

Unreportable
IN THE HIGH COURT OF DELHI AT NEW DELHI

+WP(C) Nos.1322/2007, 4461 and 8295/2007

Date of Hearing: 14.11.2007

Date of Decision: 11.01.2008

#Cement Shramik Sangh
CCI Cement Factory Men's
Union (INTUC)
DGU Cement Factory
Employees Union

....Petitioner in WP(C) No.1322/2007

....Petitioner in WP(C) No.4461/2007

....Petitioner in WP(C) No.8295/2007

!

Through: Vivek Sibel with
Mr.Sumesh Dhawan and Mr.Prabal Bagchi

Versus

\$Cement Corporation of India
Ltd. and Others

.....Respondents

^

Through Mr.K.P. Pathak, ASG with
Mr.Rakesh Tikku, Mr.Dalip Mehra,
Mr.Gaurav Duggal, Mr.Shailender Sharma,
Mr.Arijit Prasad and Mr.Sandeep Prabhakaran
for CCI & UOI

CORAM :-

***THE HON'BLE MR.JUSTICE A.K.SIKRI**

THE HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether Reporters of Local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

A.K. SIKRI, J.

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1. M/s. Cement Corporation of India Limited (hereinafter called 'the Company') is a public sector company incorporated under the Companies Act. It comes under the administrative control of the Ministry of Heavy Industry and Public Enterprises, Department of Heavy Industries, Government of India, Udyog Bhawan, New Delhi. The company was incorporated with main business activity of the production of cement and its sale thereof at a time when there used to be severe shortage of cement in India. Over a period of time it expanded its operation and in the year 1996 it owned 12 units at different places in the country. It, however, started suffering losses and its net worth was eroded. Being an industrial company under the Sick Industrial Companies (Special Provisions) Act, 1985 (in short 'SICA'), it filed reference under Section 15(1) of the SICA. Vide orders dated 8.8.1996, the Board for Industrial and Financial Reconstruction (in short 'BIFR') declared it to be a sick industrial company within the meaning of Section 3(1)(o) of the SICA and appointed FICI as the Operating Agency under Section 17(3) of the said Act. On 10.2.1998, the BIFR directed the Operating Agency to prepare a Draft Rehabilitation Scheme (DRS) based on One-Time Settlement (OTS) of the dues payable to the financial institutions envisaging the payment of entire principal and 50%

of the simple interest as on 31.3.1998 and irregularities in Working Capital Account of the banks as on the same date, payable out of the proceeds of Yerraguntla unit within one month of the sanction of the scheme. The BIFR accordingly directed sale of the Yerraguntla Plant. This plant was sold to M/s. India Cement Limited at a consideration of Rs.200.70 crores. After sale of this plant, the company now owns 11 units. It is also not in dispute that as on the date of filing the reference with the BIFR, except three units at Bokajan, Rajban and Tandur, all other were non-operating units and continued to be so.

2. Without going into further details of developments which took place in the proceedings before the BIFR, at this stage, we would like to point out that in March 2001, the Operating Agency had reported that the company was not serious in reviving itself and their losses had been increasing day by day. This had led BIFR to pass orders dated 2.11.2001 issuing a show cause notice to the company/promoters for having arrived at a *prima facie* opinion for the winding up of the company under Section 20(1) of the SICA. Thereafter, the company was directed to form an Asset Sale Committee (ASC) on 30.10.2002 with the direction to sell the specific units of the company within a time frame of six months from 15.12.2002. Many other directions were also given. However, in the year 2004, the company had submitted a proposal for its

revival, *inter alia*, envisaging closure of seven non-operating units and operation of three operating units at Bokajan, Rajban and Tandur after modernization/expansion of the installed capacity. On that basis, the Operating Agency was again directed to draw a suitable rehabilitation scheme as the Government of India had shown its interest by inducting funds. DRS was prepared and circulated by the BIFR inviting objections/suggestions. After considering the objections, the BIFR passed orders dated 21.3.2006 approving the rehabilitation scheme envisaging revival of three operating units by inducting funds out of sale proceeds of seven non-operating units. Non-operating units, which were to be sold, are situated at Charkhi Dadri, Nayagaon, Adilabad, Akaltara, Mandhar, Kurkunta, Bhatinda, Yerraguntla and Delhi Grinding Unit.

3. Employees of Nayagaon and Adilabad units through their unions challenged this order by preferring appeal before the Appellate Authority for Industrial and Financial Reconstruction (in short 'the AAIFR') being Appeal Nos.93/2006 and 120/2006. Vide orders dated 3.7.2006, the AAIFR directed maintenance of status quo. Employees of Delhi Grinding Unit, though did not file any appeal, instead filed replies to the said appeals preferred by two unions of Nayagaon and Adilabad units supporting the said appeals. These appeals were heard by the AAIFR and have been dismissed vide order dated 17.11.2006.

4. The two unions of Nayagaon cement factory and Adilabad cement factory have filed their separate writ petitions assailing orders dated 17.11.2006 passed by the AAIFR. Third writ petition is filed by the employees union of Delhi Grinding Unit. This is how all the three writ petitions assailing the same order were heard together and we propose to decide the same by this common judgment.
5. As per the scheme sanctioned by the BIFR and upheld by the AAIFR, seven units are to be sold. This course of action is taken for infusing funds to rehabilitate three units, which are still operating but are suffering losses, as it is found necessary to modernize these units to make them viable. The three unions, which have filed these writ petitions, belong to those three units which are in the list of seven units proposed to be sold. Obviously with the sale of those units they would be closed down by the company and the employees of these three units would lose their employment. It is precisely for this reason that after the dismissal of appeal by the AAIFR, the company has issued a circular dated 1.2.2007 coming out with the “CCI Voluntary Separation-2007”, which, *inter alia*, envisages that the company is filing closure applications in respect of seven non-operating units as per the provisions of Industrial Disputes Act, 1947. The employees are given chance to opt for VSS-2007. On the same date, another circular was issued by the

company which is a notice under Section 25(O) of the Industrial Disputes Act for closure of seven units, including these three units seeking permission from the Ministry of Labour for such closure. The employees of these three units do not want that these factories be closed and, therefore, they have challenged the revival scheme, as approved by the BIFR as well as the AAIFR.

6. The order of the AAIFR, vide which two appeals were dismissed, is detailed one giving account of the events which took place after the company was declared sick by the BIFR and also discusses the main provisions of the draft rehabilitation proposal whereby, after detailed study, it was deemed fit to close down the non-operating units and revive the three operating units so that they are made viable and profitable ;by infusing funds on those units to modernize them.
7. Learned counsel for the petitioners at the time of arguments could hardly point out any infirmity in the impugned orders. However, the neat argument, which was advanced by the counsel, was that the entire matter needed a fresh look only because of purported change in the circumstances. It was strenuously argued that in last few years, cement industry in India had thrived and there was tremendous scope for the factories producing cement because of sharp spurt in the demand of cement as a result of augment in the infrastructural and construction

activities in the country. A fervent appeal was accordingly made that the matter be referred back to the BIFR for consideration afresh after taking into account the aforesaid significant development, which was taking place as it was now possible to revive all the units and matter be given a fresh look.

8. We are of the opinion that the aforesaid argument cannot be considered in isolation and one will have to look into the history of this case ever since the reference of the company under Section 15 of SICA before the BIFR. The company was incorporated in 1965 as a wholly owned undertaking of the Government of India. The Corporation started incurring losses from 1984-85 onwards and its net worth was completely eroded by 31.3.1995. In fact, the Group of Ministers in its meeting held on 8.3.1995, had accorded in principle approval for the sale of all the 11 units, including Adilabad and Nayagaon Units.
9. Reference was made to BIFR some time in the year 1995. On 8.8.1996, BIFR declared it to be a sick industrial company and appointed IFCI as the Operating Agency. First DRS was circulated on 12.6.1998 but the scheme could not be sanctioned because of lack of firm commitment from the Government of India to provide funds to the tune of Rs.41.60 crores. A second attempt was made in November 1999 to revive the company and a DRS was submitted by IFCI to BIFR in November 1996,

but the same could not be circulated because of lack of firm commitment by the Government of India. A third attempt was made in March 2001 when BIFR directed sale of all units of the company on 'as is where is' basis individually or collectively, with or without liabilities and later constituted an Asset Sale Committee (ASC) for this purpose. Response was invited but only two bids were received and these were for the Rajban plant alone. These two bids were also rejected on 27.1.2004 because the bid amount was below the reserve price. All seven plants of the company, namely, Akaltara, Mandhar, Kurkunta, Nayagaon, Akaltara, Charkhi Dadri and Delhi Grinding unit had become non operative between June 1996 and February 1999 due to heavy losses. A fourth attempt was initiated on 18.4.2002, when the Government of India directed the company to take advance action for closure of all the seven non operational units under the Industrial Disputes Act, 1974 and offer benefits of Voluntary Retirement Scheme (VRS)/Voluntary Separation Scheme (VSS) to the employees as per guidelines approved by the Department of Public Enterprises (DPE). The company was also directed to obtain permission for closure of the seven non operational units in the event the sale of these units as "going concern" did not materialize. On 28.4.2004 Government of India directed the company to approach the Ministry of Labour for obtaining

approval for closure of the seven non operating units. The company sought approval of Department of Heavy Industry for filing the application before the Ministry of Labour. In the meantime, the Department of Heavy Industry decided to take an overall view of the revival of the company as a whole instead of proceeding on a piecemeal basis. Accordingly, the company submitted a proposal in September 2004 for modernization/expansion of three operating units and sale of seven non operating units. On 11.11.2004, the BIFR directed the Operating Agency (IFCI) to prepare a fresh DRS for CCI in consultation with the secured creditors. This was the fifth attempt made by BIFR to revive the company. The proposal formulated by the company/Operating Agency in pursuance of the directions was subjected to techno/financial appraisal by M/s. Holtee Consulting Pvt. Ltd. and IFCI respectively. The appraisal brought out that if revival is undertaken as per proposal formulated by the company, the profit from the three operating units would increase from Rs.12.09 crores in Financial Year 2004/2005 to Rs.88.40 crores in Financial Year 2009/2010 provided these units were suitably modernized and upgraded. The said proposal submitted by the OA after examination at different levels by specialized agencies had taken the final shape of a revival scheme dated 3.5.2005.

10. The proposal for rehabilitation envisaged two phases of implementation.

The first phase of the implementation was to be funded entirely by the Government of India, which included OTS of dues of Financial Institutions/Banks/secured creditors and payment of employees' arrears/VRS/VSS to workers in the seven non-operating units. The said proposal was considered at a joint meeting of secured creditors, Government of India and the company on 17.5.2005 when Financial Institutions, namely, IDBI and IFCI were agreeable in principle to accept the proposal after discussion. On the other hand, banks separately considered the proposal in a meeting held on 25.5.2005. After examining the said proposal the OA submitted a report to BIFR on 10.6.2005. The Department of Heavy Industries (DHI) after perusing the report submitted by the Operating Agency came to the conclusion that the post restructuring strategy envisaged operating three plants and maximizing profits by simultaneously increasing production and reducing cost of production of cement. After modernization, the capacity utilization of Tandur Unit was expected to reach 80% (from an average of about 36% during the last three years) and the cost of production was expected to come down significantly due to reduction in energy consumption. In respect of Rajban unit, it was proposed to induct Rs.6.80 crores for expansion. The unit was expected to reap the

benefits of Excise Duty holiday for ten years, as per the Government's Policy available to a plant undergoing an expansion by 25% in Himachal Pradesh. Similarly, the proposed expansion by 100% of the Bokajan unit would entitle it to receive Excise Duty waiver of Rs.90.51 crores as per the policy package applicable to the North Eastern Region. The Board for Reconstruction of Public Sector Enterprises (BRPSE) which is the higher administrative level set up in Government of India for consideration/vetting of such proposals, is of the opinion that if the revival of the company as per the proposed DRS is undertaken, the profit from the operation of three viable units after expansion/modernization would increase from Rs.12.09 crores in Financial Year 2004-05 to Rs.88.40 crores per annum by the year 2009-10. The Government of India, which was the owner, is willing to provide funds in the first phase of implementation for settlement of dues of creditors based on OTS. After the views of the Government of India was made available, a Draft Rehabilitation proposal was presented to BRPSE on 2.9.2005 for its consideration. BRPSE after examining the proposal submitted by the company/operating agency and after taking into account views of the Government of India recommended the following revival package to be implemented in two phases:-

- (i) Modernization/expansion of three operational units,

namely, Bokajan, Rajban and Tandur and sale of the remaining seven non operational units.

(ii) Fresh infusion of Rs.184.29 crores by the Government of India in Phase 1.

11. Out of this, Rs.30.67 crores were for expansion of the three units which are to be revived and Rs.153.62 crores is to be utilised as non-planned expenditure mainly for payment of OTS dues to the secured and unsecured creditors, including banks, employees' dues as well as payments to be made to workers of the seven units to be closed as VRS, VSS and retrenchment compensation. The scheme further provided that the remaining requirement of funds for rehabilitation would be made in Phase II from sale of assets of seven non-operational units which are expected to generate a total of Rs.617.76 crores. This proposal was looked into by the Committee of Secretaries on the direction of the Cabinet Committee on Economic Affairs (CCEO). The Committee of Secretaries in its meeting held on 16.11.2005 agreed with the aforesaid recommendations of the BRPSE for closure of seven non-operating units and sale of their assets as well as for expansion/modernization of three operational units, waiver of interest on Government loan and fresh fund infusion from the Government. After all this exercise was done and placed before the BIFR, the BIFR circulated DRS, invited

objections and ultimately sanctioned the said scheme.

12. We may also note that after the circulation of the DRS on 5.12.2005, a Cabinet Note was prepared by the Department of Heavy Industries in which approval of the policy package containing aforesaid and other terms was sought. The Government of India in the Cabinet meeting held on 9.3.2006 approved the policy package and only thereafter the BIFR had sanctioned the rehabilitation scheme. It is clear from the aforesaid narration of events, which are taken note of by the AAIFR in greater details, that it was the fifth attempt to revive the company which has ultimately seen the silver lining inasmuch as, after considering the package at various levels in the Government, the Cabinet ultimately approved the same. In the process by the time the BIFR sanctioned the scheme of revival, more than 10 years had passed since the filing of the reference. However, the said revival process has yet to be implemented, the petitioners challenged the order of the BIFR before the AAIFR and after dismissal of the appeal, present writ petitions have been filed, which has delayed the implementation of the approved scheme.

13. In a recent judgment rendered by us in WP (C) No. 7143/2007 entitled ***Nasik People's Co-operative Bank Ltd. v. M/s. Datar Switchgear & Anr.*** decided on 31.10.2007, we highlighted the need for balancing the interest of the sick company as well as creditors, which also necessitate

immediate revival efforts to be made by the BIFR, etc. We reproduce the following observations from the said judgment :-

“14. As pointed out above, whenever a company becomes sick and insolvent, the decision of creditors in the process of revival of such a company becomes delicate. In any insolvency regime, there is an apparent conflict between the issues involved, namely, recovery of the dues of the creditors from the insolvent company, restructuring/ rehabilitation of the insolvent company and effective liquidation process/system to ensure timely liquidation of the companies which cannot be revived. Interests of all groups concerned with these aspects are paramount: whether it be of creditors in the recovery of their debts or that of an insolvent company seeking revival. Above all, public interest, including the economic interest of the nation which is paramount, is subserved only when interest of all the aforesaid groups is protected. It is for this reason that the balancing of these purported rival and antagonist interests becomes a delicate task. All categories of creditors and investors in a company would like to put their money at stake only if they are reasonably confident that they would be able to recover the money invested; be it shareholders, debenture holders or financial institutions giving credit to such a company. Not only they want reasonable returns on the money invested, they want recovery of their investment also in the time of need. If a feeling is generated that money invested may be put in jeopardy, investors may stop making investments. These financial institutions, in turn, mobilize their resources from small investors. Therefore, protection of creditors rights in any system, is *sine qua non* of a healthy economy. For this reason municipal laws in almost all countries provide the mechanism whereby creditors are able to have recourse to law for recovery of their dues.

15. It is equally important that when an industrial company becomes insolvent first attempt has to be made to rehabilitate and restructure such a company. The reason is obvious. Insolvent industrial companies, when they remain insolvent, result in blockage of sizeable national resources which may have cascading effect on all sectors of economic and social

life of the nation. It may, in addition, put the creditors in a spot as it becomes difficult to recover their dues in such an eventuality. The ill-effects of insolvency in industrial companies would be loss of production, loss of employment, loss of revenue to Central and State Governments and locking up of investible funds of banks and financial institutions....”

14. If one has regard to the aforesaid considerations, merely on the *ipsi dixit*

of the petitioners that because of the alleged change in the scenario in so far as cement industry in the country is concerned, it is not possible to give a complete go-by and start the process afresh. We say so because of the following additional circumstances which are apparent in the present case:-

- a) Seven plants in respect of which decision is taken to sell the same became non-operative between June 1996 and February 1999 due to heavy losses. Therefore, these are not in operation for last number of years;
- b) The three units, which are operational, need modernization/expansion to make them viable. This requires funds;
- c) Apart from Rs.184.29 crores which the Government of India has agreed to invest, there is need for further substantial amount for the modernization/expansion of these units. This money can be generated by sale of seven units;
- d) The decision to close seven non-operating units was based on the techno-economic feasibility. The Consultants after conducting indepth study

analysis had formed their opinion that the seven non-operating units were not viable for the following reasons:-

(a) The units are lying non-operational for a considerable period of time as such plant and machinery had become old and obsolete.

(b) The capacity utilization of these units were very low;

(c) These units never had operational profits.

(d) Cost of production in those units was higher than the selling price.

(e) All the seven non-operational units require major upgradation, which is non feasible.

(f) The losses suffered by the 7 non-operating units till 2004-05 runs to the tune of Rs.1828.11 crores as under:

Adilabad	:	Rs.206.51 Cr.
Nayagaon	:	Rs.196.31 Cr.
Mandhar	:	Rs.171.21 Cr.
Kurkunta	:	Rs.118.45 Cr.
Akaltara	:	Rs.330.55 Cr.
Charkhi Dadri	:	Rs.149.32 Cr.
Nayagaon-Delhi:		Rs.655.76 Cr.

Total	:	----- Rs.1828.11 Cr. -----
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15. Apart from the above, if these units are not closed and sold off, there is a recurring liability. In addition, the company has been paying idle wages for these units. In respect of Nayagaon and Adilabad units alone there are losses of more than Rs.150 and Rs.113 crores respectively. Idle wages paid to the workers, ever since these units became non-operative, are to the tune of Rs.26.70 and Rs.27.21 crores till March 2006. Keeping in view all these considerations, the Government of India had taken a conscious decision for closing these unviable units.

16. The AAIFR also found that the object behind setting up of Nayagaon unit also lost with the passage of time since clinkerisation units with 10 lakh TPA was required along with two split grinding units at Delhi and Bhatinda. While clinkerisation at Nayagaon and grinding unit at Delhi commenced commercial production in 1990, Bhatinda unit could not be installed/commissioned on account of non-receipt of environmental clearance. Subsequently, the grinding unit at Delhi has also become non-operative, rendering the project at Nayagoan infructuous.

17. It was because of the aforesaid circumstances that a conscious decision

was taken by the Government of India to close down these unviable units. The purpose, therefore, sought to be achieved, is two-fold. Not only to get rid of the unviable units which are adding to mounting losses, at the same time utilise the funds generated from the sale of those units to make running units viable. With this process at least three units, which are operational, have good chance to become profitable and because of this reason, the company will revive and shall not be forced to wind up. Thus, even though it may appear to be harsh to seven units, the move is the only possible solution to save at least other three units as the other alternative was to close all units and wind up the company, which was a tentative opinion formed by the BIFR on an earlier occasion. If that happens, in so far as the petitioners herein, namely, unions of three units are concerned, they will face closure in either case.

18. We are sitting in judicial review of the orders passed by the BIFR and the AAIFR. The sequence of events narrated above also discloses that these orders are passed after taking into consideration all relevant factors by the experts in the field putting their heads together. Therefore, we do not find any reason to interfere with the exercise done by the experts, which is thoroughly gone into by the BIFR before approving the rehabilitation scheme and upheld by the appellate forum.

If there is further delay in implementation of such a scheme, it may defeat the very purpose and may cause incalculable harm which may neither be proper for the employees of the seven units which are facing closure but also for remaining three operating units which see a clear possibility of revival. We, therefore, do not find any merit in any of these petitions and consequently dismiss the same. Since the petitioners are the three unions representing their workers, we intend not to impose any costs, though we had otherwise inclination to do so.

(A.K. SIKRI)
JUDGE

January 11, 2008
HP.

(VIPIN SANGHI)
JUDGE

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For orders, see WP (C) No. 1322/2007.

**(A.K. SIKRI)
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