



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

% Date of decision: 23.03.2011

+ WP (C) Nos. 1940, 1942, 1943, 1945, 1946, 1948-1958 of 2011

DIRECTOR GENERAL OF INCOME TAX
(ADMN.) & ANR., NEW DELHI ...PETITIONERS

Through: Mr. Sanjeev Sabharwal &
Mr. D.R. Jain, Advocates.

Versus

BOARD FOR INDUSTRIAL & FINANCIAL
RECONSTRUCTION, NEW DELHI & ORS. ...RESPONDENTS

Through: Ms. Maneesha Dhir, Ms. Purti
Marwaha & Mr. Abhirup Dasgupta,
Advocates for Respondent No.2 in
WP (C) Nos.1943/2011, 1945/2011,
1948/2011, 1955/2011 & 1956/2011.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers
may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be
reported in the Digest? Yes

SANJAY KISHAN KAUL, J. (Oral)

CM No.4130/2011 in WP (C) No.1940/2011 (Exemption)

CM No.4132/2011 in WP (C) No.1942/2011 (Exemption)

CM No.4133/2011 in WP (C) No.1943/2011 (Exemption)

CM No.4135/2011 in WP (C) No.1945/2011 (Exemption)

CM No.4136/2011 in WP (C) No.1946/2011 (Exemption)

CM No.4138/2011 in WP (C) No.1948/2011 (Exemption)

CM No.4139/2011 in WP (C) No.1949/2011 (Exemption)

CM No.4140/2011 in WP (C) No.1950/2011 (Exemption)



CM No.4143/2011 in WP (C) No.1953/2011 (Exemption)
CM No.4144/2011 in WP (C) No.1954/2011 (Exemption)
CM No.4145/2011 in WP (C) No.1955/2011 (Exemption)
CM No.4146/2011 in WP (C) No.1956/2011 (Exemption)
CM No.4147/2011 in WP (C) No.1957/2011 (Exemption)
CM No.4148/2011 in WP (C) No.1958/2011 (Exemption)

Allowed subject to just exceptions.

WP (C) Nos.1940, 1942, 1945, 1946, 1948-1958 of 2011

1. In the captioned writ petitions the Income Tax Department (for short ‘the Department’) has laid an omnibus challenge under Article 226 of the Constitution of India to the following orders dated 12.6.2007, 4.7.2008, 17.11.2008, 10.7.2008, 19.5.2009, 6.10.2009, 26.11.2009, 2.12.2009, 1.8.2005, 20.2.2007, 2.1.2008, 16.12.2009, 2.2.2009, 30.12.2009, 7.8.2006, 13.8.2007 (challenged in WP (C) Nos.1940, 1942, 1945, 1946, 1948-1958 of 2011 respectively) passed by the Board for Industrial & Financial Reconstruction (for short ‘BIFR’), without taking recourse to an appellate remedy, available under Section 25 of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as the ‘SICA’). The reason supplied for not doing so were told is two-fold: - First, the decisions of the Appellate Authority for Industrial and Financial Reconstruction (in short ‘AAIFR’) in the case of M/s. Symphony Comfort Systems Ltd. (Appeal Nos.78/2009 & 254/2009); M/s. Howrah Mills Ltd. (Appeal No.219/2008) & M/s. Siris Ltd. (Appeal No.229/2009); and second, the decision of this Court in M/s. Synergy Steels Limited Vs. The Appellate Authority for Industrial & Financial Reconstruction & Ors. (2011) 1 Compl L J 371 (Del).

1.1 Since the ground of challenge in each of the writ petitions is common we will be referring to the aforementioned orders collectively as the impugned



2. As is apparent, the impugned orders span a period commencing from August, 2006 till December, 2009. Delay and latches is starkly evident on the face of these impugned orders. Since the issue raised is important, we have decided to deal with the writ petitions on merits.

3. There is a common question arising in all these writ petitions, i.e. whether the discharge of the reference by the BIFR, on the sick industrial company's net worth becoming positive, would entitle the Department to withdraw the concessions which form part of a sanctioned scheme

4. The gravamen of the submissions of the Department (as is apparent from the grounds laid in these writ petitions) is that, once the net worth of the referrer (i.e., the sick industrial company) becomes positive, and the BIFR chooses to discharge the reference, then the protective umbrella of the provisions of SICA or the sanctioned scheme will automatically stand withdrawn.

5. It is pertinent to note that in the captioned cases, references were discharged by the BIFR at the request of the referrer on the ground that their net worth had become positive.

6. In nutshell, the contention of the Department is as follows:

With the net worth turning positive and the reference pending before the BIFR being discharged; the Department ought to be in a position to recover its dues *de hors* the concessions incorporated in the sanctioned scheme.

7. We are unable to accept this plea. However, we articulate reasons for coming to this conclusion, it would be appropriate to briefly touch upon the legislative scheme of SICA.

7.1 A perusal of the statement of objects and reasons encapsulated in SICA clearly provides that the intendment of the Legislature is that in order to overcome the ill



central and state government and the blockage of illiquid funds of the bank and financial institutions given in the form of financial assistance; led to the enactment of SICA. The avowed object of enactment of SICA is not only to fully utilize the productive industrial assets (which included both tangible and intangible assets) and human resources but also to salvage the locked investible funds of banks and financial institutions in such sick industrial companies which were non-viable. Therefore, the legislature in its wisdom decided to enact a special law to deal with the industrial sickness.

7.2 This necessarily meant that the provisions of SICA would engage the attention of expert bodies constituted under it (i.e., BIFR and AAIFR) in respect of only those companies which fall within the four corners of the act. In this regard the definition of a sick industrial company is paramount. Therefore, in order to enter the domain of SICA the referrer would have to be a sick industrial company. What is a sick industrial company is ascertainable on reading the provisions of Section 3(1)(o) along with provisions of Section 3(1)(e), 3(1)(f) and 3(1)(n) of the SICA. Briefly, what is discernable on reading of these provisions, is that, a sick industrial company is one which (i) owns one or more industrial undertakings; (ii) the industrial undertakings should pertain to a scheduled industry falling in the first schedule to the Industries (Development & Regulation) Act, 1951 (in short 'IDR'); (iii) the business of the industrial undertaking(s) could be carried on in one or more factories; and (iv) lastly, the accumulated losses of such company equal to or exceed its entire net worth. The aforementioned conditions are cumulative.

7.3 The additional conditionalities which are provided in Section 3(1)(o) and Section 3(1)(f) are that: the company should have been registered for not less than five years and that such a company should not be an ancillary industrial undertakings or a small scale industrial undertakings as defined in clause (aa) of Section 3 and clause (j) of the very same Section, i.e., Section 3 of the IDR Act.



7.5 Therefore, once the accumulated loss of a company which falls within the provisions of this act is eroded it necessarily has to file a reference with the BIFR. It may not be out of place to mention here that as a matter of fact the act envisages a mandatory reporting by companies falling within the provisions of SICA, its potential sickness. Under the provisions of Section 23 of SICA potential sickness is reached when at the end of a given financial year of a company 50% or more of its peak net worth during the immediately preceding four financial years gets eroded. Under Section 23 of SICA the onus is on the company, while under Section 23A of SICA the Central Government, Reserve Bank of India or the State Government or even a public financial institution or a State financial institution or a scheduled bank is empowered to report such potential sickness, if it has sufficient reasons to believe that the 50% or more of the peak net worth during immediately preceding four financial years at the end of any financial year stands eroded.

7.6 Therefore, the act provides for a mandatory reporting of not only sickness but also potential sickness of companies governed by the provisions of SICA. Once such an eventuality is reached, the referrer is required to approach the BIFR by filing a reference, in the prescribed format.

7.7 The point in time at which a company is required to mandatorily report its reference is provided under Section 15 of SICA. As observed by us above, the onus is on the company and, therefore, the board of directors of such a company.

7.8 Once a reference is filed under Section 16; as per the regulations enacted under SICA i.e., the Board for Industrial and Financial Regulations, 1987 (hereinafter referred to as 'Regulations'), the initial scrutiny of the particulars provided in the reference and the material appended to it is carried out by the prescribed authority. The Regulations provided for a scrutiny by the Secretary or the Registrar as the case may be and if for some reason the Registrar declines to register the reference, an appeal is provided to the Secretary. In the event of the Secretary also declining to



Regulations 19). The importance of the registration of reference cannot be undermined as once a reference is registered, the provisions of SICA get triggered.

7.9 In the ordinary course of things the reference comes up before the BIFR, that is, the board which sits in Benches. The BIFR or the Board is empowered to make an inquiry upon receipt of reference under Section 16 of SICA. For the purposes of this inquiry, the Board is empowered, if it so desires, to appoint one or more persons as special directors. The special directors under sub-section (6) of Section 16 are insulated from the vagaries of change at the behest of the shareholders, since they report directly to the BIFR and stay on the board of directors of the referencee company at the pleasure of the BIFR. [See clause (a) to (d) of sub-section (6) of Section 16] Upon inquiry once the BIFR comes to the conclusion that the referrer is a sick industrial company, then it has to take a view as to whether it is practicable for the sick industrial company to make its net worth exceed its accumulated losses within a reasonable time on its own or, if it is not practicable for the sick industrial company on its own to revive itself or it is of the opinion that it is expedient in public interest to adopt all or any of the measures provided in Section 18 of the SICA, it can appoint an operating agency to formulate a scheme for revival of the referrer [see sub-section (2) and (3) of Section 17].

7.10 If the BIFR passes an order under Section 17(3), then an operating agency is required to prepare a scheme ordinarily within a period of 90 days. Such a scheme can provide for measures, which are necessarily broad and wide, as contained in clause (a) to (f) of sub-section (1) of Section 18. In addition the scheme prepared by the operating agency can also provide for various aspects as delineated in clause (a) to (m) of sub-section (2) of Section 18.

8. Once such a scheme is prepared by an operating agency it is required to be examined by the BIFR. The BIFR, thereafter is required to send the scheme (which at that point of time is only a draft scheme) with modifications, if it so chooses to the



amalgamation is proposed as a measure of revival, then such a draft scheme is also sent to any other company which is concerned with the amalgamation. In order to invite suggestions and objections the BIFR is required to get such a draft scheme in brief, published in daily newspapers, as considered necessary by it [see Section 18(3)(a)].

8.1 Further on receipt of 'suggestions' and 'objections' from entities detailed out under Section 18(3)(b), which includes the sick industrial company, the operating agency, the transferee companies (in case of amalgamation), shareholders, creditors and employees of such companies, the BIFR may make modifications, and thereafter, proceed to sanction the scheme under sub-section (4) of Section 18 of SICA. In case the scheme involves amalgamation which needs approval of the shareholders of such other company other than the sick industrial company under clause (b) of sub-section (3) of Section 18, the BIFR is empowered under Section 18(4) to provide in such a sanctioned scheme the date from which the scheme will come into force or even dates from which different provisions of the scheme would come into force.

8.2 The BIFR has been conferred the power of reviewing a sanctioned scheme under sub-section (5) of Section 18. However, once a scheme gets sanctioned then it is presumed that all requirements of the scheme relating to reconstruction or agreement or any other measure have been complied with. A certified copy of the sanctioned scheme issued by the officer of the BIFR can be admitted as evidence in all legal proceedings.

8.3 Once the scheme becomes operable or any of its provisions become operative, it binds the sick industrial company, the transferee company or as the case may be such other company as also the shareholders, creditors, guarantors, or employees of the said companies.

8.4 The power of removing difficulties vis-à-vis a sanctioned scheme is conferred on the BIFR under Section 18(9) provided such an order or direction is not



8.5 Under Section 18(10) the BIFR is empowered to direct a specified operating agency to implement the sanctioned scheme in consonance with the terms and conditions contained therein and in relation to such a sick industrial company.

8.6 Under sub-Section (12) of Section 18, the BIFR has been given the power to periodically manage the implementation of the sanctioned scheme.

8.7 We may only point out that in so far as certain entities are concerned, such as the Central Government and the State Government or other bank or even a public financial institutions or State level institution or any institution or authority, SICA provides for obtaining their consent to the draft scheme where the scheme provides for financial assistance to a sick industrial company by way of loans advances, guarantees or reliefs and concessions or calls upon them to make sacrifices in relation to financial assistance already granted by such entities [See section 19(1) and (2)]. The entities described in Section 19(1) are required to convey their consent or response to draft scheme within 60 days. In case no response is reached within the period of 60 days or within such further period not exceeding 60 days then sub-Section (2) of Section 19 provides for a deemed consent. Once the process under sub-Section (2) of Section 19 is over the scheme becomes binding on all concerned from the date of such sanction [see clause (3A) of sub-Section (3) of Section 19].

8.8 If for any reason BIFR, after making an inquiry under Section 16 and after considering all relevant facts and circumstances, forms an opinion that it is not possible for the sick industrial company to make its net worth exceed accumulated losses within a reasonable time while meeting all its financial obligations, it can recommend its winding up to the concerned High Court. Though this recommendation can be made only after hearing all concerned.

8.9 In order to provide a protective umbrella to a sick industrial company, Section 22 of SICA provides for bar against institution and if already instituted suspension of legal proceedings of the kind referred to in the said Section except with the consent of



concerned, protection provided for is under sub-Section (2) of Section 22. The prohibitions on the management of the sick industrial company are contained under sub-section (2) of Section 22. The act specifically provides under sub-section (4) of Section 22 that 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 or any other law, memorandum or articles of association of company or any instrument having effect under the said act or other law or any agreement, decree or order of the Court, Tribunal, officer or authority or any submission, settlement or standing order etc.

9. Section 22A empowers the BIFR to issue necessary direction to the sick industrial company to desist from disposing of its assets during preparation or consideration of the scheme under Section 18 and during the period falling between its order recommending winding up and the commencement of the proceeding relating to winding up before the concerned High Court.

9.1 It is in this scenario, that Section 32 of SICA provides that the provisions of the scheme framed under the SICA, i.e., the sanctioned scheme, shall override all other laws except the Foreign Exchange Regulations Act, 1973 and the Urban Land (Ceiling & Regulations) Act, 1976. The Section states in the same vein that a scheme framed under SICA will override also the memorandum and articles of association of a sick industrial company or any other instrument having effect by virtue of any law other than this act.

10. In the context of the above discussion we would like to reproduce specifically the provisions of Section 32(1) of SICA. Section 32 (1)of the SICA reads as follows:

“32. EFFECT OF THE ACT ON OTHER LAWS.

(1) The provisions of this Act and of any rules or schemes made there under shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and the Urban Land (Ceiling and Regulation) Act



Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act.”

11. In view of the aforesaid provision there can hardly be any doubt that once a scheme is formulated after a reference is gone through the process of Sections 17 & 18 of the SICA, the said scheme would have the force of law notwithstanding anything inconsistent therewith contained in any other law. Thus, neither the party making any concessions at the time of the formulation of the scheme nor the company at whose behest the scheme is formulated and sanctioned can get out of the scheme. As noticed above, a draft scheme is sanctioned under the provisions of sub-section (4) of Section 18 of the SICA. Once a draft scheme is sanctioned it is binding on those concerned as is reflected in sub-section (8) of Section 18 and Section 19(3) of SICA. Thus, once a sanctioned scheme or any of its provisions is made operable it binds the sick industrial company, and the entities referred to in Section 18(8) and 19(3) of SICA. In these circumstances, the Department cannot surely be heard to argue that the provisions of the scheme are not binding on it.

12. We have to keep in mind that any scheme is a package to rehabilitate the company. It is possible that such rehabilitation may result in early success or at times may take a greater period of time to achieve financial stability. If the argument of the Department were to be accepted it would imply that if a sick industrial company achieves success in making its net worth positive, all benefits of a sanctioned scheme would stand withdrawn whether exhausted or not, even though the emergence from sickness, and its continued health is dependent on the sanctioned scheme being fully implemented. This would, according to us, defeat the very purpose of formulating a sanctioned scheme. A



which the assets of the referrer are to be dealt with. The provisions of the sanctioned scheme would bind both the referrer and those who are party to it, including those in respect of which SICA makes a specific provision. It has to be appreciated that to forge a consensus on rehabilitation of a sick industrial company is no mean task. But once consensus is arrived at, and a scheme is sanctioned, it cannot equally be jettisoned without due deliberation and adherence to the provisions of law. Thus, the apprehension of the Department that assets will be salted away is misconceived. The company which is the beneficiary of the sanctioned scheme can be brought to heel by taking recourse to appropriate remedies in order to obtain its obeisance to the sanctioned scheme.

13. We may also note that the mere fact that the net worth has become positive does not provide an automatic exit route from the proceedings before the BIFR. It is open to the BIFR to continue to monitor the implementation of the unimplemented part of the sanctioned scheme. In the captioned cases, the BIFR appears to have discharged the reference solely on the ground that the net worth had turned positive. The discharge of reference is followed by consequent directions of relieving the operating agency and the independent director, of its mandate. The BIFR has noticed that a substantive part of the sanctioned scheme has been implemented, while issuing a direction to implement the remaining part of the sanctioned scheme. If one may say so, the second part is really redundant since, as observed above by us, once a scheme is sanctioned it has the force of law; making its enforcement amenable as a matter of law, even in foras other than BIFR. We may emphasise at the cost of repetition that gaining entry within the domain of BIFR, the erosion of net



inverse does not necessarily follow. In other words a referrer cannot seek an exit as a matter of right merely on the ground that net worth has turned positive, especially where a sanctioned scheme is under implementation. This is a call that the BIFR has to take. Where the BIFR takes such a call by discharging the reference, it does impact the sanctity of a sanctioned scheme which continues to bind all concerned.

14. A Division Bench of this Court in M/s. Synergy Steels Limited case (supra) has discussed this aspect in the facts of that case. The BIFR found that since the referrer had ceased to be a sick industrial company, it was liable to be discharged from the purview of SICA. The referrer was apprehensive of the consequences thereof. The relevant paragraphs of the said judgement are reproduced as under:

“7. We agree with all the contentions as raised by the counsel for the petitioner. Surely, a sanctioned scheme is a scheme in its entirety. Implementation is also therefore to be in entirety. To show that a part implementation can result in absurdity, let us take the example where under a sanctioned scheme a company takes all the benefits of reliefs and concessions but does not perform the obligations as envisaged in a sanctioned scheme. Surely, this is impermissible. If this is impermissible, then, it is equally impermissible that if the sick company perform its obligations, then, it should be deprived of its rights under the sanctioned scheme. Merely, because a writ petition has been filed in the Rajasthan High Court would not mean that the proceedings cannot continue under SICA. Maybe the petitioner was not properly advised in filing of the writ petition or it took that action out of abundant precaution though it need not have, yet it does not mean that the authorities acting under SICA can simply discharge a sick company from the provisions of SICA although the sanctioned scheme is not fully implemented.

8. The Supreme Court in the aforesaid case of Bombay Dyeing & Manufacturing Co. Ltd. (supra) has categorically held that all actions with respect to breach or implementation of the sanctioned scheme have necessarily to be either by BIFR or AAIFR under SICA.



9. In view of the above, we accept the petition and quash the impugned orders dated 21.9.09 of AAIFR and 23.3.06 passed by the BIFR. It is directed that the matter be listed before the BIFR on moving an application by the petitioner for monitoring and implementation of the sanctioned scheme in its entirety, especially as regards the reliefs and concessions as are envisaged to be available to the petitioner company in terms of the sanctioned scheme SS-02.”

15. We may add that it is not the case of the Department that any part of the scheme has been violated by the referrer company nor have we been made aware of the non-implementation of any part of the sanctioned scheme. In fact, so much time has elapsed since some of the impugned orders were passed, it is quite possible that very many of the sanctioned schemes may have been totally implemented by now.

16. We are, thus, of the view that the Department cannot resile from the concessions made at the stage when the scheme was formulated and sanctioned merely because the net worth of the company at whose behest the scheme was sanctioned has become positive. That part of the sanctioned scheme which remains to be implemented will have to be implemented. A contrary view would result in disastrous consequences. Creditors, employees, shareholders, amongst other dramatis personae will pull in different directions, thus defeating the very purpose for which the sanctioned scheme was formulated in the first instance.

17. Needless to say that if there is a grievance of the Department in respect of any particular case, in as much that the concerned company is not implementing the provisions of the sanctioned scheme, it will be open to the Department to take action, in accordance with law, for enforcement of the sanctioned scheme.



18. In view of the discussion above there is, thus, no ground made out to exercise jurisdiction under Article 226 of the Constitution of India, since the department seems to be aggrieved by only that part of the impugned orders which tend to bind the department to the sanctioned scheme even after the BIFR has discharged the reference. As observed whether or not the BIFR implements the sanctioned scheme, it continues to bind the Department.

19. Accordingly, the captioned writ petitions are dismissed.

SANJAY KISHAN KAUL, J.

MARCH 23, 2011
b'nesh/kk

RAJIV SHAKDHER, J.