

Delhi HC: Pending reference under SICA, Proceedings before the Arbitral Tribunal not to be stayed

Introduction

Recently, the hon'ble High Court of Delhi in Appeals no. 41, 42, and 43 of 2015 of *Goyal MG Gases Pvt. Ltd v. SBQ Steels Ltd* held that arbitration proceedings will not be stayed due to reference pending before the Board for Industrial & Financial Reconstruction (BIFR) under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). Under the appeals, the order of the Arbitral Tribunal was challenged wherein the Arbitral Tribunal has suspended the arbitral proceedings in view of the on the ground that the same are hit by Section 22(1) of the Sick Industrial Companies Act, 1985 as reference was pending before the BIFR.

Provisions of Section 22(1) in SICA reads as under:

(1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof 32 [and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.

Issues

- Whether the arbitration proceedings are covered under the mney suit and would fall within the meaning of second part of Section 22(1) of SICA ?
- Whether the order for suspension of arbitration proceedings is a valid order when the award is yet to be published?
- Under which stage an award can be treated as a decree?
- Whether in pending arbitration proceedings i.e. pre-award stage, the issue of SICA is entertainable or it could only be raised if permissible at the stage of enforcement of award (once it becomes a decree)?

Facts of the case

Goyal MG Gases Pvt. Ltd (Goyal) and SBQ Steels Ltd (SBQ) entered into a contract dated 7th August, 2008 for the supply of oxygen and nitrogen gases through the installation of a 100 TPD Air Separation Plant/Unit (ASU) by the appellant Goyal to SBQ. Due to breach of contracts, disputes arose between the parties and the matter came up for arbitration pertaining to monetary claims. During the arbitration proceedings, SBQ filed a memo dated 17th March, 2015 before the Arbitral Tribunal, alleging that it has been registered with BIFR under SICA and during the pendency of the proceedings before BIFR, the arbitral proceedings be suspended. Goyal opposed the suspension of arbitral proceedings and in its memo sought removal of the ASU. In the common order dated 20th June, 2015, the Arbitral Tribunal had proceeded to dispose of the appellant's application under Section 17 of the Act, declining the interim measure as sought and instead relegating the appellant to BIFR and further suspended the arbitral proceedings due to pendency of the reference before the BIFR.

Conclusively, the Arbitral Tribunal held that, *“having regard to the pendency of proceedings before BIFR, which has been held as an expert body vested with power of wide implications, it would be impermissible for the Tribunal to make any order on the said application filed by the claimant pending final order in reference no. 17/2015, pending before the BIFR.”*

The Arbitral Tribunal had declined to grant the interim measures only on the ground that the respondent had got its reference registered with BIFR, under SICA and the proceedings were suspended, the same cannot be considered on merit. The Appellant filed the appeal before the Hon'ble HC to challenge the aforesaid order of the Arbitral Tribunal on the ground that the Appellant is not required to approach BIFR for removing the ASU as the ASU is not the property of the Respondent.

SBQ responded stating that the arbitral proceedings are liable to be stayed under Section 22(1) of SICA since the arbitral proceedings are in the nature of a 'money suit'. Admittedly, the claims of the appellant are for recovery of the amount.

Judicial Reasoning

- In *KSL and Industries Ltd v. Arihant Threads Ltd* [(2015) 1 SCC 166] three learned judges of the Supreme Court had an occasion to consider the scope and impact of Section 22 of SICA. In dealing with the overriding effect of the provisions of SICA, the object of Section 22 and the scope of powers vested with BIFR under Sections 16, 17 and 18 of the SICA, the court specifically observed in para 26, as to what stage of the proceedings instituted and pending gets attracted to and becomes suspended under Section 22 as here under:

“.....the submission is that Section 22 lays down that only proceeding for winding up or execution, distress or the like shall not lie or be proceeded with where an enquiry is pending or a scheme is under preparation or consideration or a sanction scheme is under implementation etc.; whereas a proceeding for recovery shall lie against a sick company but an order made in it could not be executed against any of the properties of the industrial company, the effect being that the proceedings may continue without any consequence. Thus there cannot be any execution or distraint against the properties of the company but creditors may continue to apply for recovery before the DRT.”

- A three Judges Bench of the Supreme Court in *Raheja Universal Ltd v. NRC Ltd* (2012) 4 SCC 148 has discussed the said provisions in great details and held that the expression 'no proceedings' that finds place in Section 22(1) is of wide spectrum but is certainly not free of exceptions. The framers of law have given a definite meaning to the expression 'proceedings' appearing under Section 22(1) of SICA 1985. These proceedings are for winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof. The expression 'the like' has to be read ejusdem generis to the term 'proceedings'. The words 'execution, distress or the like' have a definite connotation. These proceedings can have the effect of nullifying or obstructing the sanctioning or implementation of the revival scheme, as contemplated under the provisions of SICA 1985.
- The applicability of embargo contained in Section 22(1) of SICA requires the cumulative and conjoint satisfaction of two conditions; namely;
 - a) the proceeding sought to be suspended should clearly satisfy the ingredients of Section 22(1) and fall within one or more of the categories of proceedings indicated in the said provisions and

- b) additionally, the continuance of the proceeding should have the impact of interfering with the formulation of the scheme
- The Supreme Court has also made it clear that the applicability of the embargo contained in Section 22(1) of SICA depends on the facts and circumstances of each individual case; and no principle of universal application can be laid down in all such matters.
- The Supreme Court in *San-A Tradubg Co. Ltd v. I.C. Textiles Ltd (2012) 7 SCC 192* held that an arbitral proceeding is not a 'suit' within the meaning of Section 22(1) of SICA. It was further held by the Supreme Court that the arbitration proceedings were not covered by Section 22(1) of SICA and a reference to BIFR would not bar continuance of such proceedings.
- In the case of *Paramjeet Singh Patheja v. ICDS Ltd (2006) 13 SCC 322*, the Hon'ble SC held that "It is a well established rule that a provision must be construed in a manner which would give effect to its purpose and to cure the mischief in the light of which it was enacted. The object of [Section 22](#), in protecting guarantors from legal proceedings pending a reference to BIFR of the principal debtor, is to ensure that a scheme for rehabilitation would not be defeated by isolated proceedings adopted against the guarantors of a sick company. To achieve that purpose, it is imperative that the expression "suit" in [Section 22](#) be given its plain meaning, namely any proceedings adopted for realization of a right vested in a party by law. This would clearly include arbitration proceedings".

Conclusion

The Hon'ble HC held that the pre-award proceedings were not covered by section 22(1) of SICA and such proceedings cannot be treated as suit. The award which is yet to attain finality cannot be called as decree. The plea of section 22(1) of SICA can only be raised in arbitration matters once the award becomes a decree and the same could only be raised at the stage of enforcement of decree.

However, as the Arbitral Tribunal declined the application for removal of the ASU on the ground of suspension of the Arbitral proceedings, and in view of pendency of the reference under SICA. With this observation, the Hon'ble HC relegated the Goyal to the remedy of seeking permission of BIFR for removal of its ASU. The Hon'ble HC also considered that Goyal had appealed to the court to decide the present appeal on merit. While passing the common order, the Arbitral Tribunal has not decided the application under Section 17 of the Act on merit. The Hon'ble HC proceeded to observe that the jurisdiction lies with the Arbitral Tribunal. Had the Arbitral Tribunal decided the application on merit, this Court would have considered the appeal on merit after hearing. And with the aforesaid observation the Hon'ble Court requested the Arbitral Tribunal to hear the application under section 17 of the Arbitration Act on merits.

The aforesaid judgment provides clarity on the issue of suspension of the arbitral proceedings and applicability of section 22(1) of SICA. The proposition is now settled that the proceedings before the arbitral tribunal should not be suspended due to the pendency of the reference before the BIFR and the protection provided under section 22 (1) does not extend to the arbitration proceedings before the arbitral tribunal. This judgment will assist the litigants as well as the arbitrators where similar issue was raised.