

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on : 08.10.2009

Judgment delivered on: 21.10.2009

+ **W.P.(C) 8361/2008**

CATHOLIC SYRIAN BANK

..... Petitioner

- versus -

**BOARD OF INDUSTRIAL AND FINANCIAL
RECONSTRUCTION & ORS**

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr P.I. Jose with Mr B.K. Mishra,
Advocates

For the Respondent : Mr C. Mukund with Mr Ashok
Kasera, Advocates for respondent no. 2

CORAM:-

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MS. JUSTICE VEENA BIRBAL

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

VEENA BIRBAL, J.

1. By way of present petition under Article 226 and 227 of the Constitution of India, petitioner has challenged impugned order dated 03.03.2008 passed by the Appellate Authority for Industrial and Financial Reconstruction, New Delhi (hereinafter referred to as 'AAIFR') wherein it is held that respondent no.2 is no more a sick industrial company under Section 3(1)(o) of Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as

‘SICA’) as its net worth has turned positive as such Board for Industrial and Financial Reconstruction (hereinafter referred to as ‘BIFR’) as well as AAIFR ceases to have any jurisdiction over the said company.

2. Briefly the facts necessary for disposal of present writ petition are as under:-

On 22.06.1998, respondent no. 2, i.e., Dunlop India Ltd was declared a sick industrial company in terms of Section 3(1)(o) of SICA and IDBI (Industrial Development Bank of India) was appointed as the O.A. (Operating Agency) under Section 17(3) of SICA to examine the viability of the company and submit its report for its revival. Subsequently, the O.A. was changed and State Bank of India was appointed as the O.A. After several hearings, the BIFR vide its order dated 19.10.2001 directed the company to sort out all issues and submit its Draft Rehabilitation Scheme through O.A. within 60 days. Pending approval of draft rehabilitation scheme, on 31.08.2006 and on 06.11.2006, respondent no. 2 filed applications before BIFR seeking its permission for issue of Rs. 2 crore equity shares of Rs. 10/- each fully paid up at par to its promoters and/or its associates on private placement basis against full consideration to be utilized for rehabilitation of the company and passing further specific directions incidental thereto for the purpose of listing these shares in stock exchanges in dematerialized form. On the basis of above

request of respondent no. 2, the BIFR passed an order dated 16.03.2007 permitting the company to enhance its authorized share capital from Rs. 70 crores to Rs. 75 crores. The company was further permitted to issue equity shares of face value of Rs. 10/- each worth Rs. 27 crores, at par, on rights basis against payment of full consideration within a period of one month from the date of the order by exempting respondent no. 2 from compliance of the requirements under various Acts/Regulations formulated by Securities and Exchange Board of India (SEBI) and stock exchanges as applicable. The said order was challenged by the petitioner as well as SEBI and BSE by filing separate appeals before AAIFR which were disposed of by common impugned order dated 03.03.2008 contending that the impugned order could not have been passed as no scheme under Section 18(1) of SICA had been prepared by the O.A. The SEBI and BSE had raised other contentions also which are not relevant for the disposal of present writ petition as they are not before us nor it is informed that they have challenged the impugned order. It was also contended before BIFR that no notice was given to the secured creditors by the BIFR before passing the impugned order. On the other hand, the stand of the respondent before the Tribunal was that there was no necessity to hear them and BIFR was totally justified in passing the impugned order for revival of the company by exempting the company from provisions of various Acts/Regulations. During the pendency of the appeal, the respondent company submitted the

judgment of Madras High Court in W.P.(C) No. 24422/2006 wherein it is held that Dunlop India Ltd i.e., respondent no. 2 ceases to be a sick industrial company. The Madras High Court examined the audited balance sheet of the respondent company and noted that the audited balance sheet of the company as on 31.03.2007 was showing a positive net worth and the company had already moved an application before the BIFR praying for de-registration of the case which had not been disposed of for 9 months. It was held by Madras High Court that the respondent no. 2 ceases to be a sick company and BIFR cannot retain its jurisdiction over the company any further. In view of the judgment of Madras High Court, AAIFR held that as the net worth of the company had turned positive and company was no more a sick industrial company under Section 3(1)(o) of SICA, the BIFR as well as AAIFR ceased to have any jurisdiction over it and dismissed the appeal on that ground.

3. Aggrieved with the same, the present petition is filed.

4. Learned counsel for petitioner has contended that respondent no. 2 has shown profits by sale of assets, as such, it should not have been deregistered from BIFR. In this regard, learned counsel has referred to the order of BIFR dated 23.07.2007. It is contended that vide said order, explanation from respondent no. 2 was sought as to why immovable assets of the company had been sold without the permission of BIFR when restrictions under Section 22 of SICA were in force and further, why action should not be taken against the

company/its Directors/officials under Section 24 of SICA and nullify the sale/transfer. It is contended that in the said order, BIFR also noted the contention of O.A. (SBI) that profits are there on account of sale of its assets/shares due to which the net worth has been shown positive and the same was not acceptable being not within the objectives of SICA.

Learned counsel for the petitioner has also contended that the company was declared sick on 22.06.1998 under Section 22 of the SICA due to which, petitioner was prevented from initiating any action for recovery of its dues for almost 10 years. It is further contended that had the company not been declared sick, petitioner would have had legal recourse against all those properties which have been now sold by the respondent no. 2 to its sister concern. It is contended that due to said act of respondent no. 2, petitioner has been restrained from proceeding against those properties. As such, rights of petitioner have been materially affected.

It is further contended that the impugned order of AAIFR, has restrained BIFR from looking into the correctness and legality of the balance sheet submitted for determining the sickness of the company.

5. On the other hand, the learned counsel for the respondent has contended that petitioner has no *locus standi* to challenge the impugned order dated 03.03.2008 passed by the AAIFR. It is contended that vide impugned order, petitioner has challenged the correctness of the order of BIFR dated 16.03.2007 which had

permitted the respondent company to issue equity shares of face value of Rs. 10/- each, worth Rs 27 crores at par, on rights basis, against payment of full consideration. It is contended that the said order has not affected the rights of petitioner against respondent no.2 in any manner. It is not contended that the said order has not been challenged by any shareholder of the company. Rather, it has helped the company to come out of its sickness and rehabilitate itself.

6. It is further contended that petitioner is a secured creditor. It cannot contend that a company should remain a sick industrial unit or that rehabilitation should not be done in a particular manner, as is contended in the present matter. It is further contended that petitioner is having sufficient security of the respondent company to secure the alleged dues of the petitioner as property situated at Malabar Hill, Flat No. 59 on 4th floor, Block No. 5 in Hill Park Estate, Mumbai - 400006, value of which is more than the alleged dues, is mortgaged with the petitioner Bank and the said property has not been alienated in any manner by the respondent no. 2 company. As such, petitioner has no *locus standi* to question the manner in which the respondent no. 2 is rehabilitating itself. It is further submitted that all the dues of other financial institutions have been cleared by the respondent company except the dues of petitioner Bank as it has refused to settle the matter with the respondent no. 2 and is challenging the impugned order of AAIFR. It is contended that impugned order dated

03.03.2008 records that the company has come out of its sickness, against which, the petitioner Bank should not have any grievance as the same does not affect the right/interest of the petitioner Bank in any manner.

It is further contended that petitioner has already acted upon the order of AAIFR by filing recovery proceedings of its alleged dues before the Debts Recovery Tribunal, Calcutta. As such, it is estopped from challenging the correctness of the said order. It is further contended that the said fact of filing O.A. for recovery of the dues is concealed by the petitioner in the writ petition, as such, petitioner is not entitled for discretionary relief of this court. It is further contended that the present petition is barred by delay and laches.

7. We have heard learned counsel for the parties and gone through the material on record.

8. As noted above, the respondent no. 2 was declared a sick industrial undertaking in terms of Section 3(1)(o) of the SICA on 22.06.1998. O.A. had been appointed and after several hearings before the BIFR, it directed, vide its order dated 19.10.2001, respondent No.2 to submit the Draft Rehabilitation Scheme to the O.A. within 60 days. Thereafter, on the applications dated 31.08.2006 and 06.11.2006 of the respondent no. 2 before BIFR, seeking permission of BIFR for issue of 2 crore equity shares, which was allowed vide order dated 16.03.2002 of BIFR, petitioner has shown its grievance and

challenged the same before the AAIFR by filing an appeal. It has been brought to our notice that pursuant to order of BIFR dated 16.03.2007, rights issue was opened on 02.04.2007 and on 25.04.2007, the same was fully subscribed by the shareholders without any objection. AAIFR, following the decision of Madras High Court in W.P.(C) No. 24422/2006, vide impugned order dated 03.03.2008 has held that the net worth of respondent company has turned positive and, as such, it is no more a sick company under Section 3(1)(o) of SICA and has held that BIFR as well as AAIFR cease to have any jurisdiction. The order of the Madras High Court which has been quoted in the impugned order dated 03.03.2008 of AAIFR is as under:-

“10. However, the crucial question that is to be decided in this case is whether as a result of the net worth of the respondent company i.e. DIL having turned positive as on 31.3.2007, the jurisdiction of the BIFR and the AAIFR under SICA ceases to exist. The Hon’ble High Court of Judicature at Madras in W.P. No. 24422 of 2006 in the judgment dated 19.12.2007 in Dunlop India Limited Vs. Container Corporation of India has held as follows:

“17. When the accumulated losses exceed the share capital and revenue reserves based on the audited balance sheet as at 31st December, 1997, the matter was referred to BIFR under SICA, 1985 and was thus registered as a sick company. The audited balance sheet of the petitioner company as at 31/3/2007 shows a positive net-worth. The net worth of the petitioner company based on the audited Balance Sheet for the past ten years as furnished by the petitioner is as under:-

Financial year ended	Accumulated Profit/Loss (Rs in crores)	Net worth (Rs in crores)
31.12.1997	(135.81)	-(86.91)
31.03.1999	(235.03)	-(192.88)
31.03.2000	(296.06)	-(252.21)
31.03.2001	(385.44)	-(332.99)
31.03.2002	(474.01)	-(421.56)
31.03.2003	(513.24)	-(460.79)
31.03.2004	(477.22)	-(428.12)
31.03.2005	(482.68)	-(433.58)
31.03.2006	(410.80)	-(361.70)
31.03.2007	78.76	+242.65

18. Pursuant to financial restructuring, the petitioner transferred certain assets to its wholly owned 100% subsidiary companies, which in consideration of such transfer allotted fully paid-up equity shares to the petitioner. The surplus arising out of such transfer has inter alia set off the accumulated losses of the petitioner company. The waiver of liabilities arising out of one time settlement by banks and creditors, with necessary induction of funds by new promoters also contributed to the positive net worth. Disclosure to this effect has been made in the audited and published Balance Sheet of the petitioner as 31st March, 2007 which has been approved by the members of the company in the 80th Annual General Body Meeting held on 19th July, 2007.

19. As the net worth of the petitioner company has turned positive, it filed an application in BIFR Case No. 14 of 1998 on 23rd April, 2007 inter alia praying for an order directing deregistration of the case pending before the BIFR. The BIFR did not dispose of this matter even after lapse of 9 months. It is informed that there was a hearing before BIFR on 23rd July, 2007 but no order was passed by BIFR with regard to deregistration. Except recording the summary of the proceedings BIFR

maintained nothing happened. This was drawn to the attention of AAIFR but without any result.

20. From the above, it is evident that the petitioner ceases to be a sick company. The BIFR can not retain its jurisdiction over the petitioner company any further. As per Section 3(1)(o) of SICA, 1985, “Sick Industrial Company” means an industrial company (being a company registered for not less than five years) which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth and net worth means the sum total of the paid up capital and free reserves. Section 17 of SICA, 1985 uses the following expressions:

Section 17(1) – “make its net worth exceed the accumulated losses”

Section 17(2) – “make its net worth exceed the accumulated losses”

Section 17(3) – “make its net worth exceed the accumulated losses”

21. From the audited balance sheet of the petitioner company as at 31st March, 2007, it is clear that the net worth has become positive as it had wiped out the entire accumulated losses. The statutory auditors have certified to that effect. The new entrepreneurs had brought in huge funds and running both the units at Bengal and Tamil Nadu. It has also paid of substantial loans and creditors. Thus the units have been revived.

22. There is no provision either in the Act – SICA, 1985 or in the BIFR Regulations, 1987 specifically providing for deregistration of a reference when the net worth becomes positive wiping out the accumulated losses. When the petitioner company has attained viability, there is no question of BIFR being concerned with the sick company any longer. The erstwhile sick company is not specifically required to make a formal application to the BIFR for withdrawing its jurisdiction when the company’s net worth becomes positive. There is no express provision in the Act which indicates when the BIFR loses its jurisdiction with regard to a company which was once sick. The SICA, 1985 is all about making a sick company healthy and there are lot

of detailed provisions regarding the executive financial aspects of infusing such health into a sick company. But many legal aspects are left not provided for in the Act. One such important absence is a provision as to when the company is again free and the creditors as well as all other parties are again free to proceed against the company. When, however, obvious answers are not provided by obvious express words used by Parliament itself, the Courts fill up the gap. There is absolutely no doubt that once a company ceases to be a sick industrial company as defined by the SICA, 1985, all proceedings taken by the BIFR in relation to it must thereafter absolutely cease. The question crying loud for an answer is whether the BIFR can come to a conclusion as to the loss of its own jurisdiction in relation to any particular company which was once sick and has ceased, at least for the time being, to be sick any longer. In the absence of an express provision allowing a Tribunal to decide about its own jurisdiction, the age-old principle must be applied that an authority cannot aggregate jurisdiction to itself and accordingly it is incompetent to decide about its own jurisdiction. The Courts decide about their own jurisdiction because there is no other authority which can decide it for them, that is to say, which is at a level higher than these ordinary Courts, so as to be liable to decide it for them.

23. The sickness or otherwise of an industrial company is to be decided ex facie on the basis of the audited Balance Sheet of the petitioner company showing positive net worth and other circumstances and when the net worth becomes positive BIFR ceases to have any jurisdiction. The petitioner Company has thus ceased to be a Sick Industrial Company within the meaning of Clause (o) of Sub-Section (1) of Section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985 and BIFR ceases to have jurisdiction over Case being Case No. 14/1998.”

9. The aforesaid decision of Madras High Court has not been challenged by the petitioner. Following the decision of Madras High

Court, impugned order dated 03.03.2008 is passed by the AAIFR and respondent no. 2 has been revived and has become healthy and has come out of purview of BIFR. Learned counsel for respondent No.2 has informed that no other secured creditor or any worker/ shareholder has challenged its revival and said position is not denied by learned counsel for petitioner.

10. Keeping in mind the above background, the contentions of the petitioner are being dealt herewith by us.

11. One of the contentions of the petitioner is that respondent No.2 has transferred some of its assets to its sister concern during the period of sickness and by virtue of impugned order dated 03.03.2008 of AAIFR, BIFR has no jurisdiction over respondent No.2, as such it has materially affected the right of petitioner as petitioner cannot proceed against those assets for its alleged dues. It may be noticed that the petitioner is a secured creditor. It has come on record that for advancing loan to respondent No.2, property of the respondent No.2 at Malabar Hill, Flat No. 59 on 4th floor, Block No. 5 in Hill Park Estate, Mumbai - 400006 has been mortgaged with the petitioner Bank. As per counter-affidavit of the respondent No.2 on record, the value of the flat is much more than the alleged dues. In view of above position, the contention of the petitioner about sale of assets by the respondent No.2 to its sister concern, which is based on observation of BIFR in its order dated 23.07.2007 has no relevance for the disposal

of present petition inasmuch as the right/interest of petitioner is fully protected with the mortgage of aforesaid flat with it. The petitioner's position in relation to the loan advanced to Respondent No. 2 is the same as it was prior to the Respondent No. 2 being declared a sick company. The removal of the intervening impediment of sickness, in fact, enures to the benefit of the petitioner. Further, petitioner never raised any grievance about sale of assets by the respondent No.2 to its sister concern before the BIFR or the AAIFR and is raising the same for the first time at much belated stage when the same does not affect the petitioner in any manner.

12. The other contention of the petitioner that due to respondent no. 2 being declared 'sick industrial company', petitioner was prevented for 10 years from initiating action for recovery of its alleged dues also has no force. During the period of sickness of respondent No.2, the petitioner was not prevented from filing O.A. for the recovery of its dues as petitioner could have filed the same by taking permission from the BIFR but no such steps were taken by the petitioner. Fault in not initiating action for recovery lies with the petitioner. Respondent No.2 cannot be held responsible for the same. It has also come on record that the petitioner has already taken the benefit of impugned order by filing O.A. for its alleged dues before the Debts Recovery Tribunal at Calcutta and the said fact is not disclosed in the present petition as the O.A. was filed on 17.04.2008, whereas the present

petition is filed in November, 2008. In fairness, the petitioner ought to have disclosed the same. Further it has also been submitted by the learned counsel for the petitioner that respondent No.2 has cleared the dues of other financial institutions/banks, except the alleged dues of petitioner, as it has refused to settle the matter with the respondent company. Under these circumstances, it cannot be said that the rights of the petitioner have been affected, in any manner, as is alleged. It may also be mentioned that no other secured creditor or worker has challenged the rehabilitation of the company. It is also not disputed that the status of the petitioner qua respondent No.2 has rather improved after its rehabilitation than it had when the company was sick. The petitioner has failed to explain as to how the impugned order dated 03.03.2008 of AAIFR has caused prejudice to it. Petitioner has also failed to show as to how the issue of equity shares of the face value of Rs. 10/- each worth Rs. 27 crores, at par, at rights basis against payment of full consideration, which has been taken for utilizing in the rehabilitation of the company, has prejudiced the petitioner Bank in any manner.

13. During the course of arguments, learned counsel for the petitioner has also relied upon ***Ram Janam Singh v. State of Uttar Pradesh & Another***, AIR (1994) SC 1722, wherein it is held that parties whose rights have been affected can always approach the court for appropriate remedies under law. However, petitioner has failed to

show as to how its rights to recover alleged dues from respondent No.2 have been affected. The above judgment is of no help to petitioner.

None of the contentions raised by the petitioner have any force especially when petitioner has failed to show as to how its rights have been adversely affected by the impugned order dated 03.03.2008.

14. It may be noted that there is also a delay in filing the present petition. The impugned order is dated 03.03.2008 whereas the present petition was filed in November, 2008. Petitioner has not explained the said delay. Further petitioner has also concealed the fact of filing of O.A. against respondent No.2 for recovery of its alleged dues before Debts Recovery Tribunal, Calcutta, which is a material fact. However, we are not dismissing the petition on the grounds of delay and concealment alone.

15. In view of above discussion, we find no merits in the present petition and the same stands dismissed.

VEENA BIRBAL, J

BADAR DURREZ AHMED, J

OCTOBER 21, 2009
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