

Nabha Industries Ltd. Vs Punjab State Industrial Development Corporation and Another

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Nov. 12, 2008

Acts Referred: Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) – Section 13(2)

Citation: (2010) 154 CompCas 646 : (2010) 3 CompLJ 93

Hon'ble Judges: L.N. Mittal, J; Adarsh Kumar Goel, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Adarsh Kumar Goel, J.

The petitioner seeks quashing of letter dated September 5, 2006 (annexure P11), notice dated August 20, 2007

(annexure P14) and also letter dated January 4, 2008 (annexure P17) and a direction to accept payment by way of one-time settlement in terms of

one-time settlement scheme dated March 4, 2004 (annexure P4).

2. The case set out in the petition is that the petitioner took loans from the Punjab State Industrial Development Corporation (PSIDC) and Punjab

Financial Corporation (PFC) apart from the Oriental Bank of Commerce (OBC). The petitioner made a reference to the Board for Industrial and

Financial Reconstruction (BIFR) for declaring the petitioner a sick industrial company in terms of the Sick Industrial Companies (Special

Provisions), Act, 1985 ("the SICA"). On June 23, 1997, the petitioner was declared a sick industrial company. The rehabilitation scheme was

prepared, but ultimately vide order dated December 18, 2002, the BIFR recommended winding up of the petitioner-company. Against the said

order, appeal was pending before the Appellate Authority for Industrial Financial and Reconstruction (AAIFR). In the meanwhile, the impugned

notice u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the Securitisation

Act") was issued and possession of land, plant, machinery and building was taken in February 2004, with police help. The petitioner settled the

dues of PSIDC as per one-time settlement.

3. The contention raised in the petitions is that once the petitioner had paid dues as per the one-time settlement scheme, proceedings under the

Securitisation Act, could not be taken. The account of the petitioner was never declared a NPA by PSIDC, which was necessary before taking

action under the said Act. The petitioner was not given a hearing. Since the proceedings were pending before the BIFR, action under the

Securitisation Act, was not sustainable.

4. In the reply filed on behalf of PSIDC-respondent No. 1, it is stated that the terms of the one-time settlement could not be enforced by way of a

writ particularly, when the petitioner failed to comply with the terms of the onetime settlement. The petitioner was required to pay 25 per cent, of

the onetime settlement money within 30 days from March 11, 2004, but the payment was not made. The petitioner earlier filed C.W.P. No. 20738

of 2006 on the same cause of action, which was dismissed on November 12, 2007.

5. Reply has also been filed by the PFC, respondent N. 2, denying that the account of the petitioner was not classified as non-performing asset

(NPA) by the PSIDC. Letter annexure R2 dated February 19, 2007, has been filed in support of this plea. Reliance has also been placed on a

judgment of this court in Triveni Yarns Ltd. v. Punjab Financial Corporation (C.W.P. No. 6356 of 2007, decided on January 15 2008) [2010]

154 Comp Cas 635, holding that the Securitisation Act will have overriding effect over the SICA and as per the amendment to the SICA, by way

of the provisions of Section 41 of the Securitisation Act, proceedings before the BIFR abated.

6. We have heard learned Counsel for the parties and perused the records.

7. The main question raised on behalf of the petitioner is that the bar u/s 22 of the SICA will operate against proceedings under the Securitisation

Act. Learned Counsel for the respondents contend that the Securitisation Act will override the SICA in a case of conflict.

8. Main question for consideration is whether the provisions of the Securitisation Act will override the SICA and will not be barred u/s 22 of the

SICA.

9. We may have a look at the statutory scheme of the SICA and the Securitisation Act.

10. The SICA was enacted to secure timely detection of sick companies and taking remedial measures to rehabilitate such companies. Section 22

of the SICA provides for suspension of legal proceedings against the companies during pendency of inquiry, operation of scheme or during

pendency of the appeal and bars proceedings for winding up and for execution, distress or like against any properties of the company except with

the permission of the appropriate authority. Section 32 of the SICA contains a non obstante clause.

11. Parliament has passed the Sick Industrial Companies (Special Provisions) Repeal Act, 2003. The same has to come into force on the date

specified in the notification of the Central Government which has not yet been issued. The reason for repeal appears to be that there was wide

spread misuse of the provisions of the SICA against payment of dues merely by making a reference and keeping the proceedings pending for a

long period.

12. Reference may also be made to the Securitisation Act, which was enacted to help banks and financial institutions to facilitate speedy recovery

by securitisation of financial assets, in the light of the Narasimham Committee I and II and Andhyarujina Committee constituted by the Central

Government for the purpose of examining banking sector reforms. The Act sets up a machinery for enforcing securitisation by summary disposal of

objections and to dispose of property available as security against the loanees. Section 35 of the Act contains a non obstante clause. Section 41 of

the Act amends the statutes specified in the Schedule to the Act and out of the three statutes specified therein, the SICA is one which has been

amended by incorporating proviso to the effect that after the commencement of the Securitisation Act, where financial assets have been acquired

by any securitisation company or reconstruction company, reference be not allowed to the BIFR. There is further proviso that where a reference is

already pending before the BIFR, the same will abate in the situations specified therein.

13. As is well known, to resolve such a conflict, reference to legislative history is permissible. As per "Heydon's rule", which has been followed,

inter alia, in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, (paragraph 22), the court has to see as to what was the

law immediately before the enactment in question, what was the mischief sought to be remedied and to interpret the law keeping in view the object

of suppressing such mischief. Reference to statement of objects and reasons of the Securitisation Act itself shows that the Legislature was

confronted with the situation that banking sector was not having a level playing field compared to the financial institutions in other countries. In the

light of report of experts, the Act seeks to provide for taking possession of securities and to sell the same without reference to court. For this

purpose, the provisions of the SICA were not intended to override the non obstante clause in Section 35, which makes it clear that anything

inconsistent in any other statute, will not stand in the way of the Securitisation Act. There is undoubted inconsistency in the operation of the SICA

on one hand and in the Securitisation Act on the other hand, in that, while the former provides for stay of measures for recovery against the

properties pending any inquiry or consideration or operation of a scheme, the latter provides for summary taking over of assets of a defaulting

debtor even without reference to the court. The provisions of the Securitisation Act have been upheld by the hon"ble Supreme Court in Mardia

Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., .

14. Learned Counsel for the respondents relies on judgment of this court in Triveni Yarns Ltd. [2010] 154 Comp Cas 635, while learned Counsel

for the petitioner relies on contra view taken by the Orissa High Court in Noble Aqua Pvt. Ltd. and Others Vs. State Bank of India and Others, .

We are in agreement with the view already taken by this court in Triveni Yarns Ltd. [2010] 154 Comp Cas 635, in view of provisions of Section

35, even if, we do not refer to the provisions of Section 41 of the Securitisation Act, which is not only a latter Act, its clear intention is to override

SICA in case of conflict.

15. We find from the judgment of the hon"ble Orissa High Court in Noble Aqua Pvt. Ltd. and Others Vs. State Bank of India and Others, , that

no reference has been made therein to Section 35 of the Securitisation Act. Reference has been made to Sections 37 and 41 of the Securitisation

Act. Omission to refer to Section 35 of the Securitisation Act renders the judgment per incuriam.

16. We now come to other judgments relied upon by learned Counsel for the petitioner, viz.:

(1) Morgan Securities and Credit P. Ltd. v. Modi Rubber Ltd. [2006] 12 SCC 642 : [2007] 136 Comp Cas 113;

(2) Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another, ;

(3) Jay Engineering Works Ltd. Vs. Industry Facilitation Council and Another, ;

(4) Sultana Begum Vs. Prem Chand Jain, ;

(5) Shamarao V. Parulekar Vs. The District Magistrate, Thana, Bombay and Others, ;

(6) Sanwarmal Kejriwal Vs. Vishwa Co-operative Housing Society Ltd. and others, ;

(7) M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd., ;

(8) Bharaj Industries v. Punjab Financial Corporation C.W.P. Nos. 11385 and 11413 of 2007 decided on April 10, 2008;

(9) Everest Wools Pvt. Ltd. and Others Vs. U.P. Financial Corporation and Others, ;

(10) K.S.L. and Industries Ltd. v. Arihant Threads Ltd. JT [2008] 9 381; and

(11) Transcore Vs. Union of India (UOI) and Another, .

17. In Morgan Securities and Credit P. Ltd. [2006] 12 SCC 642 : [2007] 136 Comp Cas 113, the question was whether provisions of the SICA

will apply to suspend an award rendered under the provisions of the Arbitration and Conciliation Act, 1996. After referring to the scheme of both

the statutes, the SICA was held to be applicable. It was held that arbitration award was merely a decree of the civil court and there was nothing to

show that the Arbitration Act was intended to override the provisions of the SICA.

18. In Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another, , the question for consideration

was whether the SICA will prevail over the State Financial Corporations Act, 1951. The hon"ble Supreme Court held that the SICA will prevail.

The reasons given, inter alia, are that the State Financial Corporations Act, 1951, was former and the SICA provided for rehabilitation and a

carried non obstante clause.

19. In Jay Engineering Works Ltd. Vs. Industry Facilitation Council and Another, , the question for consideration was whether the SICA will

prevail over Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, (SSAIU Act). It was held that the

SICA will prevail even though SSAIU Act was a later Act. The SSAIU Act, provided for regulating payment of interest on delayed payments to

Small Scale and Ancillary Industries. Both the Acts operated in different fields and there was in fact no question of inconsistency.

20. In Sultana Begum Vs. Prem Chand Jain, , it was observed that while interpreting two inconsistent laws, the court should make an effort to

harmonise them.

21. In Shamarao V. Parulekar Vs. The District Magistrate, Thana, Bombay and Others, , it was observed that when a subsequent Act amends an

earlier one, the amended Act must be given effect to.

22. In Sanwarmal Kejriwal Vs. Vishwa Co-operative Housing Society Ltd. and others, , it was observed that when jurisdiction was vested in two

different courts, the court having jurisdiction under special law among the two will prevail to exclude the other, even if the special law was earlier in

time.

23. In M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd., , it was observed that violation of award given after the enactment of the Arbitration

and Conciliation Act, 1996, will be governed by the said Act, even if arbitration proceedings had commenced earlier.

24. In Bharat Industries's case (supra), this court on facts held that the onetime settlement benefit was wrongly denied to the petitioner in that case.

25. In Everest Wools Pvt. Ltd. and Others Vs. U.P. Financial Corporation and Others, , the question examined was justification for invoking

power to take over a unit in the facts of that case.

26. In K.S.L. and Industries Ltd."s case JT [2008] 9 SC 381, the question was about inconsistency in the provisions of the SICA, 1985 and the

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDB Act). But the two hon"ble judges differed on the question and the

matter was referred to the larger Bench.

27. In *Transcore Vs. Union of India (UOI) and Another*, , one of the questions was whether doctrine of election applied for invoking the

provisions of Section 13(4) of the Securitisation Act without withdrawing the application u/s 19 of the RDB Act. It was held that the doctrine of

election did not bar invocation of Section 13(4) even during the pendency of application u/s 19 of the RDB Act.

28. Since none of the judgments relied upon by learned Counsel for the petitioner directly deals with the issue involving inconsistency between the

Securitisation Act on the one hand and under the SICA on the other hand, the judgments are distinguishable.

29. In view of the above, we hold that the Securitisation Act will override the SICA and mere pendency of a reference will not be a bar to

proceedings under the Securitisation Act. We further make it clear that in certain exceptional situations where the scheme is already approved, the

issue can be gone into in writ jurisdiction. It is well-settled that even where the power exists, exercise of power must be fair and reasonable.

30. In view of the answer to the above, learned Counsel for the petitioner submitted that the remaining questions may be left to be considered in

appropriate proceedings under the provisions of the Securitisation Act.

31. Learned Counsel for the petitioner also submitted that so far, action u/s 13(4) of the Securitisation Act has not been taken and if so taken, the

petitioner will be at liberty to take its alternative remedy. We have no objection to the same. It was also submitted that a direction be issued

restraining the respondents from taking physical possession. We need not go into this question at this stage as the petitioner will be at liberty to put

forth its claim to the concerned authorities and if aggrieved by their action, the petitioner will also be at liberty to take its remedies in accordance

with law.

32. The writ petition is accordingly dismissed, without prejudice to the alternative remedy of the petitioner.