

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CM(M) 115/2008

COSMIQUE GLOBAL

..... Petitioner

Through : Mr. Rajeeve Mehra, Adv. with Mr. Pallav
Saxena, Ms. Divya Chaturvedi, Adv.

versus

INTERCRAFT LTD. & ORS

..... Respondents

Through : Ms. Maneesha Dhir, Adv. with Mr. Punesh
Arora, Adv. for Respondent No.1

CORAM:

HON'BLE MR. JUSTICE T.S. THAKUR

HON'BLE MS. JUSTICE ARUNA SURESH

1. Whether reporters of local papers may be allowed
to see the judgment? Not Necessary
2. To be referred to the Reporter or not? Not Necessary
3. Whether the judgment should be reported in the Digest? Not Necessary

ORDER

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28.01.2008

Per Thakur, J (oral)

This writ petition calls in question an order dated 31st December, 2007 passed by the Appellate Authority for Industrial and Financial Reconstruction whereby Appeal No. 274/2006 filed by respondent No.1 has been allowed and an order dated 29th August, 2006 by which the BIFR rejected the reference made by the said respondent set aside. Two precise questions fall

for determination of this Court. The first question is whether filing of a copy of an order passed by the DRT by which the sale in favour of the petitioner had been set aside violated the principles of natural justice inasmuch as the petitioner was not given an opportunity to produce an order passed by the appellate tribunal by which the petitioners were directed to maintain status quo in respect of the disputed property. The second question that arises for consideration is whether the Tribunal ought to have examined the question of respondent No.1 company being an industrial company within the meaning of Section 2(6) read with Section 3(2) of the IRDA Act, 1951. The question arises in the following factual backdrop:

2. The petitioner happens to be an auction purchaser of an industrial unit owned by respondent No.1 company but sold in auction proceedings held on 25th January, 2005 in execution of a decree passed against the said company by the Debt Recovery Tribunal (DRT), Delhi. A reference made by respondent No.1 in terms of Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 before the BIFR was rejected by the BIFR by an order dated 29th August, 2006 on the ground that the industrial unit had itself been sold in consequence of the decree aforementioned thereby rendering the reference untenable in law. Aggrieved by the said order of the BIFR, respondent No.1 company appealed to the Appellate Authority for Industrial and Financial Reconstruction. The appellate authority has set aside the order made by

the BIFR relying upon an earlier order passed by it in the case of M/s Krimpex Synthetics Ltd. V/s BIFR & Ors. Appeal No. 148/1995 disposed of on 1st August, 1996. The appellate authority also noted that the order by which the auction sale in favour of the petitioner had been confirmed by the Recovery Officer had been set aside by the DRT in an appeal preferred against the same by respondent No.1 judgment debtor. The appellate authority also held that the status of the company had to be seen by reference to the financial year in which the reference was made. The reference in the instant case having been made in the year 2002, the year relevant for determining the status of the company as a sick industrial unit was to be ending 31st March, 2001. As on 31st March, 2001, the company satisfied the triple requirements of being an industrial company, it being registered for a period not less than 5 years under the Companies Act, and the accumulated losses being more than the net worth of the company. Such being the position, the rejection of the reference by the BIFR was in the opinion of the Appellate authority not justified. The order was accordingly set aside and the matter remanded to BIFR to re-hear the reference and to decide the matter in accordance with law. Aggrieved by the said order, the petitioner auction purchaser has filed the present writ petition.

3. Appearing for the petitioner Mr. Mehra made a two-fold submission before us. Firstly he contended that the appellate authority had placed reliance upon the order passed by the DRT on

23rd November, 2007 setting aside the sale made in favour of the petitioner without so much as giving to the petitioner an opportunity of being heard in the context of the said development. It was submitted by Mr. Mehra that the appellate authority had heard the arguments and reserved orders in the appeal on 14th November, 2007 whereas the order which the respondent company had filed before the AAIFR was passed on 23rd November, 2007 and was presented to the AAIFR without any notice to the petitioner. This, according to Mr. Mehra, prevented the petitioner from pointing out to the BIFR that the order in question had been challenged by the petitioner by way of an appeal bearing No. 238/2007 before the Debt Recovery Appellate Tribunal in which the said Tribunal had passed an order on 19th December, 2007 directing the parties to maintain status quo. It was contended by Mr. Mehra that the procedure adopted by the Appellate authority had resulted in the violation of the principles of natural justice and caused prejudice to the petitioner apart from affecting the validity of the order passed by the Appellate Authority. It was alternatively submitted by Mr. Mehra that respondent No.1 company did not qualify to be an industrial company within the meaning of Section 2(f) read with Section 3(2) of the IDRA Act, 1951. He submitted that the appellate authority has not addressed that aspect of the matter and thereby failed to exercise its jurisdiction properly.

4. On behalf of respondent No.1, it was per contra argued by Ms. Dhir that the question

whether the respondent company was an industrial company within the meaning of the provisions mentioned above could be raised by the petitioner before the BIFR by moving an appropriate application under Section 13(2) of the SICA. She submitted that since the petitioner claimed to be a person interested, it was entitled to invoke Section 13(2) of the Act and urge the point sought to be urged in the present proceedings. She further submitted on instructions that in the event of an application being made under Section 13(2) of the Act, respondent No.1 company shall not question the locus standi of the petitioner to maintain such an application and to urge the points legally open to it. It was also submitted that the filing of a copy of order dated 23rd November, 2007 passed by the DRT before the AAIFR did not violate any principle of natural justice especially when the petitioner was not assailing question the genuineness of the order or the fact that the order of confirmation of sale in its favour had indeed been set aside by the DRT.

5. We have given our careful consideration to the submissions made at the bar. We do not think that the filing of a copy of order dated 23rd November, 2007 passed by the DRT whereby the sale confirmation in favour of the petitioner had been set aside could be said to have resulted in violation of principles of natural justice. An order passed by a judicial or quasi judicial authority could always be taken note of by the appellate authority while disposing of the appeal pending before it. The fact that an appeal had been preferred against the order passed by the

DRT could indeed have been pointed out by the petitioner but the fact that it was not so pointed out does not in our opinion make any material difference in the peculiar facts and circumstances of the case. We do not therefore consider it necessary to interfere with the order passed by the AAIFR in appeal.

6. In so far as the alternative submission made by Mr. Mehra, namely, that the AAIFR has not examined the question whether respondent No.1 was an industrial company within the meaning of Section 2(f) read with Section 3(2) of the IDRA Act, 1951 is concerned, we are of the view that the said failure also would not call for any interference with the said order. It is true that the AAIFR could have examined the aspect mentioned above especially when any finding on the same was likely to conclude the proceedings one way or the other but the very fact that AAIFR has not in its wisdom considered it necessary to do so should not result in the setting aside of the order made by it. We say so because the question whether respondent No.1 company qualifies to be an industrial company within the meaning of Section 2(f) read with Section 3(2) of the IDRA Act, 1951 remains open and can be urged by either of the parties or any other party interested in proceedings and determined by the BIFR to whom the proceedings have been remanded back. In order to make it easy for the petitioner to agitate that aspect, Ms.Dhir appearing for respondent No.1 has made a specific statement that if an application under

Section 13(2) of the SICA is moved by the petitioner, the same shall not be opposed by respondent No.1 on the ground of locus standi. That being so, we see no reason why the petitioner cannot invoke Section 13(2) and seek determination of all such issues and questions as may be legally open to it including the question whether or not respondent No.1 company is an industrial company within the meaning of Section 2(f) read with Section 3(2) of the IDRA Act, 1951. Needless to say that the BIFR shall be free to examine all aspects and contentions as may be legally open to the parties even in regard to the maintainability of the proceedings before it. With the above observations and reserving liberty for the petitioner to agitate the matter before the BIFR under Section 13(2) of the SICA, we dispose of this petition leaving the parties to bear their own costs.

T.S. THAKUR,J

ARUNA SURESH, J

JANUARY 28, 2008
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