

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

+ **W.P. (Civil) No.1106 of 2011**

% ***Date of Decision: 01.03.2011***

M/s. Alpine Industries Ltd. *Petitioner*

Through Mr. Vivek Sibal, Advocate
Versus

Appellate Authority for Industrial & Financial Reconstruction & Ors. *Respondents*

Through Mr. S.L. Gupta, Advocate for respondent
No. 3/SBI
Mr. R.C. Chawla and Mr. Sriram Kamal,
Advocate for respondent No. 10

CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR
HON'BLE MS. JUSTICE VEENA BIRBAL

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|-----------|---|------------|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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1. The petitioner has impugned the order dated 25th January, 2011 by the Appellate Authority for Industrial and Financial Reconstruction in Appeal No. 275/2010 titled as M/s. Alpine India Ltd. Vs. BIFR & Ors., dismissing the appeal against the order dated 30th August, 2010 in case No. 458/2001 of Board of Industrial and Financial Reconstruction (BIFR). By order dated 30th August, 2010, it was held

by BIFR that the dues of State Bank of India (SBI) and Bank of India (BOI), who had taken action under Section 13(4) of SARFAESI Act were more than 75% of the total secured debt of the company and relying on Sheel International's case of the AAIFR and an order passed by the High Courts of Delhi, Chennai and Bombay, it was held that the reference under Section 15(1) of SICA has abated.

2. While holding that the reference had abated under Section 15(1) of the SICA, the BIFR had also noted that the first reference No. 58/1999 filed by the petitioner was dismissed as not maintainable as the petitioner company had manipulated the accounts and in the appeal filed by the petitioner against the order dated 20th July, 1999, dismissing the reference, the Appellate Authority had also dismissed the appeal by order dated 7th April, 2000 holding that the beneficial provisions of SICA are not meant for companies/managements who resort to frauds and falsification of accounts for the personal benefit of promoters and run to take shelter under umbrella of SICA to protect themselves from proceedings for recovery/winding up initiated by creditors.

3. While holding by Order dated 30th August, 2010 that the reference has abated under Section 15(1) of SICA, it was also noticed by the AAIFR that the petitioner had filed a writ petition bearing WP(C) No. 990/2000 against the order of AAIFR dated 7th April, 2000 in the High

Court of Madhya Pradesh, which was disposed of with a direction to BIFR to dispose of second reference within a period of two months, BIFR had also dismissed the reference pursuant to the direction of the High Court of Madhya Pradesh as non-maintainable as the company had come with manipulated accounts and unclean hands.

4. In order dated 30th August, 2010, BIFR also relied on various directions given to the petitioners to deposit amounts which were not complied with. In order to take a decision of abatement of reference in view of action under Section-13(4) under SURFAESI Act taken by SBI and BOI, the petitioner company had been directed to provide break up of debt of each secured creditors as on record date. It was stated by the counsel for the Company that the total secured dues of the company were Rs.113.80 crores out of which dues of SBI and BOI were Rs.90 crores.

5. The order of the BIFR dated 30th August, 2010 in para 2.7 is as under:-

“.....In order to take a decision on abatement of reference in view of completion of action u/s 13(4) under SARFAESI Act, taken by SBI and BOI, the Bench asked the ld. Counsel of the company to provide breakup of debt of each secured creditors as on record dated. The ld. Counsel of the company stated that the principal dues of SBI were Rs.64 crore, of BOI were Rs.26 crore, Standard Chartered Bank Rs.8.40 crore, ICICI assigned dues to SCB were Rs.10 crore, EXIM Bank Rs.1.40 crore and IIBI Rs.4.00 crore. Hence total secured dues of the company were Rs. 113.80 crores out of which dues of SBI and BOI were Rs 90

crores.”

6. The order of the BIFR dated 30th August, 2010 was challenged in Appeal No. 275/2010 along with MA No. 582/2010 alleging that SBI and BOI who had taken action under Section-13(4) of SARFAESI Act do not represent 75% of the secured debt and therefore, the condition necessary for abatement as prescribed under 3rd proviso of Section 15(1) of SICA was not met and therefore, reference could not abate. The plea was also raised that BIFR failed to hold an inquiry to ascertain conclusively whether the condition of 3/4th in value of the amount outstanding against the borrower under 3rd proviso to Section 15(1) of SICA was met or not. In the circumstances, it was contended that prior permission of BIFR under Section 22(1) of SICA before taking coercive action under Section-13(4) of SURFAESI Act was necessary.

7. The order was also challenged on the ground that even if one of the manufacturing unit of the petitioner company was taken over, two industrial units will remain under the ownership of the company and therefore, instead of abating the reference of the appellant company, the BIFR ought to have considered the rehabilitation of the company on the basis of the two surviving units of the petitioner company.

8. Before the AAIFR reliance was placed by the petitioner on a judgment of Bombay High Court in the case of Nouveaw Exports Pvt.

Ltd. dated 13th January, 2010, which was distinguished by AAIFR on the ground that the observations made by the High Court of Bombay were tentative and prima facie. Reliance had rather been placed on M/s. Kandhari Rubber Limited (Appeal No. 37/2007) and M/s. Sheel International Ltd. (Appeal No. 229/2008) holding that BIFR/AAIFR is not entitled to go into the legality or the merits of any action under Section 13(4) of the SARFAESI Act by the secured creditors.

9. AAIFR has held that three-fourths' requirement flows from the provisions of Section 13(9) of SARFAESI Act. Section 13(9) of SARFAESI Act, 2002 is as under:-

“13(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less **than three-fourth in value of the amount outstanding as on a record date** and such action shall be binding on all the secured creditors:

PROVIDED that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956):

PROVIDED FURTHER that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act:

PROVIDED ALSO that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's dues

in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

PROVIDED ALSO that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

PROVIDED also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation : For the purposes of this sub-section,--

(a) "record date" means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date;

(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor."

10. The AAIFR has also held that once the action under Section 13(4) is taken, it is to be presumed by BIFR/AAIFR that the action has been taken in accordance with law and the BIFR/AAIFR will not go into the correctness/legality of any action under Section 13(4) as the power to challenge an order under Section 13(4) of SARFAESI Act will not be with BIFR/AAIFR. The Tribunal also repelled the plea of the petitioner that the jurisdiction of BIFR and DRT is concurrent on the ground that this will lead to jurisdiction chaos. Reliance was also placed on NGF Limited Vs Chandra Developers Pvt. Ltd. and Anr., MANU/SC/2471/2005,

where it was held by the Supreme Court that the Company Court and BIFR do not exercise the concurrent jurisdiction and had repelled the plea that despite BIFR having jurisdiction to get the assets of the sick company sold in terms of sub-section (4) of Section-20 of SICA, the leave of the company court is required.

11. Relying on PNB & Ors. Vs. AAIFR & Ors., MANU/DE/0874/2008; Madras Petro Chem. Ltd. & Anr. Vs. BIFR & Ors., MANU/DE/1148/2008; it was held that protection of Section 22(1) of SICA will not be available to sick industrial companies when secured creditors have taken action under Section 13(4) of the SURFAESI Act,2002.

12. Learned counsel for the petitioner has contended that the petitioner is not questioning the legality or otherwise of the action under Section 13(4) of SURFAESI Act,2002 before the BIFR but the issue raised by the petitioner company is whether the reference filed by the petitioner company has abated under 3rd proviso to Section 15(1) of SICA when it has not been determined by the BIFR whether the action was taken by 3/4th of secured creditors. Section 15 (1) of SICA is as under:

15. Reference by Board.- (1) When an industrial company has become a sick industrial company, the Board of Directors of the company, shall, within sixty days from the date of finalization of the duly audited accounts of the company for the financial year as at the end of which the

company has become a sick industrial company make a reference to the Board for determination of the measure which shall be adopted with respect to the company:

Provided that if the Board of Directors had sufficient reasons even before such finalization to form the opinion that the company had become a sick industrial company, the Board of Directors shall , within sixty days after it has formed such opinion, make a reference to the Board for the determination of the measures which shall be adopted with respect to the company:

Provided further that no reference shall be made to the Board of Industrial and Financial Reconstruction after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where financial assets have been acquired by any securitization company or reconstruction company under sub-section (1) of section 5 of that Act:

Provided also that on or after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where a reference is pending before the Board for Industrial and Financial Reconstruction, **such reference will abate if the secured creditors, representing three fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under sub-section (4) of section 13 of that Act.**

(2).....

13. This Court has heard the learned counsel for the petitioner company and other counsel in detail and have also perused the orders of AAIFR and BIFR and the precedent relied on and distinguished by the learned counsel. In Punjab National Bank, a division Bench of this Court had held that it was not disputed that the Punjab National Bank, the Oriental Bank of Commerce and the State Bank of Bikaner and Jaipur, admittedly represented the secured creditors of more than

3/4th of the value. What was considered was whether decision taken will amount to a measure taken to recover the secured debt under Section 13(4) of the SARFAESI Act, 2002. It was held that a mere decision in the meeting of the secured creditors representing three fourth in value of the amount outstanding may not amount to a measure taken to recover a secured debt under Section 13(4) of the Securitization Act and something more concrete has to be done by the secured creditors. It was also held that the bar of Section 15 proviso will apply not only to original proceedings but also to the appeal emanating from the order of BIFR.

14. The requirement of 3/4th of the secured creditors taking measures for the abatement of reference under proviso to section 15 of SICA is not independent of measures taken by 3/4th of the secured creditors under section 13 (9) of the SARFESI ACT, 2002. Once the measures have been taken, which is not disputed in the present case as one of the unit had been taken over, whether the action was by 3/4th of the secured creditors or less in violation of section 13 (9) of SARFESI Act, 2002 is not to be re-determined independently by BIFR. The action of 3/4th secured creditors being not representing 3/4th secured creditors can be challenged in an appeal under section 17 of SARFESI Act, 2002. The plea of the learned counsel for the petitioner that the petitioner company is not challenging the action taken by secured creditors under SARFESI Act, 2002 will not ensure any benefit to the

petitioner company. If the action of 3/4th of the secured creditors is not challenged under the SARFESI Act, 2002 on the ground that it is not by 3/4th of the secured creditors, this issue cannot be raised by the petitioner company before BIFR/AAIFR nor the Board and Appellate Authority would be competent to go into the issue whether the measure taken was by 3/4th of the secured creditors or less. In the circumstances the plea of the petitioner that the BIFR should have independently adjudicated the issue cannot be sustained and the orders of BIFR/AAIFR cannot be faulted on this ground. In these circumstances abatement under proviso to section 15 of SICA on the ground that measures have been taken by 3/4th of the secured creditors under SARFESI Act, 2002 will not be on the basis of independent judicial enquiry by BIFR/AAIFR as has been contended on behalf of the petitioner.

15. The learned counsel for the petitioner has also contended that since two units of the company are still with it, the BIFR should have continued the reference with respect to two units. The respondents, however, have granted liberty to the petitioner company to file a fresh reference under section 15(1) of SICA on the basis of modified balance sheet. Taking over one of the unit of the company will have profound impact on the financial profile of the company. If that be so permitting the petitioner company to file a fresh reference under section 15(1) of SICA with modified balance sheet cannot be termed to be illegal or

unsustainable or the orders of the respondents cannot be termed to be perverse. The plea of the learned counsel for the petitioner that filing fresh reference will take its own time, will not justify any direction by this Court to the respondents to continue with reference with two units and holding that the reference has abated only in respect of one unit on account of measure taken by 3/4th of secured creditors. No other grounds have been canvassed by the learned counsel for the petitioner impugning the orders of the AAIFR and BIFR.

16. For the foregoing reasons this Court does not find any grounds to interfere with the orders of the AAIFR and BIFR impugned before us. The orders cannot be termed to be illegal or unsustainable or perverse so as to entail any interference in exercise of writ jurisdiction by this Court. The writ petition is, therefore, dismissed.

ANIL KUMAR, J.

March 01, 2011.
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VEENA BIRBAL, J.