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

+ **Date of Decision: 22.08.2012**

% **W.P.(C) 4930/2012**

UNION OF INDIA, MINISTRY OF RAILWAYS Petitioner
Through: Mr. Rajeev Mehra, ASG with Mr.
Aditya Malhotra and Mr. R.V. Sinha
for UOI
versus

CIMMCO LTD AND ORS Respondent
Through: Mr. C.A. Sundaram and Mr.
Sandeep Sethi, Sr. Advocates with
Ms. Maneesha Dhir, Ms. Purti
Marwaha, Mr. Apporve Karol, Mr.
Chirag Kher, Mr. Zafar Iniyat and
Mr. Yogesh Kothimath, Advocates
Mr. Rajiv Nayyar, Sr. Adv. with Mr.
Ajay Bhargava and Mr. Gaurav Bahl
for Hindustan Engineering &
Industries Ltd.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (Oral)

1. The Union of India, Ministry of Railways assails the order dated 02.07.2012 passed by the Appellate Authority for Industrial and Financial Reconstruction, New Delhi (AAIFR) passed in M.A. No.219/2012 in Appeal No.112/2012, whereby the AAIFR has dismissed the said application preferred by the petitioner, seeking stay of the order dated 12.03.2012 passed by the Board for Industrial and

Financial Reconstruction (BIFR) in MA No.19/2012 in Appeal No.100/2012 in BIFR Case No.372/2000. The respondent in the present petition is CIMMCO Ltd (herein referred to as the `Company').

2. By the impugned order, the AAIFR disposed of the two stay applications preferred before it – one by the petitioner being MA No.219/2012 in Appeal No.112/2012, and the other being MA No.209/2012 in Appeal No.100/2012 preferred by Hindustan Engineering & Industries Limited, to seek the same interim relief.

3. Even prior to the filing of the present petition, the company preferred W.P(C) No.2693/2012 against the Railways to seek a direction that they should comply with the provisions of the Sanctioned Scheme dated 11.03.2010 (SS-10) and in particular clause 11.6 thereof till the period of rehabilitation i.e. upto 2013-14. After hearing learned counsel for the parties, we had passed an interim order on 04.07.2012 directing the Railways to comply with the terms of SS-10 and the order dated 12.03.2012 of the BIFR.

4. We may observe that another entity namely M/s. Texmaco Rail and Engineering Limited (Texmaco) preferred Appeal No.92/2012 before the AAIFR to assail the same order of the BIFR dated 12.03.2012, as aforesaid, wherein Texmaco also moved MA No.182/2012 to seek stay of the operation of the order dated

12.03.2012 of the BIFR. The AAIFR dismissed the stay application of Texmaco vide order dated 30.05.2012. Texmaco assailed the said order by filing W.P.(C.) No.4941/2012 before this Court.

5. After some arguments, that petition preferred by Texmaco was disposed of on 14.08.2012 in the following terms:

“W.P.(C) 4941/2012 and C.M. No. 10083/2012

After some hearing, it is agreed that the writ petition be disposed of with the direction that till the AAIFR takes up the matter in appeal preferred by the petitioner, the interim arrangement envisaged by this Court as per order dated 04.07.2012 passed in W.P.(C.) No. 2693/2012, i.e. the scheme and the order dated 12.03.2012 have to be complied with qua making allocation to CIMMCO Ltd., would continue to operate.

We make it clear that we have not expressed a view qua the legality of the order passed by the BIFR, which is under challenge before the AAIFR. It will, of course, be open to learned counsel for the petitioner to pray for expediting the hearing of the matter before the AAIFR taking into consideration the nature of the controversy. It is for the petitioner to take steps in this behalf including any application for preponement of hearing.

The writ petition and the application, accordingly, stand disposed of.

Order Dasti under the signatures of the Court Master”.

6. In the writ petition of the company, which was also listed on 14.08.2012, Hindustan Engineering and Industries Ltd moved C.M.No.10099/2012 for intervention and impleadment. The order

passed in C.M.No.10099/2012 and W.P(C) No.2693/2012 on 14.08.2012

reads as follows:-

"C.M. No. 10099/2012

Notice. Notice is accepted by learned counsel for the non-applicants.

We have heard learned counsel for the parties including learned senior counsel for the applicant.

After some hearing, it is agreed that the application be disposed of with the direction that till the AAI FR takes up the matter in appeal preferred by the applicant, the interim arrangement envisaged by this Court as per order dated 04.07.2012, i.e. the scheme and the order dated 12.03.2012 have to be complied with qua making allocation to CIMMCO Ltd., would continue to operate.

We make it clear that we have not expressed a view qua the legality of the order passed by the BIFR, which is under challenge before the AAI FR. It will, of course, be open to learned counsel for the applicant to pray for expediting the hearing of the matter before the AAI FR, taking into consideration the nature of the controversy. It is for the applicant to take steps in this behalf including any application for preponement of hearing.

The application stands disposed of.

W.P.(C) 2693/2012

Learned counsel for the respondents seeks some time to obtain instructions as to whether the writ petition can be disposed of in terms of the interim arrangement dated 04.07.2012, subject to the right of the respondents to move the AAI FR for an expedited hearing since this Court, in that eventuality, would not be expressing a view one way or the other on the merits of the orders of the BIFR.

List for directions/orders on 22.08.2012.

The interim arrangement envisaged in our order dated 04.07.2012 shall continue during the pendency of the petition.

Order Dasti under the signatures of the Court Master”.

7. The present petition was also listed before this Court along with the writ petitions of Texmaco and of the company on 14.08.2012, when learned counsel for the petitioner sought deferment to take instructions, if the present petition could also be disposed of in terms of the aforesaid order.

8. Learned counsel for the petitioner has taken instructions and has sought to press the present petition.

9. We have heard learned ASG as well as learned senior counsel for the respondent, Cimmco Ltd./Company and proceed to dispose of the present petition at this stage itself.

10. The respondent Company was registered with the BIFR on 21.08.2000 as BIFR Case No.372/2000, which was declared sick on 21.08.2002. The Draft Rehabilitation Scheme (DRS) was circulated vide order dated 30.11.2009 of the BIFR. Eventually, the DRS was sanctioned by the BIFR in exercise of the powers conferred under Section 18(4) of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) read with Section 19(3) of the SICA.

11. The DRS envisaged in clause 11.6, that the Ministry of Railways should give preferential support to the Company for facilitating the revival process on current terms and waiving interest and penalties on the outstanding issues, if any, due to the closure of the Company. It also proposed that the railways should exclude the period starting from 13.11.2000 till the date of sanction of the scheme by BIFR while working out the past performance criteria. To clarify the meaning of the said concession, it was stated:

“For avoidance of doubt, if past 5 years performance records have to be considered by a particular customer for award of new orders, the performance of CBL for the 5 year period preceding 13th November, 2000 be taken followed by the period post sanction of scheme thereby excluding the period of the closure completely from reckoning.”

12. The railways did not file any objection to the said DRS. While framing SS-10, the BIFR, on its own, introduced in clause 11.6 the words “to consider”. We may note that one of the primary submissions of the learned ASG is founded upon introduction of the words “to consider” in SS-10, as it is urged that the railways was no longer bound to exclude the period for which the company remained sick for purpose of assessing their past performance, and that the railways were only required to consider the grant of such a concession.

13. The Company filed MA No.019-BC/2012 before the BIFR to seek implementation of SS-10 by placing reliance on clause 11.6 (a) and (b) thereof. The submission of the company was that the railways had granted relief by placing orders for supply of wagons on the company in the previous year. However, in the subsequent year, the railways was seeking to include the period during which the company was sick, while computing five years past experience, and thereby deny supply order to the company. Consequently, the company sought a direction to the railways to ensure implementation of the provisions of SS-10 over the entire rehabilitation period i.e. upto 2013-14 by excluding the period starting from 13.11.2000 till the date of sanction of the scheme i.e. 11.03.2010 while working out the past five year performance criteria of the company for allocation of contracts during the entire rehabilitation period, including the contract under Tender No.2011/RS(I)/954/1(TC) dated 23.06.2011.

14. While the aforesaid MA was pending, the competitors of the company M/s Besco Ltd., M/s. Texmaco, M/s Hindustan Engineering & Industries Ltd. filed applications before the BIFR to seek impleadment for opposing the aforesaid application of the company.

15. On 01.03.2012, the BIFR rejected the various applications for impleadment while giving its reasons for the same. Eventually, the

company's application was heard on 12.03.2012 by the BIFR and by a detailed order, the BIFR directed the railways to implement the provisions of SS-10, in letter and spirit, and further directed that the railways should immediately order the quantities of wagon as per the entitlement of the company under the provisions of the SS-10 within a period of two weeks from the date of the pronouncement of the order. This order has been assailed before the AAIFR in various appeals, including that of the Railways. The AAIFR, as aforesaid, has dismissed the various stay applications moved before it, inter alia, by the railways to seek stay of the aforesaid direction of the BIFR.

16. We have already noted one of the two submissions made by the learned ASG herein above, i.e. that the railways was only obliged to consider the grant of the relief of exclusion of the period of sickness, while considering the past performance of the company and that the railways was not, *per se*, obliged to exclude the said period while considering the allotment of tender to the various bidders. The second submission of learned ASG is that the BIFR had no jurisdiction under the SICA to direct the railways to even consider the grant of such a concession. In this regard, reliance is placed on Section 19 of SICA to submit that the BIFR can only direct the grant of financial assistance, and that the concession that the railways was required to consider to grant to the company was not a financial assistance.

17. On the other hand, the submission of Mr. C.A. Sundaram, learned senior counsel for the company is that the railways did not object to the DRS which was circulated by the Board vide order dated 30.11.2009. In fact, the DRS proposed that the railways should grant the said concession/relief. Even then the railways did not object to the same. The BIFR, on its own, introduced the words “to consider” without any such request being made by the railways.

18. Mr. Sundaram submits that, in fact, the railways had sought the opinion of the Ministry of Law and Justice, Department of Legal Affairs on the issue whether the order of the BIFR dated 11.03.2010 is mandatory on the railways, or is recommendatory in nature for consideration, leaving the discretion with the railways for compliance or otherwise. The concern expressed by the railways was that the aforesaid order of the BIFR may result in vitiation of the tender conditions, which are sacrosanct.

19. The Ministry of Law and Justice, Department of Legal Affairs examined the direction issued by the BIFR in clause 11.6 of SS-10 threadbare and, inter alia, observed as follows:

“(i) The department has tried to have a distance itself from the applicability of the BIFR order giving a logic that applicability of departments of Central Government is only to the extent of giving financial assistance and since the railways are not supposed to

provide any direct financial assistance, the applicability of the order is therefore not applicable on IR. This logic rests on very weak and narrow interpretation of the Act and is against the spirit of the objective of the SICA.

(ii) The idea of circulating the scheme to the concerned department was to seek objections, if any, from the department and if any particular concession was not acceptable to the IR, IR should have raised objections to the same as prescribed under the Act.

*(iii) The department has stated that clause 11.6 starts with the phrase **'may consider'**. It seems that the department has misread the order of the BIFR itself for some reason where the term **'to consider'** has been read **'may consider'**. In this regard, we would like to mention that the term may seem similar sounding, but there is very distinct difference between the two that completely changes the indent of the order. While the term **'may'** leave an option and can be taken in a positive or negative manner, whereas the **'to'** is more in the form of a directive. Therefore, order of the BIFR cannot be stated as a suggestion.*

(iv)

(v) The department has contended that the compliance of the BIFR order could result in advantages or disadvantages to individual firms. LA was suggested to keep this aspect in mind while tendering any advice in the matter. In this regard, it is to be mentioned that it is an established principle that no government/decision making process can be guided on the basis of pre-evaluating individual advantages and dis-advantages and has to be taken dis-passionately. It is to be further mentioned that if the period of five years mentioned in the BIFR order is not counted, M/s. CIMMCO, may go out even before opening the tender, then it may amount to defeat the very purpose of sanction of the scheme as well as the object of the SICA for which it was enacted. Counting of past performance of five years as mentioned in the order of BIFR does not amount that the order will be placed on M/s. CIMMCO because the order will have to be placed as per terms and conditions may get the order. Further, LA has also described properly the word consideration and use of the

administrative discretion in his opinion. Thus, the opinion of LA (Railways) still holds good we reiterate the same."

20. The opinion further reads:

*"5. SICA is a special Act and has been given over-riding affect over the provisions of any other law except FERA, 1973 and Urban Land (Ceiling) Act, 1973 and Supreme Court also has upheld the over-riding affect of the provisions of SICA over the provisions of Arbitration and Conciliation Act, 1996 in the Modi Rubber case (supra). The BIFR has passed the order under the provisions of the SICA, so consideration of the order by the administration should be done in positive manner. The interpretation should be done in reasonable manner and discretion should also be exercised by the administration within purview of Act in positive manner. About use of administrative discretion, the **legal luminary Edward Coke** has mentioned that **"Discretion is a sense or understanding to discern between falsity and truth, between right and wrong, and not to do according to will and private affection. Therefore, the discretion cannot be exercised at the whims of any administrative officer. It must be exercised for right reasons and for the purpose of is given."** The positive interpretation and use of positive administrative discretion makes order of the BIFR mandatory in nature, though it is recommendatory leaving not any scope to exercise it otherwise than as desired by the BIFR.*

6. In view of the above and under the facts and circumstances of the case, the order of the BIFR leaves no scope otherwise than to accept the same and may place the order on the firms who fulfil the tender conditions. There is no apparent vitiation of the tender conditions since there seems to be no change of the tender conditions per se. The BIFR in order primarily endeavours to provide guidelines to interpret the application of this clause.
(emphasis supplied)

7. In the present case, a particular clause deals with the quantity distribution based on the last five years performance so that workload

is given to all the eligible bidders. The BIFR order is intended to allow exclusion of Force Majeure period from the above, so that actual performance of the firm when it was working, can be considered. In our view, this order of the BIFR is more akin to a guidance on the method of application of tender clause and not a complete modification/vitiation of the clause itself. The department may take review on the application of the tender clause in a holistic manner keeping in view of the purpose of the clause itself and in full compliance of the relevant laws applicable.

.....

9. We have carefully examined the order of the BIFR, terms and conditions of the contract, opinion of Legal Advisor (Railway Board), relevant provisions applicable on the subject and are of the firm view that calculation of past five years' performance of M/s. CIMMCO Birla Ltd. preceding the date of occurrence of Force Majeure situation i.e. 30.11.2000 as ordered by the BIFR in its sanctioned scheme may not amount change of any terms of the tender conditions and the department may go ahead in calculating the period of past performance as mentioned in the sanctioned scheme of BIFR. Further, the opinion given by Legal Advisor (Railway Board) is very comprehensive and reasonable, it still holds good and we reiterate the same."

21. The aforesaid legal opinion squarely deals with the petitioner's submission that the sanctioned scheme only directs the Railways "to consider" the grant of the concession as aforesaid, and does not mandatorily require the Railways to grant the concession to the company. Though the said legal opinion may not be binding on either the BIFR or the AAIFR, it is for them to consider the effect and weight of the same. We may observe that the aforesaid legal opinion has also been relied upon by the BIFR while passing the order dated

12.03.2012. In view of the aforesaid, what can be said is that the opinion of the BIFR could not have been outrightly rejected by the AAIFR, and the same cannot be said to be *ex facie* untenable.

22. The submission of the learned ASG founded upon Section 19, that clause 11.6 of SS-10 does not constitute a direction to grant financial assistance, *prima facie*, does not impress us. Section 19(1) itself explains as to what financial assistance means by stating that *"the scheme may provide for financial assistance **by way of loans, advances or guarantees or reliefs or concessions or sacrifices** from the Central Government a public financial institution ... or other authority required by a scheme to provide **such financial assistance**"* (emphasis supplied)

23. *Prima facie*, it appears to us that financial assistances does not only mean monetary assistance, but is used in a much wider context as the Section itself makes it clear. The AAIFR has, while passing the impugned order, recorded its reasons for declining the stay of operation of the order of the BIFR in para 4 of the impugned order. The AAIFR has noted that the railways were parties to the DRS and SS-10, but neither filed objections nor appealed against the sanction scheme. They were bound to implement the sanction scheme. By the impugned order dated 12.03.2012, the BIFR had only directed the

railways to implement the provisions of SS-10, in letter and spirit. The issue whether the company is entitled to receive orders for supply of additional wagons or not, upon grant of concession/relief in terms of clause 11.6 of SS-10, is a matter which would be considered while deciding the main appeal. The AAIFR also noted that even in the previous year, orders for supply of additional wagons had been placed on the company.

24. In exercise of our jurisdiction under Article 226 of the Constitution of India, we do not sit in appeal over the orders passed by a quasi judicial statutory authority such as the BIFR and AAIFR. We are exercising our jurisdiction of judicial review of the orders passed by AAIFR. The impugned order passed by the AAIFR appears to be well reasoned and is founded upon relevant and germane considerations. It cannot be said that the AAIFR was misdirected in law while passing the impugned order.

25. There is another independent aspect which raises concern in our mind. The railways have to obtain wagons for its use and consumption. So long as it gets supply from technically approved vendors, and at the price determined by it in the tender process – which means that it does not entail any financial loss, it should not even be the concern of the railways to get embroiled in a dispute

which primarily concerns the competitors, i.e. the Company, Texmaco and others. We fail to understand as to what propelled the railways to so actively pursue this petition, particularly when one of the possibly affected parties, namely Texmaco has already withdrawn its writ petition and another party i.e. Hindustan Engineering & Industries Ltd. has withdrawn its application for intervention and impleadment, on 14.08.2012, as aforesaid, and have agreed to pursue the appeals before the BIFR.

26. In the light of the aforesaid, we find no merit in this petition and dismiss the same. We, however, make it clear that the observations made by us, as aforesaid, have been made only for the purpose of this order, and the same shall not come in the way of the AAIFR in taking an independent view, after hearing all the parties concerned.

27. Dismissed with costs of Rs.10,000/- to be paid to the respondent within 15 days.

VIPIN SANGHI, J

SANJAY KISHAN KAUL, J

AUGUST 22, 2012

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