

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

Judgment reserved on December 11, 2014

Judgment delivered on December 23, 2014

+ **W.P.(C) 3437/2014**

M/S. ZENITH INFOTECH LTD.

..... Petitioner

Through: Dr.Abhishek Manu Singhvi,
Sr.Advocate with Mr.Ajay J.Jain,
Mr.Atanu Mukherjee &
Mr.Abhishek Aggarwal,
Advocates

versus

UNION OF INDIA

..... Respondent

Through: Mr.Srivats Kaushal and
Ms.Kritika Mehra, Advocates for
R1-Union of India
Mr.Rajiv Nayar, Sr.Advocate with
Mr.Manpreet Lamba & Mr.Divij
Kishore, Advocates for Bank of
New York and Mellon (BNYM)

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. A short and an interesting question falls for our consideration in this writ petition, which is, whether, the Registrar, Board for Industrial and Financial Reconstruction ('BIFR', in short) could have declined the reference of the petitioner on the ground that the petitioner company is not carrying on any manufacturing activity, while scrutinizing the

reference filed in terms of Regulation 19 of the Board for Industrial and Financial Reconstruction (BIFR) Regulation, 1987 ('Regulations of 1987', in short).

2. Some of the relevant facts are that, the petitioner herein i.e. M/s. Zenith Infotech Ltd., formally known as Zenith Networks Ltd., was incorporated on September 20, 1996 under the Companies Act, 1956. It has set up a factory within the Special Economic Zone at Unit No. 005, Multi-storyed Building, SEEPZ, Andheri East, Mumbai. It is the case of the petitioner company that it was issued a manufacturing licence for manufacture of 12,000 numbers servers NAS and Dataware Housing Products and Customization and loading of softwares. According to the petitioner, the office of the Development Commissioners, SEEPZ Special Economic Zone, Ministry of Commerce and Industry had visited the plant and inspected the manufacturing activity and issued a certificate dated August 5, 2010 to the effect that the company has commenced production, activities for manufacture and export of server NAS and data warehousing products and customization and loading of softwares w.e.f. 13.05.2010. It is also the case of the petitioner in the writ petition that it is carrying on manufacturing activities TigerCloud Backup and Disaster Recovery (BDR) and Smart Style Office. It has its product line in the Private Cloud, Public Cloud and the Backup and Disaster Recovery

Market. The products are all electronic equipments with softwares developed by the petitioner pre-installed on this hardware. The products are special purpose equipments and hence, the software of propriety nature are pre-installed on them, are from the petitioner company only.

3. On August 01, 2013, the petitioner, based on its duly audited accounts for the period ended 30.06.2013, filed a reference under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 [‘SICA’, in short] with the BIFR in Form-A, in terms of Regulation 19 being an Industrial Company other than a government company. It is the stand of the petitioner company that its activity falls within the heading 5 Subheading 8 of the Schedule I of the Industries (Development and Regulation) Act, 1951 (‘Act of 1951’, in short). The reference of the petitioner was declined by the Registrar, BIFR vide its order dated August 12, 2013, wherein, the Registrar communicated to the petitioner the following:

“On scrutiny of your Reference dated 22-07-2013 received in BIFR on 23-07-2013 under Section 15(1) of Sick Industrial Companies (SP) Act, 1985, on basis of audited accounts as on 30-09-2013. The following deficiencies are observed:

(a) The Directors Report of Annual Accounts for the year ending 30-09-2012 state in General Information that

“The company is a software company engaged in manufacture, distribution, marketing, sale of software products and its services.

(b)The items manufactured by the company are not found in the Industries (Development and Regulations) Act, 1951.

2. In view of above, your reference is hereby declined.”

4. We note from the writ petition that during the period when the reference of the petitioner under the SICA was pending, an unsecured creditor i.e. the Bank of New York and Mellon, London Branch filed a winding up petition against the petitioner for recovering their dues before the High Court at Bombay. The said Company Petition being 28/2012 for winding up of the petitioner company was admitted by the learned Single Judge on 30.07.2013, when an Administrator was also appointed. The order dated 30.07.2013 was challenged by the petitioner company before a Division Bench of the High court at Bombay by filing an Appeal (L) No. 344/2013. The appeal was dismissed by the Division Bench vide its order dated September 02, 2013. The Company Petition No. 28/2012 was finally decided by a learned Single Judge vide his order dated December 13, 2013 whereby learned Single Judge has allowed the petition and directed the petitioner to be wound up. The Official Liquidator , High Court at Bombay was appointed the Liquidator of the

company. The judgment dated December 13, 2013 in Company Petition No. 28/2012 was challenged by the petitioner in Appeal (L) No. 14/2014. Suffice to state that the appeal was also dismissed by the Division Bench. However, the winding up order was stayed up to and including 31.08.2014 in order to facilitate the possible sale of the Cloud computing business of the petitioner company.

5. Be that as it may, the order of the Registrar dated August 12, 2013 was challenged by the petitioner before the Secretary, BIFR vide Appeal No. 15/2013. It was the case of the petitioner before the Secretary, BIFR that the Registrar, under the garb of scrutiny, had initiated enquiry into the correctness of the audited accounts and has done selective reading of the information contained in explanatory statement pursuant to Section 173(2) of the Companies Act, 1956 in respect of the special business under the heading “General Information”. The petitioner would submit that the Registrar, BIFR ought to have read the ‘General Information’ in its entirety since the company’s product line has been mentioned in subsequent sentence, which has been overlooked by the Registrar, BIFR. It was also pointed out in the memo of appeal before the Secretary, BIFR that the activity of the petitioner falls under Heading 5 Subheading 8 of Schedule I of the Act of 1951. The petitioner clarified that the company is a software company engaged in the manufacture, distribution,

marketing, sale of software products and its services. The Secretary, BIFR rejected the appeal filed by the petitioner company vide its order dated September 13, 2013. The Secretary, BIFR relied upon the balance sheet of the petitioner company by holding that there was no block of 'plant and machinery' in the books of the company. According to him, despite there being no addition to any 'plant and machinery' in the financial year 2012-13 (9 months), the company had manipulated its accounts to show a 'plant and machinery' block of Rs. 2272.65 lakhs as on 30.06.2013, which was a mere bifurcation of its gross investment of Rs. 12738.95 lakhs. By this analogy, the Secretary, BIFR held that the petitioner company was not carrying any manufacturing activities. The Secretary, BIFR also referred to the observations made by the High Court, showing the company in bad light. Suffice to state, he observed that the Single Judge of the High Court was of the view that the promoters of the company were absolutely dishonest and siphoned away the funds of the company.

6. This order of the Secretary, BIFR was challenged by the petitioner company before the Chairman, BIFR, wherein, the stand of the petitioner was similar to the one taken by it in the appeal before the Secretary, BIFR. The Chairman, BIFR dismissed the appeal (being Appeal No. 19/2013) by one of the impugned orders dated April 03, 2014. Two

issues fell for the consideration of the Chairman, BIFR; firstly, that the Registrar and Secretary had conducted enquiry under Section 16 of SICA instead of scrutiny under Section 19(5), 19(6) and 19(8) of BIFR Regulations; secondly, the nature of the company's business activity. The "industrial undertaking" as per Section 3(f) of the SICA means an undertaking pertaining to a schedule industry carried on in one or more factories but does not include ancillary undertaking as defined in Section 3 or a small scale industry as defined in Clause (j) of the Act of 1951.

The Secretary, Officers or other employees of the Board or Appellate Authority exercise and perform their duties under the control of the Chairman and exercises such powers and duties as may be prescribed or may be specified by the Chairman. The Board is established under Section 4 of the SICA, which also prescribes the qualification. The procedure and the power to regulate the procedures and conduct a business subject to the provisions of the Act vest with the Board. The Board has same powers as vested with a Civil Court under the Code of Civil Procedure, 1908 under Section 13 of the SICA and is deemed to be a Civil Court under Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

7. Insofar as the first issue is concerned, the Chairman, BIFR was of the view that while doing the 'scrutiny' of the documents, the authorities

are within their right to check the veracity of the documents in accordance with law being within their jurisdiction in terms of BIFR Regulations. On the second issue, he held that the entire process undertaken by the petitioner was development of the software and the activities fell within the scope of service industry and cannot be categorized as manufacturing in terms of the First Schedule of Act of 1951. The Chairman also referred to the observations made by the Secretary, BIFR referring to the observations of the High Court showing the conduct of the petitioner in a very poor light.

8. Dr. Abhishek Manu Singhvi, learned Senior Counsel appearing for the petitioner, after taking us through the orders passed by the Registrar, Secretary and Chairman of the BIFR, would make similar submissions as were made before the said authorities inasmuch the Registrar had conducted enquiry under Section 16 of the SICA under the garb of making scrutiny of reference, which according to him, was beyond his jurisdiction. He would also state that the conclusion of the Registrar that the petitioner was not carrying out a manufacturing activity is not tenable. According to him, the Registrar, BIFR has not even cared to reproduce the complete information given in the report of Annual Accounts ending in September 30, 2012, wherein, according to him, the complete information under the heading “General Information” reads as

under:

“1. General Information

The company is Software Company engaged in the manufacture, distribution, marketing, sale of software products and IT services. The Company’s product line is in the private cloud computing and cloud based back up and disaster recovery market and is covered by the TigerCloud and BDR product line of the Company. The Company does not have any secured loans. The Company’s overseas investments have been in its subsidiary Companies in Singapore and UAE”.

9. He would also submit that the items manufactured by the company are electronic items covered under the main Heading 5-Electrical equipments of Schedule I of the Act of 1951. He referred to the detailed description of the manufacturing process. At page 83-84, the following is stated:

“The company sources various components such as CPUs, Motherboard, Power Supply – memory (DRAM), flash memory and hard disk drives from multinational companies such as intel, Samsung and Western Digital, Super Micro FSP. When these components arrive, they are tested as to whether they are functioning correctly and there are no quality problems associated with them. This testing is done by computerized testing machines in

a highly automated fashion.

After the Electronic equipment has been assembled, software developed by Zenith is loaded on to such electronic equipment. This process is also done via specialized companies which load the software and carry out a continuous run to make sure that the software has been loaded correctly and there are no errors made in that process. Again, the plant and machinery in this case is the computerized equipment that automatically loads the software onto the electronic equipment and checks it whether it is functioning correctly.”

He has also referred to Regulation 19 of Regulations of 1987 to contend that the only requirement for filing a reference is in terms of Form A to the Regulations and the petitioner having filed the reference in terms of the said Form, the authorities under Regulation 19, more specifically Regulation 19(5), was only to scrutiny the reference i.e. to ensure that the same has been filed in terms of the said Form and, if found in order register the same by assigning a serial number to be submitted to the Chairman or assigning it to a Bench. According to him, scrutiny of a reference is not an enquiry on the merit of a reference as contemplated under Section 16 of the SICA by analysing, verifying, examination of the documents presented before the authority i.e. the Registrar. He has referred to observations made by the learned Single Judge in a winding

up petition filed by the Bank of New York and Mellon, London Branch wherein the learned Single Judge, in his order dated July 30, 2013 (in para 34), has inter alia observed that Section 16 of the SICA obliges the Board to make such enquiry as it may deem fit for determining, whether any industrial company has become a Sick Industrial Company in accordance with the procedures prescribed therein. He would rely upon judgments of the Supreme Court/High Court in *Real Value Appliances Ltd. Vs. Canara Bank & Ors. and connected matters, (1998) 5 SCC 554, Rishabh Agro Industries Ltd. Vs. P.N.B. Capital Services Ltd., (2005) 5 SCC 515 & M/s. Foremost Industries (India) Ltd. Vs. The AAIFR and Ors. (2000) 4 Company Law Journal 362 (Del)*, to submit that, direction to wound up the company by the learned Single Judge of the High Court at Bombay in the Company Petition No. 258/2012, cannot be a ground for the Registrar and the other authorities of BIFR to refuse to register the reference. He also relied upon a judgment of a Division Bench of this Court in *W.P. (C) 12723 of 2012, titled Alcatel-Lucent India Ltd. Vs. Usha India Ltd., decided on 01.06.2012*, wherein this Court has observed that while registering the references, the Registrar cannot act as quasi judicial authority which is the function of the Board. He also lay stress on the observations in this decision, wherein, the Division Bench was of the view that in order to obviate a

fresh reference after the earlier one was rejected, the matter can be referred directly to the BIFR for it to look into and decide whether it is a case for reference.

10. On the other hand, Mr.Srivats Kaushal, learned counsel appearing for the respondent would support the orders passed by the Registrar, Secretary and Chairman, BIFR. He would rely upon the conclusion arrived at by the Chairman, BIFR in para 8 of his order dated April 03, 2014, wherein, the Chairman, BIFR has held that while scrutinizing the reference under Regulation 19 of the Regulations of 1987, the Registrar can examine, verify the veracity and relevance of the documents for the purpose of registering the reference.

11. Mr.Rajiv Nayar, learned Senior Counsel, who appeared for the caveator namely Bank of New York and Mellon would, as a preliminary objection, submit that the present writ petition has become infructuous inasmuch as the High Court at Bombay, having allowed the winding up petition and appointed an Official Liquidator, the proceedings before the BIFR under the SICA would not lie. He would also justify the impugned orders passed by the authorities below.

12. Having heard the learned counsel for the parties, insofar as the first and foremost issue which arises for our consideration, that, whether, in view of the fact that the winding up order by the High Court at

Bombay, the present writ petition has become infructuous and not maintainable by the Board of Directors or authorized by law, is concerned, suffice to state that the said issue is no more res-integra having been decided by the Supreme Court in *Rishabh Agro Industries Ltd.(supra)* and *Real Value Appliances Ltd.(supra)*. The Supreme Court in *Rishabh Agro Industries Ltd. (supra)*, in para 10 & 11, held as under:

“10. It has been further suggested on behalf of the respondent-bank that the action of the appellant was malafide inasmuch as it sought time from the court to make the payment of the amount due and after seeking indulgence malafidely made the reference to the BIFR on 30th September, 1997. It is contended that after the order of the winding up and appointment of the liquidator, the Board of Directors had no jurisdiction to move the BIFR by passing a resolution. Such a submission cannot be accepted. In a winding up petition the liquidator is appointed to protect the assets of a company for the benefit of its creditors, secured and unsecured and others. It is not the function of the official liquidator to start the process of rehabilitation of the company as is aimed at under the Act. Despite appointment of the official liquidator, the Board of Directors continue to hold all residuary powers for the benefit of the company which includes the power to take steps for its rehabilitation. The Board of Directors in the instant case were not in any way by any judicial order debarred from taking recourse to the provisions of the Act for the purposes of rehabilitation of the company. If there existed a power, its exercise cannot be termed to be malafide only because it was initiated after availing the opportunity to make the payment of the amounts due and passing of the order of winding up of the company.

11. It may also be noticed that winding up order passed under the Companies Act is not the culmination

of the proceedings pending before the Company Judge but is in effect the commencement of the process. The ultimate order to be passed in such a petition is the dissolution of the company in terms of Section 481 of the Companies Act. The words "shall be deemed to commence" in Section 441 of the Companies Act clearly show the intention of the legislature that although the winding up of a petition does not in fact commence at the time of presentation of the petition itself but it shall be presumed to commence from that stage. The word "deemed" used in the Section would thus mean, "supposed", "considered", "construed", "thought", "taken to be" or "presumed".

13. The aforesaid view of the Supreme Court has been followed by the Division Bench of this Court in *M/s. Foremost Industries (India) Ltd.* (supra). In view of the views expressed by the Apex Court, the conclusion is that the reference made under Section 15 of the Act before BIFR would still be maintainable, even though the petitioner company has been directed to be wound up by the High Court of Bombay which conclusion has been upheld by the Division Bench in its order dated December 13, 2013. The reference in the present case was filed earlier on 1st August, 2013.

14. Insofar as the issue which falls for our consideration in this writ petition is concerned, before we deal with the same, we would like to reproduce hereunder some of the relevant provisions/Sections of the SICA, which have a bearing on the said issue:

“3. Definitions.— (1) In this Act, unless the context

otherwise requires.-

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*(b) “**Board**” means the Board for Industrial and Financial Reconstruction established under section 4;*

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*[e] “**industrial company**” means a company which owns one or more industrial undertakings”*

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*[n] “**scheduled industry**” means any of the industries specified for the time being in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951);*

*[o] “**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 networth.*

Explanation- For the removal of doubts, it is hereby declared that an industrial company existing immediately before the commencement of the Sick Industrial Companies (Special Provisions) Amendment Act, 1993, registered for not less than five years and having at the end of any financial year accumulated losses equal to or exceeding its entire net worth, shall be deemed to be a sick industrial company;]*

4. Establishment of Board-

(1) With effect from such date as the Central Government may, by notification, appoint, there shall be established a Board to be known as the “Board for Industrial and Financial Reconstruction”: to exercise the jurisdiction and powers and discharge the functions and duties conferred or imposed on the Board by or under this Act.

(2) The Board shall consist of a Chairman and not less than two and not more than fourteen other Members, to be appointed by the Central Government.

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12. Constitution of Benches of Board or Appellate

Authority. –

(1) The jurisdiction, powers, and authority of the Board or the Appellate Authority may be exercised by Benches thereof.

(2) The Benches shall be constituted by the Chairman and each Bench shall consist of not less than two members.

(3) If the Members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and make a reference to the Chairman of the Board or, as the case may be, the Appellate Authority who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other Members and such point or points shall be decided according to the opinion of the majority of the Members who have heard the case including those who first heard it.]

13. Procedure of Board and Appellate Authority. –

(1) Subject to the provisions of this Act, the Board or, as the case may be, the Appellate Authority, shall have powers to regulate-

(a) the procedure and conduct of the business;

(b) the procedure of the Benches, including the places at which the sittings of the Benches shall be held.

(c) The delegation to one or more Members of such powers or functions as the Board or, as the case may be, the Appellate Authority may specify.

(2) In particular and without prejudice to the generality of the foregoing provisions, the powers of the Board or, as the case may be, the Appellate Authority, shall include the power to determine the extent to which persons interested or claiming to be interested in the subject-matter of any proceeding before it may be allowed to be present or to be heard, either by themselves or by their representatives or to cross-examine witnesses or otherwise to take part in the proceedings.

(3) the Board or the Appellate Authority shall, for the purposes of any inquiry or for any other purpose under this Act, have the same powers as are vested in a civil

court under the Code of civil Procedure, 1908 (5 of 1908) while trying suits in respect of the following matters, namely:-

- (a) the summoning and enforcing the attendance of any witness and examining him on oath;*
- (b) the discovery and production of document or other material object producible as evidence;*
- (c) the reception of evidence on affidavit;*
- (d) the requisitioning of any public record from any court or office;*
- (e) the issuing of any commission for the examination of witnesses;*
- (f) any other matter which may be prescribed.*

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15. Reference to 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 finalisation 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 measures which shall be adopted with respect to the company:

Provided that if the Board of Directors had sufficient reasons even before such finalisation 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 for 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 securitisation 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 shall abate if the secured creditors, representing not less than 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) Without prejudice to the provisions of sub-section (1), the Central Government or the Reserve Bank or a State Government or a public financial institution or a State level institution or a scheduled bank may, if it has sufficient reasons to believe that any industrial company has become, for the purposes of this Act, a sick industrial company, make a reference in respect of such company to the Board for determination of the measures which may be adopted with respect to such company:

Provided that a reference shall not be made under this sub-section in respect of any industrial company by-

(a) The Government of any State unless all or any of the industrial undertakings belonging to such company are situated in such State;

(b) A public financial institution or a State level institution or a scheduled bank unless it has, by reason of any financial assistance or obligation rendered by it, or undertaken by it, with respect to, such company, an interest in such company”.

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16. Inquiry into working of sick industrial companies.-

(1) The Board may make such inquiry as it may deem fit for determining whether any industrial company has become a

sick industrial company-

(a) upon receipt of a reference with respect to such company under section 15; or

(b) upon information received with respect to such company or upon its own knowledge as to the financial condition of the company.

(2) The Board may, if it deems necessary or expedient so to do for the expeditious disposal of an inquiry under sub-section (1), require by order any operating agency to enquire into and make a report with respect to such matters as may be specified in the order.

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(4) Where the Board deems it fit to make an inquiry or to cause an inquiry to be made into any industrial company under sub-section (1) or, as the case may be, under sub-section (2), (it may appoint] one or more person to be a special director or special directors of the company for safeguarding the financial and other interests of the company (or in the public interest.)

[(4A) The Board may issue such directions to a special director appointed under sub-section (4) as it may deem necessary or expedient for proper discharge of his duties.))]

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“22. Suspension of legal proceedings, contracts, etc- (1)

Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding, anything contained in the Companies Act, 1956 (1 of 1956) or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof [and no suit for the recovery of money or for the enforcement of any

security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.

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As Regulation Nos. 3, 19 & 21 of Regulations of 1987 also arise for consideration, the same are reproduced below:-

Regulation 3:

Definitions.--

In these regulations, unless the context otherwise requires,-

(c) "Bench" means a Bench of the Board constituted under sub-section (2) of section 12;

(i) "Registrar" means an officer appointed by the Chairman as the Registrar and includes any officer to whom powers and functions of the Registrar have been entrusted by the secretary and such other person who is for the time being discharging the functions of the Registrar;

Regulation 19:

(1) Every reference to the Board under sub-section (1) of section 15 shall be made--

(i) in Form A in respect of an industrial company other than a Government Company;

(ii) in Form AA in respect of a Government Company,] and shall be accompanied by five further copies thereof alongwith four copies each of all the enclosures thereto.

(2) Every reference to the Board under sub-section (2) of section 15 shall be made--

(i) in Form B in respect of an industrial company other than a Government Company;

(ii) in Form BB in respect of a Government Company,] and shall be accompanied by five further copies thereof alongwith four copies each of all the enclosures thereto.

(3) A reference may be filed either by delivering it at the

office of the Board or by sending it by registered post.

(4) On receipt of a reference, the Secretary, or as the case may be, the Registrar shall cause to be endorsed on each reference, the date on which it is filed or received in the office of the Board.

(5) If on scrutiny, the reference is found to be in order, it shall be registered, assigned a serial number and submitted to the Chairman or assigning it to a Bench. Simultaneously, remaining information/documents required, if any, shall be called for from the informant.

(6) If on scrutiny, the reference is not found to be in order, the Secretary or, as the case may be, the Registrar may, by order, decline to register the reference and shall communicate the same to the informant.

(7) A reference declined to be registered shall be deemed not to have been made.]

(8) (1) An appeal against the order of the Registrar declining to register a reference shall be made by the aggrieved person to the Secretary within fifteen days of communication to him of such an order.

(2) An appeal against the order of the Secretary declining to register a reference shall be made by the aggrieved person to the Chairman within fifteen days of communication to him of such an order and the Chairman's decision thereon shall be final.

Regulation 21:

Upon a reference with respect to an industrial company under section 15 or upon information received with respect to such company, or upon its own knowledge as to the financial condition of the company, the Board may--

(a) itself make such inquiry, as it may deem fit, for determining whether the industrial company has become a sick industrial company; or

(b) if it deems necessary or expedient so to do, for the expeditious disposal of inquiry mentioned at (a) above,

direct by an order, an operating agency, to be specified in the order, to enquire into and make a report with respect to such matters as may be specified in the order:

Provided that reasonable opportunity for making submissions shall be given by the Board to the informant, and to the concerned industrial company if it is not the informant, before deciding whether the said company has become a sick industrial company or not.

A reading of the aforesaid provisions, would reveal the following position:

(A)“Board” means Board of Industrial and Financial Reconstruction established under Section 4 in order to exercise the jurisdiction and powers and discharge the functions and duties conferred or imposed on it by or under the Act.

(B)Section 12 refers to the constitution of Benches and each Bench shall consist of not less than two members.

(C) The jurisdiction and powers and authority of Board are exercised by the Benches. There is nothing in the Act to suggest that jurisdiction, powers and authority can be delegated to the Registrar.

15. Section 15 of the Act stipulates when reference should be made to the Board by the Board of Directors of a sick industrial company under sub-section (1). Under sub-section (2) to Section 15, Central Government or the Reserve Bank or a State Government or public

financial institution etc. can make a reference. Section 16 relates to inquiry by the Board. It stipulates that the Board may make such inquiry, as it deem fit, for determining “whether any industrial company has become a sick industrial company” (a) upon receipt of reference in respect of such company under Section 15; or (b) upon information received in respect of such company or upon its own knowledge as to the financial condition of the company. It is not difficult to visualise that issues may arise whether a company making reference is an industrial company i.e. it owns one or more industrial undertakings; whether the activity undertaken is classifiable under the scheduled industries i.e. the industries specified for the time being under the first schedule of the Act of 1951; whether the industrial company is a sick industrial company within the meaning of Section 3(o) of the Act. These issues can be debateable and contentious. We perceive and believe that when such issues arise for consideration, the power of adjudication and decision on these vital and substantive issues must vest with the Board. The Act recognises the Board as the adjudicating authority for all disputes. The office of the Registrar, Secretary etc. are not treated and regarded as the adjudicating authorities under the Act. Any other interpretation will result in narrowing of and limit the powers and jurisdiction of the Board on such important issues. The Board is a creation of the statute i.e. the

Sick Industrial Companies (Special Provisions) Act, 1985 and has the all incidental and ancillary powers, which would include registration of reference or existence and satisfaction of jurisdictional preconditions i.e. whether or not the company which has applied for reference is a “sick industrial company” and, therefore, the reference should be accepted and enquiry should be held. In *B.Y.Narasimha Prasad Vs. M. Veerappa and Anr., (2008) 9 SCC 372*, the Supreme Court has held, the question of maintainability of proceedings could be a jurisdictional issue and the Court is legally bound to address and answer the same; whether or not any objection is raised by the other side.

16. The issue which arise for consideration in the present case is whether the petitioner is an industrial company. The issue raised is whether the petitioner is carrying on manufacturing activities of the prescribed category to qualify as an industrial company. The petitioner places reliance on Annexure P-4, a communication from the office of the Development Commissioner, Ministry of Commerce and Industry, Govt. of India dated December 05, 2008 addressed to the petitioner, communicating their approval for the establishment of a manufacturing unit in SEZ of Servers NAS and Data wares Housing products and customization and loading of softwares to contend that the petitioner in fact, carrying the manufacturing activity.

17. The contention of the petitioner may be right or wrong but the authority to decide this contention, necessarily has to be the Board and not any other administrative officer, in view of the provisions of the Act.

18. Post of the Registrar is created in terms of Regulation 3 and is an officer appointed by the Chairman. Registrar can include any officer to whom powers and functions of the Registrar have been entrusted by the Secretary and such other person who is for the time being discharging the functions of the Registrar. Definition of the description 'Registrar' is, therefore, wide and can include any officer who is performing or discharging function of the Registrar and upon whom powers have been entrusted by the Secretary. Registrar certainly is not a substitute for the Board and cannot perform the functions and powers of the Board.

19. Regulation 19 states that every reference to the Board under sub-section (1) to Section 15 shall be made in the prescribed form and accompanied by five copies. Regulation 19(2) relates to reference to the Board under sub-section (2) to Section 15. Every reference is made by delivering it at the office of the Board or sending it by registered post. The reference received has to be endorsed by the Secretary or the Registrar as the case may be. Sub-regulation (5) relates to scrutiny of the reference and whether the same is in order. If the reference is found to be in order it has to be registered and assigned a serial number and

submitted to the Chairman or assigned to the Bench. Simultaneously, remaining information/documents required, if any, can be called for. If on scrutiny, the reference is not found to be in order, the Secretary or the Registrar may decline to register the reference and shall communicate the said decision. In case reference is declined, it is deemed not to have been made. Sub-regulation 19(8)(1) relates to an appeal from an order of the Registrar declining to register the reference, to the Secretary. Sub-regulation (2) applies to an appeal from the order of the Secretary declining to register a reference, to the Chairman. Sub-regulation (2) to regulation 19(8), does not provide for second appeal. It relates to an appeal against the order of the Secretary declining to register the reference. Sub-regulation (1) to Regulation 19(8) relates to right of appeal against the order of the Registrar declining to make the reference to the Secretary. Thus, only one right to appeal has been provided and the appellate forum would depend whether the order declining to register the reference is made by the Registrar or by the Secretary. As noted above, both the Registrar and the Secretary have concurrent power of scrutiny and therefore have right to decline registration of a reference. If the Registrar declines to register the reference, appeal would lie before the Secretary, but thereafter there would not be any second appeal. If the Secretary refuses to register the reference, there would be an appeal to

the Chairman. No appeal would lie before the Chairman against a decision in exercise of appellate power under sub-regulation 19(8)(1) of the Regulations of 1987 by an order of the Secretary.

20. The word 'scrutiny' is a word of narrow and limited connotation and cannot be equated with the decision or adjudication on merits. The word 'scrutiny' as normally and generally understood, would mean to examine or search. The scrutiny is required to ensure that the reference is not defective or lacking in material particulars i.e information and details should be available. Reference in this regard can be made to the decision of Allahabad High Court in in a *Writ Petition No. 13121/1986* decided on 23.12.1987, titled *Harsha Tractors Ltd. Vs. S.K.Srivastava, Deputy Labour Commissioner and Ors.* has referred to a judgment of the judgment of the Single Judge of that Court dated 18.11.1987 in Company Petition No. 17/1987 wherein it has been held that the examination of a reference under Regulation 19 framed under Section 13 of the Act is a ministerial act.

21. We are conscious of the fact that upon scrutiny, the Registrar or Secretary as the case may be, may decline registration of a reference, because they are not satisfied that the company which has made reference is a sick industrial company. Registration of reference is an important step as protection under Section 22 of the Act is available

upon registration of a reference. The aforesaid position and importance of registration was made by a Division Bench of this Court in ***Alcatel-Lucent India Ltd. (supra)*** the following words:

“23. As mentioned above, present case appears to be one where prima facie the provisions of Section 22 of the SICA are taken undue advantage of. Therefore, at least in those cases where the reference was rejected in previous years on merits by the BIFR, guidelines can be issued to ensure that fresh references in subsequent years should not be mechanically entertained.

24. Learned counsel for the respondent may be right in contending that while registering the references, the Registrar cannot act as quasi judicial authority which is the function of the Board. However, in order to ensure that such situation does not recur, at least in those cases where the reference is rejected earlier, matter can be referred to directly to the BIFR and BIFR should look into the same and to decide whether it is a case for admitting the reference. Even if BIFR decides it to admit after finding that the conditions for the same are satisfied, it can still take a decision as to whether the provisions of Section 22 should be allowed to prevail or not. Section 22 stipulates that proceedings can go on with the consent of the Board/BIFR and the Board can in such cases pass a general order giving such a consent. At that stage, in such cases, where the references were rejected previously,

the BIFR can pass appropriate directions refusing to extend the benefit of Section 22 of the SICA”.

22. Keeping in view the aforesaid legal position, we are of the view that when the Registrar or the Secretary is of the opinion or view that the company making the reference is not a sick industrial company and therefore reference should not be registered, they need not register the reference but refer the matter to the Board. The Board, thereafter, would decide whether the reference should be registered. This would ensure that the Registrar or the Secretary do not become adjudicating authorities, but their power is restricted in terms of sub-regulation (5) to Regular 19 to scrutiny alone and not to decision making or adjudication. Right to appeal conferred under Regulation 19(8)(2) before the Chairman is limited to scrutiny. In case the Chairman finds that there is a dispute or debate whether reference should be registered, which requires adjudication on merits, the said objection should be taken on record and the matter should be referred to the Board for appropriate decision. Similarly, if the reference is erroneously registered, contrary to the provisions of the Act, an objection can certainly be raised, whether jurisdictional pre-requisites are satisfied, which can be decided by the Board notwithstanding earlier registration by the Registrar, Secretary or

the Chairman of BIFR. Therefore, as in this case, they went beyond the scope of scrutiny, we direct the matter be placed before the duly constituted Board, to decide, whether the petitioner is an industrial company, which has become Sick and therefore, reference need to be registered. The Board will not be bound by the reasons and findings recorded in the impugned orders and would independently apply their mind without being influenced by the earlier orders. We are not expressing any opinion whether, the caveator herein need to be heard at this stage. The order of the Registrar, BIFR dated August 12, 2013 and the consequential orders of the Secretary, BIFR dated September 13, 2013 and the order dated April 03, 2014 of Chairman, BIFR are set aside.

23. The writ petition is accordingly allowed to the extent indicated above. No costs.

(V.KAMESWAR RAO)
JUDGE

(SANJIV KHANNA)
JUDGE

DECEMBER 23, 2014
akb