

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

ITEM No. 107
(IB)-278(PB)/2017

IN THE MATTER OF:

M/s. MS Shoes East Ltd (Tomorrow land Technologies Exports Limited)	...	Applicant/Petitioner
Vs		
Union of India	...	Respondent

Order under Section 31 of Insolvency & Bankruptcy Code, 2016.

Order delivered on 28.09.2022

CORAM:

JUSTICE RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT

SH. AVINASH KUMAR SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant : Mr. K. K. R.Das, Advocate
For the ROC : Mr. Alok Pandey, AROC

ORDER

The prayer in the petition is as follows:

- “(a) Direct the Respondents to give effect to clause 11.4(d) and (e) of the SS-13 readwith BIFR’s order dated 04-02-2014 and 13-10-2015;*
- (b) Direct the respondents to take on record/approve the Form PAS-3 pending approval and change the online records as per PAS-3 submitted by the applicant and to correct the Master data showing increase of authorized Share Capital from Rs. 90 Crores to Rs. 200 crores in terms of prayer (a) hereinabove, and*
- (C) Pass any such order(s) and grant such other relief(s) as this Hon’ble Adjudicating Authority deem fit and proper in the facts and circumstances of the case and in the interest of justice.*

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The Corporate Applicant, in this case, filed case No. 237/2002 before the Board for Industrial and Financial Reconstruction (BIFR) in Bench No. II to sanction a scheme so as to rehabilitate the sick company, the Corporate Applicant herein. The case was considered after following the procedure prescribed. The objection and suggestions were heard and the following orders were passed:

*"3. Objections/Suggestions were heard on 16.09.2013, in which the Bench sanctioned the rehabilitation scheme in exercise of powers conferred u/s 18(4) and u/s 19(4) of Sick Industrial Companies (Special Provision) Act, 1985, hereinafter called the Sanctioned **Scheme (SS-13)***

4. This order is passed for circulation to all concerned."

The scheme runs to about 25 pages. The general terms and conditions are contained in para 15 clauses 1 to 16. Since the Corporate Applicant realising that certain reliefs and concessions were not granted, filed Misc. Application 12/2014 which came to be heard by the BIFR in the summary record of proceedings dated 04.02.2014 and passed the following order:

"4.2 The Bench observed that nobody from the Ministry of Corporate Affairs and the State Government is present in the hearing today and no communication has been received from them. The Bench also observed that this relief was recommended by IDBI (OA) in the DRS forwarded to the Board and this relief is a part of the various schemes sanctioned by the Board as per copies submitted by the company during the hearing.

4.3 Having considered the submission made in the hearing and material on record, the Bench issued the following directions:-

- i) MA No. 12/2014 filed by the company is allowed and Clause 11.4 of the Sanctioned*

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Scheme SS-12 is hereby amended to include the following;

11.4 CLB/Ministry of Corporate Affairs/SEBI

d. To Exempt the Company from payment of Stamp duty on new Share Certificates to be issued on allotment of equity/preference Shares or other securities and also exempt company from payment of registration fee of ROC as well as Stamp duty for increase in Authorised Capital from Rs. 90 crores to Rs. 200 crores by the concerned department of the State Government per provision of law.

e. To grant demating of shares by NSDL / CSDL of the existing equity as well as the proposed equity to be issued to the promoters/promoter companies.

ii) M.A. No. 12/BC/2014 filed by the company is accordingly disposed off.”

As a follow up, the company filed the amended sanctioned scheme with the ROC in Form - 21 on 01.03.2014. On 21.03.2014 it is stated that the ROC approved Form - 21. On 03.03.2014 certified copy of the amended sanctioned scheme dated 04.02.2014 was physically filed with ROC. The ROC kept the matter pending without further progress and no Appeal was filed. In June 2015 corporate applicant came to know about the review application filed by the ROC. Thereafter on 19.06.2015, in order to nudge the ROC's review petition to be taken up, MA-225/2015 was filed by the applicant before the BIFR for early disposal of the review petition filed by the ROC. On 09.07.2015 the BIFR heard MA-225/2015 filed by the present Corporate

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Applicant and the ROC was also present. On 13.10.2015 MA-225/2015 was ordered in the following manner:

"2.2 The Ld. Advocate representing Ministry of Corporate Affairs stated that they have filed the reply to MA. The concerned officer of ROC was transferred. He added that ROC does not have the power to overrule the statute/order passed by BIFR. He further requested before the Board to review its order dated 04.02.2014 in the interest of justice. He requested to dispose of their application dated 28.01.2015 in order to enable them to comply the Board's direction.

2.3 Having considered the submissions made during the hearing and material on record, the Bench observed that if ROC was aggrieved by the order of the Board, while sanctioning the scheme, they should have challenged the same at that stage when the scheme was circulated/published seeking objections/ suggestions from concerned party or during its statutory hearing or after the scheme is sanctioned before AAIFR within the stipulated time period. The Bench also observed that ROC/MCA have implemented similar orders of the Board in several cases. But, they have requested before the Board at a highly belated stage to modify the scheme vide their letter dated 28.01.2015 but by then scheme has attained its finality. Moreover, Board is not empowered to review its own order. Further, the mandate of the Board is to revive the sick company in the interest of the company itself and its various stakeholders, secured creditors and workers/employees of the company. In view of the above, the Board reiterates its earlier directions as under:

i) MA No. 225/2015 filed by the company is allowed and Clause 11.4 of the Sanctioned Scheme SS-13 is hereby remains amended to include the following;-

11.4 CLB/Ministry of Corporate Affairs/SEBI

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d. To Exempt the Company from payment of Stamp duty on new Share Certificates to be issued on allotment of equity/Preference Shares or other securities and also exempt company from payment of registration fee of ROC as well as Stamp duty for increase in Authorised Capital from Rs. 90 crores to Rs. 200 crores by the concerned department of the State Government as per provisions of law.

e. To grant demating of shares by NSDL/CSDL of the existing equity as well as the proposed equity to be issued to the promoters/promoter companies.

ii) ROC to comply Board's order within a period of six weeks.

iii) IDBI (MA) to file a comprehensive report regarding the compliance of the Board's order at the end of the ROC within a period of 8 weeks.

iv) Application dated 28.01.2015 filed by the Asstt. Registrar of Companies, NCT of Delhi & Haryana stands disposed off in view of the para i) above.

v) M.A. No. 225/2015 filed by the company is accordingly disposed off."

It is also pleaded by the Applicant that on 18.03.2016 the respondent/ROC filed an Appeal before the AAIFR challenging the BIFR decision dated 13.10.2015 relating to Misc. 225/2015. While the appeal was pending, the provision of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) was repealed and BIFR/AAIFR was abolished. Consequently by notification dated 24.05.2017 issued by the Ministry of Corporate Affairs (MCA), the following notification was issued:

"Now, therefore, in exercise of the powers conferred by the sub-section (1) of the section 242 of the Insolvency

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and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby makes the following Order to remove the above said difficulties, namely

1. Short title and commencement (1) This Order may be called the Insolvency and Bankruptcy Code (Removal of Difficulties) Order, 2017.

2. In the Insolvency and Bankruptcy Code, 2016, in the Eighth Schedule, relating to amendment to the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, in section 4, in clause (b), after the second proviso, the following provisos shall be inserted, namely

"Provided also that any scheme sanctioned under sub-section (4) or any scheme under implementation under sub-section (12) of section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall be deemed to be an approved resolution plan under sub-section (1) of section 31 of the Insolvency and Bankruptcy Code, 2016 and the same shall be dealt with, in accordance with the provisions of Part II of the said Code:

Provided also that in case, the statutory period within which an appeal was allowed under the Sick Industrial Companies (Special Provisions) Act, 1985 against an order of the Board had not expired as on the date of notification of this Act, an appeal against any such deemed approved resolution plan may be preferred by any person before National Company Law Appellate Tribunal within ninety days from the date of publication of this order."

As a result of which the present petition is filed before this Tribunal to exercise the power under IBC, to issue directions as prayed for. Notice in the matter was issued on 17.08.2017. The

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replies have been filed and the Rejoinder has also been filed. However, presently we are not concerned about that for the reasons to be stated, as follows:

It is pertinent to note the ROC having filed an appeal against the order passed by BIFR in MA 225/2015 dated 13.10.2015 did not choose to pursue the same before this Tribunal after SICA was repealed and BIFR/AAIFR was abolished.

In any event, it will be noticed that the original scheme sanctioned by the BIFR dated 16.09.2013 read with the order passed in MA-12/2014 dated 04.02.2014 is not under challenge by the ROC at any point of time, therefore it has become final.

As a matter of record, we have to notice one factual position that the predecessor President of NCLT in his order dated 13.06.2018 dismissed the petition filed by this applicant invoking MCA notification dated 24.05.2017 as not maintainable.

When the NCLT declined to entertain this application, the Corporate Applicant moved ~~to~~ the Hon'ble Delhi High Court, which allowed his Writ Petition and as a result, the present petition has been revived. The order of the Hon'ble Delhi High Court dated 21.01.2020 is extracted below:

"1. The Petitioner approached this Court when its petition before the National Company Law Tribunal (NCLT) being IB-278(PB)/2017 stood dismissed by an order dated 13 June, 2018. In the said order the NCLT held that on account of the notification dated 24 May, 2017 issued by the Central Government under Section 242 (1) of the Insolvency and Bankruptcy Code 2016 (IBC), it ceased to have any jurisdiction "to carry on implementation of the scheme even if finalized by the BIFR/AAIFR".

2. The Supreme Court has since then by an order dated 25th October, 2018 in Civil Appeal Nos.7291-92 of 2018 (M/s.

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upheld the judgment dated 28th May, 2018 of the National Company Law Appellate Tribunal ('NCLAT') observing that the notification dated 24 May, 2017 is in conflict with Section 4 (b) of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 ('SICA Repeal Act, 2003) and that, therefore, the appeal before the NCLAT is not maintainable. The net result of the order of the Supreme Court is that the notification dated 24th May, 2017 issued by the Central Government ceases to have any validity, since it is plainly in conflict with Section 4 (b) of the SICA Repeal Act.

3. Since the said judgment of the Supreme Court was not available to the NCLT when it passed the order dated 13th June, 2018, that order now is now required to be set aside and the proceedings before the NCLT revived. This is because under the first proviso to Section 4 (b) of the SICA Repeal Act, 2003 a company for which the scheme has been prepared, the proceedings in respect of which stand abated, may make a reference to the NCLT under the IBC within 180 days from the commencement of the IBC

4. Consequently, this Court while setting aside the order dated 13th June, 2018 of the NCLT revives the present Petitioner's IB-278(PB)/2017 before the NCLT for now to be proceeded with in accordance with law. The said petition stands revived with the directions to be listed before the NCLT on 17th February, 2020. It will be open to the Petitioner to request the NCLT for expeditious disposal.

5. the petition is disposed of in the above terms."

Therefore the Corporate Applicant has a right to maintain this application and pursue the same in accordance with the law. Having noticed the above, we have taken note of the fact that the Corporate Applicant in the case has obtained the order from BIFR along with the modified order where certain rights have been granted and the directions has been issued to ROC for implementation of the same.

In view of the above, it is for the ROC to give effect to the orders of BIFR. In this regard, on first occasion the applicant sent notice to ROC after BIFR order on 30.04.2014 and subsequently,

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several notices were issued which is part of this application as Annexure A-39, since no action has been taken by the ROC, it has forced the applicant to come before us for the above stated relief.

In and by our order dated 23.08.2022, we passed the following order;

"ORDER

Mr. Pandey, Ld. AROC states that there is some difficulty for Mr. Pandey to access the documents, as the documents sent by email are password protected and there are certain technical issues as well. Therefore, we request Ld. Counsel to keep in touch with Mr. Pandey, AROC and do the needful to proceed in the matter.

At the request of the Ld. Counsels, list the matter for physical hearing on 28.09.2022."

This order has been complied with the Corporate Applicant by providing all the data and documents along with the password.

Subject to verification of the same, we direct the ROC to take up the case and dispose it in terms of the decision given by the BIFR and the modified order dated 04.02.2014 within a period of one month from the date of receipt of the copy of this order and the reasoned order be passed on merits.

With the above directions, the petition stands disposed of.

- SD -

(RAMALINGAM SUDHAKAR)
PRESIDENT

- SD -

(AVINASH KUMAR SRIVASTAVA)
MEMBER (TECHNICAL)