

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

1. CR No.2628 of 2017 (O&M)
Date of decision : 20.02.2018

M/s Tecpro Systems Limited and another

...Petitioners

Versus

Rajan Khandelwal

...Respondent

2. CR No.2629 of 2017 (O&M)
Date of decision : 20.02.2018

M/s Tecpro Systems Limited and another

...Petitioners

Versus

Rajan Khandelwal

...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.

Present: Mr. Sachin Mittal, Advocate for the petitioners.

Mr. R.S. Mamli, Advocate for the respondent.

ANIL KSHETARPAL, J.

By this common judgment, CR Nos.2628 and 2629 of 2017 shall stand disposed of as common issue arises for determination and the parties as well as the counsels are same.

The issue which arises for determination is whether on the registration of the reference under Section 15(1) of the Sick Industrial

Companies (Special Provisions) Act, 1985 (hereinafter to be referred as “the Act of 1985”), Section 22 of the Act of 1985 comes into the operation and execution of a Civil Court decree for recovery of the amount can be continued or not? In the present case, the Executing Court has refused to stay the execution proceedings on the following two grounds:-

1. The reference has only been registered. The Judgment Debtor Company has not been declared Sick Company within the meaning of the Act of 1985.
2. Since, the Decree Holder was not the party to the proceedings before the Board for Industrial and Financial Reconstruction, therefore, such registration of the reference, if any, is not binding on the Decree Holder.

Learned Executing Court has clearly overlooked the provisions of the Act of 1985. Section 16 of the Act of 1985, which enables the Board i.e. Board for Industrial and Financial Reconstruction to make such an enquiry as it may deem fit for determining whether any industrial company has become Sick Industrial Company or not. Section 16 of the Act of 1985 is extracted as under:-

“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.

(3) The Board or, as the case may be, the operating agency shall complete its inquiry as expeditiously as possible and endeavour shall be made to complete the inquiry within sixty days from the commencement of the inquiry.

1 [Explanation.—For the purposes of this sub-section, an inquiry shall be deemed to have commenced upon the receipt by the Board of any reference or information or upon its own knowledge reduced to writing by the Board.]

(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), 2 [it may appoint] one or more persons to be a special director or special directors of the company for safeguarding the financial and other interests of the company 1 [or in the public interest].

1[(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.]

(5) The appointment of a special director referred to in sub-section (4) shall be valid and effective notwithstanding anything to the contrary contained in the Companies Act, 1956 (1 of 1956), or in any other law for the time being in force or in the memorandum and articles of association or any other instrument relating to the industrial company, and any provision regarding share qualification, age limit, number of directorships, removal from office of directors and such like conditions contained in any such law or instrument aforesaid, shall not apply to any director

appointed by the Board.

(6) Any special director appointed under sub-section (4) shall—

(a) hold office during the pleasure of the Board and may be removed or substituted by any person by order in writing by the Board;

(b) not incur any obligation or liability by reason only of his being a director or for anything done or omitted to be done in good faith in the discharge of his duties as a director or anything in relation thereto;

(c) not be liable to retirement by rotation and shall not be taken into account for computing the number of directors liable to such retirement;

1 [(d) not be liable to be prosecuted under any law for any thing done or omitted to be done in good faith in the discharge of his duties in relation to the sick industrial company.] ”

Section 22 of the Act of 1985 provides that if an enquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or under consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to the Industrial Company is pending, then notwithstanding anything contained in the Companies Act or any other law or the Memorandum and Articles of Association or Instrument, 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 shall lie or be proceeded with.

Section 22 of the Act of 1985, is extracted as under:-

“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 3 [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.

(2) Where the management of the sick industrial company is taken over or changed 3[in pursuance of any scheme sanctioned under section 18], notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law or in the memorandum and articles of association of such company or any instrument having effect under the said Act or other law—

(a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;

(b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.

(3) 4[Where an inquiry under section 16 is pending or any

scheme referred to in section 17 is under preparation or during the period] of consideration of any scheme under section 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified by the Board:

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate.

(4) Any declaration made under sub-section (3) with respect to a sick industrial company shall have effect notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law, the memorandum and articles of association of the company or any instrument having effect under the said Act or other law or any agreement or any decree or order of a court, tribunal, officer or other authority or of any submission, settlement or standing order and accordingly,—

(a) any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration, and all proceedings relating thereto pending before any court, tribunal,

officer or other authority shall remain stayed or be continued subject to such declaration; and

(b) on the declaration ceasing to have effect—

(i) any right, privilege, obligation or liability so remaining suspended or modified, shall become revived and enforceable as if the declaration had never been made; and

(ii) any proceeding so remaining stayed shall be proceeded with, subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded.”

On reading of the aforesaid provisions, it is clear that the commencement of an enquiry as provided under Section 16 would start upon the receipt of reference with respect to such company under Section 15. It is not in dispute that in the present case, reference was registered by the Board for Industrial and Financial Reconstruction on 09.07.2015 (Annexure P-2) as case No.86/2015. Once, the reference was registered, the protection as provided under Section 22 shall become available. This issue has already been examined in detail by the Hon'ble Supreme Court in judgment as *(1998) 5 SCC 554, Real Value Appliances Ltd. Vs. Canara Bank*, and the Court has held as under:-

“23. Relying on the use of the word ‘may’ in section 16(1) of the Act it has been contended in some High Courts that the word ‘may’ in that section shows that the BIFR has

power to reject a reference summarily without going into merits and that it is only when the BIFR takes up the reference for consideration on merits under section 16(1) that it can be said that the 'inquiry' as contemplated by section has commenced. It is argued that if the reference before the BIFR is only at the stage of registration under section 15, then section 22 is not attracted. This contention, in our opinion, has no merit. In our view, when section 16(1) says that the BIFR can conduct the inquiry "in such manner as it may deem fit", the said words are intended only to convey that a wide discretion is vested in the BIFR in regard to the procedure it may follow for conducting an inquiry under section 16(1) and nothing more. In fact, Once the reference is registered after scrutiny, it is, in our view, mandatory for the BIFR to conduct an inquiry. If one looks at the format of the reference as prescribed in the Regulations, it will be clear that it contains more than fifty columns regarding extensive financial details of the Company's assets, liabilities, etc. Indeed, it will be practically impossible for the BIFR to reject a reference outright without calling for information/documents or without hearing the Company or other parties. Further, the Act is intended to revive and rehabilitate sick industries before they can be wound up under the Companies Act, 1956. Whether the Company seeks a declaration that it is sick or some other body seeks to have it declared as a sick Company, it is, in our opinion, necessary that the Company be heard before any final decision is taken under the Act. It is also the legislative intention to see that no proceedings against the assets are taken before any such decision is given by the BIFR for in the case the Company's assets are sold, or the company wound up it may indeed become difficult later to restore the status quo ante. Therefore, in

*our view, the High Court of Allahabad in **Industrial Finance Corporation vs. Maharashtra Steels Ltd. [1990 67 Comp. Cases 412 (All)]**, the High Court of Andhra Pradesh in **Sponge Iron India Ltd. vs. Neelima Steels Ltd. [1990 68 Comp. Cases 201 (AP)]**, the High Court of Himachal Pradesh in **Orissa Sponge Iron Ltd. vs. Rishab Ispat Ltd. [1993] 78 Comp. Cases 264]** are right in rejecting such a contention and in holding that the inquiry must be treated as having commenced as soon as the registration of the reference is completed after scrutiny and that from that time, action against the Company's assets must remain stayed as stated in section 22 till final decisions are taken by the BIFR."*

In view thereof, the order of the Executing Court declining to stay the execution petition on the ground that the company has not been declared Sick is clearly erroneous. Hence, liable to be set aside.

Learned court has further refused to stay the proceedings on the ground that the Decree Holder is not party to the proceedings before the Board for Industrial and Financial Reconstruction, as such registration of the reference is not binding.

In the considered opinion of this Court, even the second reason given by the Executing Court is erroneous. Section 22 of the Act of 1985 provides for suspension of the legal proceedings. Section 22 does not laid down that the Decree Holder has to be party before the Board for Industrial and Financial Reconstruction.

However, it may be significant to note here that Sick Industrial Companies (Special Provisions) Repeal Act, 2003 has been passed resulting into the repeal of the Sick Industrial Companies (Special Provisions) Act,

1985. The Repeal Act, was notified only w.e.f. 01.12.2016. In the present case, the Board has registered the reference before the repeal of the Act i.e. on 09.07.2015. However, as per Section 4(b) of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, any reference made or enquiry pending shall stand abated. The company which had sought reference is entitled to make reference to the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 within a period of 180 days from the commencement of the Insolvency and Bankruptcy Code, 2016. The petitioner has not produced any material on the record that any reference under the Insolvency and Bankruptcy Code, 2016 has made a reference to the National Company Law Tribunal.

Although, the order under challenge is erroneous, however, in view of the provisions of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, both the revision petitions have become infructuous as the proceedings before the Board for Industrial and Financial Reconstruction stand abated.

Hence, both the revision petitions are disposed of as infructuous.

20.02.2018

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No