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**(2011) 04 CAL CK 0025**

**Calcutta High Court**

**Case No:** M.A.T. No. 328 of 2011 with C.A.N. No. 2244 of 2011 with M.A.T. No. 311 of 2011 with C.A.N. No. 2144 of 2011 with M.A.T. No. 323 of 2011 with C.A.N. No. 2181 of 2011 with M.A.T. No. 367 of 2011 with C.A.N. No. 2703 of 2011 with M.A.T. No. 312 of 2011 with

Namokar Vinimay Pvt. Ltd. APPELLANT

Vs

Yashdeep Trexim Pvt. Ltd. RESPONDENT

**Date of Decision:** April 1, 2011

**Acts Referred:**

- Sick Industrial Companies (Special Provisions) Act, 1985 - Section 15

**Citation:** (2011) 3 CHN 322

**Hon'ble Judges:** Kalyan Jyoti Sengupta, J; Ashim Kumar Roy, J

**Bench:** Division Bench

**Judgement**

Kalyan Jyoti Sengupta, J.

On 29th respectively all these five matters appeared in the list and when the Court was about to pass judgment and order on the question of grant of interim relief Mr. A.K. Mitra, learned Senior Advocate appearing in M.A.T. No. 311 of 2011 (Baranagore Jute Factory Plc vs. Yashdeep Trexim Put. Ltd.) and M.A.T. No. 312 of 2011 (Baranagore Jute Factory Plc. vs. Baranagore Jute Factory Plc.) submitted on 29th March, 2011 that in the appeal his client does not want any interim order should be passed however he prayed the appeal should be heard out expeditiously as no factual question is involved, only question of law is required to be decided. Even the hearing of the appeal can be taken and the same can be disposed of on the basis of the papers placed before Court since all respondents had appeared in this matter. According to him the appeal itself should be heard right from tomorrow or soon thereafter.

2. Mr. Pal, learned Counsel appearing for the appellant in M.A.T. No. 328 of 2011 (Namokar Vinimay Put. Ltd. vs. Yashdeep Trexim Pvt. Ltd. & Ors.) contends that since he made submission for grant of interim relief necessary order should be passed in their appeal and at the same time the appeal should be heard out expeditiously.

3. Mr. Debal Banerjee, learned Senior Counsel appearing for the appellant in M.A.T. No. 323 of 2011 (Secretary, Baranagore Jute Factory, Plc Workers'' Employees Union vs. Baranagore Jute Factory Plc.) contends that this Court will pass necessary interim order in his client''s appeal, if no interim order is passed then there will be total deadlock of the functioning of the company.

4. He submits that the body of the management constituted by the BIFR has been functioning till the date of delivery of judgment and in fact, they were allowed to function by the learned Trial Judge till the date of delivery of judgment.

5. Mr. Ashok Banerjee, learned Senior Counsel appearing for some of the respondents in the appeal supports that interim order should be passed.

6. Learned Counsels namely Mr. P.C. Sen, Mr. Kar, Mr. Bimal Chatterjee, Mr. Sukhendu Sekhar Roy and Mr. Surojit Nath Mitra contend that no interim order should be passed relating to management of the company. Mr. Chatterjee, learned Counsel appearing in support of his appeal contends that no interim order should be passed.

7. When the matter appeared in the list on 30th March, 2011 and the Court was about to pass order considering fresh submission made on 29th March, 2011. Mr. Sen, learned Counsel in addition to submission made earlier contends that if for any reason the Court feels to pass any order relating to management, the same should be passed without prejudice to his clients'' (respondent Nos. 3 & 4) rights and contention. On that day his submission was recorded, but the Court reserved to deliver interim judgment and order.

8. In view of the aforesaid contention and submission now the question arises whether this Court will pass any interim order on the basis of the submissions made by all the parties? Since learned Counsels Mr. Pal, Mr. Banerjee in their separate appeal submits that interim order should be passed on the submission already advanced we think that in their appeal we should consider question of grant of interim relief. All the appeals have been preferred against the common judgment and order. So grant or refusal to grant interim relief can be considered in any appeal, even though the company in its appeal now does not press for the same after argument is advanced. We pass following judgment and orders taking note of the submission of the learned Counsel already advanced:

Above connected applications are made for appropriate interim relief prayed therein. By the impugned judgment and order, the learned Trial Judge allowed the prayers of writ petition No. 12377(W) of 2010 and W.P. No. 12406(W) of 2010 setting aside all the proceedings before BIFR and all orders passed therein. However, W.P. No. 12412(W) of 2010 was dismissed.

9. The writ petitions were brought basically to challenge the jurisdiction of the BIFR in entertaining reference under Sick Industrial Companies (Special Provisions) Act,

1985 (in short SICA). Contentions in all the writ petitions were basically that the provisions of SICA are applicable to foreign companies, carrying on business in this country.

10. After having heard the learned Counsels for the parties we think that the appeals should be heard. Accordingly, we decide to hear out the appeals expeditiously as there is no controversy on factual score so to say; only legal point decided by the learned Trial Judge, has to be decided. Hence, all the appellants will file separate compilations in their respective appeals, enclosing all the papers used before the learned Trial Judge. All the learned Advocates-on-record waive service of notice of appeal, in respect of all the appeals.

11. Now, the question arises, what interim relief should be granted in this matter. Learned Counsels for all the parties have advanced their respective arguments which are summarized hereunder:-

12. Mr. Pal, while appearing for the appellant in M.A.T. 328 of 2011 submits that the scheme prepared by the BIFR was finally settled and accepted and was being implemented and the mill was running pursuant to the methodology provided in the scheme satisfactorily. Various measures were being taken to keep the mill running. In view of provisions of SICA, statutory advantages were also available for revival of the company. If the company is not allowed to run under the measures taken in the scheme then the company will face closure and a large number of workers and employees will be thrown out of their employment resulting loss of their livelihood. In fact, by consent of all the parties, status quo as regard management to run the company was being maintained in terms of the order of the learned Trial Court till the date of delivery of the judgment.

13. He submits that when this order satisfactorily worked, there is no reason for discontinuation of the order of status quo passed earlier. No one will stand to suffer if this order of status quo as it was prevailing on the date of filing of the writ petition continues. He has shown us various clauses of the scheme and submits that balance of convenience in this case, though the scheme has been set aside by the learned Trial Judge, is strongly in favour of continuation of the order of status quo with the measure taken in the scheme.

14. Mr. Ashok Banerjee, learned Senior Advocate appearing for the respondent No. 13 in the same appeal, apart from supporting the contention of Mr. Pal submits additionally that once the appeal is preferred, the original lis revives. Hence, it is continuity of the original proceedings. Therefore, interim order which was subsisting in course of hearing before the learned Trial Judge, should be allowed to continue. He submits that he is representing a large number of workers, and with the beneficial terms of the scheme of the BIFR, his clients are feeling completely secured. In support of his submission he has relied on a decision of Supreme Court, reported in Ramesh Chandra Majumdar Vs. Sm. Sobodhbala Dasi, on the plea of

continuation of interim order.

15. Mr. Debal Banerjee, learned Senior Advocate, appearing for the respondent No. 12 supports submission of Mr. Pal. In addition thereto Mr. Banerjee contends that there has been strong prima facie case for continuation of the interim order, as the scheme was prepared in consultation with all the parties concerned, and considering all objections, the scheme was finalised and then it was being implemented. It would appear from the various measures provided in the scheme that the company is protected under the special provisions of SICA against punitive and oppressive provisions of various Acts. Moreover, the group of management provided in the scheme was successfully and effectively running the mill. If the order of status quo, granted earlier, is not restored, company cannot be run and managed at all. This group of management has been working satisfactorily for last two years, even before and after filing of the writ petitions. As such, there is no harm in continuity of order of status quo, passed on consent of all the parties by the learned Trial Judge till the disposal of the appeal.

16. Mr. P.C. Sen, learned Senior Advocate appearing for one of the respondents opposes to the prayer of continuation of the order of status quo passed by the learned Trial Judge if, according to him, it is allowed to continue it is tantamount to revival of the scheme framed by BIFR which has been set aside by the learned Trial Judge. According to him the constitution of Board of Management by the BIFR is contrary to the Division Bench judgment and order passed in the company proceedings. By the Division Bench judgment and order it has been directed specifically that Company Court of the first instance will monitor and supervise the management of the above company namely Baranagar Jute Factory PLC through the Joint Special Officers. As far as the management and control are concerned the same is being time to time monitored by the Company Court in terms of the Division Bench judgment of this Court. Composition of Board of Management evolved by the BIFR is directly in-conflict with order passed by the Division Bench.

17. He submits that BIFR being a Statutory authority cannot pass any order inconsistent with the Hon''ble High Court. In order to maintain hierarchy in the judicial system the subordinate Tribunal''s order cannot be allowed to supersede that of the superior judicial authority. In support of his submission he has drawn our attention to the Supreme Court judgment reported in 2006 (12) SCC 642 .

18. The aforesaid point was raised before the BIFR by his client and such point has been overruled and appeal has been preferred against the aforesaid order. In fact, by the order of the Company Court various measures have been taken for revival or running of the company by appointing Joint Special Officers who have taken possession of all the properties and assets of the said company.

According to him there was no need to approach the BIFR. Therefore, he submits the Board of Management formed by the scheme of the BIFR should not be allowed

to function in derogation of the methodology adopted by this Hon''ble Court in various judgments and orders.

19. Mr. Kar, learned Counsel led by Mr. Kalyan Bandyopadhyay, learned Senior Counsel appearing for the respondent No.1 citing a decision of the Supreme Court reported in Radheshyam Ajitsaria and Another Vs. Bengal Chatkal Mazdoor Union and Others, contends that the scheme which is directly in conflict with the judgment and order passed by the Supreme Court in the above matter. This judgment was rendered in relation to this company. The scheme of management provided by the Company Court cannot be overridden by the scheme of the BIFR.

20. He submits that when the scheme has been set aside by the learned Trial Judge, the same group of management constituted by the BIFR should not be allowed to continue. The body of Management which was functioning before scheme of Management being framed by BIFR ought to be allowed to function.

21. Mr. Surojit Nath Mitra, learned Senior Counsel appearing for the respondent No. 16 submits drawing our attention to the date of delivery of judgment and order of the learned Trial Judge and also date of preferring appeal, that there is no urgency of passing any interim order when the appellant could wait for a considerable long time. He contends that no statements and averments made in the petitions to pray for interim order of status quo as prayed for by the learned Counsel. Even there is no averment much less prayer for management of the company. Unless prima facie case is made out for obtaining interim relief the Court cannot and should not pass order.

22. Mr. Sukhendu Sekhar Roy, learned Advocate appearing for the workers'' union, respondent No. 15 submits that the package for management as provided by the Company Court should be allowed to be impleaded and by this measure interest of all the workers will be amply protected. The scheme provided by the BIFR is absolutely contrary to the judgment and order of this Court. He therefore opposes to the prayer of restoration of status quo which was continuing on the date of filing of the writ petition.

23. Mr. Bimal Chatterjee, learned Senior Counsel appearing for M/s. Daksh Vyapaar Pvt. Limited who has also preferred appeal separately supports argument of Mr. P.C. Sen and other learned Counsels, Mr. Joydeep Kar, Mr. Sukhendu Sekhar Roy, and contends additionally that the Court should not pass such order which would halt the running of the company. The mill and factory of the company must be run but how it should be done is the question now to be decided by the Court.

24. He submits that various orders have been passed by this Court in the company jurisdiction and indeed the learned Judge with special assignment of this matter, has been supervising and monitoring the management of the said company. It is not understood why the BIFR should be allowed to intervene in the matter. He brings various records to our notice to establish the fact that surreptitious y erstwhile

management has made an application for reference to BIFR for declaring sick of the said company although the Company Court was in the seisin over the matter and had passed various orders. When BIFR did not take any action, without serving any notice upon any of the interested parties one of the erstwhile Directors filed a writ petition and obtained ex parte order for taking action by the BIFR u/s 15 of the said SICA. Strangely several orders were obtained from the same learned Judge in company jurisdiction for taking measure of management of the company in terms of the Division Bench judgment. While supporting the argument of Mr. Sen he contends that orders passed in the Company Court must prevail over the scheme provided by the BIFR apart from what has been held by the learned Trial Judge.

25. In course of hearing we directed notices to be served upon the learned Additional Solicitor General, learned Advocate General of the State, learned Counsel for the Commissioner of Provident Fund and ESI Authority. Pursuant to the said notices the learned Advocate General made submission that the State Government would extend all possible facilities for running of the said company so that the workers are not thrown out of employment.

26. He submits that although, the scheme framed by the BIFR has been set aside but the assurance given before the BIFR will continue provided this Court accept the same.

27. Learned Additional Solicitor General appearing on behalf of the Tax Authority namely Income Tax Authorities, as well as P.F. Authorities submits that other Courts have directed to make payment of their dues however very small portion of dues has been paid. Although considerable amount is still remaining due and payable on account of Income Tax as well as Provident Fund, neither of the management took any effective step to make payment even after the BIFR scheme was framed. Under this circumstances he contends that the Tax Authorities want that the dues should be paid off as early as possible keeping in view the fact that the company at the same time should run.

28. He also submits that before the BIFR no concession has been made on behalf of the Government, only requests of the BIFR were agreed to be considered by the Government. It is prepared to consider the same but under no circumstances realization or recovery of the dues is contemplated to be suspended.

29. Mr. Subal Moitra, learned Counsel appearing for the E.S.I, made similar submission. However, as far as recovery of dues is concerned learned Additional Solicitor General and Mr. Moitra entirely depend upon the Court to take such measure so that interest of company as well as the dues of this authorities are taken care of by this Court.

30. Heard respective contentions of the learned Counsel for the parties.

31. Mr. Surajit Mitra and Mr. P.C. Sen, learned Counsel have rightly pointed out that no case has been made out warranting interim order retaining status quo maintained during the hearing of the writ petition. The prayer for stay of operation of order of the learned Trial Judge has been made meaning thereby the scheme of the BIFR is to be allowed to continue.

32. We are of the prima facie view when the scheme has been set aside by the learned Trial Judge we cannot grant stay of operation of the impugned judgment and order for revival of the scheme for operation, for it would literally result in allowing appeal before it is heard out. Therefore, prayer for stay of operation of the judgments is refused at this stage. But it does not mean that the Court cannot take any interim measure that warrants on the facts and circumstances of the case.

33. We having gone through the records feel that if we leave this matter without taking any measure there is a possibility of total stalemate of running of the company for it had hitherto been run under the scheme of management formulated by the BIFR till the date of filing of the writ petitions, and by virtue of interim order of status quo passed by the learned Trial Judge such management continued. It appears that the impugned scheme was framed after hearing, deliberating with all the persons concerned including Central Government, State Government, ESI Authority, Provident Fund Authority. All the stake holders duly participated in the hearing despite existence of the order of this Court. The BIFR after considering all aspects of the matter took measure for running of the company and thereby formed a Board of, Management.

34. From date of sanctioning of scheme till the date of filing of the writ petition the Board of Management provided by the BIFR was functioning till impugned order was passed. Therefore, we think that in order to run the company as it is the wishes of all the parties including ours some methodology has to be adopted. Even if scheme of management framed by the BIFR is discounted, some measure has to be taken by this Court. It appears prima facie that Chaitan Choudhary and Ridhkaran Rakhecha respondent Nos. 3 and 4 respectively indeed activated BIFR abandoning scheme of management provided by the Court. Now these two persons do not want scheme of the BIFR either. It does not appear from the record that neither of them was in Board of Management on the date of filing of the writ petition till judgment was delivered.

35. In order to strike balance we feel that at present the company should be run under a group of management consisting of the following persons:-

36. Mr. Pritipal Singh, AGM IDBI Bank, Mr. J.K. Puri and any person whether in capacity of Director or otherwise who was operating bank account(s) of the company as part of the Management on the date of filing of writ petition.

37. Reason for choosing of above two persons is that they are independent and were part of the management for last more than one year.

In addition to the aforesaid persons we in terms of the order of the Division Bench of this Court direct the Joint Special Officer to be members of this group of management and they will operate bank account of the company with existing account operator. However, the Joint Special Officer shall continue to remain responsible as regard protection of assets and properties in terms of the order passed by this Court from time to time.

38. It must not be construed that by choosing aforesaid personnel even if it amounts to picking up names mentioned by BIFR we accepted scheme of BIFR by any stretch of thoughts. As far as the scheme is concerned, BIFR & AIFR