positive. In fact, the net worth of the company just about turned positive and thereafter soon again turned negative within a year, and consequently, AAIFR has noted that the object basically was to use the same for benefitting the petitioners and prejudicing the respondents No. 1 to 3 herein. This aspect is dealt in para 9 of the impugned order of the AAIFR which we are not reproducing herein for the sake of brevity.

11. In view of the above, we find the present petition to be a gross abuse of the process of law. The impugned order of AAIFR is not only just but also legally correct. The petition being therefore wholly misconceived is dismissed with costs quantified at Rs. 25,000/- payable within a period of two weeks from today.

CM No. 12840/2010 (Stay)

Dismissed.