Sarla Gems Ltd. and Another Vs Board for Industrial and Financial Reconstruction and Others

Court: Calcutta High Court

Date of Decision: Jan. 9, 2001

Acts Referred: Constitution of India, 1950 â€" Article 226
Sick Industrial Companies (Special Provisions) Act, 1985 â€" Section 15(1), 18, 18(1), 3(1)

Citation: (2002) 108 CompCas 663

Hon'ble Judges: Dilip Kumar Seth, J

Bench: Single Bench

Advocate: Bhaskar Sen, Amit Chakraborty, Dipak Bhattacharjee, Niloy Sen and Mononita Poddar, for the Appellant;V.B. Biswanathan and Biswarup Dasgupta, for the Respondent

Final Decision: Dismissed

Judgement

Dilip Kumar Seth, J.
The petitioner-company Sarla Gems Ltd. having become sick as defined in the Sick Industrial Companies (Special

Provisions) Act, 1985 (SICA), was referred on September 8, 1998, u/s 15(1) of the SICA before the Board for Industrial and Financial

Reconstruction (BIFR), in BIFR Case No. 244 of 1998. On February 22, 1999, Bank of Baroda was appointed the operating agency u/s 17(3)

of the SICA upon a declaration u/s 3(1)(o) of the SICA that the petitioner-company was a sick industrial undertaking.

2. The petitioner submitted a rehabilitation package for reviving the undertaking. In the said scheme a proposal was mooted for establishment of an

undertaking for production of PVC compound in palate form and powder form which is in heavy demand for manufacture of electrical cable

industries footwear industry and moulded goods, pipes, agricultural houses, films and various other materials at a different site. Upon consideration

of the said scheme, the BIFR rejected the said scheme by a reasoned order passed on April 17, 2000, in BIFR Case No. 2144 of 1998

contained in annexure H to this petition. It is this order which is the subject-matter of challenge in this writ petition.

3. Mr. Bhaskar Sen, learned counsel for the petitioner, assails the said order on various grounds. According to him, the rejection of the scheme on

the ground that the scheme was not a rehabilitation proposal but a setting up of a new project is bad in law. In such circumstances the SICA was

promulgated for revival of sick companies and not sick units as is apparent from the preamble to the SICA. This contention is supported by him

upon a reference to Section 3(1)(o) under which ""sick industrial company"" was defined to be a company. Therefore, in order to rehabilitate the

company, it is immaterial as to what project the company would take up. It is also not necessary that the same equipment or unit is to be used or

even the same site has to be utilised. It is not the unit or the undertaking but it is the company which is to be revived. Any of the objects

incorporated in the memorandum or articles of the company may be undertaken for rehabilitation of the company. He has also cited a few

instances giving particulars with regard to the permission to open altogether a new venture by Phoenix Mills Ltd., Shreeram Mills Ltd. and

Hindustan Mills Ltd. He has pointed out that all these companies were permitted to shift their business even to the extent of construction of

buildings on the land of those mills. He had also relied on, to support his contention, the case of The Upper India Couper Paper Mills Co. Limited

Vs. The Appellate Authority for Industrial and Financial Reconstruction and Others, . Relying on the said decision, he contended that it was the

company the rehabilitation of revival whereof is the aim and object of the SICA. The purpose of rehabilitation or revival had never been intended

to be confined to an undertaking or a unit of the sick company. He had referred to various Sections of the SICA and had elaborated his

submissions in order to elucidate the points canvassed by him. Relying on the decision in the case of Subhash Kumar Bhuwalka Vs. Appellate

Authority for Industrial, Financial Reconstruction Board for Industrial, Financial Reconstruction Industrial Development Bank of India, Union Bank

of India, East India Commercial Co. Ltd., Government of Andhra Pradesh, Jute Mill Workers Union, Guntur (Andhra Pradesh) and Shree

Bajrang Jute Mills. Ltd., he contended that if the operating agency is unable to prepare a scheme, in that event the BIFR is expected to get some

other rehabilitation scheme proposed by themselves or by some other institutions. According to him, this judgment points out to the scheme of the

Act and attempt to revive the company. He had also referred to the case of B.P. Choudhury Vs. Appellate Authority for Industrial and Financial

Reconstruction, wherein it was held that all endeavour and efforts for revival and rehabilitation of the sick company is the intended object of the

SICA. Only when revival becomes impossible it is to be ordered for winding up.

4. According to Mr. Sen the steps include diversion of the project or the undertaking altogether the purpose being the revival of the company.

Relying on the case of Collector of Customs v, Biswanath Kumar Mukherjee [1974] CLJ 251 he contended that where it comes to the conclusion

upon consideration of the materials that the Tribunal was unable to reach a fair decision and that such considerations are extraneous a writ court in

exercise of its jurisdiction under Article 226 is capable of interfering with the decision of the Tribunal.

5. With regard the question of maintainability of the writ petition by counsel for the Bank of Baroda (BOB) appears to be strange for him.

According to him the Bank of Baroda was reprimanded for its inept handling of the case and it was their duty to prepare a scheme u/s 17(3) and

Bank of Baroda having failed in that regard it is not open to it to raise such a question particularly when the revival and not the winding up will

enure to its benefit. With regard to the maintainability there being a provision for appeal the writ court should not interfere, he contends that where

on the face of the order it appears that the BIFR had failed to exercise its jurisdiction and that it has proceeded on the basis of certain extraneous

consideration the writ is maintainable, despite alternative remedy. In this context he relied on In the Matter of the Appropriate Authority and

Another Vs. Smt. Sudha Patil and Another, wherein it was held that a High Court in exercise of jurisdiction under Article 226 is entitled to interfere

where the Tribunal had failed to consider some relevant material or has considered some extraneous or irrelevant materials or that the finding is

based on no evidence or the finding is such that no reasonable man can come to such a conclusion. According to him in the present case the Board

has not exercise its jurisdiction. It had proceeded with the concept of revival of the unit not the company. This is an error which goes to the root of

the jurisdiction of the Board in forming the opinion that the company should be wound up. He had also referred to Whirlpool Corporation v.

Registrar of Trade Marks, Mumbai [1998] 8 SCC 5 In the said decision it was held that the restriction imposed on the High Court by its own

discretion to the extent that normally it should not interfere where there is an alternative remedy but where the contingency shows when there has

been a clear violation of the principles of natural justice or there has been a glaring failure or there is a jurisdictional error the alternative remedy

would never stand as a bar. In support of the same contention he had relied on Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya

Mahavidyalaya, Sitapur (U.P.) and Others, wherein a view was taken that the High Court could interfere where the order was passed without

jurisdiction and where the order was a nullity despite the existence of alternative remedy u/s 68 of the U. P. State Universities Act. Relying in the

decision of the case Shreekanta Bar v. State of West Bengal [1999] 1 CLJ 538 he contended that where the Tribunal determining a question did

not address itself to the essential issue then it must be held that it had acted without jurisdiction and that if there is an error which goes to the root of

jurisdiction then it becomes a subject-matter of judicial review. Thus, the writ court is entitled to interfere. He had also relied on D.R.M. Steel

Industries P. Ltd. v. Board for Industrial and Financial Reconstruction [1998] 93 Comp Cas 667 wherein also the question of alternative remedy

was held not to be a bar in certain cases for the exercise of jurisdiction under Article 226. On these grounds he had prayed for quashing of the

impugned order.

6. Learned counsel appearing on behalf of the bank on the other hand contended that here in this case the company Sarla Gems had but one unit

only at Falta and it had imported certain machinery for the purpose of cutting diamonds. In this scheme, the petitioner had proposed for

establishing a plan for manufacturing PVC compound and powder at Joka. Thus, it is not only diverting its activities to altogether a new field but

also it is shifting its project to a different site. In fact, it is not a revival of the company but in effect it was the establishment of altogether a new

company. It would also necessitate the change in its name as has been proposed. That apart, he has pointed out that the land at Falta has already

been transferred to some one else by the company. Therefore, it is not at all a revival of the sick industry. He then contends that the order passed

by the BIFR is appealable. There being an adequate alternative efficacious remedy the writ petition cannot be maintained. The questions that are

being raised are not free from doubt. It is also not abundantly clear that the view taken by the BIFR is so erroneous that no reasonable man can

take the view and as such it is not possible to hold that the order passed by the BIFR is wholly without jurisdiction so as to attract the exceptions

to the rule of alternative remedy. He had also pointed out from the materials before this court that the present case does not satisfy any of the tests

for excepting the normal rule of alternative remedy. He had sought to distinguish all the judgments cited by Mr. Sen. According to him, the

company is synonymous with its unit. The company did not diversify before its unit became non-profitable. Therefore, the petition should fail.

7. In reply Mr, Sen pointed out that the land has not been sold by the petitioner and that it is the revival of the company through a new project. He

had met each of the contentions made for counsel for the bank. I have heard both counsel at length for days together.

8. Admittedly, the company had but one unit Sarla Gems with the object of dealing with gems and had imported certain machinery and established

the industry at Falta. A third party interest has since been admitted to be created in respect of the land by the petitioner which is at an advanced

stage. Now in the rehabilitation scheme the proposal has been given for establishment of altogether a new project at a different site at Joka

necessitating establishment of a new industry.

9. The SICA was enacted with the aims and object as would appear from the Statement of Objects and Reasons of the Act which runs as follows

(page 303 of 58 Comp Cas (St.)) :

The ill effects of sickness in industrial companies such as loss of production, loss of employment, loss of revenue to the Central and State

Governments and locking up of investable funds of banks and financial institutions are of serious concern to the Government and the society at

large. The concern of the Government is accentuated by the alarming increase in the incidence of sickness in industrial companies. It has been

recognised that in order to fully utilise the productive industrial assets, afford maximum production of employment and optimise the use of the funds

of the banks and financial institution, it would be imperative to revive and rehabilitate the potentially viable sick industrial companies as quickly as

possible. It would also be equally imperative to salvage the productive assets and realise the amounts due to the banks and financial institution, to

the extent possible, from the non-viable sick industrial companies through liquidation of those companies.

It has been the experience that the existing institutional arrangements and procedures for revival and rehabilitation of potentially viable sick industrial

companies are both inadequate and time-consuming. A multiplicity of laws and agencies makes the adoption of a co-ordinated approach for

dealing with sick industrial companies difficult. A need has, therefore, been felt to enact in public interest a legislation to provide for timely detection

of sickness in industrial companies and for expeditious determination by a body of exports of the preventive, ameliorative, remedial and other

measures that would need to be adopted with respect to such companies and for enforcement of the measures considered appropriate with utmost

practicable dispatch

The Act was enacted for loss of production, loss of employment and loss of revenue locking up of investible funds of banks and financial

institutions which are a serious concern to the Government and the society at large. It aimed at full utilisation of the productive industrial assets and

affording maximum protection of employment and optimise the use of the funds of banks and financial institutions. Therefore, the object of revival

of the company or rehabilitation thereof was intended to secure employment, revenue payable to the Government, funds invested by banks and

financial institutions by using of the productive assets. This Act is never aimed at helping the board of director themselves or only to facilitate new

entrepreneurship or establishment of new unit of companies.

10. In the present case, the names are also proposed to be changed and the proposed industry is being shifted to a different place. The company is

diverting to a new project and has aimed at establishing together a new project. The land has already been sought to be transferred and the assets

will not be utilised but would be sold only. If it is shifted to a different site employment would not be secured. Inasmuch as it would open a new

industry at a new place which might create new employment. It would not be possible to secure the loss of employment of the people employed in

the company at Falta. In such circumstances, the people employed had expertised in the cutting of diamonds which is absolutely different from

those if a new project is undertaken. Admittedly, the company had only one undertaking. None of the machineries could be utilised for the new

industry. Thus, neither the land nor the labour nor the assets could in any way be utilised for the new industry and as such it is very difficult to

accept the proposition advanced by Mr. Sen.

11. Having regard to the above facts, it is abundantly clear that the question raised by Mr. Sen is not so clear and unambiguous that the decision of

the Board can be described as wholly without jurisdiction and that no reasonable man can form such an opinion and or it goes to the root of the

jurisdiction.

12. Be that as it may, the preliminary objection with regard to the maintainability of the writ petition was urged by counsel for Bank of Baroda after

Mr. Sen had concluded his submission. So far as the question of alternative remedy is concerned the same has now a settled principle of law and

there is no scope of question for having two opinions with regard to the proposition. Though in the facts and circumstances of the case having

regard to the question raised it appears that this court ought not to have entertained this writ petition, but in view of the fact that a question has

been raised as to whether the Board can refuse a scheme for rehabilitation which aims at establishing a new project altogether and the same having

been argued elaborately and the question having been attended to on behalf of the respondent represented by counsel, it appears that this question

goes to the root of the jurisdiction of the Tribunal and as such this court at its discretion may entertain the same. Having regard to the facts and

circumstances of this case, the main ground on which the scheme was rejected was that the diversion was incompatible with the scheme and object

of the SICA and as such cannot be accepted. For this purpose, it is not necessary to determine any disputed question of fact, in order to determine

the question raised by Mr. Sen. It is a simple question whether the ground on which the Tribunal had rejected the scheme of rehabilitation, was

within its jurisdiction or could be a ground valid for rejection of the scheme. It is pure and simple, a question of law which is required to be gone

into. In the circumstances, I propose to decide the question by overruling the preliminary objection raised on behalf of the respondent.

13. As discussed above, the object of the SICA was to rehabilitate a company so as to secure recovery of the amounts due to the banks and

financial institutions by salvaging the productive assets rehabilitating the potentially viable sick industrial company. The company as referred to must

be an industrial company. In the present case, if the land on which the industry of the company is situated is allowed to be transferred and the entire

machinery and other assets being the principal security, are disposed of, then the recovery of the funds for the financial institutions and banks would

be a misnomer. In case it opens up a new venture at a new place in that event, the securities of the banks or the financial institutions would

completely disappear. Fresh securities are to be created and for the purpose of such industry the assets of the industrial company would be of no

use. It would be altogether infusing new funds for establishing a new industry and thereby creating more and new liabilities for the company without

there being any possibility of salvaging the productive assets and release of the amounts due to banks and financial institutions. At the same time,

the employment will also not be secured. Because the employees of one place are not expected to be shifted to another distant place. Then again,

the employees used to deal with cutting of diamonds, are not expected to be skilled labourers in altogether a different venture. At the same time,

none of the productive assets would be utilised for such purpose. Neither the land nor the machinery would come to any use for the new venture.

The new venture will necessitate investment of further funds. The rehabilitation of a company as envisaged in the SICA does not mean that a

company would establish an industry and then liquidate the same, at the cost of the employees, the banks and financial institutions and then go for a

new venture. If such a proposition is accepted in that event, it would be giving a new handle to a company and thereby take advantage of the

SICA to salvage its own position at the cost of the employees, and the banks and financial institutions. Thus, such a situation cannot be acceded to.

14. It is contended by Mr. Sen relying upon the decision in the case of The Upper India Couper Paper Mills Co. Limited Vs. The Appellate

Authority for Industrial and Financial Reconstruction and Others, that rehabilitation or revival is not required to be confined to an undertaking or a

unit of the sick company. Even applying the ratio decided in the said case, we cannot accede to the contention of Mr. Sen in the facts and

circumstances of this case. In the present case, it is but only one unit that the company had and that the present unit is being dissipated and a new

venture is being proposed to be undertaken without using or utilising either the productive assets on the employees or anything else. Thus, the said

ratio cannot be attracted in the present case. Admittedly, as held in the case of Subhash Kumar Bhuwalka Vs. Appellate Authority for Industrial,

Financial Reconstruction Board for Industrial, Financial Reconstruction Industrial Development Bank of India, Union Bank of India, East India

Commercial Co. Ltd., Government of Andhra Pradesh, Jute Mill Workers Union, Guntur (Andhra Pradesh) and Shree Bajrang Jute Mills. Ltd.,

the scheme may be formulated even by someone else. But the present case is not one such a case where it is necessary, after lapse of such a long

time, to prepare another scheme. It is also a settled proposition that all efforts shall be made for revival of the sick company which is the object of

the S1CA. But in case, the revival is not possible in that event, it may be liquidated. It is not that revival is to be effected at any cost, even if it is

outside the scope on purview of the SICA or it is not at all viable or it will not serve the purpose of salvaging the productive assets or utilising the

employment of the employees or otherwise. If after efforts having been made, it appears that it is not viable, in that event, it can certainly be

liquidated for which appropriate orders are to be passed by the BIFR according to its own discretion applying its own mind. Thus, the decision in

the case of B.P. Choudhury Vs. Appellate Authority for Industrial and Financial Reconstruction, , does not help us in the facts and circumstances

of the case.

15. In the present case, I have found that the main ground on which the Tribunal had rejected the scheme appears to be reasonable and a valid

ground having regard to the object of the SICA as discussed hereinbefore, in the facts and circumstances of this case. As such, it is not a case that

the Tribunal was unable to reach a fair decision, or that it had rejected the scheme upon consideration of extraneous circumstances, or that it had

acted in excess of its jurisdiction, or had failed to exercise its jurisdiction. Therefore, the decision in the case of Collector of Customs v. Biswanath

Kumar Mukherjee [1974] CLJ 251 has no manner of application in the present facts and circumstances of the case.

16. The failure of Bank of Baroda to prepare a scheme though might be deprecated by the Tribunal yet does not add to the feasibility of the

scheme, unless it is compatible with the SICA. Similarly, the decision in the case of In the Matter of the Appropriate Authority and Another Vs.

Smt. Sudha Patil and Another, will also not apply for the same reasons as indicated hereinbefore.

17. The fact that in some cases namely the Phoenix Mills Ltd., Sreeram Mills Ltd. and Hindustan Mills Ltd. were permitted to enter into altogether

a new venture. But this contention of Mr. Sen does not help us in the facts and circumstances of this case. Inasmuch as in all those cases, the

productive assets were salvaged and the new ventures were permitted utilising the productive assets of the company. In all these cases, the

companies were permitted to enter into the construction on the land of the industries, thus the land or assets of the industries were utilised for its

revival. Though however I may have reservation in following the rationale laid down, on which the said decisions were based. Be that as it may, I

need not enter in those questions in view of the distinguishing feature having regard to the facts and circumstances of this case as discussed

hereinbefore.

Section 18 of the SICA in Sub-section (1) provides as follows :

Section 18. Preparation and sanction of schemes.--(1) Where an order is made under Sub-section (3) of Section 17 in relation to any sick

industrial company, the operating agency specified in the order shall prepare, as expeditiously as possible and ordinarily within a period of ninety

days from the date of such order, a scheme with respect to such company providing for any one or more of the following measures, namely : --

(a) the financial reconstruction of the sick industrial company ;

(b) the proper management of the sick industrial company by change in, or take over of, the management of the sick industrial company ;

(c) the amalgamation of-

(i) the sick industrial company with any other company ; or

(ii) any other company with the sick industrial company; (hereinafter in this section, in the case of Sub-clause (i), the other company, and in the

case of Sub-clause (ii), the sick industrial company referred to as "transferee-company") ;

(d) the sale or lease of a part or whole of any industrial undertaking of the sick industrial company ;

(d)(a) the rationalisation of managerial personnel, supervisory staff and workmen in accordance with law ;

(e) such other preventive, ameliorative and remedial measures as may be appropriate ;

(f) such incidental, consequential or supplemental measures as may be necessary or expedient in connection with or for the purposes of the

measures specified in Clauses (a) to (e).

Sub-section (1) relates to the preparation of the scheme. A scheme has to be prepared according to the provision contemplated in Sub-section (1)

of Section 18. Any scheme which is beyond the scope and ambit of Sub-section (1) is not a scheme which can be sanctioned by the BIFR.

Sub-section (1) of Section 18 prescribes that such scheme shall provide for the financial reconstruction of the sick industrial company and proper

management of the sick industrial company by change in the management or by taking over of the management. It may be by amalgamation of the

sick industrial company with any other company, or by amalgamation of any other company with the sick industrial company, or by sale or lease of

a part of whole or any industrial undertaking of the sick industrial company, or by rationalisation of managerial personnel supervisory staff and

workmen in accordance with law, and such other appropriate preventive, ameliorative and remedial measures and such incidental, consequential

and supplementary measures as may be necessary or expedient in connection with any of the Clauses (a) to (e).

18. The company may be a company as defined in the Companies Act but Section 17 refers to a sick industrial company. It does not refer to a

sick company. An industrial company means a company which owns one or more industrial undertakings as defined in Section 3(e) of the SICA.

Thus, in the present case the company owns only one undertaking. It is neither a financial reconstruction of the sick industrial company by reason

of opening a new venture, nor a proper management or taking over of the management of the company. The scheme is also not an amalgamation of

the sick industrial company with another company, nor any other company is being amalgamated with the sick industrial company. On the other

hand, the company wants to open up a new venture which is not contemplated in Sub-section (1) of Section 18. There is no attempt to revive the

sick industrial company. It is revival of the sick industrial company which is intended in Sections 16, 17 and 18 of the SICA. Tf the present unit is

completely dissolved and a new unit is sought to be established in that event, it may be a company within the meaning of Section 3(d) but it will not

be an industrial company within the meaning of Section 3(e). None of the provisions provided in Clauses (a) to (e) appears to have been provided

in the scheme. Clause (f) only supplements Clauses (a) to (e). The same cannot be interpreted to incorporate a new venture as in the present case.

Thus, the question of approval or sanction altogether of a new venture, as in the present case, cannot be contemplated within Section 18, Sub-

section (1) of the SICA.

19. Thus, the scheme appears to be wholly incompatible with the provisions contained in Sections 16, 17 and 18 of the SICA. As such the

Tribunal has come to a decision on the basis of the materials before it, that it is not viable and as such it was not bound to approve of the sanction

that the scheme so formulated. The thorough diversion including the change in the name, as discussed above, had never been contemplated within

the scheme, object and purpose of the SICA. A scheme incompatible with the purpose, object and scheme of the SICA can never be sanctioned.

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20. In the facts and circumstances of the case, it appears that the Tribunal was well within its jurisdiction to reject the scheme in the facts and

circumstances of the case as discussed hereinbefore.

21. In the result, the writ petition fails and is accordingly dismissed. There will be no order as to costs.

22. Urgent xerox certified copy of this order be given to the learned advocates for the parties at the earliest.