* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P.(C) No. 8803/2009**

% Reserved on: 27th September, 2010

Pronounced on: 30th September,2010

INTERCRAFT LIMITED ..... Petitioner

Through: Mr. Rajshekhar Rao, Advocate.

VERSUS

M/S COSMIQUE GLOBAL & ANR. ....Respondents

Through: Mr. Ramji Srinivasan, Senior Advocate with Mr. Pallav Saxena, Advocate and Mr. Zeyaul Haque, Advocate for the respondent No.1.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

JUDGMENT

VALMIKI J. MEHTA, J

1. The petitioner company by this writ petition under Articles 226 and 227 of the Constitution of India challenges the order dated 27.4.2009 passed by the Debt Recovery Appellate Tribunal (DRAT). The sequence of the orders of the three authorities below is as under:-

(i) The first order dated 28.3.2007 is passed by the Recovery Officer in favour of respondent no.1 herein- auction purchaser. The sale in favour of the auction purchaser was confirmed by the Recovery Officer.

(ii) The second order is of the Debt Recovery Tribunal (DRT) dated 23.11.2007 accepting the appeal of the petitioner company and setting aside the order of the Recovery Officer dated 28.3.2007.

(iii) The third is the impugned order of the DRAT whereby it accepted the appeal of the auction purchaser-respondent no.1 herein, and set aside the order dated 23.11.2007 of the DRT meaning thereby the sale of the auction property in favour of respondent no.1 was confirmed. It is this order which has been challenged by the borrower-petitioner company.

2. The facts of the case are that the respondent no.2 herein filed an Original Application (OA) No. 141/2000 for recovery of its dues *inter alia* against the present petitioner company. This OA was decreed and a recovery certificate No.116/2002 was issued. The subject property being plot no. G.P-38, Sector-18, Udyog Vihar, Phase-1 (E), Maruti Industrial Area, Gurgaon, Haryana. admeasuring 1923.03 sq.m was attached in execution of the recovery certificate. The property in question was put to auction on 25.1.2005 and the respondent no.1 purchased the same for Rs. 2.72 crores. Before the order of confirmation of sale could be passed, a joint compromise application was filed by the petitioner herein and the financial institution/respondent no.2 that a One Time Settlement (OTS) had been

agreed upon between the borrower and the financial institution whereby a total amount of Rs. 4 crore was to be paid and the outstanding liquidated by 30.3.2007. Rupees 2 crores had already been paid when the joint compromise application was made before the Recovery Officer and post dated cheques of Rs.1 crore each were handed over to the financial institution before the Recovery Officer. The Recovery Officer, however, did not accept the compromise on the ground that vested rights had accrued to the respondent no.1 under the auction. The Recovery Officer held that the sale could not be set aside on the mere ground that the matter had been compromised between the parties for an amount higher than the bid in the auction. The Recovery Officer, therefore, confirmed the sale in favour of the respondent no.1 and the possession of the property was also handed over to the respondent no.1. DRT vide its order dated 23.11.2007 accepted the compromise and set aside the auction with a further direction for delivery of the property in question from the respondent no.1 to the petitioner. DRAT by the impugned order dated 27.4.2009 has restored the order of the Recovery Officer by setting aside the order of the DRT.

3. It was argued by learned counsel for the petitioner before us that the DRAT fell into a grave error in relying upon, in para 14 of the impugned order, a decision of this court reported as ***Industrial Development Bank of India Vs. Surekha Coated Tubes and Sheets Ltd. 1994 II AD (Delhi) 119*** in which judgment it was held

by this court that Section 22 of the Sick Industrial Company (Special Provision) Act, 1985 (SICA) does not apply where reference under Section 15 of the SICA is pending but no inquiry under Section 16 thereof is pending. It was further held by this court in the case of ***Industrial Development Bank of India*** (supra) that once a reference is rejected and the mere fact that appeal is pending under Section 25 would not mean that Section 22 would apply. It was held that Section 22 will not come into operation where an inquiry under Section 16 is not commenced and where the reference under Section 15 has been rejected. The learned counsel for the petitioner has drawn our attention to para 13 in which DRAT makes reference to the decision of the Supreme Court in the case of ***Real Value Appliances Ltd. Vs. Canara Bank & Ors. AIR (1998) SC 2064: 1988 (5) SCC 554*** and has argued that DRAT has committed a grave and manifest error in relying upon an earlier decision of 1994 of this court although reliance was placed by the petitioner herein to the decision of the Supreme Court which was a later decision of the year 1998 and in which it was held in para 23 as under:-

> "23. Relying on the use of the word "may" in Section 16(1) of the Act it has been contended in some High Courts that the word "may" in that section shows that the BIFR has power to reject a reference summarily without going into merits and that it is only when the BIFR takes up the reference for consideration on merits under Section 16(1) that it can be said that the "inquiry" as contemplated by the section has commenced. It is argued that if the reference before the BIFR is only at the stage of registration under Section 15, then Section 22 is not attracted. This contention, in our opinion, has no

merit. In our view, when Section 16(1) says that the BIFR can conduct the inquiry "in such manner as it may deem fit", the said words are intended only to convey that a wide discretion is vested in the BIFR in regard to the procedure it may follow for conducting an inquiry under Section 16 (1) and nothing more. In fact, once the reference is registered after scrutiny, it is, in our view, mandatory for the BIFR to conduct an inquiry. If one looks at the format of the reference as prescribed in the Regulations, it will be clear that it contains more than fifty columns regarding extensive financial details of the Company's assets, liabilities etc. Indeed, it will be practically impossible for the BIFR to reject a reference outright without calling for information/documents or without hearing the Company or other parties. Further, the Act is intended to revive and rehabilitate sick industries before they can be wound up under the Companies Act, 1956. Whether the Company seeks a declaration that it is sick or some other body seeks to have it declared as a sick company, it is, in our opinion, necessary that the Company be heard before any final decision is taken under the Act. It is also legislative intention to see that no proceedings against the assets are taken before any such decision is given by the BIFR for in case the Company's assets are sold, or the Company wound up it may indeed become difficult later to restore the status quo ante. Therefore, in our view, the High Court of Allahabad in *Industrial Finance Corpn. of India V. Maharashtra Steels Ltd.,* the High Court of Andhra Pradesh in *Sponge Iron India Ltd. V. Neelima Steels Ltd.,* the High Court of Himachal Pradesh in *Orissa Sponge Iron Ltd. V. Rishab Ispatt Ltd.* are right in rejecting such a contention and in holding that the inquiry must be treated as having commenced as soon as the registration of the reference is completed after scrutiny and that from that time, action against the Company's assets must remain stayed as stated in Section 22 till final decisions are taken by the BIFR." (Emphasis added)

4. According to us, DRAT has fallen into a clear error in relying upon the decision of this Court in the case of ***Industrial Development Bank (supra)*** although the decision of the ***Real Value Appliances Ltd. (Supra)*** of the Supreme Court was cited before it. The ratio of

the decision of the Supreme Court in ***Real Value Appliances Ltd. (supra)*** leaves no manner of doubt that once registration is made under Section 15 of SICA, the provision of Section 22 will immediately come into play. It is not necessary that there should be further an enquiry under Section 16 before it can be said that Section 22 comes into play. According to us, this logic will also apply when an appeal is pending under Section 25 before AAIFR. This is for the reason that suppose a sick company succeeds before AAIFR and it is held that the order of BIFR rejecting the reference is invalid and therefore it is directed that a sick company needs to be rehabilitated by formulating a scheme, then, in certain cases there would be futility of such remand orders because unless Section 22 applies after filing of an appeal under Section 25 it is possible that there would be scramble among the creditors to appropriate the assets, whether by getting the decrees or otherwise, of a sick company and that by the time AAIFR sends the matter back to BIFR for formulating and implementing a revival scheme, there may not be available any assets or sufficient assets for revival of the sick company on account of eventuality of Section 22 not applying during the pendency of an appeal against an order rejecting the registration of a reference by BIFR. In such scenario, if a sick company succeeds in AAIFR, the appeal would yet become infructuous because in the meanwhile all the assets of the sick company would have been lost. We would hasten to add here that in such circumstances it is incumbent upon AAIFR to decide the appeal under

Section 25 most expeditiously and without delay to avoid any eventuality of a sick company taking undue advantage of the pending appeal.

5. In the facts of the present case, it is not disputed that the Recovery Officer when he was proceeding ahead with the auction sale proceedings, an appeal was in fact pending before AAIFR. If that be so, the entire action of the Recovery Officer was clearly hit and was violative of Section 22 of SICA. The operation of Section 22 of SICA is automatic and any action taken in violation of the same by any authority would clearly be void *ab initio*. The Supreme Court in its recent decision reported as ***Bhoruka Textiles Ltd. Vs. Kashmiri Rice Industries***, ***2009 (7) SCC 521*** has held that a decision of a civil court in violation of Section 22 is *coram non judice*. Any other interpretation, would jeopardise the assets of a sick company if its revival is intended. Accordingly, the auction sale proceedings which took place on 25.1.2005, although on that date an appeal was pending before AAIFR with respect to the petitioner company for registration as a sick company, is liable to be set aside and consequently also the confirmation of the auction sale proceedings in favour of the respondent No.1 herein.

6. The aforesaid aspect of violation of Section 22 goes to the root of the matter and on this ground alone the impugned order of the DRAT is liable to be set aside. We, therefore, need not to go into the other

aspects as to whether the compromise ought to have been arrived at ordinarily within the time limit as per Rules 60-62 of the second schedule to the Income Tax Rules, 1961 as applicable to the DRT.

7. We may note that the amount of Rs.4 crore paid by the petitioner under the compromise to the financial institution is substantially higher than Rs.2.72 crores which was paid under the auction by the respondent No.1-auction purchaser. Of course, this amount has been paid subsequently after about 2 years, however, the financial institution is getting a huge amount additionally i.e. Rs.1.28 crores. In any case, nothing much would turn on this aspect inasmuch as the fundamental issue is that the auction sale proceedings are void *ab initio* in view of the same having been conducted in violation of Section 22 of SICA. We may note that certain observations were made by DRAT against the financial institution that the compromise entered into by it with the borrower was not correct and was unfair and malafide. The financial institution had filed a writ petition No.9870/2009 and while reserving the judgment in this case on 27.9.2010 we had allowed the said petition of the bank by passing the following order:-

> "The petitioner, IFCI Limited, has filed this writ petition only aggrieved by some observations made in the impugned order adverse to the functioning of the petitioner Institution. This Court by a separate order passed in WP (C) No.8803/2009 had called upon the Chairman and Managing Director of IFCI to independently conduct an inquiry, to report as to whether the compromise accorded to the borrower was fair or not. The inquiry report has been filed in those proceedings which shows that a commercial decision

was taken in the best interest of the petitioner Institution *inter alia* because the settlement compromised two accounts.

We are of the considered view that commercial institution should be able to settle accounts with its borrower on commercial basis and the Tribunal would not substitute its own mind with that of a commercial decision like an Ombudsman.

The writ petition is allowed to the limited extent canvassed before us arising from prayer (ii) and the remarks and observations made against the petitioner in para 46 of the impugned judgement are set aside. No other relief is pressed."

8. During the course of hearing, in this case, a proposal had emerged that respondent no.1 can be compensated by paying interest to it by the petitioner at commercial rates at which loans are advanced by the respondent no.2 institution with respect to its amount paid in auction of Rs. 2.72 crores in case there is an agreed position to set aside the impugned order. The petitioner was agreeable to this course of conduct, however, the respondent no.1 refused to agree to the same. In fact, after the arguments were concluded and judgment was reserved on 23.9.2010 the matter was fixed on 27.9.2010 for the counsel for respondent no.1 to take instruction on this aspect. However, instead an application was filed seeking to raise fresh arguments and fresh points after the conclusion of arguments and which application was dismissed by an order on 27.9.2010 observing as under:-

"Notice, which is accepted by learned counsel for the petitioner.

The application has been filed seeking adjournment of the present proceedings in view of an appeal pending before the AAIFR.

> We may notice that the arguments were concluded in this matter on 23.9.2010 and the matter deferred only at request of learned counsel for respondent no.1/auction purchaser to seek some time to obtain instructions. This was in view of the fact as to whether any agreed order could be passed or whether a decision would be invited on merits. Instead of that this application has been filed seeking deferment of the judgment after the whole arguments had been concluded.
> We strongly deprecate such endeavour, the application being filed with an oblique motive.
> Dismissed."

9. We have recently in WP(C) 4166/2010 on 5.7.2010 had an occasion to consider a similar issue with respect to a right of an auction purchaser for confirmation of the auction sale proceedings. We have held that there is no inherent right for confirmation of the auction sale proceedings. The following paragraphs of the said judgment are relevant and we reproduce the same as under:-

> "We are unable to agree with the contentions of the senior counsel for the petitioner and we are of the opinion that the present petition is liable to be dismissed. The proceedings under Article 226 are discretionary and are intended to sub-serve the interest of justice. The petitioner is not admittedly the owner of the property as it is only an auction purchaser. Respondent No.2 borrower to whom the property belongs has paid the OTS amount to the respondent No.1. There is no inherent right in confirming of auction proceedings and this has been held by this court in its judgment in W.P.(C) No. 10219/2009 ***D.J.Enterprises Ltd. Vs. IFCI Ltd.*** decided on 4.5.2010. This court relied upon the two Supreme Court judgments reported as ***Mohan Wahi Vs. Commissioner of Income Tax, (2001) 4 SCC 362*** and ***LICA (P) Ltd. Vs. The Official Liquidator, 1996 Company Case 788 (SC)*** and a Division Bench judgment of this court

> reported as ***A.K.Jain Vs. Canara Bank MANU/DE/8620/2007*** that there is no inherent right to get the auction sale proceedings confirmed once there is an offer for a higher price.
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> In the present case, there was an offer for higher price and the DRT vide the first impugned order accepted this higher amount. We see no illegality in this action of the DRT. The DRAT has also by reasoned order rejected the appeal and held that there is no inherent right for confirmation of the auction sale proceedings, once, the company was a sick company. ……."

10. In view of the above, we are persuaded to exercise our powers under Articles 226 and 227 of the Constitution of India because the order of the DRAT is ex facie against the law being provision of Section 22 of SICA and the decisions of the Supreme Court in the cases of ***Real Value Appliances Ltd.*** and ***Bhoruka Textiles Ltd. (supra).***

11. In view of the above, the impugned order of the DRAT dated 27.4.2009 is set aside and the auction sale proceedings are therefore quashed. It is directed that possession of the subject property be returned to the petitioner within a period of two weeks from today. The amount deposited along with accrued interest, if any, by respondent no.1 be returned within two weeks of the possession being delivered.

The writ petition is allowed leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J.

SEPTEMBER 30, 2010 **SANJAY KISHAN KAUL, J.**
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