

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.10221 OF 2014 @
(SPECIAL LEAVE PETITION (C) NO.5249 OF 2014)

GHANSHYAM SARDA ... APPELLANT

Versus

M/S SHIV SHANKAR
TRADING CO. & ORS.RESPONDENTS

WITH

CIVIL APPEAL NO.10222 OF 2014 @
(SPECIAL LEAVE PETITION (C) NO.5897 OF 2014)

GHANSHYAM SARDA ... APPELLANT

Versus

M/S SHIV SHANKAR
TRADING CO. & ORS. ... RESPONDENTS

CIVIL APPEAL NO.10223 OF 2014 @
(SPECIAL LEAVE PETITION (CIVIL) NO.8610 OF 2014)

JK JUTE MILL MAZDOOR
EKTA UNION ... APPELLANT

Versus

M/S SHIV SHANKAR

TRADING CO. & ORS.

... RESPONDENTS

CIVIL APPEAL NOS.10224-10225 OF 2014 @
(SPECIAL LEAVE PETITION (C) NOS.8611-8612 OF 2014)

JK JUTE MILL MAZDOOR
EKTA UNION

... APPELLANT

Versus

M/S SHIV SHANKAR
TRADING CO. & ORS

... RESPONDENTS

CIVIL APPEAL NO.10226 OF 2014 @
(SPECIAL LEAVE PETITION (CIVIL) NO.6412 OF 2014)

GHANSHYAM SARDA

... APPELLANT

Versus

M/S JK JUTE MILLS
CO. LTD. & ANR.

... RESPONDENTS

CONTEMPT PET. (C) NO.338 OF 2014 IN
(SPECIAL LEAVE PETITION (CIVIL) NO.5249 OF 2014)

GHANSHYAM SARDA

...PETITIONER/
APPLICANT

Versus

SASHIKANT JHA, DIRECTOR M/S JK
JUTE MILLS CO. LTD. & ORS.

... RESPONDENTS

AND

SUPREME COURT OF INDIA



JUDGMENT

CONTEMPT PET. (C) NO.375 OF 2014 IN @
(SPECIAL LEAVE PETITION (CIVIL) NO.8610 OF 2014)

JK JUTE MILLS MAZDOOR PETITIONER/
EKTA UNION APPLICANT

Versus

SASHIKANT JHA, DIRECTOR M/S JK
JUTE MILLS CO. LTD. & ORS. ... RESPONDENTS

J U D G M E N T

UDAY UMESH LALIT, J.

1. Permission to file SLP granted in SLP(C) Nos.8611-12/2014. Leave to appeal granted in all Special Leave Petitions.
2. All these Special Leave Petitions arise out of a common judgment and order dt. 06.01.2014 passed by the High Court of Gauhati in FAO No. 10 of 2013 and Writ Petition Nos. 4303 of 2013 and 6286 of 2013 and are being disposed by this common judgment and order. These petitions raise questions regarding scope and ambit of Sections 22(1), 26 and 32(1) of the Sick Industrial Companies (Special Provisions) Act 1985, hereinafter referred to as the Act.

3. A company named J.K. Jute Mill Company Ltd. (hereinafter referred to as 'the company') having its registered office at Kanpur, Uttar Pradesh filed Reference No. 149 of 1994 before the Board for Industrial and Financial Reconstruction ("BIFR" for short) under the provisions of the Act. Though the scheme was initially sanctioned for reconstruction, the BIFR subsequently held the scheme to have failed and directed the company to be wound up. These orders were stayed by the Appellate Authority for Industrial and Financial Reconstruction ("AAIFR" for short) and further proceedings before the BIFR continued. While the matter was thus pending, "Sarda Group" took over the Company through Rainey Park Suppliers Private Ltd. (RPSPL) in 2007. BIFR by its order dated 17.12.2008 approved such take over of the management. The management of the company was handed over to Shri Govind Sarda. It appears that in 2009, Shri Govind Sarda assigned the debt held by RPSPL in favour of an entity named Libra Retailer Pvt. Ltd. (LRPL) and he is stated to have handed over Jute Mill of the company to a third party. As he failed to revive the company, show cause notice for winding up was issued by the BIFR. This

action was challenged by the Company by filing Appeal No. 186 of 2009 before the AAIFR which appeal is still pending.

4. At this stage, Shri Ghanshyam Sarada, (hereinafter referred to as the present appellant) filed an application for impleading himself in the proceedings which application was accepted by AAIFR. Upon this order being challenged, the High Court of Delhi in W.P. No.2839 of 2010 held the present appellant to be entitled to present his point of view in the form of proposal/scheme, which order was confirmed by this Court by dismissing Special Leave Petition filed at the instance of the Company. In terms of the aforesaid orders the BIFR impleaded the present appellant who thereafter submitted a proposal for revival of the company and also filed MA No.162 of 2012 in the BIFR for restoration of shareholding pattern. On 18.02.2013 the BIFR issued directions to the operating agency to consider the scheme of the present management and the scheme submitted by the present Appellant and thereafter submit a fully tied up Draft Revival Scheme (“DRS” for short). The BIFR fixed the next date for hearing of MA 162 of 2012 on 04.04.2013. In the proceedings dated 27.02.2013, it was decided that the DRS be

circulated seeking objections and suggestions from all the concerned.

5. On 03.04.2013, two applications were filed before the BIFR by M/S Shyam Jute Supplier, Chindwara M.P. and M/S Shiv Shankar Trading Co. & Ors, Gauhati Assam (hereinafter referred to as 'SSTC') signed by the same person through same Counsel stating that they were unsecured creditors and sought permission from the BIFR to institute Civil Suit for recovery of money stated to be recoverable from the company. On 04.04.2013 the BIFR held a hearing to consider the change in the share holding pattern of the company without due permission from BIFR. At that stage Counsel appearing for the Company submitted that Application No. 162 of 2012 could not be considered as the BIFR no longer retained jurisdiction over the Company. It was submitted that in the Audited Balance-Sheet for the period of nine months i.e. 01.04.2012 to 31.12.2012 the net worth of the Company having turned positive, the Company ought to be discharged from the BIFR. Learned counsel appearing for Shyam Jute Supplier and SSTC supported such submissions.

6. Paragraphs (4.1, 4.3, 4.4, 4.8, 4.12 and 4.13) of the proceedings dated 04.04.2013 are quoted here under which are self eloquent.

“**4.1.** Today’s hearing (04.04.2013) was fixed for consideration of MA No. 162/BC/2012 filed by Shri Ghanshyam Sarda praying as under:

- a) Declare that the change in shareholding pattern to the extent the same reduces the shareholding of RPSPL from 86.23% to 5.34% without approval of BIFR as null and void;
- b) Restore the management and the shareholding pattern of JKJMCL as approved by the learned BIFR vide its order dated 18.09.2008.
- c) Initiate action under section 33 read with section 34 against the management for changing the shareholding pattern of the sick company without seeking permission from BIFR; and
- d) Appoint a special director (BIFR Nominee) in the Board of the Company to look into and monitor its affairs;
- e) Pass such other further order(s) as this Hon’ble BIFR may deem fit and proper in the facts and circumstances of the case;

4.3. Shri Sudhansu Batra, Sr. Advocate appearing on behalf of the Sick Company intervened and stated the MA NO. 162/BC/2012 cannot be considered today since BIFR no longer retains jurisdiction over the company. Shri Batra, Sr. Advocate stated that the Balance sheet as on 31.12.2012 has been audited which shows that the networth of the company has turned positive and the company has to be discharged from BIFR. Upon a query from the Bench, Shri Sudhansu

Batra, Sr. Advocate stated that the company has already filed a letter dated 25.03.2013 with the BIFR informing that the networth of the company as on 31.12.2012 has turned positive. Upon a query from the Bench, Shri Sudhansu Batra, Sr. Advocate stated that the financial period of the company is normally for 12 months but this year the accounts have been closed by auditing the balance sheet for 9 months period from 01.04.2012 to 31.12.2012. The Ld. Senior Advocate prayed that in view of the networth turning positive the company should be discharged from the BIFR. The Ld. Senior advocate argued that there are no provision under SICA for deregistration of a reference when the net worth becomes positive and the Sick Company is not required to make a formal application to the BIFR for discharge when the company's net worth becomes positive. The Ld. Advocate further stated that the sickness of the company is to be decided ex facie on the basis of the audited Balance Sheet and as the Audited Balance Sheet as at 31.12.2012 is showing positive Networth, BIFR ceases to have any jurisdiction. The Ld. Senior Advocate to support of this submissions referred to and relied upon the judgment passed by Hon'ble Delhi High Court in the case of: Cahtolic Syrian Bank V/s BIFR & Ors. On a query from the bench that assuming the networth has turned positive whether BIFR would automatically lose its jurisdiction or BIFR still has the powers to examine the audited balance sheet and formally pass an order of discharge, Shri Sudhansu Batra Sr. Advocate agreed and in fairness conceded that before discharging the company, the BIFR can examine the audited balance sheet as on 31.12.2012 by all means and methods and satisfy itself. Shri Sudhansu Batra, Sr. Advocate stated that his clients is not required to file an application seeking discharge and BIFR on

its own may examine the audited Balance Sheet and discharge the company from BIFR.

4.4. Shri Ashish Mohan, Advocate appearing for an unsecured creditor stated that his clients have filed application seeking impleadment as well as permission under section 22(1) of SICA to file recovery proceedings against the management of the company; but in view of the networth of the company turning positive the company may be discharged from BIFR so that his clients may file recovery suit against the company. The learned Advocate stated that since the networth of the Sick Company has turned positive, he would not be pressing any of his application (s) and would take legal recourse against the company in court of law.

4.8 The representatives of IDBI (OA) stated that they are not in a position to comment upon the Audited Balance Sheet as on 31.12. 2012 without examining the same. The OA further stated that the ASC is going ahead as per its schedule and the next meeting of the ASC is on 16.04.2013. The Bench observed that the ASC may go ahead with its schedule and that ASC should do nothing more at present except opening and evaluating the bids and submit its report on such evaluation to the BIFR and that BIFR shall take a final view upon the bids and the sale of assets at the time of approval of DRS. The bench further observed that DRS has already been circulated on 26.02.2013 and the objections & suggestions shall be considered on 20.05.2013. Till such time either the Bench considers the DRS or discharge the company from SICA; the Bench shall safeguard the assets of the company and retain its jurisdiction over the company/its assets.

4.12. The Bench stated that they would consider the arguments of the parties including the

arguments of Mr. Aggarwal on the next date of hearing. The Bench also observed that as per the Company's ABS as on 31.03.2012, (12 months) the networth of the company is Rs. 5.71 crores and the accumulated losses are Rs. 36.23 crores and it would like to satisfy itself about the Balance Sheet as at 31.12.2012 to which Mr. Batra agreed that the BIFR could undertake such an exercise. Since the issue of lack of jurisdiction has been raised; the Bench would decide the said issue alongwith MA No. 162/BC/2012.

4.13. Having considered the submissions made in the hearing, materials on record, the Bench issued the following directions:

(i) The company to submit certified copy of its ABS as on 31.12.2012 along with all relevant papers & documents in support of its networth within one week from today with copy to the IDBI (OA) and all concerned parties alongwith documentary evidence;

(ii) The ASC would go-ahead as per its schedule and confirmation of sell, if any will take place upon approval of DRS on 20.05.2013, with the consent of Bench.

(iii) The Bench fixed the next date of hearing on 26.04.2013 at 11.30 AM for considering the submission of the Company that its networth has turned positive as on 31.12.2012 and also hear the MA No. 162/BC/2012 on the said date."

7. At this stage some of the other proceedings need a mention. J.K. Jute Mazdoor Sabha filed Writ Petition No. 22897 of 2013 before the Allahabad High Court on 25.04.2013 challenging the BIFR's order dated 04.04.2013. Said Writ

Petition having been dismissed by a Single Judge, in an appeal therefrom the Division Bench in its order dated 01.05.2013 observed that the BIFR would be in a better position to assess the net worth position of the company. In the meantime, Shyam Jute Suppliers approached the High Court of Madhya Pradesh by filing Writ Petition No.7534 of 2013 questioning the order dated 04.04.2013 of the BIFR. The petition was dismissed by a Single Judge on the ground of lack of territorial jurisdiction which order was approved in appeal by the Division Bench of the High Court.

8. On 22.04.2013, SSTC filed Title Suit No. 166 of 2013 in Civil Court at Kamroop, Gauhati against the Company adding BIFR as proforma defendant. It was *inter alia* averred

“.... Now it appears from the balance sheet of the defendant company filed before the proforma defendant that its net worth had become positive. In view of the said admission on the part of the defendant No. 2 it is no longer a sick establishment under the Sick Industrial Companies (Special Provisions) Act, 1985 and consequently the proforma defendant No. 2 has ceased to have jurisdiction over the defendant No. 1 and as such the defendant No. 1 is no longer entitled to any benefit under the Sick Industrial Companies (Special Provisions) Act, 1985. Thus the defendant No. 1 under the aforesaid facts and circumstances has become liable to be sued in a Civil Court of competent jurisdiction with effect from the date

the 2012 balance sheet as submitted by it before the proforma defendant No. 2 and the proforma defendant ceased to have any jurisdiction whatsoever.”

The plaintiff prayed for declaration, *inter alia*, that the company was no longer a sick company within the meaning of the Act and that the BIFR ceased to have jurisdiction over the company and all the proceedings in BIFR after filing of positive balance-sheet be declared without jurisdiction. The Civil Court by its order dated 23.04.2014 while issuing notices to the defendants directed that status-quo be maintained in respect of the BIFR case till the next date of hearing.

9. The company filed its written objections on 13.05.2013. Though the claim of the plaintiff and its entitlement to recover the sum stated to be due was denied, the company accepted that it was no longer a sick company. The relevant averments were to the following effect.

“..... That the answering opposite party humbly states that the statements made in paragraph number 1 of Misc. (J) Case No. 254/13 are to the extent that the opposite party is no longer a sick establishment is not denied.”

“ That the answering opposite party admits the statement made in paragraph number 10 and admit that on and from the financial year 2012-2013 it is no longer a sick company. The balance sheet is also admitted. The rest of the statements regard jurisdiction is a matter of fact and law and the opposite party has no comment to offer.”

10. The matter came up before the Civil Court on 13.05.2013.

It noted the aforementioned stand and in view of such admitted position held that the BIFR ceased to have any jurisdiction over the defendant company. It was observed:-

“.... But a question that is still required to be answered at this juncture is as to whether this Court has the jurisdiction to grant the relief of temporary injunction as sought for in the instant case. Section 26 of the SICA, which provides *inter alia* that no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act, shall not be applicable to the opposite party no. 1 company any more as it is no more a sick industrial company admittedly and the provisions of the SICA are not applicable to it anymore, and, therefore, the civil court will definitely have jurisdiction over it. Hence, this Court has jurisdiction to grant the relief as sought for in the instant case....”

In the premises, the Civil Court restrained the defendants including the BIFR from proceeding with BIFR case no. 149 of 1994. Neither the Plaintiff nor the Company at any stage placed

on record before the Civil Court the proceedings dated 04.04.2013 of the BIFR nor was the Civil Court appraised of the fact that the Plaintiff had sought leave under Section 22 (1) of the Act from the BIFR to file the Civil Suit.

11. In the meantime while dealing with appeals preferred against the orders of the BIFR including one dated 27.02.2013, the AAIFR was appraised that the issue of Net worth was under consideration of the BIFR, so vide its order dt.16.05.2013 it preferred to await such decision. In the subsequent proceedings of the same day i.e. 16.05.2013 the aforesaid order of the Civil Court was placed before the BIFR which observed that it had not given any permission under Section 22 (1) of the Act to SSTC to file any recovery suit against the company and the matter was adjourned in the presence of the counsel concerned for considering the submission of the parties on the issue of net worth as on 31.12.2012. It was further observed that in the absence of permission under Section 22 (1) the suit filed by SSTC was not competent and that, the company had not yet been de-registered from BIFR and a filing of Civil Suit without taking permission was violative of the Act. Taking note of the order of

the AAIFR dated 16.05.2013 and the order passed by the High Court of Allahabad dated 01.05.2013, it was observed that it had to decide the issue whether the net worth of the company had turned positive or not. The BIFR thus directed the parties to file their written submission on the aspect of the net worth of the company as on 31.12.2012.

12. On 30.05.2013, the present appellant filed an application for impleadment as defendant in the aforesaid Suit. Adverting to the orders passed by the BIFR and AAIFR impleading him in the proceedings before the BIFR and the subsequent orders passed by the Division Bench of the High Court of Delhi and this Court on his impleadment and the fact that he had submitted a proposal for revival, the present appellant prayed that he be impleaded in said suit as a defendant. The present appellant thereafter filed FAO No.10 of 2013 before Gauhati High Court challenging the Civil Court's order dated 13.05.2013. A learned Single Judge after preliminary hearing by his order dated 14.06.2013 admitted the appeal for hearing and also passed interim order to the effect that no third party rights in respect of the property of the

respondents/defendants be created during the pendency of the appeal.

13. In the meantime, the matter appeared before the BIFR on 01.07.2013. It prima facie was of the view that the Audited Balance-Sheet as on 31.12.2012 of the company did not reflect true and fair view and that the matter required examination as to how the net worth of the company, all of a sudden, turned positive. It was observed that SSTC was not granted any permission by the BIFR under Section 22 (1) of the Act and the suit of SSTC was not competent, that SSTC had suppressed the fact from the Civil Court and that the order passed by the Civil Court being without jurisdiction was a nullity in the eyes of law and not binding upon the BIFR. It was further observed that the BIFR had to satisfy itself whether the net worth had turned positive due to some positive development and not merely by manipulation of the accounts. In the premises it directed the State Bank of India to appoint independent auditor for Special Investigative Audit and to file its report about net worth position of the company as on 31.12.2012.

14. SSTC who was the original plaintiff in the aforesaid Suit filed Writ Petition No. 4303 of 2013 in Gauhati High Court challenging the orders dated 16.05.2013 and 01.07.2013 of the BIFR. Said Writ Petition came up before the Single Judge who by his order dated 01.08.2013 impleaded the present appellant as Respondent No. 3 in the Writ Petition and further directed that till the next date of hearing further proceedings in BIFR case No. 149 of 2014 shall remain stayed. Subsequently, the matter appeared before the Single Judge again who, on 14.08.2013 directed that the matter be placed before Hon'ble the Chief Justice for directions whether the Writ Petition could be heard along with FAO No.10 of 2013.

15. On 04.09.2013, State Bank of India as directed by the BIFR submitted the Report of the Special Investigative Audit pointing out the manipulation in the balance-sheet submitted by the company and that the net worth of the company as on 31.12.2012 was in fact on the negative side by Rs.36 crores in nine months. In the proceedings before the BIFR dated 05.09.2013, the aforesaid Report was taken on record and comments from the parties were invited.

16. Immediately the company filed Writ Petition No.4286 of 2013 before Gauhati High Court questioning the order dated 05.09.2013 of the BIFR. The matter came up before a Single Judge on 30.09.2013 who issued rule in the Writ Petition and by way of interim order directed that further proceedings in BIFR case No.194 of 1994 shall remain stayed. This order was vacated by Division Bench of the High Court in Writ Appeals vide its order dated 14.11.2013. These three matters namely FAO No.10 of 2013 and Writ Petition Nos.4303 and 6286 of 2013 were thereafter clubbed and posted before the Single Judge on 21.11.2013, who adjourned the matters to 04.12.2013 and observed that since the Court was in seisin of the matter it was expected that the BIFR may not proceed further with the case till conclusion of the hearing before the learned Single Judge. In deference to the aforesaid order dated 21.11.2013, the BIFR adjourned the case.

17. These three matters then came up before the High Court which observed that FAO No.10 of 2013 was filed by the present appellant who was not yet a party before the Civil Court and that

said FAO which was filed without seeking appropriate leave of the Appellate Court was not maintainable and as such it was not necessary to enter upon deliberations on merits of the matter. The High Court was of the view that since the application for impleadment was still pending before the Civil Court, as and when the present appellant was impleaded as defendant in the suit, it would then be open to him to file such application for variation or setting aside of the order of injunction. It was held that in the absence of any challenge, the order of injunction was still in operation and that until and unless such order was vacated and recalled by appropriate judicial forum, the same had to be respected and given effect to. The High Court also disposed of Writ Petitions on the ground that since all the proceedings before BIFR stood stayed, further proceeding in BIFR would be of no legal consequence. It was further observed that one of the members of BIFR having recused himself from hearing the case on the earlier occasions as noted in the order dated 31.01.2013, of the BIFR, said member ought not to have participated in any further proceedings.

18. This common order passed by the High Court has given rise to six Special Leave Petitions, three by present appellant namely SLP No. 5249, 5897 and 6412 challenging the order of the High Court in respect of FAO No.10 of 2013, Writ Petition No.4303 of 2013 and Writ Petition No.6286 of 2013 respectively. The other three petitions are by J.K. Jute Mill Mazdur Ekta Unions being Special Leave Petition Nos. 8610, 8611 and 8612 of 2014 against the aforesaid order in respect of three proceedings as stated above respectively. This Court issued notice in the matter on 24.03.2014 on which date the company had appeared on caveat. By order dated 08.05.2014, it was directed that till further orders the capital assets of the Company shall not be disposed of without taking permission of this court. Soon thereafter Civil Contempt Petition Nos.338 and 375 of 2014 were filed by the present appellant and J.K. Jute Mills Mazdoor Union contending *inter alia* that in violation of order dated 08.05.2014, the contemnors in the petition had caused certain properties of the Company to be transferred. During the pendency of these matters SSTC assigned in favour of M/s

Goodlife Merchants Pvt. Ltd. all the rights in respect of the debt of the Company.

19. All the aforesaid matters were taken up for hearing together by this Court. Appearing for the present appellant, Mr. Kapil Sibal, learned Senior Counsel submitted that the Act is a complete code in itself and given the true scope and purport of Sections 22 , 26 and 32 of the Act, the jurisdiction of the BIFR over any company in question would continue till its formal discharge by BIFR either after the net worth of the company turned positive by successful implementation of the scheme or by the order of winding up passed in respect of such company. It was further submitted that the BIFR alone will have competence and jurisdiction to declare a company which was once a sick company, to be no longer sick and discharge it from the purview of the Act and that the Civil Court will not have jurisdiction or competence to decide these questions. It was further submitted that the Civil Court is not the appropriate forum and lacks jurisdiction to examine the correctness of the annual accounts and conclude whether the company in question was no longer amenable to be dealt with under the Act. In support of his

submissions, reliance was placed on the decisions of this Court in **Managing Director Bhoruka Textiles Limited Vs. Kashmiri Rice Industries¹** and **Raheja Universal Limited Vs. NRC Limited & Ors.²** Appearing for J.K. Jute Mill Mazdur Ekta Union, Shri Krishnan Venugopal and Shri R.P. Bhatt, learned Senior Counsel adopted the submissions of Shri Sibal. Shri Venugopal, learned Senior Counsel also invited the attention of this Court to the report of the State Bank of India to show how the net worth of the company was still on the negative side. Shri Kapil Sibal and Shri Sanjeev Sen, learned Senior counsel also invited the attention of the Court and submitted that the alleged contemnors in aforementioned Contempt Petitions had flagrantly violated orders of this Court.

20. Shri Guru Krishna Kumar, learned Senior Counsel appearing for SSTC original plaintiff and the transferee M/s Goodlife Merchants Pvt. Ltd. in all the matters submitted that since the audited balance-sheet as on 31.12.2012 showed the net worth of the company on positive side, the company was out of the purview of the provisions of the Act and it was competent for

¹ 2009(7) SCC 521

² 2012 (2) SCC 148

the company to claim itself to be no longer amenable to the jurisdiction of the BIFR. It was submitted that it was open to assert, upon the net worth being positive, that the company *ipso facto* was no longer amenable to the jurisdiction of the BIFR. In support, reliance was placed on the view taken by the High Courts of **Calcutta**³, **Madras**⁴ and **Delhi**⁵. Dr. A.M. Singhvi and Shri Harin Rawal, learned Senior Counsel appearing for the company submitted *inter alia* that while the matters were pending before this Court, the Trial Court by its order dated 29.08.2014 had allowed the application for impleadment filed by present appellant in Title Suit No.166 of 2013 and that it was now open to the present appellant to go before the Trial Court and ask for variation and modification of the order of injunction passed by it. It was submitted that BIFR which is a Tribunal with limited jurisdiction could not have disobeyed the order of the Civil Court. Relying on the views taken by the High Courts of Calcutta, Madras and Delhi in the aforesaid cases it was submitted that there was no provision in the Act under which

³3. Dated 08.08.1995 in Zuari Agro Chemicals Ltd. & Anr Vs. The Industrial Credit and Investment Corporation of India & Ors. in Matter No.362 of 1995 (OS).

⁴4. Dated 19.12.2007 in Dunlop India Ltd. Vs. Container Corporation of India Ltd. & Anr. in Writ Petition No.24422 of 2006.

⁵5. Dated 21.10.2009 in Catholic Syrian Bank Vs. BIFR & Ors. in W.P. (C) No.8361 of 2008.

BIFR could pass an order discharging a company under the Act and as such the matter could lie in the domain of the Civil Court. Shri C.U. Singh, learned Senior Counsel appearing for LRPL, one of the secured creditors, adopted the submissions and further submitted that various proceedings before the BIFR actually showed that the members of the BIFR were biased against the Company.

21. Before we deal with the legal issues involved in the matter certain factual facets of the matter need clarification and assessment. During the course of submissions, it was submitted that the Counsel appearing for the company had never agreed before the BIFR on 04.04.2013 that the BIFR could examine the audited balance sheet itself to satisfy whether the net worth of the company had turned positive or not. In support, reliance was placed on letter dated 18.04.2013 stated to have been written on behalf of the company to the Secretary Bench 3, BIFR, copy of which letter was also placed on record. Said letter purportedly stated that the recording of such submission was wrong and that the learned counsel had never submitted that before discharging the company the BIFR could examine the audited balance sheet

and satisfy itself. Be it noted that the letter was not written by the learned counsel nor any affidavit was sworn by the learned counsel denying such factum. Furthermore, in none of the subsequent proceedings after 04.04.2013, as per the record of the BIFR, any argument disputing or denying such submission appears to have been made, nor is there any reference in the subsequent proceedings to the letter dated 18.04.2013. In the circumstances we deem it appropriate to proceed on the basis that the submission was in fact made by the learned counsel and it was so rightly recorded by the BIFR in its proceedings dated 04.04.2013.

Secondly, it has been accepted by the company that property at Saif Ganj, Katihar belonging to the company has in fact been sold. At this stage, it may be useful to quote from the written submissions filed on behalf of the company and the relevant portion reads as under:

“A sale deed of the Katihar property was executed on 2.4.2013 for Rs.3.55 crores in favour of Thapar Herbs & spices Ltd. and the sale consideration was received on 4.4.2013. On 16.4.2013, the constructive possession was handed over and registration fee of Rs.35.00 lacs was paid by the Purchaser. As per the Revenue Department, the stamp duty was higher than affixed and the

matter was pending adjudication and thereafter, final registration was done on 16.4.2014. Under the Bihar local stamp laws, since over a year had lapsed, a fresh sale deed was presented. The difference of registration fee was paid by the purchaser on 16.6.2014. On 2.7.2014, the sale deed was presented which act of presentation was only ministerial.”

This would mean that even before the hearing of the matter before the BIFR on 04.04.2013 the property was sold. The record does not indicate anywhere that the factum of such sale was ever brought to the notice of the BIFR on 04.04.2013 or thereafter nor was it disclosed that the Rs.3.55 crores were received by way of consideration. Furthermore, when this Court issued notice on 24.03.2014 when the company had appeared on caveat and subsequently passed interim order on 08.05.2014, nothing was disclosed to this Court that the property had been sold.

22. We may also at this stage deal with submission regarding effect of order dated 29.08.2014 of the Civil Court impleading the present appellant as defendant. Confining itself to the question of competence of the present appellant to file the appeal without leave of the court, the High Court had not dealt with

legal issues, namely what shall be the effect of sections 22, 26 and 32 of the Act insofar as the present controversy is concerned. It was therefore submitted on behalf of the company that since the appellant now stands impleaded, he be left to pursue appropriate remedies before the Trial Court. We are not persuaded to agree with this submission to relegate the matter to the Trial Court and we proceed to deal with the legal issues involved in the matter inasmuch as the matter raises basic issues concerning jurisdiction of the Civil Court itself. The learned Counsel appearing for the Original Plaintiff as well as the company have also advanced submissions on the legal issues in question and we therefore deem it appropriate to deal with such issues.

JUDGMENT

23. At this juncture the question regarding maintainability of the appeal before the High Court needs to be dealt with. As the facts indicate, FAO was admitted after hearing the respondents. Neither at that stage nor at any subsequent stage anything was filed by way of formal opposition to the filing of such appeal without the leave of the Court. Further the status of the present

appellant to present his point of view in the form of proposal or scheme before the BIFR was accepted right up to this Court and he had thereafter been represented before the BIFR. The proceedings dated 04.04.2013 also indicate that the BIFR was in seisin of MA NO.162 of 2012 preferred by him. He was also impleaded as respondent in the writ petitions which were dealt with along with the said FAO. The present appellant was thus not a stranger to the controversy. There is nothing in Order XLIII Rule 1 of the Code of Civil Procedure that leave to appeal has to be applied for in any particular format. In the circumstances, the High Court was not justified in dismissing the appeal on a technical ground and it ought to have considered the merits of the matter. We hold the appeal preferred by the present appellant to be maintainable and proceed to consider the basic issues involved in the matter.

24. Sections 22(1), 26 and 32(1) of the Act, the ambit and scope of which fall for our consideration are quoted hereunder:

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 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.

26. Bar of Jurisdiction—No order passed or proposal made under this Act shall be appealable except as provided therein and no civil court shall have jurisdiction in respect of any matter which the Appellate Authority or the Board is empowered by, or under, this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

32. Effect of the Act on other laws.—(1) The provisions of this Act and of any rules or schemes made thereunder 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 (33of 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.

25. Chapter III of the Act details out various stages at which inquiry into the working and status of sick industrial companies and the scheme for revival is undertaken. Upon a reference to the Board or upon information received with respect to financial conditions of any industrial company, the Board is empowered under Section 16 to conduct such inquiry as it may deem fit for determining whether such company has become a sick industrial company. After being so satisfied, the measures which could be taken up to enable the company to make its net worth exceed the accumulated losses that is to say to make it positive are postulated in Section 17. Under Section 17(1) the Board may by order in writing allow an industrial company to revive itself, if it is practicable so to do within a reasonable time. If it is not so practicable, it may direct any operating agency to prepare a scheme for the revival of such company. In other words, once the reference is registered, it is the BIFR which supervises the aspects leading to the revival of such company. Subsequent

sections deal with the preparation and sanction of scheme for revival of such company and empower the Board to have dominion over such company to enable the revival of that Company and in cases where such revival is not possible, to recommend the winding up of such company. It is clear that after a reference is registered by the Board, all throughout the subsequent stages, the BIFR has complete supervisory control over the affairs of such company till it is revived or the decision to wind up such company is taken. In our view, the ambit and extent of such control means and includes determination of such measures to achieve revival of the sick company and to check whether by such measures the revival is being achieved or not. This must cover the power to decide at any stage subsequent to the registration of reference under Section 16 whether such company has ceased to be sick company or not. Cessation of the status as a sick company can be under Section 17(1) or as a result of scheme for revival being implemented and determination of such issue, in our view, is in the exclusive domain of the BIFR.

26. In **Raheja Universal Limited Vs. NRC Limited**², it was observed in para 48 thus:

“Chapter III, in fact, is the soul and essence of SICA 1985 and it provides for the methodology that is to be adopted for the purpose of detecting, reviving or even winding up a sick industrial company. Provisions under SICA 1985 also provide for an appeal against the orders of BIFR before another specialized body i.e. AAIFR. To put it simply, this is a self-contained code and because of the non obstnace provisions, contained therein, it has an overriding effect over the other laws. As per Section 32 of SICA 1985, the Act is required to be enforced with all its vigour and in precedence to other laws.”

The Act is a self-contained Code and has conferred upon the BIFR complete supervisory control over a sick industrial company to adopt such methodology as provided in Chapter III for detecting, reviving or winding up such sick company. The authority to determine the existence and extent of sickness of such company and to adopt methodology for its revival are, in the exclusive domain of the BIFR and by virtue of Section 26 there is an express exclusion of the jurisdiction of the Civil Court in that behalf.

27. As laid down by this Court the Act is a complete Code in itself. The Act gives complete supervisory control to the BIFR over the affairs of a sick Industrial Company from the stage of

registration of reference and questions concerning status of sickness of such company are in the exclusive domain of the BIFR. Any submission or assertion by anyone including the Company that by certain developments the Company has revived itself and/or that its net worth since the stage of registration having become positive no such scheme for revival needs to be undertaken, must be and can only be dealt with by the BIFR. Any such assertion or claim has to be made before the BIFR and only upon the satisfaction of the BIFR that a sick company is no longer sick, that such company could be said to have ceased to be amenable to its supervisory control under the Act. The aspects of revival of such company being completely within its exclusive domain, it is the BIFR alone, which can determine the issue whether such company now stands revived or not. The jurisdiction of the civil court in respect of these matters stands completely excluded.

28. Unlike cases where the existence of jurisdictional fact or facts, on the basis of which alone a Tribunal can invoke and exercise jurisdiction, is or are doubted, stand on a different footing from the one where invocation and exercise of

jurisdiction at the initial stage is not disputed but what is projected is that by subsequent or supervening circumstances the concerned Tribunal has lost jurisdiction. In the present case the fact that the company was registered as a sick company is not doubted nor has it been contended that the BIFR had wrongly assumed initial jurisdiction. But what is projected is that the net worth having become positive the BIFR has now lost jurisdiction over the company. In our view, the BIFR having correctly assumed jurisdiction and when all the financial affairs of such company were directly under the supervisory control of the BIFR, the power to decide whether it has since then lost the jurisdiction or not, is also in the exclusive domain of the BIFR. The BIFR alone is empowered to determine whether net worth has become positive as a result of which it would cease to have such jurisdiction. Any inquiry into such issue regarding net worth by anyone outside the Act including civil court, would be against the express intent of the Act and would lead to incongruous and undesired results. The suit as framed seeking declaration that the company was no longer a sick company within the meaning of the Act, was therefore not competent and

maintainable. The Civil Court was not right and justified in issuing injunction as it did. The counsel who represented the company before the BIFR on 04.04.2013, correctly submitted that before discharging the company the BIFR can examine the audited balance sheet and satisfy itself whether the net worth had turned positive.

29. Insofar as the recovery of money is concerned, the matter is completely covered by Section 22(1) of the Act. The language employed in Section 22(1) of the Act refers to the entirety of the period beginning from the inquiry under Section 16 till the implementation of sanctioned scheme for revival. Section 22(1) bars any suit for recovery of money or for the enforcement of any security against the industrial company without the express consent of the Board. Reference in Section 22(1) is to “an Industrial Company” and not to “the sick Industrial Company” as found in later sub-sections of the same Section. This also throws light that the bar is during the period contemplated in said Section 22(1). Such bar is period specific and sub-section (5) of Section 22 entitles exclusion of such period while computing limitation. During the entirety of that period the Act grants

protection to the company and leaves it to the discretion of the BIFR whether to permit filing and maintaining of suit or other proceedings. In the present case the BIFR was considering Draft Rehabilitation Scheme which is a stage under Section 18(3) and is completely covered by the period under Section 22 of the Act. The suit in the instant case as framed for recovery of money filed without the consent of the BIFR was not competent and maintainable. We may at this stage refer to the decisions rendered by this Court with regard to Section 22(1) of the Act. In ***Managing Director, Boruka Textiles Limited Vs. Kashmiri Rice Industries***¹, after quoting sub-section (1) of Section 22 of the Act, it was observed:-

“A plain reading of the aforementioned provision would clearly go to show that a suit is barred when an enquiry under Section 16 is pending. It is also not in dispute that prior to institution of the suit, the respondent did not obtain consent of the Board.

9. the provision of the Act and, in particular, Chapter III thereof, provides for a complete code. The Board has a wide power in terms of the provisions of the Act, although it is not a court. Sub-section (4) of Section 20 as also Section 32 of the Act provides for non obstante clauses. It envisages speedy disposal of the enquiry and preferably within the time framed provided for thereafter. Section 17 empowers the court to make suitable orders on the completion of enquiry.

Preparation and sanction of the scheme is also contemplated under the Act.”

In para 12 of the said decision, it was further stated:

“If the civil court’s jurisdiction was ousted in terms of the provisions of Section 22 of the Act, any judgment rendered by it would be *coram non judice*. It is a well settled principle of law that a judgment and decree passed by a court or tribunal lacking inherent jurisdiction would be a nullity.”

Similarly, in **Raheja Universal Limited Vs. NRC Limited**² it was observed as under:

“49. BIFR has been vested with wide powers and, being an expert body, is required to perform duties and functions of wide-ranged nature. If one looks into the legislative intent in relation to a sick industrial company, it is obvious that BIFR has to first make an effort to provide an opportunity to the sick industrial company to make its net worth exceed the accumulated losses within a reasonable time, failing which BIFR has to formulate a scheme for revival of the company, even by providing financial assistance in cases wherein BIFR in its wisdom deems it necessary and finally only when both these options fail and the public interest so requires, BIFR may recommend winding up of the sick industrial company. So long as the scheme is under consideration before BIFR or it is being implemented after being sanctioned and is made operational from a given date, it is the legislative intent that such scheme should not be interjected by any other judicial process or frustrated by the impediments created by third parties and even by the management of the sick

industrial company, in relation to the assets of the company.”

The suit in the instant case, insofar as it relates to the claim for recovery of money, could lie or be proceeded with only after express consent of the BIFR.

30. We now deal with the decisions of the High Courts of Calcutta, Madras and Delhi. All these decisions were rendered while considering writ petitions under Article 226 of the Constitution of India. In the first of these three cases the High Court took the view that there is no express provision in the Act which indicates when the BIFR loses its jurisdiction with regard to a company which was once sick and proceeded to declare the company in question not amenable to the jurisdiction of the BIFR from and with effect from the date the Balance Sheet showed the Net Worth to be positive. In the second case the High Court was of the view that sickness of an industrial company is to be decided ex-facie on the basis of the audited balance sheet and when the Net Worth becomes positive the BIFR ceases to have any jurisdiction. The last case arose from the same BIFR matter and Delhi High Court followed the view taken by Madras High

Court. Said decisions must now be read in the light of the above discussion and view that we have taken.

31. In the circumstances, we allow the present appeals and set aside the order dated 06.01.2014 passed by the High Court of Gauhati in FAO No.10 of 2013 and Writ Petition Nos.4303 of 2013 and 6286 of 2013. It is held that the Title Suit No.166 of 2013 pending on the file of the learned Civil Court at Kamroop, Gauhati is not maintainable insofar as it seeks declaration that the company was no longer a sick company within the meaning of the Act and that the BIFR ceased to have jurisdiction over the company and that all the proceedings in the BIFR after filing of the positive balance-sheet were without jurisdiction. Consequently the order of injunction passed by the Civil Court is set aside. Insofar as the said Suit pertains to the claim for recovery of money from the Company, the Suit could lie and be proceeded with only after express consent of the BIFR is received by the plaintiff. We direct that the company i.e., J.K. Jute Mills Company Ltd. having its registered office at Kanpur U.P. continues to be under the jurisdiction of the BIFR. We leave it to the BIFR to satisfy itself and determine the issues

whether the net worth of the company has turned positive or not. If the BIFR is so satisfied, it shall de-register the company and upon such declaration the company will be out of the supervisory jurisdiction of the BIFR under the Act. Needless to say that if the BIFR is not satisfied that the net worth of the company has turned positive, it shall go ahead and consider the scheme for revival of the company. We direct the BIFR to complete this exercise within two months from date of receipt of this order. We have refrained from dealing with the matter concerning the merits or de-merits of the claim that the net worth has turned positive nor have we dealt with the report made by the State Bank of India in its Special Investigative Audit. We leave these issues to be considered by the BIFR at an appropriate stage. We have also not dealt with the submissions alleging bias as the matters in that behalf are still pending consideration before the authorities and we leave these issues to be dealt with at an appropriate stage.

32. Since in our view the company continues to be a sick company and it was not competent for anyone except the BIFR to determine whether the net worth of the company had turned

positive, we hold the sale of Katihar property effected by the company without express leave or permission of the BIFR to be questionable. However, since the transferee of that property is not before this Court we relegate this matter for appropriate assessment by the BIFR after issuing due notice to the transferee. We also leave it to the BIFR to consider and assess whether there was any necessity or expediency to sell the property in question. If in its opinion such expediency and necessity are established, the BIFR may also consider whether the value that the property has fetched is adequate or not. If the value is adequate it may confirm the sale in favour of the transferee. However, if the value in its opinion is inadequate, it shall give offer and adequate time to the transferee to make good the deficit. In any case if the sale is held to be bad or if the transferee is not willing to make good the deficit, the entire consideration for the transaction be returned to the transferee. In such eventuality whatever the transferee has paid in excess of the consideration money towards stamp duty and registration shall be recovered from the Directors and persons responsible for effecting such sale on behalf of the company.

33. Now we turn to the filing of the civil suit in the instant case and its conduct. The original plaintiff had sought consent of the BIFR under Section 22(1) of the Act and was before the BIFR on 04.04.2013. However, he did not disclose either the factum that he had so sought such consent or that the BIFR was in seisin of the matter and considering whether the net worth of the company had turned positive. Non-disclosure of these two essential facts, in our view, was not accidental. We therefore impose costs of Rs.5 lacs on the original plaintiff which shall be deposited within three months from the date of this order, failing which action in contempt shall be initiated against the original plaintiff. The costs shall be deposited to the account of the Supreme Court Legal Services Authority. Though the conduct of the company as defendant before the Civil Court was of the same order, since it is a sick company we refrain from imposing any costs on the company. No other order as to costs.

34. The appeals are allowed in the aforesaid terms. FAO No.10 of 2013 thus stands allowed and Writ Petition Nos.4303 of 2013 and 6286 of 2013 are dismissed. As regards Contempt

Petition Nos.338 and 375 of 2014, since this Court had not issued any notice to the alleged contemnors, we have not dealt with said petitions. By a separate order we issue appropriate notice to the alleged contemnors.

.....J.
(Anil R. Dave)

.....J.
(Uday Umesh Lalit)

New Delhi,
November 13, 2014



JUDGMENT