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

Reserved on: 04.07.2013
Pronounced on: 19.07.2013

\+ **W.P.(C) 1915/2013, C.M. APPL. 3645/2013**

M/S LORD CHLORO ALKALIES LTD. ..... Petitioner
Through : Sh. J.P. Sengh, Sr. Advocate with Ms. Vinita Sasidharan, Ms. Varsha Banerjee, Sh. Sumeet Batra and Ms. Ankita Gupta, Advocates.

versus

DIRECTOR GENERAL OF INCOME TAX (ADMN) AND ANR. ..... Respondents
Through : Sh. Sanjeev Sabharwal, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S.RAVINDRA BHAT

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1. In these proceedings under Article 226 of the Constitution of India, the petitioner challenges the orders of the Appellate Authority for Industrial Reconstruction (hereafter "AAIFR") under provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereafter "SICA") dated 01.04.2009 and 27.09.2012 in Appeal No. 227/2008. By that order, the AAIFR had set aside a scheme

formulated under the SICA to the extent it dealt with waiver and deduction of interest under provisions of the Income Tax Act, 1961.

2. The Petitioner was incorporated under the Companies Act, 1956 on 1st March, 1979; it was originally named Modi Alkalies & Chemicals Limited, which was subsequently changed to M/s Lord Chloro Alkalies Ltd in the year 2003. It started commercial production of caustic soda in 1994-95 with a capacity of 126 TPD which was later enhanced to 195 TPD based on mercury cell technology which was replaced by membrane cell technology in the year 1994-95 with a further enhancement in its capacity to 255 TPD. Till 1997-98 the Petitioner-company operated satisfactorily. Later, due to adverse market conditions, change in government policy, high cost of power, high cost of production and heavy interest burden, the Petitioner started incurring heavy losses resulting in closure of its operations. On 30.06.1999, in view of the colossal losses, the net worth of the Petitioner eroded pursuant to which it made a reference under Section 15(1) of SICA to the Board for Industrial Finance and Reconstruction (hereafter "BIFR"); it was rejected in July 2001 as not maintainable. Later, on 30.06.2000, the Petitioner filed another reference before the BIFR based on its accounts. This time, it was registered as Case No.308 of 2001. On 15.01.2002, BIFR declared that the Petitioner was a sick company and directed IDBI to act as the Operating Agency (OA).

3. Holding that no feasible rehabilitation proposals were forthcoming from the Petitioner Company, BIFR by its order dated 19.08.2003 directed the OA to issue an advertisement for change of

management (COM) as the offers received by the OA for COM did not fructify. Taking these factors into account BIFR *prima facie* concluded that it would be just, fair and in public interest that the Company should be wound-up and show cause notice for Winding Up should be issued to the Petitioner Company. By *ex-parte* order dated 02.06.2004, BIFR directed winding up of the Petitioner Company under Section 20(1) of SICA and accordingly directed issuance of Show Cause Notice (SCN) for Winding Up. Aggrieved by that order of BIFR, the Petitioner filed an appeal being Appeal No. 154/ 2004.

4. During pendency of the said appeal, the first Respondent, i.e. the Income Tax Department filed an application on 14.11.2005 under Section 22(1) of SICA seeking permission to recover its dues of Rs. 997.79 lakhs with an alternative claim that in the event a scheme is allowed to be formulated then a suitable provision for payment of income tax dues of the Petitioner-Company ought to be made in the scheme itself. It is stated that on 14.03.2006, during the pendency of the appeal before BIFR, the Petitioner could settle the dues of all its secured creditors (except IIBI, RIICO & UTI). The AAIFR, taking note of the fact that the Petitioner, out of its 10 secured creditors namely IDBI, ICICI, IFCI SBI, PNB, Syndicate Bank, Indian Bank, IIBI, RIICO & UTI had already settled the dues of 7 creditors (except IIBI, RIICO and UTI), by order dated 14.03.2006 allowed the appeal and set aside the order (dated 02.06.2004) and remanded the matter with a direction that a suitable provision for payment of income tax dues amounting to Rs. 997.79 lakhs payable by the Petitioner ought to be made in the rehabilitation scheme. By its order dated 22.09.2006,

BIFR directed for circulation/publication of the Draft Rehabilitation Scheme (DRS), in compliance with provisions of Section 18(3) of SICA. The DRS was duly published. The BIFR after considering the objections/suggestions of the secured creditors to the DRS sanctioned the scheme on 30.11.2006; a copy of the sanctioned scheme was duly sent by BIFR to the income tax authorities on 15.12.2006. The petitioner states that by a separate letter, the sanctioning of the scheme was brought to the notice of the income tax authorities on 27th February, 2007.

5. In September 2008, being aggrieved by the order (dated 30.11.2006 of BIFR), the Income Tax Department preferred a belated appeal to AAIFR, (being Appeal No.227 of 2008) in respect of the Income Tax reliefs and concessions provided in the Sanctioned scheme in Paras 10.7(1), (2), (3) & (4). An accompanying application, M.A. No.46 of 2009 for condoning the delay of two years was filed. The appeal and application were objected to by the Petitioner. On 01.04.2009 by its interim order, AAIFR allowed the application for condonation of delay and held that the first Respondent department had no knowledge of the proceedings before the BIFR prior to 07.08.2008. The Petitioner had opposed the application and argued that the Income Tax Department had in fact, given effect to clause 11.5 of the sanctioned scheme and waived the interest under Section 234B of Income Tax Act to the extent of Rs.2,47,34,779/- and interest under Section 220(2) amounting to Rs.3,20,62,504/- in respect of the Petitioner Company for assessment year 1996-1997. By the impugned order, the AAIFR finally allowed the Income Tax Department's

appeal and set aside Clause 11.5 of the published scheme, approved by the BIFR.

6. The Petitioner argues, in its pleadings, and through the submissions of its senior counsel, Shri J.P.Sengh, that the impugned order is not sustainable in law. It is pointed out that the finding regarding the order (of AAIFR) having been made in contravention of principles of natural justice is contrary to facts. It was argued in this regard that the letter of 30.09.2009 of the concerned assessing officer of the Income Tax Department itself shows that the Respondents were aware of the BIFR's orders, and accepted them without demur. The said letter reads as follows:

> ***"Order to give effect to the decision of the BIFR u/Ss 22 & 32 of the SICA Act 1985 Dated : 30-9-2009***
>
> *The Board for Industrial and Financial Reconstruction, New Delhi in Case No. 308/2001 in the case of M/s Lords Chloro Alkalies Ltd. Dated 13.12.2006 has passed the order as per para 11.5 which is as under:*
>
> > *"The statutory liabilities which are under litigation/appeal shall on crystallization after exercise of all the legal remedies available to the company be paid over a period of seven years on interest free basis. All the penal interest, damages, penalties, charges are chargeable on the same shall be waived."*
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> *The Hon'ble ITAT, Jaipur in its decision in appeal no.199/JP/2000 and 210/JP/2000 dated 19.02.2008 set aside the decision before the ld. CIT(A), Alwar in view of the decision passed by the BIFR for fresh adjudication de novo in the assessment year 1996-97.*

> *To give effect to the decision of BIFR, the interest u/s 234B amounting to Rs.2,47,34,779/- and interest u/s 220(2) amounting to Rs. 3,20,62,504/- waived by the BIFR is hereby reduced from the arrear demand against the M/s. Modi Alkalies & Chemicals Ltd., Alwar."*

Learned senior counsel also relied on the order of the CIT (Appeals) dated 4th March, 2011, especially Paras 31 and 32, to say that the determination of BIFR was accepted, and directions contained in its order were implemented. Consequently argued counsel, the Income Tax authorities should not have made a grievance of the BIFR scheme. The consequential order of the assessing officer, dated 29.03.2011, reducing the demands, in line with the order of BIFR was relied on. The said order reads as follows:

> *"Consequent to order of Ld.CIT(A), Alwar of AY 1999-97, a demand has been reduced to Rs.2,87,17,062/- after appeal effect.*
>
> *As per order of BIFR, you are required to make the payment of above demand in seven installments. Accordingly, it is requested to pay Rs.41,02,437/(1/7th of Rs. 2,87,17,062/-) by 31.03.2011 positively.*
>
> *Please note in the event of non-response the above mentioned demand will be recovered by adopting coercive measures."*

7. It is argued on behalf of the Petitioner that in the above circumstances, the Income Tax authorities were estopped and bound by the principle of waiver from contending that the orders of the BIFR were not binding upon them. Counsel further emphasised that the

order of BIFR had been worked out and the benefits of both in respect of the income tax concessions as well as the other benefits mandated under the rehabilitation scheme had been implemented. In these circumstances, contended learned senior counsel, it would be unjust and inequitable to set aside the order of BIFR on an erroneous interpretation of law and mistaken view of the facts.

8. Learned Counsel next argued that in terms of Section 32 of the Sick Industrial Companies (Special Provisions) Act, 1985, overriding effect has been given to the orders of BIFR and schemes of rehabilitation which are otherwise legally valid.

9. On behalf of the official respondents, it is argued by Shri. Sanjeev Sabharwal, learned Standing Counsel, that the income tax authorities were completely in the dark about the nature of the scheme finalised by BIFR. It was argued that after the previous order of remand by the AAIFR, a duty had been cast upon the BIFR to circulate the draft scheme to it i.e. the income tax authorities. There was no material on the record to suggest that such an obligation had been fulfilled.

10. More substantially, learned Standing Counsel argued that the provisions of SICA could not prevail over those of the Income Tax Act. In this context, it was argued that in terms of the decision of the Supreme Court in *Commissioner of Income tax v Anjum. M.H. Ghaswala & Ors.* (2002) 1 SCC 633 it was held that the interest contemplated under Sections 234A, 234B and 234C is mandatory in nature and the power of waiver or reduction, having not been expressly conferred on the Settlement Commission, waiver or

reduction in payment of statutory interest is outside the purview of the settlement proceedings, contemplated in Chapter XIX-A of the Act. It was submitted that likewise, since no provision of SICA enabled waiver or reduction of statutory interest mandated by the Act, BIFR could not have unilaterally directed such a relief. In this respect, contended Learned Standing Counsel, the sole repository of the power to grant a waiver or reduction of interest rates or amounts was the Board of Direct Taxes, under Section 119 (2) of the Income Tax Act. Reliance was also placed on Board Circular No. 400/234-95/IT (B) which has specified the authorities entitled to consider the question of waiver of interest and such other relief. It was submitted that in the present case, the assessing officers and Commissioners had unilaterally, and without reference to the Board, and its circulars, which they were bound to respect, given effect to the orders of the BIFR.

11. The broad and brief facts necessary to decide this petition are not in dispute. The company was declared sick; when a reference was made, BIFR circulated the draft rehabilitation scheme with the broad acceptance of the company's secured creditors. At that stage, the income tax authorities were in the know of the scheme. During the pendency of an appeal to the AAIFR, the Income Tax Commissioner had preferred an application, on 14.11.2005. In that application, the following reliefs were claimed:

> *"1) the Deptt may be granted permission u/s 22(1) of SICA to recover its dues of Rs. 976.79 lakhs as intimated by the company.*

2) If a scheme is being directed to be formulated, provision may be directed to be kept in that revival scheme for the payment of I.T. dues of Rs. 976.79 lakhs on priority basis.

3) Taking cognizance of Section 281 of the I.T.Act, 1961 the Deptt may be given priority in the matter of recovery of Rs. 976.79 lakhs. In the event, a scheme is allowed to be formulated the 1.T.dues of Rs. 976.79 Iakhs may be given due priority for payment over other dues.

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The AAIFR, while disposing of the appeal, took note of the claims of the Income Tax Department, and directed as follows, in its order dated 14.03.2006:

"XXXXXX XXXXXX XXXXXX

Given this context we set aside the impugned order and remand the case to the BIFR. We also direct the company and the OA severally to ensure that a fully tied up revival scheme is presented to the BIFR not later than 60 days of this order. If in the meanwhile negotiations cannot be completed with IIBI, RIICO and UTI then the scheme may provide that their dues will be settled by the company/ promoters separately. One Trivedi & Sons who is an unsecured creditor and had appeared before us has some dues from the company which should be taken care of in an appropriate manner in the scheme itself. Income Tax Authorities in a separate application dated 14th Nov. 2005 have filed an application seeking permission under Section 22(1) of SICA to recover its dues of 997.79 lakhs.

XXXXXX XXXXXX XXXXXX"

The BIFR scheme complied with this direction, and expressly

provided that *"The statutory liabilities which are under litigation/appeal shall on crystallization after exercise of all the legal remedies available to the company be paid over a period of seven years on interest free basis. All the penal interest, damages, penalties, charges are chargeable on the same shall be waived."*

12. The first question is whether the income tax authorities are justified in stating that the order of BIFR, to the extent that it scaled down interest (on income tax liability) are beyond jurisdiction, since only the Board through its designate has the authority to waive or remit interest under the Income Tax wholly or in part. The petitioner in this context, relies on Section 32 of SICA; it 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, 1976 (33 of 1976) for the time being in force or in the 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.*
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> *(2) Where there has been under any scheme under this Act an amalgamation of a sick industrial company with another company, the provisions of section 72A of the Income-tax Act, 1961 (43 of 1961), shall, subject to the modifications that the power of the Central Government under that section may be exercised by the Board without any recommendation by the specified authority referred to in that section, apply in relation to such amalgamation as they apply in relation to the amalgamation of a*

company owning an industrial undertaking with another company."

The decision of the Supreme Court in *Anjum M.H. Ghaswala (supra)* is no doubt an authority for the proposition that interest waiver cannot be granted to anyone except those specified in the Income Tax Act. However, the court did not have any occasion to deal with provisions of SICA, or their interface with provisions and orders under the Income Tax Act.

13. One well recognized principle of statutory construction is that when courts have to deal with conflicting or inconsistent laws, or inconsistent provisions of two separate enactments, the first approach should be to attempt at harmonization of the two provisions, to avoid, or minimize the conflict. The second line of approach is to see which of the two laws is a general law. A prior special law will prevail over a later and general law. This is more so, when the prior law contains a *non-obstante* clause (*R.S. Raghunath vs State Of Karnataka And Anr* AIR 1992 SC 81; *Allahabad Bank v. Canara Bank & Anr.* (2000) 4 SCC 406). The tenor and express provisions of Section 32 of SICA, in the opinion of this court, leave no doubt that the provisions of SICA are to prevail, *except to the extent excluded.* The immunity, or exception from, the *non obstante* clause, is limited to the provisions of enactments referred, of the enactments referred. The specific reference to Foreign Exchange Regulation Act and Urban Land Ceiling Act in Sectin 32 (1) and to Section 72-A of the Income Tax Act, mean that

those provisions will stand excluded from the rigors of Section 32 of SICA.

14. A somewhat similar question had been considered by the Supreme Court in *Aswini Kumar Ghosh & Anr v. Arabinda Bose & Anr,* [1953] SCR 1, when it was observed that - *"It should first be ascertained what the enacting part of the section provides on a fair construction of the words used according to their natural and ordinary meaning, and the non obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing laws which is inconsistent with the new enactment."* In the case of Section 32 SICA, the specific exclusion of two enactments, and the express reference to Section 72A of the Income Tax Act, to say that its provisions apply (by Section 32 (2)) manifest Parliamentary intention that provisions of SICA have to prevail over those of the Income Tax Act. This court's conclusion is strengthened by precedent. In http://indiankanoon.org/doc/366360/ *Mewar Sugar Mills Ltd. v. Chairman, Central Board of Direct Taxes & Anr* 1998 VI AD(DELHI) 309 a Division Bench had concluded that:

> *"21. To sum up:*
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> *(1) The non obstinate clause contained in sub-section (1) of Section 32 of SICA does not give the SICA a blanket overriding effect on all other laws; the overriding effect is given to the provisions of SICA, rules or schemes made thereunder only to the extent of inconsistency therewith contained in any other law excepting a few exceptions enumerated therein.*

(2) Exempting from and suspending the operation of the provisions contained in Section 41 of the Income-tax Act, 1961 as regards a sick industry amounts to 'sacrifice from the Central Govt.'- the expression as used in Section 19(1) of SICA.

(3) It is for the BIFR to form an opinion while framing a scheme of rehabilitation for a sick industry whether an exemption from operation of S 41 of the Income-Tax Act, 1961 is required to be engrafted in the scheme so as to secure the object of rehabilitation and if so then to what extent. If the BIFR may form an opinion in favour of grant of such exemption then the same amounts to 'financial assistance' from the Central Govt to the extent of the sick industry having been exempted from the operation of Section 41 of the Income-tax Act."

This court also notices that a similar view has been expressed by the Bombay High Court in *Vadilal Dairy International Ltd v. State of Maharashtra* 2009 (1) Comp. LJ 466 (Bom).

15. The next issue is whether the revenue is correct in saying that by virtue of Section 119 of the Income Tax Act, and circulars issued under that enactment, the Board of Direct Taxes' views have primacy over that of BIFR. Section 119 reads as follows:

"119. Instructions to subordinate authorities

(1) The Board may, from time to time, issue such orders, instructions and directions to other income- tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board: Provided that no such orders, instructions or directions shall be issued-

(a) so as to require any income- tax authority to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Deputy Commissioner (Appeals) or the Commissioner (Appeals)] in the exercise of his appellate functions.

(2) Without prejudice to the generality of the foregoing power,-

(a) the Board may, if it considers it necessary or expedient so to do, for the purpose of proper and efficient management of the work of assessment and collection of revenue, issue, from time to time whether by way of relaxation of any of the provisions of sections 5[139], 143, 144, 147, 148, 154, 155, 6[sub- section (1A) of section 201, sections 210, 211, 7[234A, 234B], 234C], 271 and 273 or otherwise, general or special orders in respect of any class of incomes or class of cases, setting forth directions or instructions (not being prejudicial to assessees) as to the guidelines, principles or procedures to be followed by other income- tax authorities in the work relating to assessment or collection of revenue or the initiation of proceedings for the imposition of penalties and any such order may, if the Board is of opinion that it is necessary in the public interest so to do, be published and circulated in the prescribed manner for general information;

(b) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order, authorise 8[any income- tax authority, not being a Deputy Commissioner (Appeals) or Commissioner (Appeals)] to admit an application or claim for any exemption, deduction, refund or any other relief under

this Act after the expiry of the period specified by or under this Act for making such application or claim and deal with the same on merits in accordance with law.

(c) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order for reasons to be specified therein, relax any requirement contained in any of the provisions of Chapter IV or Chapter VIA, where the assessee has failed to comply with any requirement specified in such provision for claiming deduction thereunder, subject to the following conditions, namely:-

(i) the default in complying with such requirement was due to circumstances beyond the control of the assessee; and

(ii) the assessee has complied with such requirement before the completion of assessment in relation to the previous year in which such deduction is claimed: Provided that the Central Government shall cause every order issued under this clause to be laid before each House of Parliament.

(3) Every Income- tax Officer employed in the execution of this Act shall observe and follow such instructions as may be issued to him for his guidance by the Director of Inspection or by the Commissioner or by the Inspecting Assistant Commissioner within whose jurisdiction he performs his functions."

16. In pursuance of the above provision, the Central Board of Direct Taxes had withdrawn previous circulars, and in its Circular No. 683 dated 08.06.1994, required that the nodal authority for coordinating between BIFR and the Central Board was the Director General (Administration). This was sought to be highlighted by counsel for the

revenue. This court has no doubt about the proposition. However, the blanket submission that when the circular under Section 119 is ignored, and a scheme is given effect to by income tax authorities themselves, the BIFR's order or scheme is void, cannot be countenanced. There is no material on record to suggest such a conclusion. The Income Tax authorities in this case were aware in the earlier round, about the reference and possibility of a scheme; they requested for provision to recover their dues. The AAIFR specifically remitted the matter to BIFR to consider this aspect, which it did. Although the income tax authorities were not given notice, the order of BIFR reveals that it applied its mind, and granted limited concession only as regards reduction and waiver of interest. The larger pleas of the company towards income tax dues and concessions were denied by the BIFR. Having regard to these circumstances, and Section 32 of the Act as well as the Circular No. 683 of 1994 under the Income Tax Act, the failure of income tax authorities to inform the Director General (since the Circular was in existence at the time of formulation of the scheme in the present case) would not result in the invalidity of BIFR's scheme. Another aspect which this court notices is that the Income Tax authorities, i.e. the assessing officer and the Commissioner, have given effect to the orders of BIFR. These were pursuant to the orders of the Income Tax Appellate Tribunal (ITAT) dated 19.02.2008. That order stands and has attained finality. Besides, the period for operation of the limited concessions in the scheme has also apparently ended. Lastly, in view of the concurrence of the other secured creditors, and implementation of the approved scheme, it

would be inequitable and unjust to put the clock back, at the behest of the Income Tax authorities.

17. In view of the above discussion, the writ petition is entitled to succeed. The impugned orders of AAIFR dated 01.04-2009 and 27.09.2012 in Appeal No. 227/2008 are hereby quashed. The orders of BIFR sanctioning the scheme, on 30th November, 2006 are hereby restored. The writ petition is allowed in these terms; there shall be no order as to costs.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

JULY 19, 2013