

Reportable
IN THE HIGH COURT OF DELHI AT NEW DELHI

+WP(C) Nos.3669/2006 and 3672/2006

Date of Decision: 28.03.2008

#Oman International Bank S.A.O.G.Petitioner

! Through: Mr.Adarsh B. Dial,
Senior Advocate with
Mr.Rajeev K. Pandey and
Mr.Sushil Kr. Tekriwal

Versus

\$Appellate Authority for Industrial
And Financial Reconstruction and Ors.Respondents

^ Through Mr.Vibhu Bakru with
Mr.Sumesh Dhawan and
Mr.Vikas Chandel for respondent
No.2
Mr.Vijay Kumar for respondent
No.13/Canara Bank
Mr.Raj Kumar for the Insurance
Inspector, ESIC
Ms.Sushmita Banerjee for Federal
Bank

CORAM :-

***THE HON'BLE MR.JUSTICE A.K.SIKRI**
THE HON'BLE MR. JUSTICE VIPIN SANGHI

- 1.Whether Reporters of Local papers may be allowed to see the Judgment?
- 2.To be referred to the Reporter or not?
- 3.Whether the judgment should be reported in the Digest?

A.K. SIKRI, J.
:

WP(C) No.3669 & 3672/2006

1. The petitioner is a banking company constituted under the laws prevailing in Sultanate of Oman. For carrying out banking business in India, it has been granted licence by the Reserved Bank of India. It had granted financial accommodation to the two companies, namely, Premier Synthetics Ltd. (respondent No.2 in WP(C) No.3669/2006) and Blue Blends (India) Ltd. (respondent No.2 in WP(C) No.3672/2006) and both the companies are declared as sick companies. Both these companies have approached the Board for Industrial and Financial Reconstruction (in short the 'BIFR') for revival/rehabilitation on the ground that they are sick companies. Though their reference under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act (in short the 'SICA') for declaring them sick companies was rejected by the BIFR, appeals filed by them before the Appellate Authority for Industrial and Financial Reconstruction (in short the 'AAIFR') under Section 25 of the Act have been allowed and the cases are remanded back to the BIFR for fresh consideration on the basis of the principle set out by the AAIFR in the impugned judgment. The petitioner bank was objector in both the appeals and is not happy with the impugned orders passed by the AAIFR. In these circumstances, these two writ petitions are filed assailing the orders of the AAIFR. The legal effect of both the orders is same

as identical question is determined by the AAIFR in a common judgment. It is, in these circumstances, both these writ petitions were clubbed and heard together. For the sake of brevity, we take note of facts of WP(C) No.3672/2006.

2. In the year 1986, credit facilities were sanctioned by the petitioner in favour of Blue Blends (India) Ltd. (hereinafter referred to as the 'Company'). The company had availed similar facilities from some other banks as well. As it committed default in making repayments of these loans, all those banks, forming a consortium, filed an OA, being OA No.2518/2000, before the Debt Recovery Tribunal, Mumbai. The same is still pending adjudication. As per the petitioner bank, as on 30.9.2002 an amount of Rs.25.30 crores with further interest was due from the company.

3. After the filing of the said OA, on 6.2.2001, the company filed a reference under Section 15(1) of the SICA before the BIFR, which was registered as Reference Case No.235/2002. The company had sought the prayer that it be declared a sick industrial company and measures be determined for its rehabilitation by the BIFR. The BIFR heard this reference and vide its order dated 6.11.2002 rejected the same on the ground that reference filed by the company was time-barred. In coming to this conclusion the BIFR took into consideration certain dates.

4. The company had preferred first reference under Section 15(1) of the SICA on the basis of balance-sheet as on 31.3.2000. The Board of Directors of the company in their meeting held on 29.11.2000 had formed an opinion on the basis of the aforesaid balance-sheet, to the effect that net worth of the company was completely eroded and therefore, a reference was required to be made before the BIFR. Accordingly, reference was made on 6.2.2001. Admittedly, this was after the expiry of 60 days' period from the date on which the Board of Directors formed the opinion that the company had become a sick industrial company. Limitation period for making such a reference is 60 days as per Section 15(1) of the SICA. Thus, on 1.5.2002, the reference was rejected by the BIFR as time-barred.

5. The company filed a fresh reference, which was treated as Case No.235/2002. It was based on the balance-sheet as on 31.3.2002. However, no reference based on its balance-sheet as on 31.3.2001 was filed by the company. The BIFR, in these circumstances, noted that though the net worth of the company was fully eroded as on 31.3.2001, and the statutory auditors had confirmed in their audit reports that the company had become a sick industrial company as per the provisions of the SICA and the audited accounts as on 31.3.2001 were adopted at the AGM held on 10.11.2001, no reference was filed by the company based on its balance-sheet as on 31.3.2001 when its net worth was fully

eroded. It, thus, rejected the reference as not maintainable. The company preferred appeal before the AAIFR. The AAIFR has reversed the judgment of the BIFR in its order dated 8.11.2005.

6. It is not in dispute that under Section 15(1) of the SICA, reference is to be made by the Board of Directors of the company “within 60 days from the date of finalization of the duly audited accounts of the company for the financial year at the end of which the company has become a sick industrial company.” Proviso to this Section, however, lays down that if the Board of Directors has sufficient reasons even before such finalization, to form the opinion that the company has become a sick industrial company, then “within 60 days after it has formed such opinion” the Board of Directors shall make a reference to the BIFR. The Appellate Authority formulated the following questions for determination while undertaking the exercise of interpreting Section 15 with its proviso, with reference to the facts of this case:-

- i. Whether a reference under Section 15(1) of SICA filed within the period of 60 days after adoption of accounts can be treated as time-barred?
- ii. Whether BIFR/AAIFR have the power to condone delay and entertain a reference that has been filed after 60 days from the date of finalization of accounts?

- iii. When does the period of 60 days for filing a reference as prescribed under Section 15(1) of SICA start running?
- iv. Whether the proviso to Section 15(1) can override the main Section, i.e. Section 15(1) of SICA.
- v. Whether SICA provides any restriction from filing reference based on subsequent years' accounts if the reference based on the accounts of an earlier year has been rejected on the ground that it was time barred?
- vi. Whether SICA provides for filing of a reference for subsequent financial years when an earlier reference is pending adjudication?

7. We may note at this stage itself that since the BIFR had rejected the reference on the ground that earlier reference was filed belatedly, and no reference on the basis of balance-sheet as on 30.3.2001 was filed, this issue was covered by question No.(v) formulated above. While answering this question, the appellate authority noted that as per the judgments of this Court in Madhumilan Syntex Ltd. V. AAIFR & Ors., Denholm v. BIFR and Others, and Paam Pharmaceuticals Ltd. V. BIFR & Ors., each year's reference had to be decided on its own merits. There is no quarrel raised by the petitioner as far as answer to this question formulated by the appellate authority/AAIFR is concerned. However, the petitioner feels

aggrieved by the manner in which the proviso to Section 15(1) is interpreted vis-à-vis main provision of Section 15 and in the process following general principles for dealing with references filed under SICA are laid down by the AAIFR:-

“On a careful consideration of the averments made before us and records we are of the opinion that:

- a) That the earliest date on which the reference can be filed is 60 days from the date of the meeting of BOD, when the opinion regarding sickness has been formed under the Proviso to Section 15(1). The latest date on which the sick company can file the reference is 60 days from the date of finalization of the accounts under section 15(1).
- b) If the reference is filed after the due date, i.e., the period applicable under (1), BIFR can determine whether there were justifiable reasons for delay or there was any mala fide in not filing the reference within the stipulated period and thereafter, deal with the reference on merits even though it may be belated. Delay in filing the reference can, however, result in initiation of penal action against the management of the sick industrial company under Section 33(1) of SICA.
- c) A belated reference should not be rejected in limini but the reasons for delay should be considered and delay can be condoned if justifiable grounds for the same are demonstrated.

d) Each year's reference on the basis of which a declaration of sickness is claimed should be examined after due enquiry based on the criteria laid down at section 3(1)(o) of SICA.

e) If one year's reference has been dismissed as time barred, there is no bar to examining the reference filed in the subsequent year."

8. The bone of contention is the principle laid down in (a) above. As per this principle, AAIFR has given two dates between which reference can be filed. Earliest date on which reference can be filed is 60 days from the date of meeting of the Board of Directors. Starting from that date it can be filed on any date upto 60 days from the date on which the company finalises its accounts. It is the contention of the learned counsel for the petitioner that this principle is wholly erroneous and it does violence to the language of Section 15(1) of SICA, inasmuch as, there is no such warrant in the said provision for fixing initial date and outer limit with full liberty to the company to file its reference on any date during the said period. In order to appreciate the contention, we first reproduce Section 15(1) along with its proviso in its entirety:-

"15. Reference to Board

(1) When an industrial company has become a sick industrial company, the Board of Directors of the company,

shall, within sixty days from the date of finalization of the duly audited accounts of the company for the financial year as at the end of which the company has become a sick industrial company, make a reference to the Board for determination of the measures which shall be adopted with respect to the company.

PROVIDED that if the Board of Directors has sufficient reasons even before such finalization of form the opinion that the company had become sick industrial company, the Board of Directors shall, within sixty days after it has formed such opinion, make a reference to the Board for the determination of the measures which shall be adopted with respect to the company."

9. As per sub-section (1) of Section 15, the Board of Directors are under an obligation (as is clear from the expression 'shall' appearing therein) to make a reference to BIFR within 60 days from the date of finalization of duly audited accounts of the company for the financial year, at the end of which the company has become a sick industrial company. Since the financial year of a company, for the purposes is 31st March of a particular financial year, the date on which accounts as on 31st March of that year are duly audited and finalized shall be the starting point of counting the limitation of 60 days for making reference. Thus, if the accounts, say of the year as on 31.3.2002 after they are duly

audited, finalized on 30.9.2002, within 60 days to be counted from 1.10.2002, the reference is to be made.

10. Proviso to sub-section (1), however, makes an exception to the aforesaid principle. As per this proviso, if the Board of Directors has sufficient reasons to form the opinion that the company had become sick industrial company even before the finalization of the duly audited accounts, the Board is not required to wait till the date of finalization of the accounts. In that event, when such an opinion is formed, the period of 60 days shall start counting from the day the Board of Directors has sufficient reason to form the opinion about the sickness of the company and reference is to be made within 60 days after such an opinion is formed whether the accounts are finalized or not. In the example given above, if we presume that there were sufficient reasons to form the opinion about the sickness of the company on 31.7.2002, the limitation of 60 days, within which reference is to be made, shall start running from 1.8.2002, though the accounts were ultimately finalized on 30.9.2002. When we interpret the provision in the aforesaid manner it is difficult to agree with the opinion of the AAIFR formulated at (a) above, namely, giving an option to the company to make reference within 60 days from forming the opinion and upto 60 days from the date of finalization of accounts.

11. However, at the same time it is also important to decide what treatment is to be given to a reference if it is filed within 60 days computed in the aforesaid manner. Section 15(1) with its proviso rather exhibited a sense of urgency for making such a reference. Whereas sub-section (1) of Section 15 deals with computation of 60 days from the date when the duly audited accounts are finalized, proviso fixes an even earlier date for making such a reference. The reason is obvious, namely, if the company has become sick and normally such a fact would be known when the accounts are finalized, within 60 days the reference is to be made. However, if this fact has come to the notice of the Board of Directors even before finalization of the accounts, 60 days' period is to start from the formation of the opinion. The purpose is to approach the BIFR as early as possible so that immediate measures are taken for revival of such a sick company by the BIFR. The law as laid down by various judgments of the Bombay High Court as well as by this Court is that Section 15(1) does not lay down any period of limitation but creates an obligation upon the Board of Directors of a sick industrial company to approach the BIFR at the earliest. Therefore, in the event of delay in fulfilling the obligation, and not preferring the reference within 60 days from the date the same ought to be preferred, the consequence would be to take

penal action against the management of the sick industrial company as provided under Section 33(1) of the SICA. At the same time, in so far as reference is concerned, it is not to be rejected on the sole ground of belated filing of the reference, unless the Board finds that delayed filing of reference is on account of the Board of Directors of the company being guilty of 'supine indifference' or that there was a lack of bona fides on the part of the Directors. This principle was first laid down by the Bombay High Court in the matter of Garware Chemicals Ltd. v. BIFR & Ors., (2004) 1 CLJ 350 Bom. and followed by it in its subsequent judgment in the case of Esquire Polymers Ltd. v. AAIFR & Ors., (2004) 53 SCL 183. In this judgment, the Bombay High Court also held that there was no provision in the Act which debarred the BIFR to exercise its discretion of condonation of delay, in a given case on the basis of material placed on record before it. It was subsequently held that in the event of delay in filing the reference, it is not to be rejected on the sole ground that it was not filed within stipulated period of 60 days. Rather, there was an obligation on the part of the BIFR to take the reference to its logical conclusion and not to scuttle it down by reading Section 15(1) as a period of limitation. Following observations from this judgment are worth a quote:-

“10. As noted above, under Section 16(1)(b) of the SICA, the BIFR itself is empowered to take cognizance of the problem and register reference on its own. There is no period of limitation therein. There is no period of limitation when it comes to the reference at the instance of Central Government, Reserve Bank, State Bank or Public Financial Institutions under Section 15(2) of the SICA. In this background, when we look at Section 15(1) of the SICA, the only inference, that can be drawn, will be that this is a requirement which puts the Companies on their toes and it expects them to file their reference within a period of sixty days. In the event, the reference is not filed, there will be a penal consequence under Section 33(1) of the SICA. However, to say that the reference would not be registered at the end of the period of sixty days, would be negating the objectives, for which the quasi judicial Authority under the Act is created. The Authority cannot close the eyes in the problem brought to its notice merely because the reference is made beyond sixty days. It has power to hold an inquiry as required under Section 16(1) of the SICA and proceed to frame an appropriate scheme by way of rehabilitation and/or to pass appropriate order, if it is of the opinion that no rehabilitation is possible; reference must to go its logical conclusion and it cannot be scuttled by reading Section 15(1) as a period of limitation.”

12. This Court in its judgment dated 23.9.2004 rendered in WP(C) No.713/2003 entitled *Avik Pharmaceuticals Limited* agreed with the view of the Bombay High Court expressed in the aforesaid judgments. In that case, the Board of Directors formed an opinion that the company had become sick vide its resolution recorded in its meeting dated 5.2.2001. The reference was

registered on 30.4.2001, which was beyond 60 days. The BIFR dismissed the reference vide judgment dated 26.6.2002 holding that it lacked power to condone the delay. The AAIFR upheld the order of the BIFR, which was reversed by this Court in its decision rendered in the aforesaid writ petition extracting the aforesaid quote of the Bombay High Court in its judgment. The AAIFR in its impugned order has also referred to another judgment of this Court in M/s. Empire Jute Co. v. AAIFR – WP(C) No.4035/2001 – decided on 13.8.2001. In that case, reference was filed based on the audited balance-sheet for the financial year dated 31.3.1998. However, on noticing that the company had become sick in the year 1989 itself, the BIFR rejected the reference as time-barred, which decision was upheld by the AAIFR holding that cause of action would arise as soon as the company became sick for the first time and not every year when its annual accounts are audited even though the sickness persisted in subsequent years. Though Section 15(1) of SICA does not lay down limitation but casts an obligation on the part of the Board of Directors to file the reference within time as stipulated in the said sub-section, the position, thus, emerges would be the following:-

- a) Section 15(1) does not lay down any period of limitation but creates an obligation upon the Board of Directors of the sick industrial company to approach the BIFR within the period prescribed.

- b) In case the Board of Directors fails to approach the BIFR within the stipulated period, the management of such sick industrial company would be liable for penal action under Section 33(1) of SICA.
- c) The reference can still be entertained on merits as the purpose is to take expeditious steps for revival of a sick industrial company, if such revival is feasible.
- d) Even in the absence of any specific provision, the BIFR can exercise its discretion to condone the delay.
- e) The reference should be rejected only if the Board of Directors of the company are guilty of 'supine indifference' or when there is lack of bona fides in making such a reference.

14. When the position in law, is as stated hereinabove, it cannot follow that the reference can be made during the period as opined by the AAIFR in its conclusion (a). If that interpretation is accepted, even when the reference is made beyond 60 days, the Board of Directors can contend that there is no fault on their part and they are not liable for action under Section 33(1) of SICA. The carving out of 'earliest date' and 'latest date' between which reference can be filed is clearly in the teeth of provisions of Section 15, as if the proviso lays

down an additional date for filing the reference. The provisos are not to be interpreted in this manner. It would be of interest to note that the AAIFR took note of certain judgment of the Apex Court as well as Privy Council providing guidelines as to how provisos are to be interpreted, as is clear from the following discussion contained in the judgment:-

“In the case of Angurbala Mullick Vs. Bebabrata Mullick, AIR 1951 SC 293, the Hon’ble Supreme Court has held as under:-

“proviso is normally an excepting or qualifying clause and the effect of it is to execute out of the preceding clause upon which it is engrafted something which but for the proviso would be within it. Proviso which is found contradictory to the whole document, held to be ignored.”

13. In the words of Lord Macmillan [Madras & Southern Maharatta Rly. Co. Vs. Bezwada Municipality AIR 1944 PC 71 at 73]:

“As a general rule, a proviso is added to an enactment to qualify or create an exception to which is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule.”

(iv) In the case of *S. Sundaram Pillai v. V.R. Pattabiraman*, [(1985) 1 SCC 591, at page 611], the Hon’ble Supreme Court has held as under:

“43. We need not multiply authorities after authorities on this point because the legal position seems to be clearly and

manifestly well established. To sum up, a proviso may serve four different purposes:

- (1) qualifying or excepting certain provisions from the main enactment:*
- (2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable.*
- (3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and*
- (4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."*

15. In spite thereof, the Tribunal concluded that proviso to Section 15(1) was an enabling provision and could not have overriding effect over the main provision. On this basis principle (a) was laid down with which we are unable to agree and substitute the said principle in the following words:-

"(a) The reference is normally to be made by the Board of Directors of a sick industrial company, with BIFR, within 60 days from

the date of finalization of the duly audited accounts of the company for the financial year. However in case the Board of Directors has sufficient reasons to form the opinion, even before the finalization of accounts, that the company has become sick, then the Board of Directors are not to wait till the accounts are finalized but are under obligation to make a reference to the BIFR within 60 days from the date of forming such an opinion. In this eventuality, provided under the proviso, the date by which reference is to be made would even be earlier than the time, which is stipulated in sub-section (1)

In so far as principles (b) to (e) are concerned, we approve the same.

16. Notwithstanding the view which we have taken, we do not deem it proper to interfere with the direction given by the AAIFR in remanding the case to the BIFR for fresh consideration. Reason is simple. As noted above, BIFR had rejected the reference as time-barred only on the ground that the company did not approach on the basis of balance-sheet as on 1.3.2001, though statutory auditors had confirmed that it had become a sick industrial company as per the provisions of the Act. Even in such a case, when the reference is sought on the basis of balance-sheet as on 31.3.2002, it has to be considered in the light of the principles laid down in paras (b) to (e) above and the BIFR has to determine as to whether there were justifiable reasons for delay or it was a case of 'supine indifference' or there was any mala fides in not filing

the reference within the stipulated period. Of course, because of delay, action under Section 33(1) of SICA could be taken against the management of the company as observed by the AAIFR as well. We, therefore, dismiss these writ petitions and direct the BIFR to consider the reference submitted by these companies in the light of the discussion above. There shall, however, be no order as to costs.

(A.K. SIKRI)
JUDGE

March 28, 2008
HP.

(VIPIN SANGHI)
JUDGE