

(2008) 08 MAD CK 0023
In the Madras High Court
Case No : W.A. No. 405 of 2008

Tamil Nadu Industrial Development Corporation Ltd.	APPELLANT
Vs	
Board for Industrial and Financial Reconstruction and Others (No. 2)	RESPONDENT

Date of Decision : 04-08-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 115JB, 41(1), 79
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 17, 18, 18(2), 19

Citation : (2008) 145 CompCas 24

Hon'ble Judges : P.P.S. Janarthana Raja, J;K. Raviraja Pandian, J

Bench : Division Bench

Advocate : G. Masilamani, -General for Joose John, for King and Partridge, for the Appellant; R. Muthukumarasamy, for A.R. Ramanathan, for the Respondent

Final Decision : Dismissed

Judgement

K. Raviraja Pandian, J.—In this appeal, the Tamil Nadu Industrial Development Corporation Ltd. assailed the order of this Court dated

February 20, 2008, made in W. P. No. 8846 of 2007 (Tamil Nadu Industrial Development Corporation Ltd. v. Board For Industrial and

Financial Reconstruction (No. 1) [2008] 145 Comp Cas 9 non-suiting the appellant herein for the relief of setting aside the order of the first

respondent-Board for Industrial and Financial Reconstruction (hereinafter referred to as ""BIFR"") dated July 27, 2005, whereby a scheme has been

sanctioned for rehabilitation of the third respondent-company and that of the order of the Appellate Authority for Industrial and Financial

Reconstruction (hereinafter referred to as ""AAIFR""), dated October 12, 2006, made in Appeal No. 107 of 2005 confirming the order of the

BIFR.

2. The facts of the case are as follows:

The appellant is 26.06 per cent, equity shareholder of the third respondent-company, a hundred per cent, export-oriented unit for the manufacture of 40.50 lakhs metres per annum of coarse cotton grey fabric at Mugalapalli village, Hosur taluk. The third respondent commenced the commercial production in April 1995 and went into expansion in the year 1996. However, as on March 31, 2000, the net worth of the third respondent-company was eroded with an accumulated loss of Rs. 1,537 lakhs as against available assets of Rs. 673.52 lakhs. The third respondent was referred to the BIFR for the purpose of framing a scheme for rehabilitation of the third respondent. After the initial struggle, the third respondent on May 21, 2004, submitted a proposal envisaging the taking over of the management of the third respondent-company by the fourth respondent and for one-time settlement of the dues to the Industrial Development Bank of India and Industrial Financial Corporation of India Ltd. The Industrial Development Bank of India was appointed as operating agency, which submitted a report with the scheme for rehabilitation on November 23, 2004. The BIFR approved the draft revival scheme and circulated the scheme for the opinion seeking suggestions and objections of the shareholders including the appellant. In the said scheme, suggestions were made in so far as the equity shareholders as follows:

(i) to agree to the proposed change of management in favour of the fourth respondent-company, as also terms of OTS offered to institutions for revival of the company;

(ii) to agree to write down the present equity shareholding in the company by 99 per cent. The face value of each equity share would be brought down from existing Rs. 10 per share to Re. 0.10 ps. per share;

(iii) to agree for conversion of face value (after writing down) of Re. 0.10 ps per share into Rs. 10 per share by accepting one equity share of Rs.

10 each against every hundred shares of Re. 0.10 ps. share held in the company.

3. The appellant on June 16, 2005, submitted its objections to the scheme as the scheme, according to appellant, would adversely affect the rights

of the appellant as equity shares held by the appellant is sought to be reduced to almost nothing. The appellant requested that the revival scheme be

sanctioned without reduction of existing share capital. The further objection of the appellant was that the appellant being a trustee of public funds

for investment, it cannot agree to the writing away of public funds, which would adversely affect the public interest and prayed for deletion of

certain paragraphs, which are adverse to the interest of the appellant. They are (1) for reduction of share capital from Rs. 10 per share, (2)

conversion of the face value to Re. 0.10 ps. per share into Rs. 10 per share by accepting one equity share of Rs. 10 each against every hundred

share of Re. 0.10 ps. held in company, (3) for stepping down from the Board of the company ; and (4) for transferring the entire equity holding in

the company at reduced value from Rs. 10 per share to Re. 0.10 ps. per share to the new promoters.

4. The BIFR by its order dated July 27, 2005, ordered for sanction of the draft scheme by observing that the appellant had given its consent to all

the concessions and reliefs projected in the draft rehabilitation scheme. The appellant carried the matter by way of appeal before the AAIFR,

which confirmed the order of the BIFR.

5. The appellant challenged those orders in the writ petition filed before this Court on the ground that the appellant, being a State level financial

institution, the consent of the appellant is mandatory for sanction of the rehabilitation scheme in terms of Section 19(2) of the Sick Industrial

Companies (Special Provisions) Act, 1985 (hereinafter referred to as "the SICA").

6. The third respondent resisted the case by contending that though the appellant is a State level institution, it had not provided any financial

assistance as required u/s 19(1) of the SICA, but only invested in the shares and as such it is only an equity shareholder and therefore no consent

need be obtained for approving the rehabilitation scheme. The scheme is also implemented by spending about more than Rs. 10 crores. The

company is now going well.

7. The learned single judge has recorded a finding that the appellant, being an equity shareholder, is not under any obligation to grant consent for the

approval of the rehabilitation scheme. The authorities under the SICA, i.e., the BIFR has power under Sections 18 and 19 of the Act to frame a

scheme for the revival of the company and thus dismissed the writ petition.

8. Mr. G. Masilamani, learned Advocate General appearing for the appellant contended that the appellant-Tamil Nadu Industrial Development Corporation Ltd. (hereinafter referred to as ""TIDCO""), being a State owned corporation, invests huge amount for promotion of companies like the third respondent and it has to be treated as a person rendered financial assistance to the third respondent. Lending of a loan to the company and making financial investment by way of equity cannot be treated differently. There is no such dichotomy contemplated under SICA. The appellant has to be treated as a person rendered financial assistance in terms of Section 19(2) of the SICA. In such circumstances, in terms of the said provision, the appellant's consent is necessarily required to be obtained with respect to the terms contained in the scheme for revival of the third respondent-company. It is obvious that by circulating the copy of the draft scheme to the appellant the BIFR regarded the appellant as a State level institution rendered financial assistance to the company. Having regarded so, the BIFR and AAIFR totally failed to consider the objection raised by the appellant, which is requirement of Section 19 of the SICA. The appellant is investing public money for promotion of companies to achieve the industrial growth in the State. In such circumstances, in spite of the objections raised, the capital value of the shares owned by the appellant should not be reduced. In order to bring home his contention, he has taken us through the definition contained in Sections 3(o) and 3(p) and the provisions of Sections 16, 17, 18 and 19 of the SICA. He also laid emphasis on Section 19 so as to contend that the appellant, being a State level institution, the consent as required under the provision has to be obtained before sanctioning the scheme. The appellant objected to the terms of the scheme, which are adverse to the interest of the appellant. The objections have to be considered in a proper perspective and the interest of the appellant should have been safeguarded while making provision for revival of the company.

9. However, Mr. Muthukumaraswamy, learned senior Counsel appearing for the third respondent has contended that the appellant is only an equity shareholder and as such, having only the shareholding right under the Companies Act, 1956. It is true that the appellant is a State level institution. But being a State level institution, per se, would not make the appellant as a person who rendered financial assistance to the company in

terms of Section 19(1) and (2) of the SICA. Except the holding of equity shares, no financial assistance was rendered by the appellant. In such circumstances, the appellant's consent is not necessary u/s 19(2) of the SICA. Based on the sanctioned scheme by the BIFR, which has been approved by the AAIFR on appeal at the instance of the appellant, the revival of the company has already been implemented by spending huge amount. This Court while exercising power under Article 226 of the Constitution of India shall not render a finding against the very object of the Act and the court can interfere only if there is any mistake or procedural irregularity committed while making decision by the respondent. The decision cannot be put in issue by the appellant.

10. We heard the argument of learned Counsel on either side and perused the materials on record.

11. From the rival contentions above stated, the point to be resolved in this case is, whether the consent of the appellant is necessary while approving the scheme framed for revival of the third respondent-company by the BIFR u/s 19 of the SICA.

12. Section 19(1) and 19(2) of the Sick Industrial Companies (Special Provisions) Act, 1985, reads as follows:

19. Rehabilitation by giving financial assistance.--(1) Where the scheme relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial company, the scheme may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from 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 (any Government, bank, institution or other authority required by a scheme to provide for such financial assistance being hereafter in this section referred to as the person required by the scheme to provide financial assistance) to the sick industrial company.

(2) Every scheme referred to in Sub-section (1) shall be circulated to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation or within such further period, not exceeding sixty days, as may be allowed by the Board, and if no consent is received within such period or further period, it

shall be deemed that consent has been given.

(bold supplied).

13. As per Section 19(2) of the SICA, every scheme referred, to in Sub-section (1) shall be circulated to every person required by the scheme to

provide financial assistance for consent within a period of sixty days or extended period of another sixty days from the date of such circulation and

if no consent is received within such period, it shall be deemed that consent has been given. Thus, the person entitled to have the draft scheme

circulated for consent is the only person required to provide financial assistance under the scheme for the revival of the company.

14. The meaning of the term ""financial assistance"" can be gathered from the provision of Sub-section (1) of Section 19, which provided that where

the scheme has been framed for the purpose of preventive, ameliorative, remedial and other measures in respect of any sick industrial company,

the scheme may provide for financial assistance by way of loans, advances or by way of guarantees or by way of reliefs or concessions or by way

of sacrifices from 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 required by a scheme to provide for such financial assistance as the person required by the scheme to

provide financial assistance to the sick industry.

15. In the sanctioned scheme, Clauses 9.1 to 9.6 under the sub-heading of ""Reliefs and Concessions"" reads as follows:

9.1. Industrial Development Bank of India Ltd. (IDBI):

(i) To accept Rs. 713.87 lakhs in cash in settlement of part of principal dues in the following manner--

a. Down payment of Rs. 178.46 lakhs by November 20, 2004 (since paid).

b. Balance Rs. 535.41 lakhs in 4 (four) quarterly instalments on interest-free basis. The due dates for the payment of instalments would be

February 15, 2005, May 15, 2005, August 15, 2005 and November 15, 2005 and SSL shall issue post-dated cheques (PDCs) for the same.

(ii) To agree to convert part of principal dues to the extent of Rs. 89.23 lakhs into equity share capital of the company (892,300 equity shares of

Rs. 10 each at par) after writing down of existing equity shares capital by 99 per cent.

(iii) To agree to the proposal of writing down of existing equity share capital by 99 per cent, by bringing down face value of equity share to Re.

0.10 per share from the existing Rs. 10 per share. Accordingly, existing holding of IDBI of 20,60,000 equity shares of face value of Rs. 10 each

aggregating Rs. 206 lakhs would be converted as 20,60,000 equity shares of Re. 0.10 each aggregating Rs. 2.06 lakhs.

(iv) To agree for conversion/consolidation of existing equity shares. Face value of Re. 0.10 per share would be converted into face value of Rs. 10

per share by issuing 1 share of Rs. 10 each against every 100 shares of Re. 0.10 held in the company. Accordingly IDBFs existing holding would

be converted into 20,600 shares of Rs. 10 each.

(v) Waiver of balance principal outstanding of Rs. 708.71 lakhs and entire simple interest, compound interest and liquidated damages and other

charges amounting to Rs. 2422.01 lakhs as on March 31, 2004 (the cut-off date). The total waivers of IDBI is estimated at Rs. 3130.72 lakhs as

on March 31, 2004 (the cut-off date).

(vi) To agree to release personal guarantees of existing promoters on receipt of down payment and after substitution of guarantees by incoming

promoters, i.e., by Shri Prashant B., Director, M/s. Satidham Syntex.

(vii) To agree to release personal guarantees of new promoters and charge on assets after receipt of full cash payment as proposed under OTS.

9.2 IFCI Ltd.

(i) To accept Rs. 86.13 lakhs in cash in settlement of part of principal dues in the following manner--

a. Down payment of Rs. 21.54 lakhs by November 20, 2004 (since paid).

b. Balance Rs. 64.59 lakhs in 4 (four) quarterly instalments on interest-free basis. The due dates for the payment of instalments would be February

15, 2005, May 15, 2005, August 15, 2005 and November 15, 2005 and SSL shall issue post-dated cheques (PDCs) for the same.

(ii) To agree to convert part of principal dues to the extent of Rs. 10.77 lakhs into equity share capital of the company (107,700 equity shares of

Rs. 10 each at par) after writing down of existing equity shares capital by 99 per cent.

(iii) To agree to the proposal of writing down of existing equity share capital by 99 per cent, by bringing down face value of equity share to Re.

0.10 per share from the existing Rs. 10 per share. Accordingly existing holding of IFCI Ltd. of 10,00,000 equity shares of face value of Rs. 10

each aggregating Rs. 100 lakhs would be converted as 10,00,000 equity shares of Re. 0.10 each aggregating Rs. 1 lakh.

(iv) To agree for conversion/consolidation of existing equity shares. Face value of Re. 0.10 per share would be converted into face value of Rs. 10

per share by issuing 1 share of Rs. 10 each against every 100 shares of Re. 0.10 held in the company. Accordingly, IFCI's existing holding would

be converted into 10,000 shares of Rs. 10 each.

(v) Waiver of balance principal outstanding and entire simple interest, compound interest and liquidated damages and any other charges

outstanding/overdue as on cut-off date. The total waivers of IFCI Ltd., is estimated at Rs. 500.40 lakhs as on March 31, 2004 (the cut-off date).

(vi) To agree to release personal guarantees of existing promoters on receipt of down payment and after substitution of guarantees by incoming

promoters, i.e., by Shri Prashant B., director, M/s. Satidham Syntex Ltd.

(vii) To agree to release personal guarantees of new promoters and charge on assets after receipt of full cash payment as proposed under OTS.

9.3 Government of Tamil Nadu:

(i) To consider exempting the company from sales tax (if made applicable in future years) for the period of 5 years from the date of sanction of the

scheme. The sales tax can be deferred for 5 years as per G.O.Ms. No. 848/28.06.88 and G.O.Ms. No. 1076/04.10.88 (Industries).

(ii) To consider exempting the company from sales tax on domestic purchases of raw material, i.e., yarn, sizing chemicals, etc., for a period of 5

years from the date of sanction of the scheme.

(iii) Tamil Nadu Electricity Board (TNEB) to consider exempting the unit from power cuts and power restrictions during the rehabilitation period.

9.4 Government of India:

(i) To consider exempting the company from paying customs duty on import of raw material, consumable and other inputs for a period of 5 years

from sanction of scheme by BIFR.

(ii) Presently, the excise duty on the products of the company is optional. However, in case the excise is made compulsory, to exempt the

company from excise duty on domestic purchases or raw material for a period of 5 years from sanction of scheme by BIFR.

(iii) BIFR to consider exercising their powers u/s 18(2)(f) of SICA, and to direct reduction of the interest or rights of the shareholders in the

company to the extent of 99 per cent, for revival of the company and exempt the company from the provisions of Company Law Board/High

Court as required for reduction of share capital.

(iv) To consider exempting the company from payment of RoC fees for increase in authorized share capital.

9.5 Central Board of Direct Taxes (CBDT)

(i) To consider granting relief u/s 41(1) of the Income Tax Act, 1961, towards interest waivers and relief u/s 79 regarding carry-forward

unabsorbed business losses.

(ii) To consider allowing the company to carry-forward the unabsorbed business losses and depreciation for the further period of 8 years from the

date of sanction of the scheme.

(iii) To consider exempting the company from minimum alternative tax (MAT) u/s 115JB for a period of seven years from the date of sanction of

the scheme.

(iv) To consider exempting the company, its new directors and officials from any penal provisions for the defaults, if any, committed during the

sickness till the cut-off date.

(v) To consider providing any other exemptions to the company during rehabilitation period for smooth implementation of the sanctioned scheme.

9.6 Director-General Foreign Trade (DGFT):

(i) To consider exempting the company from payment of interest/penalty on account of non-fulfilment of export obligations during the period when

the unit was under 100 per cent. EOU.

(ii) The unit was de-bonded from 100 per cent. EOU to 5 per cent. Export Promotion Capital Goods (EPCG) Scheme during June'02. As per the

EPCG Scheme the company has an export obligation to be fulfilled within 8 years with 2 years moratorium. As the company was operating on job

work and there was no own production, it could not export its own products and fulfil the export obligation under EPCG Scheme. Now with the

change of management, it will take some time to establish in the domestic as well as international market. In view of this to consider extension of

time from 8 years to 12 years with moratorium of 6 years, which is allowed as per export and import policy 2002-07 under Chapter 5.5.1. The

export obligation fixed at US\$ 2,800,552.95 based on depreciated value of imported capital goods at the time of de-bonding. However, as per

the present exim policy the export obligation of EPCG units is to the extent of duty saved and not on depreciated value of imported capital goods.

In view of this to consider extending similar facility to the company and re-fixing the export obligation based on the duty saved at the time of de-

bonding.

(iii) To consider exempting the company, its new directors and officials from any penal provisions of the defaults committed till the cut-off date.

16. From the clauses above, it is clear that the Industrial Development Bank of India and Industrial Financial Corporation of India Ltd., the equity

shareholders and lenders, in addition to the reduction of share value in respect of the shares held by them, required to waive part of the principal

and interest in a sum of Rs. 3130.71 lakhs and Rs. 500.40 lakhs respectively. Like that the Central and State Government also required to grant

exemption from the tax to be levied on the third respondent sick company for certain periods thereby sacrificing their revenue receipt for certain

extent. But the requirement of the appellant in the scheme is stated in Clause 9(12)(2) of the scheme, which reads as follows:

(2) Tamil Nadu Industrial Development Corporation Ltd., (TIDCO) (existing promoters):

(i) To agree to the proposed change of management in favour of M/s. Satidham Syntex Ltd., as also terms of OTS offered to institutions for revival

of the company.

(ii) To agree to step down from the board of the company on sanction of the scheme.

(iii) To agree to transfer entire equity holding in the company to the new promoters at a written down value.

17. The appellant is not required to do any sacrifice under the scheme except curtailing the right of shareholding.

18. From the above, it is clear that though the appellant is a State level

institution incorporated for the purpose of development of industries in the State, it is only an equity shareholder in the third respondent-company and is not required to make financial assistance by way of loans and advances or guarantee or relief or concession or sacrifice under the scheme. Thus, the appellant is not coming within the persons whose consent is required by the provision u/s 19(2) of the SICA. To put it in other words, the appellant cannot be regarded as a person, who has rendered financial assistance as required under the scheme, for the revival of the company, whose objection alone is required to be considered by respondents Nos. 1 and 2 as per Section 19(1) and (2).

19. In respect of the curtailment of rights of shareholders, there is express provision u/s 18(2)(f) of the SICA empowering the BIFR to make such reduction, which reads as follows:

The reduction of the interest or rights which the shareholders have in the sick industrial company to such extent as the Board considers necessary"

in the interests of the reconstruction, revival or rehabilitation of the industrial company or for the maintenance of the business of the sick industrial company.

20. Thus, the reduction of share value is authorised by law and the experts to their wisdom for revival of the company can do so.

21. The shares of a sick company are usually valued at zero since erosion of net worth has already taken place and the net value of the assets of

the company is negative, which is (-) 863.48 lakhs (accumulated loss of Rs. 1,537 lakhs less the assets available as on March 31, 2000, of Rs.

673.52 lakhs). Under the scheme, the share value of the company has reduced not only against the appellant alone but also other equity

shareholders such as Industrial Development Bank of India, which held 20.18 percentage of the shares and Industrial Financial Corporation of

India Ltd., which held 9.80 percentage of shares in the third respondent-company. For revival of the company, the statute vests with the Board

such a power. Circulating of the draft scheme to the appellant cannot alter the status of the appellant from equity shareholder as that of either

lender or assistance provider or sacrificer under the scheme for revival of the company in the absence of any such financial assistance offered by

the appellant. Hence, we find no irregularity either in the order of the AAIFR or in

the order of the learned single judge, who confirmed the same.

For the foregoing reasons, the writ appeal is dismissed. However, there is no order as to costs.