

Alcatel-lucent India Ltd. Vs. Usha India Ltd.

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Court : Delhi

Decided On : Jun-01-2012

Judge : The Honourable Acting Chief Justice Mr. a.K. Sikri & Rajiv Sahai
Endlaw

Appeal No. : W.P. (C) 12723 OF 2012

Appellant : Alcatel-lucent India Ltd.

Respondent : Usha India Ltd.

Judgement :

A.K. SIKRI, ACJ.

1. The petitioner feels aggrieved by the action of the respondent Usha India Limited in making repeated references before the BIFR and appeals therefrom before the AAIFR, even when previous references made by the petitioner were rejected. The grievance of the petitioner is that it amounts to continuous and systematic abuse of process resorted to by Usha India limited with the sole motive of delaying and defeating the rights of its creditors. Usha has been filing repeated references before the BIFR and getting for itself protection of the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 which it is otherwise not entitled to. To highlight the purported mala fides and abuse on the part of the Usha, the petitioner traced the following events in its petition.

2. On 30.7.2002 Usha filed its first Reference before BIFR which was registered as Reference no. 117/2002, claiming losses of ` 1015.24 Crores. In just three months, the said Reference was rejected. The BIFR, vide a detailed order recorded that far from losses, the net worth of Usha is positive by ` 800.73 Crores. The following findings of the BIFR's order dated 28.10.2002 are relevant:

“...The Company made investments of ` 504 crores in these companies during 1996-2000. The profit of the company during this period was ` 66.25 cores. The company disinvested in many of the sister concern companies. These were both quoted and unquoted investments. The company has not disclosed to whom these investments were sold and as to how the funds were realized.”

“...AS explained above, funds aggregating ` 504 crores were made in preference shares, 0% FCDs and these investments were not entirely made out of the profits of the company. The system adopted by the Company about valuation of unquoted investments was neither transparent nor consistent. The investments cannot be considered having completely eroded, especially when UIL was the promoter of these companies and the investments were made as promoter's contribution to draw long term benefits.... The contention of the company that it had raised cash by dis-investing in sister concerns during 1997-98 to 1999-2000 is also not supported with any evidence as to how and to whom these investments were sold. The company has been manipulating its investment portfolio...”

“...The net worth of the company would become positive by ` 800.73 crores after disallowing the losses to the extent of ` 1015.24 crores as discussed”.

3. On 12.03.2003, Usha filed an appeal against the aforesaid order dated 28.10.2002 before the AAIFR. On 4.8.2006 i.e. after about three and half years, the above appeal (appeal against the first reference rejection) was finally disposed off by the AAIFR, which affirmed that there has been manipulation of accounts by Usha in order to establish sickness. Some portions of the AAIFR order which may be noted are:-

“....No doubt a company is not barred from making investments outside. However, such huge investments outside, all of which has turned bad, at the cost of running

the appellant company itself cannot be considered as an example of bona fide wrong intention. This company had net worth nearly 833 crores but as early as 30.6.1996 it had invested ` 1554 crores outside itself; such huge investments outside the company cannot be considered as bonafide mistakes. No company can be absolved of the action of investing outside consciously, at the detriment of the parent company, and therefore claim sickness.”

4. The findings of the BIFR as affirmed by the AAIFR on 4.8.2006 were not challenged by Usha. Therefore, the same became final and binding. Yet, Usha continues to illegally carry forward these disallowed losses in subsequent references which act according to the petitioner is a complete abuse of legal process and claiming protection for years on a reference based on such losses is patently illegal, and designed solely to deny creditors the window for execution.

5. While the appeal against the first reference was pending before the AAIFR, Usha in the year 2003 filed another Reference (second Reference) before BIFR which was registered as Reference No. 316/2003. This was in relation to the accounting year 2003. Usha carried forward the disallowed losses in its books for the year 2003 and further exaggerated the losses for the year 2003 to ` 1198.28 crores. This reference was finally rejected by BIFR on 8.2.2006 with the following crucial findings:

“BIFR records that Usha’s auditors themselves stated in their report for the year 2004 that the accounts do not give a true and fair view in conformity with the accounting principles.”

“...the sickness of the company has been brought upon itself deliberately and the company has not become sick in the normal course..”

6. The BIFR records that the net worth of the company is ` 845.27 crores as on 31.3.2003. On 9.11.2006 Usha filed an appeal before AAIFR against BIFR’s above order of 8.2.2006 (Appeal No. 322/2006). This appeal was dismissed on 2.9.2008 i.e. after about two years. AAIFR has found that the second reference was not based on any new fact that Usha had merely carried forward disallowed losses. Again this finding of the AAIFR has not been challenged. This clearly indicates that

Usha is not concerned with supporting its position. It finds it simpler to file repeated references and keep them pending for years and thus illegally enjoys the protection granted under SICA.

7. It is further averred that as Usha was enjoying the protection of SICA, it deliberately did not file any reference for the years 2004 and 2005, thereby further showing that it was only interested in defeating/delaying its creditors. After waiting for all these years, Usha filed a fresh Reference (Third Reference) to BIFR being case No. 26/2008 (filed on 12.11.2007). On 14.8.2008 the said Reference was taken up for consideration to determine the status of Usha's sickness. It was brought to the BIFR's notice by representatives of the IFCI, the Export-Import Bank of India and other creditors that two earlier References No. 117/2002 and 316/2003 had been rejected as the net worth of Usha was positive. It was also recorded by BIFR that there was insufficient information submitted by Usha in its Form „A'no Factory License was submitted and there were reservations in the Auditors report. Then the BIFR records that in fact the advocate for Usha admitted that the company was not in operation since 2002. Nonetheless, instead of rejecting this reference on the ground that admittedly Usha lacked "industrial character'and there could be no claim to sickness, the BIFR continued with the matter though it was a regular case and fixed 24.9.2008 as the next date of hearing.

8. The third reference was finally disposed off on 11.11.2009 i.e. after two years, with the BIFR noting that Usha has admittedly remained closed since 2002, and it did not possess an industrial license on the date of filling the reference. Thus, the BIFR held that Usha did not qualify to apply for SICA protection as it was not an "industry" within the meaning of Section 3 (1) (o) of the SICA. On 12.1.2010 Usha filed an appeal against the above order. (Appeal No. 9/20100. The appeal was admitted and notices were issued on 15.3.2010.

9. Based on the aforesaid averments in the petition, the submission of the petitioner is that there is not an iota of genuineness in these references and the BIFR and AAIFR have repeatedly held so. This has now been going on for nearly 10 years (the first Reference being made in July, 2002). Conclusive findings of the

BIFR and AAIFR, to the effect that Usha has fudged/maintained irregular accounts to illegally depict sickness are on record. In fact, even its statutory auditors do not accept/ approve of Usha's accounting practices. Yet, Usha continues to file references based on the same losses, which the BIFR and AAIFR have repeatedly disallowed and/or with incomplete information and/or with caveats and disclaimers by its auditors. Though these references are finally rejected, by the time the order rejecting the same is passed (and affirmed in appeal), Usha has enjoyed protection under the provisions of the SICA and its creditors have been denied their rights under the decree.

10. It is pout that the petitioner has a monetary decree dated 6.9.2004 in its favour but has not been able to execute the same because of the protection enjoyed by the Usha under SICA.

11. Mr. Neeraj Kaul, learned Senior Counsel appearing for the petitioner submitted that the law has to be enforced in such a manner that the dubious persons are not able to misuse and abuse the process and/or exploit the provisions to their advantage in a malafide manner. It was argued that this Court has been vested with very wide powers under Article 227 to ensure that the stream of justice remains pure and unadulterated. The said power includes the power to guide the supervise subordinate courts and tribunals in order to ensure the ends of justice. Various judgments in this regard have been cited during the course of hearing. According to the petitioner, in light of the facts set out above, it is only with judicial intervention that the perpetual malpractices being carried out by Usha would come to an end. Mr. Kaul, thus, pleaded that this Court should lay down suitable guidelines directing the BIFR to perform a pre-registration scrutiny (as required in law) before registering future references filed by Usha to ensure that there are new and genuine grounds entitling Usha to file the reference and that the reference is not based on the same grounds which the BIFR and AAIFR have repeatedly disallowed. It was submitted that as per the post registration stage,(which will come into play only after the pre-registration scrutiny described above), the statute stipulates time and again that the enquiry be completed within 60 days but that has not happened even once (though the first reference was disposed of within 3 months). Mr. Kaul concluded his submissions by making a passionate plea for

issuance of necessary and appropriate directions/orders in the interest of justice or otherwise Usha shall continue the abuse of process and rights of its creditors permanently defeated.

12. The petition is contested by Usha. The learned counsel for the Usha raised preliminary objection by submitting that writ petition had become infructuous as the reference of Usha before the BIFR had been rejected vide order dated 11.11.2009 and at present there are no proceedings pending before the BIFR with respect to Usha. It was also argued that the petitioner has an alternative and equally efficacious remedy. Replying to the allegation of making repeated references by Usha resulting in availing protection under Section 22 of the SICA, it was submitted that the protection available to the sick company under Section 22 of SICA is not absolute and any person seeking to proceed against the Company has a right to apply and take leave of the BIFR or AAIFR in this regard and proceed against the company. In this context, the learned counsel emphasized the following aspects:-

(i) That the petitioner is not pressing any application under Section 22 (1) of the SICA before AAIFR to proceed against the respondent company.

(ii) The petitioner has filed execution proceeding against the respondent M/s Koshika Telecom Ltd. and there has been no impediment, on account of reference filed by the respondent company, preventing the petitioner from pursuing with the execution proceedings. On the contrary, the execution proceedings were delayed as M/s Koshika Telecom Ltd. is in liquidation and all its assets are in possession of the Official Liquidator attached to this Court and the petitioner had not approached the Company Court despite the liberty granted by the Ld. Single Judge 5 years ago and has failed to file its claim before the official liquidator attached to this Court. Even the execution proceedings have since been concluded for want of available assets with the judgment debtor.

13. It was also submitted that when the law permits making of reference under Section 15 (1) of the SICA in the event the final accounts of an Industrial Company for the relevant period indicate that the net worth of the company has been eroded and Usha had been making reference since satisfying the aforesaid condition. It

was argued that though the first reference for the year ending 30.11.2001 had been rejected on the ground that Usha's networth was positive, if certain amount advanced by the Company which had been written off are not considered. In the subsequent year, the Usha had clearly disclosed that there was no possibility of recovering the amount and therefore, there was no question of networth of the company being considered as positive.

14. Refuting the contention of the petitioner, it was contended that there was no such power with the Register, BIFR under BIFR Regulations or in the BIFR Rules as it amounts to discharge of judicial function which Registrar could not undertake. He argued that BIFR and AAIFR are statutory bodies, established under Section 4 and 5 of the SICA respectively. Section 4 (1) provides for Establishment of BIFR to exercise the jurisdiction and powers and discharge the functions and duties conferred or imposed on the Board by or under this Act. Section 12 of the SICA further expressly provides that

“(1) The jurisdiction, power and authority of the Board or the Appellate Authority may be exercised by the Benches.

(2) The Benches shall be constituted by the Chairman and each Bench shall consist of not less than two Members.

(3) If the Members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority but if the Member are equally divided, they shall state the point or points on which they differ and make a reference to the Chairman of the Board, or as the case may be, the Appellate Authority who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other Members and such point or points shall be decided according to the opinion of the majority of the Members who have heard the case including those who first heard it.”

15. He also referred to Section 36 of the SICA which provides that the Central Government may make Rules to carry out the provisions of SICA, but such subordinate legislation cannot supplant, repugnant and contrary to the statute itself. Relying upon the provision of Section 16 of the SICA, he submitted that the

power and duty to enquire into the working of the Sick Company is expressly conferred upon the BIFR by virtue of Section 16 of the SICA only and it would not be open for the Secretary, BIFR or any other functionary of BIFR except the Bench to enquire and determine as to whether the company is a sick company or not. According to the learned counsel the role of Registrar, BIFR is thus limited to examining whether reference under Section 15 is complete and that the same can be put up before a competent Bench of the BIFR. Regulation 19 of the BIFR Regulations indicates the same, whilst sub regulation (1),(2) and (3) of Regulation 19 of the BIFR Regulations provide for manner of making and communicating the reference to the BIFR. Sub Regulation (4) and (5) of Regulation 19 provide for the receipt and scrutiny of the reference respectively. A harmonious reading of Section 16 of SICA and Regulation 19 of the BIFR Regulation indicate that scrutiny of the reference by the Registrar is limited to ensure that the same is in the form as provided under Regulation 19 (1) or 19(2) has been received alongwith the prescribed documents. In terms of Regulation 19 (3) it would not be open for either the Registrar or the Secretary, BIFR to adjudicate any contentious issues or to embark upon the enquiry whether the company making the reference is a sick company or not in exercise of its powers under Section 19 (5). Similarly, Rule 4 of BIFR Rules cannot be interpreted to empower the Secretary BIFR to decide as to the sickness of the company. Any issue arising out of the reference would necessarily have to be limited in relation to the form, extent of information and receipt of the reference and the issues relating to the inquiry into the sickness of a company is not contemplated. It is further submitted that the contention that the Registrar or the Secretary itself determine or adjudicate the contentious issue as to whether a company is sick or not at the time of receipt of the reference and before its registration, is patently erroneous and liable to be rejected.

16. We have considered these submissions of counsel for the parties, made at the Bar.

17. At the outset, we would like to remark that even though no reference is pending at present and looking from this angle, we could have disposed of the writ petition without passing any effective order. However, the matter cannot be treated in the manner projected by the learned counsel for the respondent. Present case

itself eloquently demonstrates that there can be misuse of the machinery provided under the SICA by making repeated references year after year; taking advantage of the manner in which such references are admitted, consequence of which is that all proceedings against such a company shall stand stayed under Section 22 of the SICA; to gain time endlessly with repeated references even when previous references are rejected on merits.

18. We would like to start our discussion by stating that in any insolvency regime, there is an apparent conflict between the issues involved, namely, recovery of the dues of the creditors from a company, restructuring/rehabilitation of an insolvent company and effective liquidation process/system to ensure timely liquidation of the companies which cannot be revived. Interests of all groups concerned with these aspects are paramount: whether it be of creditors in the recovery of their debts or that of an insolvent company seeking revival. Above all, public interest including the economic interest of the nation which is paramount is subserved only when interest of all the aforesaid groups is protected. It is for this reason balancing of these purported rival and antagonist interests becomes a delicate task. All kinds of creditors and investors in a company would like to put their money at stakes only if they are reasonably confident that they would be able to recover the money invested; be it shareholder, debenture holder or a financial institution giving credit to such a company. Not only they want reasonable returns on the money invested, they want recovery of their investment also in the time of need. If a feeling is generated that money invested may be put in jeopardy, investors may stop making investments.

19. It is equally important that when an industrial company becomes insolvent first attempt has to be made to rehabilitate and restructure such a company. The reason is obvious. Insolvent industrial companies, when remain insolvent, result in blockage of sizeable national resources which may have cascading effect on all sectors of economic and social life of the nation. It may, in addition, put the creditors in a spot as it becomes difficult to recover their dues in such an eventuality. The ill-effects of insolvency in industrial companies would be loss of production, loss of employment, loss of revenue to Central and State Governments and locking up of investible funds of banks and financial institutions.

This became cause of serious concern to the Government and the society at large and this concern was accentuated by the alarming increase in the incidence of insolvency in industrial companies. The Parliament of India enacted the insolvent Industrial Companies (Special Provisions) Act, 1985 (SICA). The enactment of this legislation was recognition of the fact that in order to fully utilise the productive industrial assets, afford maximum protection of employment and optimise the use of funds of the banks and financial institutions, it would be imperative to revive and rehabilitate the potentially viable insolvent industrial companies as quickly as possible. It would also be equally imperative to salvage the productive assets and realise the amounts due to banks and financial institutions, to the extent possible, from the non-viable insolvent industrial companies through liquidation of those companies. It was felt that the existing institutional arrangements and procedures for revival and rehabilitation of potentially viable insolvent industrial company were both inadequate and time consuming and a comprehensive law was needed. The Act as originally enacted, made provisions for identification of insolventness in industrial companies fixing on the Board of Directors of such a company the responsibility to report such insolventness to the Board of Industrial and Financial Reconstruction (BIFR) which has been set up under this Act for evolving suitable measures to rehabilitate/revive the company. This Act operates and is sought to be implemented through a three-tier system, namely, (i) Operating Agency, (ii) the Board, and (iii) the Appellate Authority. The Operating Agency is essentially the hand-tool of the Board to carry out some investigations and legislation provisions. The scheme of the Act visualises:-

- (a) the initiation of a reference and determination by the Board of the insolventness of a company;
- (b) the enquiry, consideration and determination by the Board whether the insolvent industrial company can on its own within a reasonable time make its 'net worth positive', and if not, then the formulation of a scheme of revival in respect thereof;
- (c) the further determination by the Board after due consideration that the hopes of the company are belied and it cannot or has failed to make its net worth positive

and, therefore, the permanent sanction of a scheme of revival is necessary. The further consideration is that such a scheme is not practicable or that the financial assistance, concessions and reliefs necessary to make the scheme successful are not forthcoming and, therefore, the formation of an opinion by the Board that it is just and equitable to wind up the company. These are essential jurisdictional parameters of the Board and beyond these it cannot and need not travel. Till the whole exercise is gone through, the jurisdiction and parallel proceedings under all other Acts (to the extent provided in Sections 22 and 23) cannot lie or be proceeded with.”

Thus one of the salient features is contained in Section 22 of SICA which mandates that no proceedings against the company for recovery of dues shall proceed with during the pendency of proceedings before BIFR.

20. Once reference is admitted, the provision of Section 22 of the SICA, gets triggered and it comes to the aid of such a company. Section 22 (1) provides that in case the inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration by BIFR or any appeal under Section 25 is pending then certain proceedings against the industrial company are to be suspended or presumed to be suspended. The nature of proceedings which automatically attract the provisions of the suspension are:-

- * Winding-up of the industrial company.
- * Proceedings for execution of distress against the properties of sick industrial company.
- * Proceedings for the appointment of receiver.

The Sick Industrial Companies (Special Provisions) Amendment Act, 1993 has brought the following proceedings also within the purview of the provisions of Section 22(1):

- * Suit for recovery of money.

* Suit for enforcement of any security or any guarantee in respect of any loans or advances granted to the company.

It has been stated that such proceedings shall be suspended and if it is intended by the concerned party that the proceedings are to be continued against the sick industrial company then prior consent or approval of BIFR should be taken. Once the enquiry under Section 16 is treated to be pending, the provisions of Section 22 are attracted and the company court cannot proceed further the matter. {see **Maruti Udhyog Ltd. Vs. Instrumentation Ltd.** (1995) 82 Comp Cas 455 (Guj.)}. Thus the suspension of the proceedings would commence as soon as the inquiry under Section 16 is ordered by the Board. Section 16 (3) provides that the inquiry should be completed as expeditiously as possible and preferably within sixty days. The Board may appoint Operating Agency for the purpose of completion of the inquiry. Depending upon the outcome of the inquiry, the BIFR can order actions to be taken by the sick industrial company under the provisions of Section 17. It is clear from the provisions of Section 22 (1) that proceedings in a civil suit are liable to be suspended or stayed only when an enquiry 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. (See **Shri Hari Mills P. Ltd. Vs. Hanumantha Reddy and Co.**(2009) 148 Com Cas 81 (Kar.) **The starting point of suspension of proceedings is the commencement of the inquiry under Section 16 and the terminal point is the implementation of the scheme or, as the case may be, the disposal of the appeal by the appellate authority. (see C.J. Gelatine Products Ltd. In re** (1994) 81 Comp Cas 890 (Bom.)). The settled law is that the deemed date of commencement of inquiry for the purpose of section 22 of the Act is the date of submission of reference under Section 15. In other words once a company is registered with the Board for Industrial and Financial Reconstruction, all proceedings filed against a company must be stayed forthwith and shall not be proceeded with without the consent of the Board.(See **Rishabh Agro Industries Ltd. Vs. P.N. B. Capital Services Ltd.** (2000) 5 SCC 515.) This was so held by the Supreme Court in the case of **BSI Ltd. Vs. Gift Holding Pvt. Ltd.** (2000) 100 Comp Cas 436 in the following words:-

“The word “suit” envisaged in section 22(1) cannot be stretched to criminal prosecutions. The suit mentioned therein is restricted to “recovery of money or for enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company”. As the suit is clearly delineated in the provision itself, the context would not admit of any other stretching process.”

21. Thus, when the effect of submission of reference under Section 15 is that Section 22 of SICA gets triggered, appropriate steps needs to be taken to ensure that this provision is not misused. It is a matter of concern that over a period there has been rampant abuse of this provision.

22. The experience of the working of the SICA has been far from satisfactory. This enactment was formulated as an alternative to the process of recovery through civil courts, which was a very time consuming process and the winding up through the companies Act where hardly any recoveries could be made by the financial sector, while at the same time, ensuring that social and economic fallout of the said two routes of recovery could be avoided. However, unfortunately the new system set up in place of SICA met with only limited success. On the contrary it lent itself to gross misuse of some of its provisions particularly Section 22 of the Act.

23. As mentioned above, present case appears to be one where prima facie the provisions of Section 22 of the SICA are taken undue advantage of. Therefore, at least in those cases where the reference was rejected in previous years on merits by the BIFR, guidelines can be issued to ensure that fresh references in subsequent years should not be mechanically entertained.

24. Learned counsel for the respondent may be right in contending that while registering the references, the Registrar cannot act as quasi judicial authority which is the function of the Board. However, in order to ensure that such situation does not recur, at least in those cases where the reference is rejected earlier, matter can be referred to directly to the BIFR and BIFR should look into the same and to decide whether it is a case for admitting the reference. Even if BIFR decides it to admit after finding that the conditions for the same are satisfied, it can

still take a decision as to whether the provisions of Section 22 should be allowed to prevail or not. Section 22 stipulates that proceedings can go on with the consent of the Board/BIFR and the Board can in such cases pass a general order giving such a consent. At that stage, in such cases, where the references were rejected previously, the BIFR can pass appropriate directions refusing to extend the benefit of Section 22 of the SICA.

25. We, thus, dispose of this writ petition with the direction that BIFR should formulate necessary Practice Directions in the light of our aforesaid discussion within three months and issue the same for compliance.

26. Writ petition stands disposed of in the aforesaid terms.

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