

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, COURT-II

CP (IB) 1152/MB/2017

Under Section 424 & Section 434 of the Companies Act,
2013.

Mount Overseas Private Limited,

[CIN: U51909MH2004PTC147118]

202, May Building, 297/299/301, Princess Street, Near
Marine Lines Flyover, Marine Lines, Mumbai-400002

...Petitioner

Versus

Bee Electronics Machines Limited

266, Dr. Annie Besant Road, Opposite Old Passport Office,
Worli, Mumbai-400030

... Respondent No. 1

Canara Bank

112, JC Road, Bangalore-560002

... Respondent No. 2

Order Delivered on: 12.08.2022

Coram:

Hon'ble Member (Judicial) : Justice P.N. Deshmukh

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Financial Creditor : Mr. Kunal Mehta, Counsel.

For the Respondent No. 1 : Mr. Ashish Pyasi, Counsel.

For the Respondent No. 2 : Mr. Prakash Shinde, Counsel.

ORDER

Per: Shyam Babu Gautam, Member (Technical)

1. The present Company Petition (hereinafter referred to as “Petition”) is filed by Mount Overseas Private Limited, (hereinafter referred to as “the Petitioner”) under Section 424 & Section 434 of the Companies Act, 2013 seeking the following directions to be issued to the Respondents:
 - a. Respondent No. 1 to transfer the right, title and interest in subject properties to the Petitioner after duly executing the Conveyance Deed, hand over all the documents showing the prior ownership relating to the subject properties in original, give the proof of liabilities settled in respect of the subject properties including electricity, MIDC, Land Revenue, labour, telephone, water, Panchayat tax, arrears of property tax, etc and to hand over vacant and peaceful possession in the subject properties to the Petitioner along with a Possession Letter;
 - b. Respondent No. 2 has failed and neglected to execute the sale deeds in respect of the subject properties in the Petitioner’s favour, Respondent No. 2 is in breach of the orders dates 30.06.2016 and 28.09.2015; thus to pay interest to the Petitioner by Respondent No. 2 from 12.04.2013 till date on the sum of ₹2.70 crores in light of the aforesaid breach;
 - c. Respondent No. 2 to forthwith execute sale deeds in the Petitioner’s favour;
 - d. In the event the Tribunal is of the opinion that the Respondent No. 1 is also required to execute sale deeds conveying all right, title and interest in the Petitioner’s favour, then this Tribunal be

pleased to order and direct Respondents No. 1 & 2 to forthwith execute the sale deeds in the Petitioner's favour.

- e. Pending the hearing and final disposal of the Petition, this Tribunal be pleased to pass an order and injunction restraining Respondent No. 1 from dealing with and/or creating any rights whatsoever (including parting with possession) over the subject properties.
2. The Respondent No. 1 and Respondent No. 2, are companies incorporated under the Companies Act, 1956 and Banking Regulation Act, 1949 having its registered office at 266, Dr. Annie Besant Road, Opposite Old Passport Office, Worli, Mumbai-400030 and 112, JC Road, Bangalore respectively. The property which is the subject matter of this Petition is also within this Tribunal's jurisdiction. Hence, this Tribunal has the jurisdiction to try and entertain the Petition.

Submissions made by the Ld. Counsel of the Applicant:

3. It is the case of the Petitioner that Respondent No. 1 had been referred to the Board of Industrial and Financial Restructuring (hereinafter referred to as "BIFR"), under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "SICA").
4. On 28.2.2006, by an order passed by the BIFR the Respondent No.1 had been declared as a sick industrial company, in respect of whom, proceedings were pending as on 01.12.2016 i.e. the coming into force of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 (hereinafter referred to as "SICA Repeal Act").
5. Pursuant to the above order, Respondent No.2 which is a banking company had been appointed as the Operating Agency (OA) of

Respondent No.1 and since then it has been performing its functions as contemplated by the SICA.

6. As in 2012, Respondent No.1 had several liabilities towards secured creditors and statutory bodies in respect of statutory liabilities. In order to ensure a settlement of these dues and liabilities, the BIFR passed orders permitting the sale of the subject properties. Respondent No.2 as the OA was to ensure this sale by conducting a public auction. [Case No. 97 of 2003]
7. On 29.11.2012, Respondent No.2 advertised in the Financial Express, the sale of the subject properties and, pursuant thereto, received five bids. Copy of advertisement in Financial Express is annexed as Exhibit C.
8. The Petitioner participated in the public auction and submitted the highest bid of Rs.2.70 crores. As a part of this bidding process, the Petitioner had issued an earnest money cheque of Rs.30 lakhs. Copies of the correspondence qua the bidding process including the Petitioner's bids are annexed as Exhibits D and E.
9. By a letter dated 26.03.2013, Respondent No.2 accepted the Petitioner's bid as the highest bid and accordingly, called upon the Petitioner to pay the balance portion of Rs.2.40 crores. A copy of Respondent No. 2's letter dated 26.03.2013 is annexed as Exhibit F.
10. The said cheque of Petitioner of Rs.30 Lakhs was encashed on 27.03.2013.
11. On 12.04.2013, the Petitioner made a RTGS payment of Rs.2.40 crores to Respondent No.2.
12. By an order on 15.04.2013, the BIFR accepted the Petitioner's bid of ₹2.70 crores as the highest bid and the same was also confirmed by an order dated 07.11.2013. Copies of the orders dated 15.04.2013 and 07.11.2013 are annexed as Exhibit G and H.

13. By a letter dated 07.06.2013, Respondent No.2 recorded, that in terms of BIFR's Order dated 15.04.2013, the Petitioner's bid was accepted as the highest bid; that the money of ₹2.70 crores was to be utilized towards meeting statutory liabilities, advertisement costs and the cost of the valuation conducted by ARCIL and the balance was to be shared by the secured creditors. A copy of Respondent No. 2's letter dated 07.06.2013 is annexed as Exhibit I.
14. By an email dated 22.08.2013, the Petitioner forwarded to Respondent No.2, a draft of the sale/conveyance deed which the Respondents were to execute in the Petitioner's favor.
15. By an order dated 15.01.2014, the BIFR prima facie held that Respondent No.1 could not be revived, hence ordered that it be wound up and ordered the issuance of the show cause notice for this purpose. In paragraph 20.4 of the order dated 15.01.2014, the Respondent No.2 was directed to return the amount of ₹2.70 crores to the Petitioner. A copy of the order dated 15.01.2014 is annexed as Exhibit J.
16. The Petitioner did not accept the part of the Order dated 15.01.2014 which required Respondent No.2 to refund the amount of ₹2.70 crores, because based on the previous orders passed by the BIFR, the sale of the subject properties in the Petitioner's favour had already been accepted and confirmed and the Petitioner had paid the entire sum of ₹2.70 crores to Respondent No. 2. Therefore, the Petitioner instituted, Appeal against the part of the order dated 15.01.2014 which ordered the refund of the bid amount of ₹2.70 crores before the Appellate Authority for Industrial and Financial Reconstruction (**AAIFR**).
17. Pursuant to the order dated 15.01.2014, by a letter dated 26.02.2014, Respondent No.2 forwarded to the Petitioner, three demand drafts to

return the amount of ₹2.70 crores. A copy of the letter dated 26.02.2014 and the demand draft are annexed as Exhibit K.

18. By a letter dated 07.05.2014, the Petitioner conveyed its non-acceptance of the demand draft of ₹2.70 crores and accordingly returned the same. On 21.05.2014, the Respondent No.2 once again forwarded the demand draft for ₹2.70 crores. Copies of letters dated 07.05.2014 and 21.05.2014 are annexed as Exhibits L & M respectively. The Petitioner had not accepted the part of the order dated 15.01.2014 ordering the return of the deposit and therefore, the Petitioner never accepted the return of the sum of Rs.2.70 crores from Respondent No.2.
19. On 17.12.2014, the AAIFR by its order, set aside paragraph 20.4 and remanded the matter back to the BIFR to consider the matter relating to the sale of the subject properties in the Petitioner's favour.
20. On 28.01.2015, the Petitioner instituted Miscellaneous Application No. 42/BC/2015 (MA No. 42 of 2015) seeking a direction against the Respondents requiring them to execute sale deeds conveying the subject properties in the Petitioner's favour.
21. On 28.9.2015, by an Order in MA No.42 of 2015, the BIFR confirmed the sale of the subject properties in the Petitioner's favour. A copy of the order dated 28.09.2015 is annexed as Exhibit N.
22. On 30.06.2016, by BIFR's order in MA No. 42 of 2015, Respondent Nos.2 was directed to execute deeds of conveyance conveying the subject properties in the Petitioner's favour.
23. The Petitioner submits that there has been no challenge by Respondent No.1 to the BIFR's Order dated 30.6.2016. As such, Respondent No.1 can have no objection whatsoever to Respondent No.2 executing the sale deeds conveying all right, title and interest of the subject properties in the Petitioner's favour and is bound to comply with the Order dated

30.06.2016. It is only Respondent No.2 who is required to execute the sale deeds. This is because, the subject properties were acquired through a statutorily recognized and mandated public auction under the SICA, it was only Respondent No.2 acting as Respondent No.1's operating agency who had the power to authority to do so; it is Respondent No.2 who had conducted the auction and received the payment of Rs.2.70 crores; and even as per the order dated 30.06.2016, it is only Respondent No.2 who is required to execute the sale deeds in respect of the subject properties in the Petitioner's favour.

24. By a letter dated 15.09.2016, for the purpose of complying with the Orders passed in MA 42 of 2015, Respondent No.2 *inter-alia* called upon Respondent No.1 to inform it of a convenient date to execute the sale deeds in favour of the Petitioner conveying all right, title and interest in the subject properties. A copy of Respondent No. 2's letter dated 15.09.2016 is annexed as Exhibit P.
25. On 01.12.2016, thereafter, the SICA Repeal Act was notified to come into force. With the passing of the SICA Repeal Act, all pending proceedings before the BIFR stood abated. According to the Petitioner, despite the SICA Repeal Act, the orders dated 30.06.2016 is still valid and binding as, in law and under the SICA Repeal Act, the same constitute actions under the SICA which are saved. As such, the sale of the subject properties in the Petitioner's favour stands confirmed and finalised. That position does not change even by virtue of the SICA Repeal Act. Therefore, even after the coming into force of the SICA Repeal Act i.e. 01.12.2016, Respondent No.2 is still, in its capacity of being Respondent No.1's operating agency, obligated to execute and can execute the sale deeds in the Petitioner's favour. In view of this position, the Petitioners respectfully submits that, post 30.06.2016 although

Respondent No.2 could have immediately executed the sale deeds in the Petitioner's favour, for reasons best known to it, it did not do so.

26. The Petitioner further submits that, in 2017, it appears that after the passing of the SICA Repeal Act, some correspondence has ensued between Respondent Nos.1 and 2. However, the Petitioner is not aware of this as it has not been kept privy to the same.
27. On 18.03.2017, the Petitioner received a letter dated 10.03.2017 from Respondent No.2 addressed to Respondent No.1 whereby Respondent No.2 recorded the coming into force of the SICA Repealing Act, and in that context, stated that its role as OA would only "resume" upon registration of a case with the NCLT and accordingly, called upon Respondent No.1 to approach the Hon'ble NCLT for registration of the case and inform Respondent No.2 of the same for it to proceed further in the matter. A copy of Respondent No. 2's letter dated 10.03.2017 is annexed as Exhibit Q.
28. In the given circumstances, the Petitioner states and submits that Respondent No. 2 is in breach of the BIFR's order dated 30.06.2016 and the same is causing injustice to the Petitioner. Therefore, this is a fit case for this Tribunal to exercise its inherent powers under Rule 11 of the NCLT Rules and pass an order and direction directing Respondent No. 2 to execute the sale deeds annexed as Exhibit R and S in the Petitioner's favour with such modifications as this Tribunal may deem fit and proper.

Submissions made by the Ld. Counsel of the Respondent No. 2:

29. Respondent No.2 states that Section 252 of the Insolvency and Bankruptcy Code, 2016 (IBC), provide for amendment to SICA Repeal Act in the manner as specified in the Eighth Schedule to IBC. Consequently, the Board for Industrial and Financial Reconstruction (BIFR) and the Appellate Authority for Industrial and Financial

Reconstruction (AAIFR) stands dissolved and any appeal preferred to the Appellate Authority or any reference made or inquiry pending before the Appellate Authority or any proceeding of whatever nature pending before the Appellate Authority or the Board under the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) stands abated and the companies effected as a result of SICA Repeal Act may make reference to the National Company Law Tribunal (“NCLT”) under the Insolvency and Bankruptcy Code, 2016 within one hundred and eight days from the commencement of the IBC in accordance with the provisions of IBC.

30. It is pertinent to note that reference to NCLT can be made on account of SICA Repeal Act under the provisions of IBC and not Companies Act, 2013.
31. Further, the Petitioner cannot invoke the provisions of Rule 11 of the NCLT Rules, 2016 which gives the Tribunal inherent powers to make such order as may be necessary for meeting the ends of justice or to prevent abuse of the process of Tribunal. The said rule does not apply to the provisions of Section 424 and 434 of Companies Act, 2013 and therefore, no jurisdiction of this Tribunal arises under Rule 11 for granting of any reliefs under the aforesaid provisions of Companies Act, 2013.
32. The Respondent Nos.2 further states that Section 255 of the Insolvency and Bankruptcy Code, 2016 (IBC), provide for amendment to certain sections of Companies Act, 2013 in the manner as specified in the Eleventh Schedule of the IBC, which includes Section 424 and 434 of the Companies Act, 2013, under which the present petition is filed. As regards the necessary amendments, the Respondent No.2 states that Section 424 which deals with “*Procedure before the Tribunal and Appellate*

Tribunal” introduces “Insolvency and Bankruptcy Code, 2016” in addition to provisions of Companies Act 2013 and Section 434 which deals with “*Transfer of certain pending proceedings*” provides for transfer of pending proceedings to Tribunal effective from 15th December 2016.

33. The Respondent No.2 states that, primarily the Insolvency and Bankruptcy Code applies to matters relating to insolvency and liquidation of Corporate Debtor where there is some existence of default in repayment of debt due pursuant to monies borrowed against payment of interest or where a claim arises in respect of provision of goods or services by a creditor. The Petitioner is neither a Creditor nor a Corporate Debtor. Therefore, the fact that Petitioner approached NCLT after repeal of SICA Act does not justify its action.
34. Further, the Petitioner in the given case is a company which had participated in a public auction for sale of subject properties of Respondent No.1 who has approached to BIFR to be declared as sick industrial company. Respondent No.2 has been appointed as the operating agency. The said public auction was arranged by Respondent No.2 and since highest bid was provided by Petitioner, the same was accepted and confirmed by BIFR vide its order dated 15.04.2013. Vide orders dated 28.09.2015 and 30.06.2016, sale of subject properties was confirmed by BIFR with a direction to Respondent No.2 to execute sale deeds in respect of subject properties of Respondent No.1 in favour of Petitioner in its capacity as operating agency.
35. Based on the above facts, it is clear the Petitioner here seeks execution of sale deed and transfer the Right, title and interest in favour of Petitioner, which being in the nature of specific performance, cannot be sought under Companies Act, 2013 before NCLT.

36. Respondent No.2 states that neither the Section 424 nor Section 434 deals with any provision in relation to executing sale deeds in favour of a company. Hence, the ideal forum for the Petitioner Company, given the facts of the case would be a Civil Court and not NCLT and hence the Petitioner has no locus standi to file the present Company Petition. Further, Respondent No.2 states that in order to file petition before the Tribunal, the said Petition must comply and adhere to Rules 21 to 26 of NCLT Rules, 2016, which deals with the manner and procedure in which the petition or application is ought to be drafted and filed.
37. In the light of the above the Tribunal does not have the jurisdiction to entertain the petition of the Petitioner neither under Section 424 and 434 of Companies Act 2013 nor under the Rule 11 of the National Company Law Tribunal Rules, 2016.

Findings:

38. We have heard the submissions of Applicant as well as the Respondent and perused the records.
39. We note that the SICA Repeal Act came into effect on 01.12.2016 and the Petitioner was bound to file the Petition within 180 days from the same. Thus, the Petitioner is well in time and within limitation.
40. We find it pertinent to note that this Tribunal can invoke the provisions of Rule 11 of the NCLT Rules, 2016. The said inherent powers have been conferred over the Tribunal under Section 469 of the Companies Act, 2013. Hence, the Respondent No. 2 has failed to clarify the provision which debars the applicability of Rule 11 to Sections 424 and 434 of the Companies Act, 2013.
41. We further note that S. 5 (1) (d) of the SICA Repeal Act states that:
- (1) The repeal by this Act of the repealed enactment shall not—***

(d) affect any order made by the Board for sanction of the schemes;

Thus, it clearly states that the repeal of SICA shall not affect the order of BIFR and thus the order dated 30.06.2016 shall stand confirmed as on today. It is important to take a note that in this case where the case has been decided by the Board, the Tribunal is not bound to adhere to Rules 21 to 26 of NCLT Rules, 2016, which deals with the manner and procedure in which the petition or application is ought to be drafted and filed.

42. The Respondent had earlier stated that they shall resume with their role as an operating agency once the case is filed before the NCLT. However, now the Respondent has challenged the jurisdiction of the NCLT to entertain this Petition, claiming that the civil courts have the jurisdiction to entertain the same, thereby contradicting their own statement. This shows that the Respondent is unnecessarily trying to delay the process and mislead the authorities.
43. Respondent must take a note that it is undisputed that the Tribunal is the appropriate body to determine matters not only relating to IBC, 2016 but also the Companies Act, 2013. Thus, it's contention that reference to NCLT can be made on account of SICA Repeal Act under the provisions of IBC and not Companies Act, 2013 is incorrect.
44. It is, accordingly, ordered as follows: -
 - (a) The petition bearing **C.P. (IB) 1152/MB/2022** filed by Mount Overseas Private Limited, under Sections 424 and 434 of the Companies Act, 2013, is **allowed**.
 - (b) Respondent No. 1 to transfer the right, title and interest in subject properties to the Petitioner after duly executing the Conveyance Deed, hand over all the documents showing the prior ownership

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relating to the subject properties in original, give the proof of liabilities settled in respect of the subject properties including electricity, MIDC, Land Revenue, labour, telephone, water, Panchayat tax, arrears of property tax, etc and to hand over vacant and peaceful possession in the subject properties to the Petitioner along with a Possession Letter;

- (c) Respondent No. 2 to forthwith execute sale deeds in the Petitioner's favour.
- (d) To comply with all other requirements as laid down in the BIFR's order dated 30.06.2016.

Sd/-

SHYAM BABU GAUTAM
Member (Technical)

12.08.2022

SAM

Sd/-

JUSTICE P. N. DESHMUKH
Member (Judicial)