

Indian Shaving Products Ltd. Vs. Delhi Development Authority and anr.

Indian Shaving Products Ltd. Vs. Delhi Development Authority and anr.

SooperKanoon Citation : sooperkanoon.com/705369

Court : Delhi

Decided On : Oct-05-2001

Reported in : [2004]120CompCas818(Delhi); 95(2002)DLT87; 2002(61)DRJ304

Judge : Anil Dev Singh and; O.P. Dwivedi, JJ.

Acts : [Companies Act, 1956](#); Sick Industrial Companies (Special Provisions) Act, 1985 - Sections 3(1), 16(2), 17(3), 18 and 32; Income-tax Act - Sections 72A; [Foreign Exchange Regulation Act, 1973](#); Urban Land (Ceiling and Regulation) Act, 1976

Appeal No. : Civil Writ Petition No. 3489 of 1995

Appellant : Indian Shaving Products Ltd.

Respondent : Delhi Development Authority and anr.

Advocate for Def. : V.K. Sharma, Adv., for D.D.A.

Advocate for Pet/Ap. : Gopal Subramaniam, Sr. Adv. and; D.K. Singh, Adv

Disposition : Writ petition dismissed

Judgement :

Anil Dev Singh, J.

1. The petitioner calls in question the impugned notice dated August 29, 1995 whereby the petitioner company has been asked to pay an amount of Rs. 5,39,14,966/- to the first respondent -Delhi Development Authority (for short 'the D.D.A.') The facts giving rise to the petition are as follows:-

2. The petitioner is a public limited company incorporated under the [Companies Act, 1956](#). It is stated to be new entrant in the razor blade market. In the year 1987 the petitioner along with its subsidiary companies bought the entire share holding of a company called Sharpedge Limited. The latter company was incorporated in the year 1957 and was engaged in the business of manufacture and sale of safety razor blades and other related shaving products. In the year 1989, a reference was made to the Board of Industrial and Financial Reconstruction (for short' the BIFR') on the ground of Sharpedge Limited being a sick industrial company. On August, 9, 1989, the BIFR declared Sharpedge Limited as a sick industrial company within the meaning of Section 3(1)(o) of the Sick Industrial Companies (special Provisions) Act, 1985 (for short' the SICA'). Thereafter on July 9 ,1991 under Section 16(2) of the SICA the Industrial Credit and Investment Corporation of India (for short the ICICI) was appointed as the operating agency to formulate a proposal for rehabilitation of the company in consultation with the concerned authorities. On October 4, 1991 the operating agency submitted a final draft rehabilitation scheme to the BIFR. Consequent upon the submission of final draft scheme by the operating agency, the Board formulated its draft scheme which was circulated to he concerned authorities, namely, the sick industrial company, concerned financial institutions and banks, the the State Government, the union of the sick industrial company's workers. Short particulars of the scheme were also published in two daily newspapers, one in English and the other in Hindi, for circulation in the Union Territory of Delhi for information of the shareholders and creditors and employees of the company and other interested parties with a view to providing them an opportunity to submit their comments or suggestions or objections, if any, within two months from the date of the publication of the draft rehabilitation scheme. The draft rehabilitation scheme inter alias envisaged the amalgamation of Sharpedge Limited with the petitioner. After the time for filing suggestions and objections by the concerned parties expired, the BIFR gave its approval to the scheme of amalgamation on April 23, 1992 with a direction that the

sanctioned scheme shall come into force with immediate effect.

3. As one of the terms of amalgamation it was provided that the undertaking of the transferor company shall with effect from the transfer date (April 1, 1991) and without any further act or deed on the part of any party thereto, be deemed to have been transferred to and vested in the transferee company pursuant to an order to that effect by the BIFR under Section 17(3) read with Section 18 of the Act (the SICA) for all the estate and interest of the transferor company, but subject nevertheless to all changes, if any, then affecting the same or any part thereof, and on the transfer date, the transferor company shall be deemed to have been amalgamated with the transferee company' Clause 14.3 of the draft scheme provided that consequent to the amalgamation all properties of the transferor company will vest in the transferee company as owner. By the same clause all concerned authorities including the M.C.D. and the D.D.A. were required to effect necessary changes in the licenses, permissions, approvals, deeds, agreements, without payment of any transfer charges on account of stamp duty, registration, etc.

4. By a communication dated May 15,1991, the petitioner requested the first respondent to effect the requisite changes in its record in consonance with the scheme of amalgamation approved by the BIFR. The first respondent however, reacted to the request of the petitioner by letter dated August 29, 1995 whereby it required the petitioner to furnish certain information. On August 29,1995 the first respondent issued the impugned demand notice whereby it required the petitioner to pay a sum of Rs. 5,39,14,966/- as unearned increases. The petitioner being aggrieved by the impugned demand has filed the instant petition.

5. While issuing notice to the respondents to show cause why rule nisi be not granted, the Bench limited the notice to the following question:

'whether the scheme framed under SICA by virtue of Section 32 of the Act would have such an overriding effect as to take away the right to recover unearned increase?'

The Bench also restrained the respondents from taking coercive steps for the recovery of the amount in question. subsequently, on February, 6 ,1996 the Bench modified the earlier interim order by directing the appellant to deposit the amount of Rs. 3.50 crores with the D.D.A. and to furnish a bank guarantee in an amount of Rs. 1,87,95,788/- undertaking to pay the same consistently with the final order that may be passed by this Court in the main petition.

6. We have heard the learned counsel for the parties.

7. Before we deal with the question in issue we may note that a perpetual lease deed dated July 5,1978 was executed by the first respondent in favor of M/s. Sharpedge Limited whereby industrial Plot No. 31, Block E, Okhla Industrial Area, Phase II, New Delhi, was demised unto M/s. Sharpedge Limited in perpetuity. Clauses (4)(a), (5) and (7) of the perpetual lease deed have a bearing on the question in issue. These clauses read as follows:-

'(4)(a) The Lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the industrial plot except with the previous consent in writing of the Lesser which he shall be entitled to refuse in his absolute discretion.

PROVIDED that such consent shall not be given for a period of then years from the commencement of this Lease unless, in the opinion of the Lesser, exceptional circumstances exist for the grant of such consent.

PROVIDED FURTHER that in the event of the consent being given, the Lesser may impose such terms and conditions as he thinks fit and the Lesser shall be entitled to claim and recover a portion of the unearned increase in the value (i.e., the difference between the premium paid and the market value) of he industrial plot at the time of sale, transfer, assignment or parting with the possession, the amount to be recovered being fifty per cent of the unearned increase and the decision of the Lesser in respect of the market value shall be final and binding.

PROVIDED FURTHER that the Lesser shall have the pre-emptive right to purchaser the property after deducting fifty % of the unearned increase as

aforesaid.

(b).....

xx xx xx (5) The Lesser's right to the recovery of fifty per cent of the unearned increase and the pre-emptive right to purchase the property as mentioned hereinbefore shall apply equally to an involuntary sale or transfer whether it be by or through an executing or insolvency court.

xx xx xx (7) Whenever the title of the Lessee in the industrial plot is transferred in any manner whatsoever the transferor and the transferee shall within three months of the transfer, give notice of such transfer in writing to the Lesser. xx xx xx

8. According to clause(4)(a) of the perpetual lease deed, the Lesser is entitled to claim 50% portion of the unearned increase in the value (i.e., the difference between the premium paid and the market value) of the industrial plot at the time of sale, transfer, assignment, or parting with the possession by the lessee. Besides, the lessee is interdicted from selling, assigning or parting with the possession of the whole or any part of the industrial plot except with the previous consent in writing of the Lesser which can be refused in the absolute discretion of the Lesser. That apart, the Lesser by virtue of clause (4)(a) of the perpetual lease deed had reserved for itself the pre-emptive right to purchase the property after deducting 50% percent of the unearned increase as aforesaid.

9. It was argued by the learned counsel for the petitioner that since the vesting of the undertaking is in pursuance of the order of the BIFR, it does not constitute a transfer within the meaning of clause (4)(a) of the perpetual lease deed. It was urged that clause (4)(a) of the perpetual lease deed will not come into operation as it was not a case of transfer of the demised property from M/s. Sharpedge Limited to M/s. Indian Shaving Products Limited. According to him, it was a case of amalgamation of the two companies and as a consequence of the amalgamation directed by the BIFR consequent changes have to be made in the record of the D.D.A. It was also pointed out that no consideration has passed from the petitioner to M/s. Sharpedge Limited in respect of the demised property. It was canvassed that since no consideration has been paid there is no question of

payment of unearned increase by the petitioner to the D.D.A. The learned counsel also canvassed that in the instant case the vesting of the undertaking of M/s. Sharpedge Limited was made in pursuance to an order of the BIFR, and there was no voluntary transfer or the property in question from M/s. Sharpedge Limited to M/s. Indian Shaving Products Limited.

10. On the other hand, learned counsel for the first respondent (D.D.A.) submitted that no privity of contract existed between the petitioner and the first respondent. According to the learned counsel, the first respondent is entitled to recover unearned increase under clause (4) of the perpetual lease deed since the transaction, though approved by the BIFR vide its order dated April 23, 1992, constitutes a transfer of the land by M/s. Sharpedge Limited to M/s. India Shaving Products Limited.

11. We have considered the submission of the learned counsel for the parties. The first respondent-DDA was not a party before the BIFR though vital interests of the DDA were involved. As per the scheme of rehabilitation which was approved by the BIFR by its order dated April 23, 1992, the undertaking of the transferor company w.e.f. from the transfer date, viz., April, 1, 1991, was deemed to have been transferred to and vested in the transferor company without and further act or deed on the part of any party to the scheme of amalgamation. Therefore, it appears that amalgamation had already taken place on April 1, 1991 before the order of the B.I.F.R. dated April 23, 1992. This also appears to be so from the order of the appellate authority, constituted under the SICA, in an appeal filed against the order of the BIFR declining to grant the benefit of Section 72A of the Income-tax Act to the amalgamation of the two companies. An extract from the order of the appellate authority is noticed in the judgment of the Supreme Court in *Indian Shaving Products Limited v. Board of Industrial and Financial Reconstruction and Anr.* : [1996]218 ITR 140 (SC) . The order of the appellate authority reads as follows:-

'None of those factors can be considered totally irrelevant or extraneous except possibly the fact that both these companies are closely companies and also the fact that all the liabilities of the sick industrial company are in respect of its parent

company, namely, the amalgamating company, the ISPL. It may also be stated that, as on the date of amalgamation, that is, on April, 1991, the sick industrial company's net worth had not yet become possible.'

12. Thus, the date of amalgamation is April 1, 1991. We do not find anything on record to show that the amalgamation which took place on April 1, 1991 was involuntary.

13. The scheme of amalgamation inter alia provided that consequent to the amalgamation, all properties of the transferor company shall vest in the transferee company as owner and all authorities including the DDA was required to effect the necessary changes in the licenses, permissions, approvals, deeds, agreements, without payment of any transfer charges on account of stamp duty, registration etc.

14. It is, however, significant to note that Clause 14.3. of the scheme talks of scheme talks of properties of the transferor. therefore, this clause will apply only to the properties owned by the transferor. Transferor was the lessee of the property. The demised property, therefore cannot vest in the transferee company even after amalgamation. The BIFR by approving the scheme of amalgamation was not competent to effect change in the ownership of the property, which belongs to the DDA, and it has not done so. The ownership of the property still remains with the DDA. Since the transferee company has applied for mutation of the property in its name, it is required to pay the unearned increase. It may be noted that even before the amalgamation of the transferor and the transferee, the transferee has purchased all the shares of the transferor company. Even the date of transfer is prior to the date of the amalgamation. Assuming that the demised premises were capable of being transferred to the transferee, the DDA was entitled to charge unearned increase. We fail to appreciate as to how by a deed of amalgamation the terms of the perpetual lease deed can be said to have been altered. Since the DDA was not a party to the scheme its rights cannot be affected, and the order passed by the BIFR does not bind the DDA. Learned counsel for the petitioner submitted that the perpetual lease deed will be of no consequence as its effect has been neutralised by Section 32 of the SICA. Section 32 of the SICA

provides that the provisions of this Act and any rules or schemes made there under will have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulations Act, 1973 and the Urban Land (Ceiling & Regulation) Act, 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. Section 32 has no application to the agreements. This section gives overriding effect to the provisions of the SICA. Even rules and schemes made there under override and other law. In other words, provisions of the SICA and rules and schemes made there under shall have effect notwithstanding anything inconsistent therewith contained in other statutes or rules. This, however, does not affect agreements executed by contracting parties. thereforee, the terms of the perpetual lease deed, which are not statutory in nature, are not affected by the provisions of Section 32 of the SICA as they do not override an agreement. For all these reasons, we are of the opinion that the demand raised by the D.D.A. is not hit by Section 32 of the SICA. The writ petition, thereforee, fails and is hereby dismissed.