

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

Judgment Reserved on: February 26, 2016

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Judgment Delivered on: March 01, 2016

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W.P.(C) 3543/2015 & CM 6305/2015

RAJASTHAN TRADE UNION KENDRA & ANR. Petitioners
Represented by: Mr. Uday Gupta with Mr.Hiren
Dasan & Mr.D.Bhowmick,
Advs.

versus

**BOARD OF INDUSTRIAL AND FINANCIAL RECONSTRUCTION
& ORS. Respondents**

Represented by: Mr. Rajiv Nayyar, Sr.Adv.
instructed by Ms.Purti
Marwaha, Mr.Arvind Kumar
and Ms.Henna George, Advs.
for R-3.
Mr.Balraj Dewan, Adv. for R-
6.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. A brief exposition of facts before dealing with the issue raised in this writ petition is that respondent No.3 in the present writ petition, Arafat Petrochemicals Pvt. Ltd. (in short 'Arafat') filed a Misc. Application being MA No.575/2011 under Section 18(5) of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) before Board for Industrial & Financial Reconstruction (BIFR) with a prayer to examine, approve and sanction the modified draft rehabilitation scheme (MDRS) circulated as Annexure A-7 to the application. In the present writ petition, the

miscellaneous application before BIFR is not in question and thus we need not go into it.

2. M.A. 575/2011 was initially heard by a Bench comprising of Shri Nirmal Singh, the then Chairman BIFR and Shri Y.K. Gaiha member on July 26, 2012. A difference of opinion arose between Shri Nirmal Singh and Shri Y.K. Gaiha. As per Shri Nirmal Singh, Arafat was a company with a positive net worth thus it was not covered under SICA and the revised MDRS could be submitted only by a joint venture company which was approved by Appellate Authority for Industrial & Financial Reconstruction (AAIFR). In view of the major violation in the scheme, Shri Nirmal Singh held that first notice is required to be issued to M/s J.K. Synthetics Ltd. (JKSL) and Arafat as to why action should not be taken against them for violation of the provisions of the scheme. However, Shri Y.K. Gaiha disposed of MA 575/2011 directing the Board office to examine and consider the MDRS submitted by Arafat in terms of the provisions under Section 18(5) of SICA. However, the same should be routed through the Monitoring Agency.

3. After the difference of opinion, MA 575/2011 was listed before a Bench of Shri Y.K. Gaiha and Shri S.C. Sinha on July 01, 2013. The petitioners Rajasthan Trade Union Kendra (RTUK) and J.K. Staff Association-II (JKSA) raised an objection as to the constitution of the Bench and argued that in terms of Section 12(3) of SICA, the application was required to be decided by one or more members of the Bench of which Shri Y.K. Gaiha was not a member. Arguments on MA 575/2011 were heard and orders reserved on July 01, 2013.

4. Arafat filed WP(C) No.5552/2013 with a limited prayer that BIFR be

directed to expeditiously adjudicate M.A. No.575/2011 which had been heard and orders had been reserved on July 01, 2013. Vide order dated September 04, 2013, WP(C) No.5552/2013 was disposed of by the Division Bench of this court directing BIFR to expedite the adjudication and to pass an appropriate order as early as possible and preferably within four weeks.

5. Thereafter, an application being CM No.13916/2013 was filed by the BIFR informing this Court in WP(C) No.5552/2013 that after orders were reserved in MA 575/2011 Shri Y.K. Gaiha, a member of the Board had recused himself from the matter and the Chairman, BIFR passed an order dated August 06, 2013 allocating hearing of MA 575/2011 to a Bench comprising of Shri B.S. Meena Chairman-BIFR and Shri J.P. Dua Member. In the application BIFR sought modification of the order dated September 04, 2013 and permission to Bench-I of the BIFR to adjudicate MA No.575/2011. In CM No.13916/2013 the following order was passed by the Division Bench of this Court on October 07, 2013:-

“CM No.13916/2013

This is an application filed on behalf of respondent no.1 (BIFR) after disposal of the writ petition which was disposed of by an order dated 04.09.2013 directing the BIFR to pass an order, as early as possible and preferably within four weeks, in M.A. no. 575/2011 which had been reserved for orders on 01.07.2013. By way of the present application, the BIFR has requested that it may be permitted to hear the matter on 15.10.2013 and to pass appropriate orders at an early date. The application has been necessitated, according to the BIFR, because one of the members which heard the M.A. no. 575/2011 had subsequently recused from hearing of the case. It is thereafter that the chairman is supposed to have transferred the case to the Bench no.1 for hearing and a hearing notice was also issued on 15.10.2013. We are of the view that once an

application has been heard by a particular Bench and orders are reserved, it is that Bench which should pronounce orders either disposing of the application or if the one of the members of that Bench for some reasons or the other wishes to recuse, the Bench has to pass an order. The member ought not to have written a letter to the Chairman recusing from the matter without notice to the parties concerned and in particular the petitioner herein. As a result, we direct that M.A. no. 575/2011 be listed before the very same Bench, which heard the application on 01.07.2013, on 11.10.2013. If any member of the said Bench wishes to recuse he may say so in an order passed on that date. If that be the case, then the parties shall appear before the Bench no.1 on 15.10.2013. Whether any member recuses on 11.10.2013 or the matter is heard on 15.10.2013, the order on the said application be pronounced at the earliest within eight weeks from today.

The application stands disposed of.”

6. In WP(C) 5552/2013 Arafat impleaded BIFR and IDBI Bank Ltd. (IDBI) only as respondents. The petitioners in the present writ petition and other affected parties were not impleaded as respondents by Arafat. Thus, the petitioners filed CM Nos.17021-22/2014 seeking impleadment under Order I Rule 10 CPC and clarification of the order dated October 07, 2013. The said applications were permitted to be withdrawn by this Court vide order dated October 31, 2014 obviously because WP(C) No.5552/2013 had already been disposed off.

7. Pursuant to order dated October 07, 2013 passed by this Court in WP(C) No.5552/2013, BIFR pronounced its order in MA 575/2011 on October 22, 2013.

8. The petitioners herein challenged the order dated October 11, 2013 before AAIFR in Appeal No.28/2014 wherein they again objected to the constitution of the Bench hearing MA 575/2011 in view of Section 12(3) of

SICA. However, the AAIFR in view of order dated October 07, 2013 passed by this Court in WP(C) No.5552/2013 dismissed the appeal and passed the following order on January 14, 2015:-

“After hearing Mr. Udai Gupta ld. Counsel appearing for the appellant and Mr. Vivek Sibal ld. Counsel appearing on caveat for the respondent, we find that this appeal has been preferred by the appellant against the impugned order of BIFR dated 11.10.2013 whereby the matter has been heard and decided by the Bench of BIFR comprising of Mr.S.C. Sinha and Mr. Y.K. Ghaiya. The grievance of the appellant is that the matter should not have been heard by Mr.Ghaiya as he had already heard the matter earlier and expressed his opinion vide BIFR order dated 26.7.2012. Our attention has been drawn to the order of Hon’ble High Court of Delhi dated 7.10.2013 whereby the Hon’ble High Court has directed that the said MA be listed before the very same Bench which heard the applicant on 1.7.2013. The matter was, accordingly, heard and decided by the BIFR Bench comprising of Mr.Y.K. Ghaiya and Mr.S.C. Sinha. In view of this direction of the Hon’ble High Court of Delhi which has been fully complied by BIFR, we do not find any reason to entertain this appeal.

There is no merit in the appeal. The appeal is dismissed accordingly.”

9. Thus, the short issue before this Court in the present writ petition is whether the order dated October 07, 2013 passed by this Court in WP(C) No.5552/2013 on an application filed by BIFR impliedly decided the plea of the petitioners herein that a Bench of which Shri Y.K. Gaiha was a member would not hear MA 575/2011 in view of difference of opinion already rendered by him in terms of Section 12(3) SICA.

10. Obviously learned counsel for the petitioner harps on Section 12(3) SICA whereas learned counsel for the respondents harps on order dated October 07, 2013 passed by this Court in WP(C) No.5552/2013 noted as

above.

11. In WP(C) No.5552/2013 Arafat did not implead the petitioners in the present writ petition as parties. The prayer as noted above was an innocuous prayer by Arafat seeking expeditious disposal of MA 575/2011. The issue of Section 12(3) SICA was not raised nor was it pointed out to the Division Bench of this Court that two of the affected parties have taken the plea regarding competence of Shri Y.K. Gaiha to hear the matter in view of Section 12(3) SICA. Thus, the Court passed an order dated September 04, 2013 noted above disposing of the writ petition directing BIFR to expedite the adjudication and to pass an appropriate order as early as possible and preferably within four weeks. In CM 13916/2013 filed by BIFR the issue raised by the BIFR was not whether in view of Section 12(3) SICA Shri Y.K. Gaiha was competent to hear the matter but that although orders passed by the Bench-II were reserved in MA 575/2011 on July 01, 2013 subsequently Shri Y.K. Gaiha member of the Bench recused himself with a communication addressed to the Secretary, BIFR dated July 16, 2013. It is in this context that this Court passed the order dated October 07, 2013 in WP(C) No.5552/2013 noting that the Bench which heard the matter and reserved it for orders should pronounce the orders and in case one of the members wishes to recuse, he cannot do it by writing a letter to the Chairman but could pass an order in this regard after due notice to the parties. Both Arafat and BIFR failed to bring to the notice of the Court the objection of the petitioners herein to the constitution of the Bench. Applicability of Section 12(3) SICA was never raised before this Court nor decided. We may note that AAIFR has passed the impugned order dated January 14, 2015 rejecting to hear the plea of the petitioners with regard to

applicability of Section 12(3) SICA in appeal No.28/2014 on the strength of the order dated October 07, 2013 passed by this Court in CM No.13916/2013 on the application of BIFR. As noted above, the order dated October 07, 2013 was only a clarification on the plea that Shri Y.K. Gaiha had recused and the issue of applicability of provisions of Section 12(3) SICA was never considered by this Court.

12. Consequently, the impugned order dated January 14, 2015 in Appeal No.28/2014 is set aside. AAIFR is directed to decide the objection of the petitioners with regard to the applicability of Section 12(3) SICA in Appeal No.28/2014.

13. Writ petition and application are disposed of.

14. No cost.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

MARCH 01, 2016
‘v mittal’