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THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 02.05.2011

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WP(C) 2849/2011

M/S MEKASTAR TELEMATICS LTD.

..... PETITIONER

Vs

AAIFR & ORS.

..... RESPONDENTS

Advocates who appeared in this case:

For the Petitioner : Mr Vivek Sibal & Mr Rahul Sharma, Advocates
For the Defendant: None

CORAM :-

HON'BLE MR JUSTICE SANJAY KISHAN KAUL

HON'BLE MR JUSTICE RAJIV SHAKDHER

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

RAJIV SHAKDHER, J

1. By this writ petition a challenge is laid to the order dated 09.03.2011 passed by the Appellate Authority for Industrial and Financial Reconstruction (hereinafter referred to as 'AAIFR') in Appeal No. 128/2006 and order dated 08.03.2006 passed by the Board for Industrial and Financial Reconstruction (hereinafter referred to as 'BIFR') in case no. 379/2003. For the sake of convenience the aforementioned orders will be collectively referred to as the impugned orders.

2. In brief the petitioner before us is aggrieved by the order passed by the BIFR which has been sustained by the AAIFR whereby the reference filed by it has been held to be non-maintainable on the sole ground that on the date of institution of the reference it was not an industrial company within the meaning of Section 3(1)(e) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as 'SICA').

2.1 The reasoning adopted by the BIFR in passing order dated 08.03.2006 is briefly that the petitioner had filed its reference on 17.10.2003. However, even prior to the said date the Pradeshia Industrial Investment Corporation of Uttar Pradesh (in short 'PICUP'), which was one of the creditors, had in exercise of its powers under Section 29 of the State Financial Corporation Act, 1951 (in short 'SFC Act') sold the plant and machinery of the petitioner in an auction in March-April, 2003. Given these facts the BIFR came to the conclusion that the petitioner was not an industrial undertaking within the meaning of Section 3(1)(e) of SICA. This view has been affirmed by the AAIFR by its order dated 09.03.2011.

3. The petitioner has assailed the impugned order broadly on the following grounds:

(i) A conjoint reading of Section 3(1)(e), 3(1)(f), 3(1)(o) and 3(2)(d) of SICA along with Section 3(c) of the Industrial Development and Regulation Act, 1951 (in short 'IDR Act') would clearly indicate that the jurisdiction of BIFR is attracted to such a industrial company which carries on manufacturing process in one or more factories. In other words an industrial company would be one which has one or more industrial undertaking(s) which pertain to a scheduled industry falling in schedule I of the IDR Act. The industrial undertaking in turn can carry on the manufacturing process in one or more factories with a conclusion that if the manufacturing process is carried on with the aid of power then it should have 50 or more workers working with it on any day in the preceding 12 months. However, where manufacturing process is carried in a factory without the aid of power it should have engaged the services of 100 or more workers on any day in the preceding 12 months. In calculating the period specified, i.e., the '*preceding 12 months*' one would have to begin from the date on which the financial/accounting year of the company seeking a reference comes to an end, and not on the date on which the reference is filed.

(ii) Since the reference was filed with the BIFR on 17.10.2003, the sale of the land and building in April, 2004, without seeking the permission of BIFR under Section 22(1) of SICA, was void ab initio.

4. We may note that as a matter of fact Mr Sibal, who appeared for the petitioner, did not press the first ground before us. The only ground Mr Sibal pressed before us was no. (ii) even so we propose to deal with both grounds. Before we deal with the matters put in issue, it would be useful to notice briefly the broad facts which has given rise to the present petition.

4.1 The petitioner, it appears, had taken financial assistance from respondent no. 3, i.e., PICUP in 1995-96. According to the petitioners the financial assistance was taken by way of two separate loan transaction. It is averred that the first loan transaction which fructified in 1995 was liquidated. It is, however, not disputed that there were defaults in respect of the second loan transaction whereby, a sum of Rs 22.05 lacs was lent to the petitioner. It is also averred that the petitioner had arrived at a one-time settlement (OTS) with PICUP. Since admittedly the petitioner was unable to adhere to the discipline of paying the agreed instalment as per the OTS, PICUP exercised its powers under Section 29 of the SPF Act pursuant to the defaults committed by the petitioner. A notice was issued by PICUP on 21.08.2002. Consequent thereto, on 16.09.2002 PICUP took possession of the plant and machinery. It is also not disputed that the plant and machinery was auctioned and possession handed over to the auctioned-purchaser in March-April, 2003.

4.2 The petitioner, thereafter, filed a reference with the BIFR on 17.10.2003. It appears that the petitioner received a letter from the Dy. Distt. Magistrate informing that PICUP had auctioned even the immovable property, that is, land and building situate at C-294, Sector-10, Noida, U.P (in short 'land & building'). The petitioner has averred in the writ petition that it had received a communication dated 15.04.2004 from PICUP, informing that it had received a highest bid of Rs 42 lacs in respect of the said land and building.

4.3 A reading of the order of AAIFR would show that the petitioner had filed objections with the SDM in respect of the said land and building broadly to the effect that it stood mortgaged to one V.K. Jain and hence, could not be sold. The said objections

were rejected and the sale was confirmed on 14.06.2004. As a matter of fact it is further noticed from the impugned order that on 30.06.2004, a sale deed was executed and the transfer of rights in the land has taken place in favour of auctioned-purchaser as far back as on 23.10.2004. Curiously, there is no reference to these dates in the writ petition nor are any averments made referring the veracity of these events. There is, however, a reference in the list of dates to the fact that the petitioner received a notice dated 27.12.2004 from a Dy. Commissioner, Saket, New Delhi calling upon it to pay Rs 30,94,443.21/-, failing which, PICUP would take action to realize the said sum.

4.4 The petitioner evidently sought to challenge the auction of plant and machinery (which was admittedly conducted in March-April, 2003) in 2005, by instituting a writ petition in the Allahabad High Court. This writ petition was numbered as Civil Misc. Writ Petition (CWP) 2995/2005 titled “M/s Mekaster Telematics Ltd. vs Managing Director, The Pradeshiya Industrial and Investment Corporation, U.P. Ltd”. An interim order dated 11.03.2005 was passed by the Allahabad High Court in CM CWP 2995/2005 to the effect that any transaction made by the auctioned-purchaser with respect to plant and machinery will be subject to the final decision in the writ petition. Similarly, qua the auctioned-purchaser of the land and building, by way of the same order, it was directed that he shall not alter the nature of the property in dispute until further orders of the court. We may note the typed copy of the order dated 11.03.2005, which has been appended as annexure P-9, seems to suggest that the said order was passed only in CWP 2995/2005.

4.5 On 08.03.2006, the BIFR passed the impugned order dismissing the reference by holding it to be non-maintainable for the reason indicated above. It appears that V.K. Jain, to whom the petitioner’s land and building had been mortgaged, also filed a writ petition. The said CWP is numbered as CM CWP 20396/2006. Whether this writ petition was filed in 2006 or was renumbered in 2006 is not clear. Both the aforementioned writ petitions were dismissed by a common order dated 17.09.2009. The Division Bench of the Allahabad High Court in the operative part of its order while dismissing the writ petitions observed as follows:

“According to us whether repayment loan amount by the petitioner company to the PICUP, automatically creates right in favour of the petitioner company to get back the property from purchaser under the auction sale and/or whether PICUP had right only in respect of the plant and machinery but not in respect of land and building, therefore, the transfer of landed property is bad and/or, whether before completion of BIFR proceedings or without permission of such forum, the sale has rightly taken place and/or whether the guarantor has co-extensive right of repayment of loan amount and/or whether there is any question of payability of interest, all such questions seem to be diversified academic question before the writ court at present. Moot point for consideration is whether the respondent no. 5 being a private party can be able to retain possession of the property in question in spite of repayment of loan amount by the petitioner company to PICUP and the respondent no. 5 will relinquish possessory right in favour of the petitioners company of the first writ petition due to such payment of loan amount or in favour of the petitioner of the second writ petition, as he claimed that the land and building are not under the mortgage of PICUP, is required to be considered by an appropriate forum having right to determine possessory right, title interest inter se private parties. We cannot advise the writ petitioner/s either to go before the BIR or its appellate authority or before any forum under the UPZA & LR AR act or in the civil court with regular or summary suit. It is entirely open for the petitioner to invoke appropriate jurisdiction in such a complex situation. This court only holds that there is alternative forum for adjudication of such type of disputes. Having so, we dismiss both the writ petitions without entering into the merit. Interim orders, if any, stands vacated.

No order is passed as to cost.

However, passing of this order will in no way affect the right of either of the petitioners to invoke the appropriate forum for adjudication to get appropriate relief on merit as expeditiously as possible.”

A typed copy of the order is appended as annexure P-10 of the paper book.

4.6 Against the dismissal of the writ petition a special leave petition (SLP) has been preferred. The typed copy of the said order is filed and marked as annexure P-11. A perusal of the typed order seems to indicate that special leave petition has been preferred

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only in CM CWP 2995/2005. However, the counsel for the petitioner informed us that there is a stay on alienation of the land and building. We will, therefore, accept that the interim order passed by the Supreme Court pertains to the land and building of the petitioner. To be noted a copy of the special leave petition has not been filed. The order of the Supreme Court dated 14.12.2009 reads as follows:

“Issue notice.

Interim stay of alienation by fifth respondent as per prayer in paragraph 8(a) of the SLP.”

4.7 To complete the narrative, aggrieved by the order of the BIFR dated 08.03.2006 an appeal was preferred to the AAIFR under Section 25 of the SICA. The AAIFR rejected the appeal vide order dated 09.03.2011.

5. Upon perusing the record and hearing Mr Sibal we find that there is no infirmity with the orders passed by the authorities below. In so far as the first issue raised before us is concerned, it is quite clear that the petitioner ceased to remain an industrial undertaking on the auction and the consequent possession of the plant and machinery in March-April, 2003. Therefore, on the date when reference was filed by the petitioner under Section 15(1) of the SICA, the reference was not maintainable. The argument of the petitioner advanced in the petition and before us that it could set up a new plant and machinery is, to say the least rather curious since if it otherwise has finance to set up a new plant and machinery it logically does not require the protective regime of SICA to resuscitate itself. Therefore, the plea raised by the petitioner that the period of twelve (12) months had to be counted from the end of the accounting/ financial year and not from the date when the reference was filed cannot lead us astray from the fact that the engagement of the requisite number of workers would only be relevant if otherwise the petitioner on the date of reference was in possession of plant and machinery. The petitioner took its own time in approaching the court by way of a writ petition. The writ petition was filed only in 2005.

6. This brings us to the second contention made on behalf of the petitioner, which is, that the PICUP could not have sold the land and building in an auction carried out in WP(C) 2849/2011

April, 2004 when its reference was admittedly lodged and pending since October, 2003. For this purpose Mr Sibal had drawn our attention to the letter of PICUP to the Distt. Magistrate calling upon him to provisionally stay the recovery proceedings, in view of the pendency of reference before the BIR. Mr Sibal had also drawn our attention to an application dated 26.04.2004 filed by PICUP with BIFR seeking permission for continuing with the sale of the land and building. It was submitted by Mr Sibal that since admittedly no permission was accorded, the sale of land and building by the BIFR was void in law.

6.1 From the facts noticed hereinabove, in respect of which the petitioner has maintained an eloquent silence, it is quite obvious that on the auction of the land and building several subsequent events have transpired. These include the execution of the sale deed in favour of the auction -purchaser and transfer of the land by the Noida Authority. Whether or not PICUP could sell the land and building in an auction without permission under Section 22 of the SICA became academic due to petitioner's own slothful approach to the matter as no steps were taken by the petitioner between October, 2003 and April, 2004. The procrastination of the petitioner can perhaps be attributed to the fact that mortgagee's interest was more prominent. This, to some extent, is established by the fact that it was the mortgagee/V.K.Jain who approached Allahabad High Court by way of a writ petition, to which we have already referred to hereinabove. The BIFR being cognizant of the fact that the petitioner had been dispossessed of its plant and machinery way back in March-April, 2003, i.e., even before it had registered its reference with it, rightly held that the reference of the petitioner was 'non-maintainable'. The AAIFR, in turn, put its seal of approval on the approach adopted by the BIFR. We can do no different for the reason that the said argument of the petitioner would have been valid if the reference as filed was maintainable. Since the reference by itself was not maintainable, the mere fact that PICUP by way of abundant caution had filed an application under Section 22(1) of SICA would not in law relegate them to a worse position had they not filed the application and had proceeded to sell the land and building

in an auction based on their understanding of the legal position that the transaction in law had no impediment. It is an educated risk that they took, which proved to be the right approach. Therefore, in our view, Mr Sibal's contention to the contrary misses this crucial aspect of matter.

7. In our view, the AAIFR, keeping in mind the fact that the special leave petition filed by the petitioner is pending adjudication, has correctly accorded a right to the petitioner to approach the BIFR by way of a fresh reference in the event of, the Supreme Court, allowing its petition, and directing restoration of both the plant and machinery as well as the land and building.

8. For the reasons given above, we find no ground to interfere with the impugned orders. The writ petition is dismissed.

RAJIV SHAKDHER, J

SANJAY KISHAN KAUL, J

MAY 02, 2011

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