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

Decided on: 28.02.2014

\+ **W.P.(C) 626/2014, C.M. APPL. 1246/2014**

UNION OF INDIA .....Petitioner

Through: Sh. Rajeeve Mehra, ASG with Ms. Geetanjali Mohan and Sh. Ashish Virmani, Advocates.

Versus

CIMMCO LTD. AND ORS. .....Respondents

Through: Sh. Sandeep Sethi, Sr. Advocate with Sh. K. Datta, Sh. Ashish Verma and Sh. Rahul Malhotra, Advocates, for Resp. No.1.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S. RAVINDRA BHAT

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1. This writ petition impugns an order of the Appellate Authority for Industrial and Financial Reconstruction ("*AAIFR*") dated 7.5.2013 dismissing the appeal of the Union of India, through the Railway Ministry, (hereafter "Railways") against an order of the Board for Industrial and Financial Reconstruction ("*BIFR*") dated 12.3.2012, concerning certain concessions to be provided by the Railways to Cimmco Birla Ltd. ("*CBL*"), the respondent, in terms of a Sanctioned Scheme for rehabilitation sanctioned by the BIFR as regards CBL.

2. The BIFR had declared CBL as a sick company under Section 3(1)(o) of the Sick Industrial Companies Act, 1985 ("*SICA*") on 21.8.2002. On 11.3.2010, the BIFR sanctioned a revival scheme for CBL after inviting suggestions/objections from all stakeholders by circulating a Draft Rehabilitation Scheme ("*DRS*"). The dispute today concerns the application of Clause 11.6 of the Sanctioned Scheme, which envisages a certain concession by the Ministry of Railways vis-à-vis CBL as regards tenders floated by the Railways for supply of wagons, the business in which CBL is engaged. Clause 11.6 states as follows:

> "*XXXXXX XXXXXX XXXXXX*
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> ***Clause 11.6: MINISTRY OF INDIAN RAILWAYS: (Secretary, Railway Board):***
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> *(a) The railways to give preferential support to the company for facilitating the revival process on current terms and waiving interests and penalties on the outstanding dues, if any, due to the closure of the company. In respect of current year orders, in which CBL could not participate due to its closure, Railway Board to extend ad-hoc order.*
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> *(b) XXXXXX XXXXXX*
>
> *(c) XXXXXX XXXXXX*
>
> *(d) Considering the nature of business CBL is in and various past performance requirements based on which orders are normally awarded by the potential customers (such as Railways, NHPC etc.) the period starting from 13th November, 2000 till the date of sanction of the scheme by*

BIFR, may be excluded while working out the past performance criteria. For avoidance of doubt, if past 5 years performance records have to be considered by a particular customer for award of new orders, the performance of CBL for the 5 year preceding 13th November, 2000 be taken followed by the period post sanction of scheme thereby excluding the period of the closure completely from reckoning ..."

3. Previously, a tender had been floated by the Railways in September, 2009 for 17,670 wagons. While on 1.2.2010, when the tender was opened by the Railways, CBL was ineligible under the terms of the tender, with a view to develop an additional source of supply, the Railways complied with Clause 11.6 and placed an order for 10% of the total tendered quantity, outside the tender. The question in the present case relates to a second tender floated by the Railways on 23.6.2011 for the manufacture and supply of 15,700 wagons. CBL, along with other manufactures, participated in the bid, and after evaluation of the bids, contracts were awarded to the various bidders including CBL, for the supply of 353 wagons.

4. However, it is an admitted fact by the Railways that Clause 11.6 of the Sanctioned Scheme was not adhered to in the evaluation of bids. Aggrieved by this action of the Railways, CBL filed MA No. 19/12 in Case No. 372/2000 before the BIFR seeking compliance with the Sanctioned Scheme for the second tender. The BIFR decided against the Railways, which appealed to the AAIFR under Section 25 of the SICA, along with an MA No. 219/2012, seeking a stay of the operation of the BIFR order. The AAIFR dismissed the stay application by an order dated 2.7.2012. This order was challenged

unsuccessfully before this Court in WP(C) No. 4930/2012. The writ petition was dismissed by an order dated 22.8.2012, which was in turn unsuccessfully challenged before the Supreme Court through a special leave petition. The Supreme Court ordered that the period of closure of CBL be excluded in terms of Clause 11.6 for the evaluation of CBL's bid. Subsequently, the AAIFR dismissed the appeal by an order dated 7.5.2013, which is currently the subject matter of challenge in these proceedings.

5. The question that arises in the present case is whether Clause 11.6 is binding upon the Railways and obliges it to give preference to CBL. The concurrent findings of the BIFR order dated 12.3.2012, the AAIFR order dated 2.7.2012, the High Court order dated 22.8.2012, and the second AAIFR order dated 7.5.2013 have been three-fold: *first*, the Sanctioned Scheme – having been circulated to the Railways for its consent – is binding under Section 19, SICA, and Section 19 envisages concessions such as those incorporated in Clause 11.6; *secondly*, Clause 11.6 cannot be said to violate Article 14 of the Constitution as CBL is not equal to other bidders, and thus, equality must apply only between equals; *thirdly*, Section 18(8) of the SICA is not applicable to the present issue; and *finally*, Clause 11.6 is mandatory, and the use of the words "*to consider*" does not make it merely recommendatory.

6. Impugning the order of the AAIFR, the learned Additional Solicitor General appearing on behalf of the Railways argues first that BIFR exceeded its statutory powers under the SICA in the Sanctioned Scheme, as it cannot bind the Railways. For this, the learned ASG

relies on Section 18(8) of the SICA to argue that only the sick company itself, the transferee company or any other such company and its shareholders, creditors, guarantors and employees can be bound by a scheme of rehabilitation. It is argued that Section 19 of the SICA must be read subject to Section 18(8), such that only those entities finding a reference in sub-clause 8 can be bound by the BIFR. Since the Railways does not fall within Section 18(8), it is argued that the Sanctioned Scheme in this case cannot bind it, which had previously chosen to grant a concession to CBL on its own terms. Further, the learned ASG argues that, in any case, Clause 11.6 only requires the Railways to *consider* CBL's bid given its past history and closure during sickness, rather than impose any mandate to exclude that period.

7. It is urged that doing so would be contrary to the public interest, in that competition in the tender process would be adversely affected. Reliance here is placed on the General Financial Rules, 2005 ("*GFR 2005*") of the Government of India, specifically Rules 137 and 160, which prescribe that bids should be judged in a transparent, fair and competitive manner, without including or considering any conditions not mentioned in the tender document itself. It is argued that compliance with the Sanctioned Scheme in this case would require a deviation from this basic principle incorporated in the GFR 2005, and cause prejudice to the public interest. Equally, it is argued that the tender conditions are publicized must necessarily be ignored if Clause 11.6 is to be given effect, and that such deviations from the tender conditions, which are in place to ensure competition and fairness –

must not be countenanced. It is further argued that the Sanctioned Scheme is scheduled to end in the first half of March, and as the net worth of CBL has turned positive way back in 7.12.2011, it is asking for preferential treatment in order to avoid a fair and competitive bidding process, despite not undergoing any disability in competing with the other bids. Finally, the learned ASG argues that even Section 19 does not envisage a concession such as the one contemplated by Clause 11.6. It is argued that Section 19 must be read *ejusdem generis*. Since clause 3A considers *financial* concessions in the form of loans, advances, guarantees, the 'concessions' contemplated in that section ought to be read in a similar fashion as financial sacrifices, and not sacrifices in respect of tender conditions.

8. Before considering the questions that arise in this case, it is useful to extract the relevant portions of Sections 18 and 19 of the SICA.

> "*18. PREPARATION AND SANCTION OF SCHEMES.*
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> *(1) Where an order is made under sub-section (3) of section 17 in relation to any sick industrial company, the operating agency specified in the order shall prepare, as expeditiously as possible and ordinarily within a period of ninety days from the date of such order, a scheme with respect to such company providing for any one or more of the following measures, namely:-*
>
> *(a) XXXXXX XXXXXX*
>
> *(8) On and from the date of the coming into operation of the sanctioned scheme or any provision thereof, the*

scheme or such provision shall be binding on the sick industrial company and the transferee company, or as the case may be, the other company and also on the shareholders, creditors and guarantors and employees of the said companies.

19. REHABILITATION BY GIVING FINANCIAL ASSISTANCE.

(1) Where the scheme relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial company, the scheme may provide for financial assistance by way of loans, advances or guarantees or relief's or concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution or any institution or other authority (any Government bank, institution or other authority required by a scheme to provide for such financial assistance being hereafter in this section referred to as the person required by the scheme to provide financial assistance) to the sick industrial company.

(2) Every scheme referred to in sub-section (1) shall be circulated to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation or within such further period, not exceeding sixty days, as may be allowed by the Board, and if no consent is received within such period or further period, it shall be deemed that consent has been given.
(3) Where in respect of any scheme the consent referred to in sub-section (2) is given by every person required by the scheme to provide financial assistance, the Board may, as soon as may be, sanction the scheme and from the date of such sanction the scheme shall be binding on all concerned."

9. Five questions arise in this case: *first*, whether the BIFR may – by sanctioned scheme of rehabilitation under the SICA – only bind those entities referred to in Section 18(8); *secondly*, whether Clause 11.6 binds the Railways under Section 19 of the SICA; *thirdly*, whether Clause 11.6 is binding in its own terms or whether it only recommends certain action; *fourthly*, whether CBL can benefit from the concessions granted by Clause 11.6 even if the BIFR has declared that that company is no longer sick, and is in fact, returning positive figures; and *finally*, whether the deviation from the 2005 GFR Rules envisaged by Clause 11.6 renders it void.

10. As regards the first two questions, the Court notes that the provisions of Section 18 and 19 are complementary, and dealing with different spheres of action. Section 18(8) states that the scheme sanctioned by the BIFR will be binding on the sick company, its creditors, employees, guarantors etc. Indeed, these are the only entities which the BIFR can unilaterally bind. The scope of application of Section 19, however, is different. In the words of the section, as regards "*the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution or any institution or other authority*", the BIFR does *not* have the authority to bind these entities by its orders and thus modify the obligations and rights owed between the sick company and these entities. However, the scheme for rehabilitation may – in the interests of ensuring that the sick company returns to a profitable state as soon as possible – envisage "*financial assistance by way of loans, advances*

or guarantees or relief's or concessions or sacrifices from" any of the above entities. These provisions in the DRS will not be binding on these entities, *unless their consent is obtained*. Thus, these entities – the Railways in this case – may determine whether the concessions envisaged in the DRS will be provided by them and either to consent or reject the provision. If the entity rejects the provision, unlike in the case of the entities covered under Section 18(8), they will not be bound by the scheme sanctioned subsequently. This is made clear by clause 2 of Section 19, which states that the DRS is to be circulated in order to obtain consent. Once consent is obtained, however, the provision becomes binding for the period of the sanctioned scheme. Crucially, in this regard, Section 19(2) categorically provides that "*if no consent is received within such period or further period, it shall be deemed that consent has been given.*"

11. In this case, as the AAIFR has noted in the impugned order – at paragraph 3 – that it is undisputed that the DRS was circulated to the Railways, for the purpose of obtaining consent and inviting suggestions/objections. No objections were filed by the Railways. It states today – for the first time since the scheme was sanctioned by the BIFR on 11.3.2010 – that the scheme was circulated to the Secretary, Ministry of Railways and then redirected to the Stores Directorate of the Ministry later (which is the concerned department, it is claimed), by which stage "*hardly any time was left for filing of objection*". The Railways raises this plea after almost three years of the presentation of the claim by CBL to the BIFR. No such stand was taken before, and in any event, no request for extension of time, let alone an objection

taken at any stage of these proceedings before the BIRF, AAIFR, this Court or the Supreme Court in the various rounds of litigation witnessed in this matter. Thus, in terms of Section 19(2), deemed consent of the Railways to Clause 11.6 of the Sanctioned Scheme was taken, and it is accordingly binding on it.

12. The Court will now consider the related question of whether such concessions are permissible under Section 19(1), having regard to its phraseology. This Court notes that the concessions (and generally, financial assistance) envisaged in Section 19 are broadly and openly worded, in order to allow the greatest possible assistance and help to a sick company to ensure its revival. Especially since Section 19 incorporates a consent requirement, whereby *any* concession requires the consent of the entity concerned, there is no mandate to limit the scope of Section 19 only to strictly financial concessions, such as loans, advances etc. While financial concessions are some, and possibly the most common, forms of assistance that may be provided to a sick company, there is nothing in the text of Section 19 to disallow concessions as to appropriate tender conditions in order to allow the sick company to revive itself. In fact, the object and purpose of Section 19 is to enable and garner support – in the form of wide-ranging concessions – by entities with which the sick company conducts business, in this case the Railways, as CBL is a wagon producer and a captive industry that supplies exclusively to the Railways. The argument that Section 19, thus, does not allow for relaxation of tender requirements in incorrect, especially in a case such as the present one, where the concession is narrowly tailored to

ensure that the past performance requirement is not prejudicial to CBL only for the period of its closure. Rather than putting CBL at an unfair advantage, Clause 11.6 only requires that the period of closure be excluded from consideration, and the bids be examined competitively in all other respects, for the time that CBL was operational.

13. The next question that arises is whether Clause 11.6 is binding or only recommendatory. While Clause 11.6 does use the words "*to consider*", this does not imply that the clause is only recommendatory, for three reasons: *first*, a close reading of Clause 11.6 indicates that the Railways is to *consider* the *bid* of CBL in its tender process, *after* excluding the period of closure. The requirement 'to consider' only indicates – quite naturally – that the Railways may proceed with (or consider) the evaluation of bids, including that of CBL, without somehow directly awarding it a contract. The Railways must consider the other factors and conditions involved in the bidding process, and reach a fair evaluation, but in doing so, exclude CBL's period of closure for the purpose of judging past performance. *Secondly*, given that Section 19 incorporates a consent requirement, the very purpose is to circulate schemes which contain clauses that are binding. Holding that Clause 11.6 itself is not binding would render the purpose of circulation of the DRS redundant. *Finally*, given that CBL is a captive producer that only manufactures wagons for the Railways, an interpretation that renders Clause 11.6 recommendatory would seriously undermine the purpose of the Sanctioned Scheme, i.e. to revive CBL by way of ensuring manufacture and sale of wagons. Such an interpretation must be avoided.

14. Finally, it was urged that since CBL now has a positive net worth, and the period of the Sanctioned Scheme is nearing an end, such a concession is not proper. However, it is well-settled that the mere fact that a sick company starts returning positive results is not a ground to set aside the Sanctioned Scheme. Moreover, the Sanctioned Scheme must operate – and those obligated by it to provide concessions must do so – for the entire period of the scheme, which in this case is this still operational. The scheme – after proper passage through the BIFR in terms of Sections 18 and 19 of the SICA – acquires a binding character backed by statute, and cannot be ignored by parties on the basis of individual assessment of the financials of a company, or the propriety of its continued application. Indeed, if any objections do arise, the proper forum for redress remains the BIFR, as opposed to unilateral determinations by the parties concerned. This conclusion is reinforced by the decision of a Division Bench of this Court in *DGIT (Admn) and Anr.* v. *BIFR and Ors.*, [2012] 171 Comp Case 147 (Delhi):

> "……..*One has to keep in mind that any scheme is a package to rehabilitate the company. It is possible that such rehabilitation may result in early success or at times may take a greater period of time to achieve financial stability. If the argument of the Department were to be accepted it would imply that if a sick industrial company achieves success in making its net worth positive, all benefits of a sanctioned scheme would stand withdrawn whether exhausted or not, even though the emergence from sickness, and its continued health is dependent on the sanctioned scheme being fully*

implemented. This would, defeat the very purpose of formulating a sanctioned scheme. A sanctioned scheme in myriad ways would ordinarily devise ways and means by which the assets of the referrer are to be dealt with. The provisions of the sanctioned scheme would bind both the referrer and those who are party to it, including those in respect of which SICA makes a specific provision. It has to be appreciated that to forge a consensus on rehabilitation of a sick industrial company is no mean task. But once consensus is arrived at, and a scheme is sanctioned, it cannot equally be jettisoned without due deliberation and adherence to the provisions of law. Thus, the apprehension of the department that assets will be salted away is misconceived. The company which is the beneficiary of the sanctioned scheme can be brought to heel by taking recourse to appropriate remedies in order to obtain its obeisance to the sanctioned scheme.

13……mere fact that the net worth has become positive does not provide an automatic exit route from the proceedings before the BIFR. It is open to the BIFR to continue to monitor the implementation of the unimplemented part of the sanctioned scheme. In the captioned cases, the BIFR appears to have discharged the reference solely on the ground that the net worth had turned positive. The discharge of reference is followed by consequent directions of relieving the operating agency and the independent director, of its mandate. The BIFR has noticed that a substantive part of the sanctioned scheme has been implemented, while issuing a direction to implement the remaining part of the sanctioned scheme. If one may say so, the second part is really redundant since, as observed, once a scheme is sanctioned it has the force of law; making its enforcement amenable as a matter of law, even in foras other than BIFR. One may emphasise at the cost of repetition that gaining entry within the domain of BIFR, the erosion of net worth (amongst other jurisdictional attributes) is an

> *essential criteria; the inverse does not necessarily follow. In other words a referrer cannot seek an exit as a matter of right merely on the ground that net worth has turned positive, especially where a sanctioned scheme is under implementation. This is a call that the BIFR has to take*." (emphasis supplied)

15. The final question concerns the alleged deviation from the publicized tender conditions and GFR Rules that will result if Clause 11.6 is enforced. The Court here notes the Railways itself took a legal opinion from the Legal Advisor (Railways), Railway Board, dated 26.4.2010, who considered this question and stated that compliance with Clause 11.6 will not violate the tender conditions. Subsequently, a legal opinion was also requested from the Department of Legal Affairs of the Ministry of Law and Justice, which reached the same conclusion in a reply dated 12.7.2010, noting that:

> "*The BIFR order is intended to allow exclusion of Force Majeure period from the above, so that actual performance of the firm when it was working, can be considered. In our view, this order of the BIFR is more akin to a guidance on the method of application of tender clause and not a complete modification/vitiation of the clause itself.*"

16. Given conclusions within the Railways' own ranks that Clause 11.6 does not vitiate the tender conditions, and no reasons have been provided to indicate that these concurring legal opinions are incorrect, the Court finds no reason to interfere with the application of Clause 11.6. In any case, Section 32 of the SICA prescribes that the SICA overrides any contrary provisions in any other law, except for the

Foreign Exchange Regulation Act, 1973 and the Urban Land (Ceiling and Regulation) Act, 1976, let alone contractual tender conditions or policy guidelines prescribed by the Railways. Indeed, as the Supreme Court noted in *Raheja Universal Limited* .v *NRC Limited and Ors.*, (2012) 4 SCC 148:

> "*26……..The purpose is so very clear that during the examination, finalization and implementation of the scheme, there should be no impediment caused to the smooth execution of the scheme of revival of the sick industrial company. It is only when the specified period of restrictions and declarations contemplated under the provisions of the Act of 1985 is over, that the status quo ante as it existed at the time of the consideration and finalization of the scheme, would become operative.*" (emphasis supplied)

17. For the above reasons, the writ petition has no merit and is accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

FEBRUARY 28, 2014