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

\+ W.P.(C) 6890/2015

M/S AKAY ORGANICS LIMITED ..... Petitioner

Represented by: Ms.Purti Marwaha, Mr.Arvind Kumar, Ms.Henna George, Advs.

versus

UNION OF INDIA & ORS ..... Respondent

Represented by: Mr.Rakesh Kumar, CGSC for UOI/R-1.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

<u>O R D E R</u>

% **03.03.2016**

<u>CM 7741/2016 (rectification)</u>

1. Indeed the typographical errors as pointed out in the application needs to be corrected. The same would be in paragraphs 1, 9, 10, 13, 16 and 22. As corrected, order dated February 22, 2016 shall read as under:

> *"1. The petitioner company M/s.Akay Organics Limited (hereinafter referred to as Akay) was incorporated on August 13, 1984 under the Companies Act 1956. The Company was promoted by two gentlemen namely : (i) Mr.L.S.Pardasaney and (ii) Mr.V.Swaminathan. Share holding of the two was 50.63 : 49.37, in favour of Mr.L.S.Pardasaney.*
>
> *2. Akay started incurring heavy losses and on February 20, 1995 was declared a sick industrial company by BIFR and IRBI was appointed as an operating agency to examine the viability of Akay and if possible submit a scheme of rehabilitation.*

3. Conscious of the fact that a scheme for rehabilitation could result in a reduction of the interest or rights of the share holders, Mr.L.S.Pardasaney and Mr.V.Swaminathan participated in the proceedings before BIFR. Last attendance before the BIFR by Mr.V.Swaminathan was at the hearing held on July 21, 2001. Thereafter he stopped taking any interest in the affairs of Akay including rehabilitation thereof. Mr.L.S.Pardasaney interacted with the operating agency and other stakeholders. He ensured representation before BIFR. Proceedings before BIFR dragged on. On April 08, 2013 BIFR sanctioned a scheme for rehabilitation which envisaged existing equity to be written down by 99% and fresh capital infused by the promoters. Needless to state, there were other ameliorative measures in the scheme. The quasi-judicial order dated April 08, 2013 was given a formal shape on May 24, 2013.

4. On December 19, 2013 Mr.V.Swaminathan applied for a certified copy of the order dated May 24, 2013 which was received by him on January 23, 2014 and the appeal was filed before the AAIFR on January 27, 2014. It was registered as Appeal No.59/2014, challenging the scheme for rehabilitation which was sanctioned. He challenged the order dated May 24, 2013. Notice being issued in the appeal Mr.L.S.Pardasaney questioned the maintainability of the appeal with reference to it challenging the order dated May 24, 2013. He urged that the scheme had been sanctioned on April 08, 2013 and it was said order which could have been challenged. The technical objection was turned down by AAIFR vide order dated November 17, 2014 observing that the practice of BIFR was to follow up an order sanctioning a scheme by issuing a formal separate order which was distinct from the first and though the first order, sanctioning the scheme, found its reflection in the second order, the second order was the one which formally sanctioned the scheme. Thus, as per AAIFR, the order dated April 08, 2013 merged in the order dated May 24, 2013.

5. Mr.L.S.Pardasaney did not immediately challenge the order dated November 17, 2014.

6. He waited for the second objection taken by him to be decided concerning limitation.

7. As per Section 25 of the Sick Industrial Companies (Special Provisions) Act, 1985 an appeal has to be preferred to AAIFR against an order passed by BIFR within 45 days. As per the proviso to sub-Section (1) of Section 25, upon being satisfied that the appellant was prevented by sufficient cause from filing the appeal in time, if appeal is filed within 60 days the same can be entertained.

8. Since certified copy of the order passed by BIFR which is challenged before AAIFR has to be annexed with the appeal, various judicial pronouncements, (noted in para 4 of the impugned order dated May 26, 2015) passed by AAIFR have held that the aggrieved person has to apply for certified copy of the order passed by BIFR within the period of limitation and limitation would reckon from the date the person concerned had knowledge of the order passed by BIFR.

9. Take off point for considering limitation before the BIFR was the date on which Mr.V.S.Swaminathan acquired knowledge of the order dated May 24, 2013 passed by BIFR.

10. Since learned counsel for the parties before AAIFR as also before this Court proceeded on the basis that limitation has to be reckoned with reference to the date of knowledge of the order passed by BIFR which is challenged, we straightaway proceed to note that the dispute of knowledge acquired by Mr.V.S.Swaminathan centered on two dates : Whether knowledge was acquired on September 12, 2013 or October 22, 2013. For if knowledge would be acquired on September 12, 2013, the appeal filed before the AAIFR being beyond 60 days of the order passed by BIFR reckoning limitation commencing from September 12, 2013 would be barred by limitation. If knowledge is held to be acquired by Mr.V.S.Swaminathan on October 22, 2013, the appeal would be within limitation.

11. On September 06, 2013 notice of the Annual General Meeting of Akay was sent to the share holders which included Mr.V.Swaminathan. The notice reads as under :-

> *"Date: 06.09.2013*
>
> *To*
> *Mr.V.Swaminathan*
> *C-201, Eden-III,*
> *Hiranandani Garden,*
> *Powai, Mumbai-400 076.*
>
> *Dear Sir,*
>
> *We are forwarding herewith the Notice for Annual General Meeting along with the following:*
>
> 1. *Auditors Report*
> 2. *Profit & Loss Account, Balance Sheets alongwith Schedules (1 to 21) for Accounting year 31/03/2013*
> 3. *Directors Report*
>
> *For AKAY ORGANICS LTD.*
>
> *Sd/-*
> *L.S.PARDASANEY*
> *(Chairman & Managing Director)*
>
> *Encl :As stated above"*

12. The auditor report and the notes thereto sent to Mr.V.Swaminathan clearly brought to his knowledge the following :-

> *"BIFR has finally formulated and sanctioned Rehabilitation Scheme for revival of the Company during the hearing held on 08^{th} April 2013 and forwarded the Sanctioned Scheme dt. 24^{th} May 2013. As per the*

Sanctioned Scheme the Equity and Secured Loan shall be written down by 99% and 97% respectively and fresh capital is required to be infused by Promoter along with various other concessions and obligations of Promoters as listed in the Scheme."

13. Notice of the Annual General Meeting of Akay dated September 06, 2013 was received by Mr.V.Swaminathan on September 12, 2013. He approached the statutory auditors of the company when he received the notice of the Annual General Meeting dated September 06, 2013 requested the statutory auditors to provide him with the scheme of rehabilitation and on October 22, 2013 he received a letter from the statutory auditors informing him that his share holding was reduced from 49.37% to 8.32%. As noted above Mr.V.Swaminathan applied for a certified copy of the order dated May 24, 2013 passed by BIFR on December 19, 2013 which he received on January 23, 2014 and filed the appeal before AAIFR on January 27, 2014.

14. Thus, as per Mr.V.Swaminathan actionable knowledge was gained by him on October 22, 2013. Reckoned from this date, excluding the period spent in obtaining certified copy of the order dated May 24, 2013 passed by BIFR, as per Mr.V.Swaminathan the appeal filed by him before AAIFR was within limitation.

15. Vide order dated May 26, 2015 AAIFR has held that actionable knowledge gained by Mr.V.Swaminathan would be on October 22, 2013 and thus it has been held that the appeal filed by him is within limitation.

16. One very important feature has been overlooked by AAIFR. The same is that Akay is a company shareholding whereof is held by L.S.Pardasaney and his family members and V.Swaminathan and his wife. The former having 50.63% shareholding and the latter 49.37%. Both of them are technocrats as pleaded by them and therefore are persons well versed with the importance of shareholding in a company. The two having fallen foul with each other is, apart from other causes, a contributory factor to Akay becoming sick. The two would be imputed with the knowledge that a reference made to BIFR *of a sick industrial company would require BIFR to enquire into whether the company is liable to be declared sick. The two would be imputed with knowledge that the power of the Board is to try and rehabilitate the company and for which a scheme of rehabilitation would be drawn. The two would be imputed with the knowledge that while preparing and sanctioning a scheme of revival, preventive, ameliorative and remedial measures could be directed by BIFR which may include the alteration of the memorandum or articles of association to alter the capital structure of the company as also reduction of the interest or rights of the shareholders, and for which Section 18(2)(d) and (f) may be simply noted. That Mr.V.Swaminathan participated in the proceedings before BIFR till July 21, 2001 is proof of the fact that he was aware of his having a vital interest in the ongoing proceedings before BIFR. If he chose to withdraw from the proceedings he cannot claim innocence of a by-standard, as in, an unsecured creditor. Aware of the fact that Akay had filed an application before BIFR to be registered as a sick industrial company he ought to have known that sooner or later, in compliance with the mandate of sub-Section (3) of Section 18 of SICA 1985, there was every likelihood of a draft scheme to be published before it was finally considered by BIFR. AAIFR glossed over the fact that before BIFR sanction the scheme it was duly published and objections were invited and Mr.V.Swaminathan did not file any objection.*

17. Further, admittedly Mr.V.Swaminathan received the notice of the AGM dated September 06, 2013 on September 12, 2013 and concededly the auditor's report and the notes thereto were received by him, clearly informing him that : BIFR has finally formulated and sanctioned Rehabilitation Scheme for revival of the Company during the hearing held on 08th April 2013 and forwarded the Sanctioned Scheme dt. 24th May 2013. As per the Sanctioned Scheme the Equity and Secured Loan shall be written down by 99% and 97% respectively and fresh capital is required to be infused by Promoter along with various other concessions and obligations of Promoters as listed in the Scheme. He was aware that equity had been written down by 99%. That his interest was adversely affected was known to him. Reason for the same was contained in the scheme for rehabilitation sanction and *this was known to him. It is not a case where Mr.V.Swaminathan was to make any further enquiry to gain actionable knowledge except to apply for a certified copy of the order dated May 24, 2013 sanctioning the scheme.*

18. We find malice in the action of Mr.V.Swaminathan who has contributed nothing to the rehabilitation of the company and wants to put a spanner in the wheel of the rehabilitation scheme.

19. Keeping in view the information conveyed to Mr.V.Swaminathan in the notice dated September 06, 2013, he knew that his shareholding was reduced. He knew that the reduction was as per the scheme of rehabilitation. To gain knowledge of the reason contained in the scheme for rehabilitation he was obliged to apply for a certified copy of the order passed by BIFR sanctioning a scheme for rehabilitation of Akay and this he had to do within sixty days of September 12, 2013.

20. We accordingly hold that the appeal filed by Mr.V.Swaminathan against the order dated May 24, 2013 was barred by limitation.

21. Petitioner's contention that the scheme had been sanctioned on April 08, 2013 by BIFR and said order had to be challenged is found to be without any merit because practice of BIFR is to pass an order sanctioning a scheme followed thereafter by minutes drawn up where the scheme is formally notified by BIFR. This happened on May 24, 2013. The other reason is that this aspect of the matter was decided by AAIFR on November 17, 2014 and said order was not challenged soon thereafter by the petitioner. The petitioner filed the instant petition after the second order dated May 26, 2015 was passed by AAIFR holding appeal filed by Mr.V.Swaminathan to be maintainable.

22. The writ petition is disposed of quashing the order dated May 26, 2015. It is declared that Appeal No.59/14 filed before AAIFR was barred by limitation.

23. No costs.”

2. Application is disposed of.

PRADEEP NANDRAJOG, J.

MUKTA GUPTA, J.

MARCH 03, 2016
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