

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

Decided on: 15.07.2013

+ **W.P.(C)4301/2013**

M/S. AGARPARA COMPANY LTD. Appellant
Through : Mr. Akhil Sibal, Mr. Jatin Mongia
and Mr. Sandeep Bisht, Advocates.

versus

APPELLATE AUTHORITY FOR INDUSTRIAL AND
FINANCIAL RECONSTRUCTION & ORS.

..... Respondents
Through : Mr. Amit. S. Chaddha, Sr. Advocate
with Mr. Atanu Mukherjee and Ms. Shalini
Kapoor, Advocates, for Resp. No.3.
Mr. Anirben Sen, Advocate.
Mr. Neeraj Kishan Kaul, Sr. Advocate with Mr.
C. Mukund and Mr. Ashok Jain, Advocates, for
Resp. No.5.
Mr. Tanuj Khurana, Advocate, for Resp. No.6.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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CAV. 579/2013 TO 582/2013

Learned counsel for the caveators have put in appearance.
Cav. 579/2013 to 582/2013 are accordingly discharged.

W.P.(C) 4301/2013, C.M. APPL.9983/2013 (for stay), C.M. APPL. 10060/2013

1. M/s Agarpara Company Ltd (ACL), the petitioner, challenges the order of the Appellate Authority for Industrial & Financial Reconstruction (AAIFR), dated 13.06.2013, under Section 25 of the Sick Industrial Companies (Special Provisions) Act of 1985 (SICA). That appeal had been preferred against an order of the Board for Industrial and Financial Reconstruction (hereinafter “BIFR”) dated 20.10.2010, whereby that authority (the BIFR) held that Mr. Ghanshyam Sarda was the real promoter/owner of the Respondent No. 3 in this writ, M/s. Agarpara Jute Mills Ltd (AJML).

2. Briefly, this case revolves around the financial reconstruction and rehabilitation of AJML. Based on its audited balance sheet of 31.03.1993, AJML filed a reference before the BIFR under Section 15(1) of SICA, and was declared sick in terms of Section 3(1)(o) of the Act on 14.07.1995. In the facts relevant to the present dispute, three stages are important: At the first stage, on being declared sick, the BIFR observed that the scheme prepared by the Operating Agency appointed under the Act was inadequate and ordered for winding up of AJML on 17.12.1999. This order for winding up was quashed by the Calcutta High Court on 08.07.2004, and AJML was ordered to present an alternate plan for rehabilitation. Accordingly, on 29.09.2004, AJML submitted a rehabilitation proposal, and the BIFR through its order dated

06.02.2007 directed circulation of the DRS for objections/suggestions. Till this date, neither party to the present petition presented any facts alluding to a dispute as to ownership. Subsequently, however, in the second stage of this dispute, two rival factions emerged within the sick company, one headed by Mr. Ghanshyam Sarda and the other by the present petitioners, ACL. The petitioners claim that Mr. Ghanshyam Sarda, acting through various instrumentalities, took over the management of the sick company in the interim. Contrary to this, the Respondent claims that it was always in control of the sick company, having, at all relevant times, possessed the requisite shares to display ownership and relying on the fact of payment of salaries and other dues to employees of the sick company. The Petitioner further claims that, contrary to the object and purpose of the SICA, the Respondent appointed 3 and 8 directors on 29.11.2008 and 24.01.2009, respectively, thereby constructing a false majority. The events of 29.11.2008 and onwards are disputed by the Appellant specifically, though the Appellant admit *de facto* control of the Sarda Group, and its payment of dues/salaries (paragraph 6 of the impugned order). Finally, the third stage of this dispute revolves around the shareholding of AJML and the ability of ACL to propose a DRS of its own for the purposes of circulation and objection. Here, the Petitioner claims that out of a total of 1,00,007 shares of AJML, 1,00,001 shares were owned by it; thus the petitioner was the holding company for AJML. However, as these shares were found missing, on application to AJML, duplicate shares were issued to

the holding company, the petitioner herein. On this basis, the petitioner claims that being a majority shareholder, the management and constitution of the Board of Directors as it existed prior to the influx of new directors represents the correct management of the sick company, AJML. Contrary to this, the Respondent claims that these duplicate shares were improperly issued, on the basis of an application from the same person, Mr. Mahender Sharma, to himself, in two different capacities in AJML and ACL, and that a total of 1,00,001 shares were always held by the Sarda Group.

3. The above constitute the backdrop of facts, for the challenge to the impugned order of the AAIFR, which is disputed on two grounds: first, that the impugned order recognizes – incorrectly and without jurisdiction (the latter argument emanating from an apparent conflict of jurisdiction of the AAIFR/BIFR and the Company Law Board) – that the management of AJML is represented by the Sarda Group as it currently stands. Second, that the impugned order incorrectly directs the circulation of the DRS proposed by the current management, without recognizing the petitioners’ DRS as well.

4. On the first ground, the AAIFR categorically held that the jurisdiction of the BIFR does not extend to adjudicating management or ownership issues in companies *inter se*, and that the Company Law Board is the appropriate forum for such questions (paragraphs 8-10 of the Impugned Order). However, for the “*limited purpose*” of ensuring rehabilitation and reconstruction

of the sick company, the AAIFR notes that it has “*to recognize and deal with the current management ... of the sick company*” (paragraph 8 of the Impugned Order), without giving “*any finding as to who is the real promoter/owner of the company which is presently under adjudication before the CLB*” (paragraph 9 of the Impugned Order)

5. In this case, the petitioner seeks three reliefs, i.e. quashing of the AAIFR order to the extent it recognizes the present management of the company as falling to the Sarda group; a direction to mandate the circulation of the petitioner’s DRS and an order prohibiting circulation of the Respondent’s DRS.

6. Mr Akhil Sibal argued that AAIFR completely ignored and failed to appreciate the issue that the disputes as to who the present management is, being in dispute, the circulation of an alleged Draft Rehabilitation Scheme for revival of the fourth respondent being considered was divorced from the principles of natural justice and in gross violation of SICA. ACL, being a 42% stake holder supported by remaining 58% stake holders in the fourth respondent and having acquiesced to the Draft Rehabilitation Scheme submitted by the Operating Agency in terms of the Calcutta High Court's order dated 8th July, 2004, that scheme is entitled to be considered as a Draft Rehabilitation Scheme for the purpose of revival of the company. The scheme sought to be circulated as the scheme of the present management, is really a scheme of the interloper, led by Ghanshyam Sarda, which, identifies the sale of the third respondent's landed assets and properties to infuse fresh

funds for revival of the fourth respondent. On sale of such land, there will be nothing left to revive. The land is situate in an industrially viable portion of West Bengal and can fetch a market value of more than ₹1,000 crores. This amply demonstrates the intention of Ghanshyam Sarda to take over the fourth respondent and with the aid of orders of BIFR and AAIFR, sell off the assets of the company and misappropriate the proceeds for his personal enrichment and gain.

7. It is argued that in the present scenario, since the entire issue of management of the fourth respondent is shrouded in disputes, claims and counter claims, AAIFR could not have directed a particular scheme, presented by an interloper, to be considered for its viability. AAIFR, it is submitted, overlooked to appreciate that the duly constituted management of the respondent No.4 to which the petitioner had acquiesced had already been granted liberty and/or leave to propose a Draft Rehabilitation Scheme in terms of the order of the Calcutta High Court dated 8th July, 2004.

8. It is contended that in view of the admitted position, the petitioner should be allowed to pursue the DRS formulated originally and that denial of relief would lead to irreparable prejudice to the petitioner.

9. This Court is of the opinion that the AAIFR correctly recognized and held that the proper forum for adjudication of ownership or management disputes in companies is the Company Law Board, a special body constituted for those matters, and not the BIFR. Yet, in order to ensure that this division of jurisdictions

does not preclude the reconstruction of sick companies where management is contested, it stands to reason that the BIFR also has a *limited* authority to recognize the *present* management of the company, without prejudice to the Company Law Board's ultimate decision, in order to deal with *some* management for the purposes of rehabilitation. Indeed, a contrary conclusion would render the BIFR incapable of communicating with *all* sick companies, through their Board of Directors, where management is contested and thus, preclude it from performing its statutory function.

10. In this case, neither does the BIFR order constitute a judgment on the legal validity of the management, nor does it prejudice the right of either faction to the ultimate benefits of ownership, as and when decided by the Company Law Board. Moreover, as the AAIFR recognizes in its order: "*No prejudice would be caused to the appellant if the sick company is revived without their effort as they would be entitled to all the benefits of its ownership if and when they get an order in their favour from the competent forum, i.e. the CLB*" (paragraph 8 of the impugned Order).

11. The petitioner's claims are mutually contradictory. The petitioner requests this Court to issue a writ prohibiting the circulation of the Respondent's DRS, asking rather for the recognition of its own DRS. Entering the same question, and the fact of allowing one DRS and not another, would draw the Court into an exercise of determining *which* management is legally valid and correct under the Companies Act and related laws; an exercise

which the petitioner itself admits falls within the special jurisdiction of the CLB. Accordingly, for that precise reason, to avoid litigation on the question of which management ought to, under the law, represent the sick company, and focus solely on the factual question of which management, as of the date of hearing before the BIFR, has *de facto* control, the AAIFR's order is reasonable. This limited factual determination allows for the BIFR/AAIFR to proceed with the rehabilitation of the company, without any of the attendant legal complexities of determining the validity of ownership/management that are assigned to another statutory body under the Companies Act and related laws.

12. The breadth of the authority vested in the BIFR for the management of sick companies has been recognized. For example, in *Pasupati Fabrics Ltd and Ors v. Priyanka Overseas Pvt. Ltd. and Ors.*, [2006] 132 Comp Cas 113 (Delhi), this Court at paragraph 51 noted that “*from the date of registration of reference, there is a complete take over by the BIFR which assumes total control and the company is to function thereafter as per the mandate of the BIFR. It is the BIFR which has to decide how the company is to be rehabilitated and sanction the scheme, which would be a package deal, for operation of the functioning of such a company. The company has to thereafter function as per the provisions of the scheme sanctioned. As noted above, these provisions may provide for the complete take over by the new management, new Board of Directors, new constitution of the company with altered Memorandum and Articles of Association*

and even reduction of the interest or rights of the existing shareholders and allotment of shares of such a company to some other persons, particularly the creditors.”

13. Furthermore, this Court is of opinion that, equally, Courts must be cautious of interfering with the functioning of the BIFR in such instances of proceedings involving rival factions battling for the management of a sick company. This was specifically recognized by the Andhra Pradesh High Court in *B. Subba Reddy v. Appellate Authority for Industrial and Financial Reconstruction*, 2008 (1) ALT 113, in noting the “*utmost importance that the courts do not lengthen the proceedings before BIFR unless such interference is absolutely imperative for well defined reasons in the interest of the creditors as a whole and in the interest of the workers and the sick industry itself, but not in the interest of a particular management.*” The question in this case is precisely of supporting the DRS of one management faction over another, and entertaining such a relief would fall foul of the limited supervisory function played by the Court in instances of action taken by the BIFR. Similarly, in *Dharam Godha v. Universal Paper Mills Ltd.*, [2012] 110 CLA 32 (Cal), paragraphs 11-13, the AAIFR’s discussion and recognition of a particular management was acknowledged by the Calcutta High Court.

14. The AAIFR, by the impugned order has said that since there were disputes about the ownership and challenges regarding the acquisition of shares had to be decided or resolved by the Company Law Board, at the same time, the DRS pending before the BIFR

had to be decided. To ensure that the company's rehabilitation process did not suffer, the AAIFR proposed that the proposals of the Sarda group, which appeared to be (to it) in *de facto* control, should be considered on merits. At the same time, the petitioner group was also permitted to participate in the hearings. There is, in this Court's opinion, no unreasonableness or irregularity with the approach of the AAIFR in its impugned order.

15. Finally, Learned counsel for the petitioner submits that he would not be pressing additional grounds number 7.35 and XXXV, alleging that "*one of the Members sitting (sic) in the present Bench is a close friend of Sh. Ghanshyam Sarda. The Bench is biased against the Petitioner*".

16. For the above reasons, the writ petition is dismissed with no order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

JULY 15, 2013