



IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 06th DAY OF APRIL, 2011

PRESENT

THE HON'BLE MR. JUSTICE N.KUMAR

AND

THE HON'BLE MR.JUSTICE RAVI MALIMATH

O.S.A.No.9/2011

BETWEEN:

1. M/s. Bellary Steels and Alloys Ltd.,
(under liquidation)
S.10/11, P.B.No.19,
Ananthpur Road,
Bellary.

2. Sri S.Madhav
S/o late S.Nagappa
Aged 61 years
Ex.Managing Director
M/s. Bellary Steels and Alloys Ltd.,
(Under liquidation)
at: No.201,7th Cross,
2nd Stage, Indiranagar
Bangalore-560 038.

..APPELLANTS

(By Sri A.N.Jayaram, Senior Counsel for
Sri Mahesh Kumar, Adv.)

AND:

1. M/s. Man Takraf (India)Pvt. Ltd.,
A company incorporated under
The provisions of the Companies
Act, 1956 having its registered
Office at 24, Wallace Garden,
3rd Street, Madras_: 600 006
Represented by its
Managing Director.

2. The Official Liquidator
Attached to High Court of Karnataka
Having office at No.26, 12th floor,
Raheja Towers, M.G.Road,
Bangalore-1.

3. Industrial Finance Corporation of India
#61, IFCI Towers, Nehru Place,
New Delhi
[Branch Off] at #7, 2nd Cross,
CSI Compound, Mission road,
Bangalore
Rep. By Senior AVP

.RESPONDENTS

(By Sri Vijayshankar, Senior Counsel for
Sri Ravindranath, Adv. For R1.
Sri Jayaram, Adv. For R2
Sri Naganand, Senior Counsel for
M/s.Just Law for R3.)



THIS APPEAL IS FILED UNDER SECTION 483 OF THE COMPANIES ACT, 1956 R/W SEC.4 OF THE KARNATAKA HIGH COURT ACT, 1961 PRAYING TO SET ASIDE THE ORDER DATED 22.9.2010 PASSED BY THE LEARNED SINGLE JUDGE IN CO.P.NO.49/2001 WINDING UP THE 1ST APPELLANT COMPANY UNDER ANNEXURE-E.

THIS APPEAL COMING ON FOR ORDERS THIS DAY, N.KUMAR.J DELIVERED THE FOLLOWING;

J U D G M E N T

This appeal is preferred by M/s. Bellary Steels and Alloys Limited and its Managing Director challenging the order passed by the learned Company Judge winding up the company.

2. The creditors of the company including the first respondent company filed several company petitions before the Company Court for winding up of the company on the ground the company is unable to pay its debts. During the pendency of the said proceedings, the company was referred to Board for Industrial and Financial Reconstruction and was declared as a sick industrial unit under the provisions of Sick Industrial Companies (Special Provisions) Act 1985 (for short hereinafter referred to as ' the Act'). When once the



company is declared as sick industrial unit, Section 22 of the Act apply and the creditors cannot proceed against the company for recovery of money due to them or prosecute the petition for winding up of the company. Therefore the Company Court by its order dated 14.12.2007 in Co.P.75/2000 and other connected matters passed an order dismissing all the company petitions, but reserving liberty to them to file an application for revival of their petitions in the event of the company being revived and comes out of BIFR. Now from the material on record, it is clear that one of the creditors of the company- ARCIL filed a Miscellaneous Application on 24.12.2009 before the BIFR for abatement of the reference of the company under the third proviso to Sec.15(1) of the Act in view of the fact that the secured creditors have taken action against the company under Sec.13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short hereinafter referred to as 'SARFAESI Act'). The Chartered Accountant appearing for the company opposed the said request contending that the Debt Recovery



Tribunal, Bangalore has passed an order dated 22.12.2009 staying all further proceedings initiated by ARCIL and the said order has been extended upto 15.1.2010 and therefore sought for time to enable the company to get a specific order setting aside the action taken by the secured creditors under Section 13(4) of the SARFAESI Act. However, the said request was not acceded to by the Board. Taking note of the judgments rendered by various High Courts in the Country it proceeded to hold that as the DRT has not set aside the action taken under Sec.13(4) of SARFAESI Act and by virtue of third proviso to Section 15(1) of the Act, the proceedings before the BIFR has abated, by an order dated 5.1.2010. Aggrieved by the said order of BIFR, the company preferred an appeal under Section 25 of the Act before the Appellate Authority for Industrial and Financial Reconstruction, New Delhi on 23.1.2010. On 20.4.2010 the Appellate Authority issued notice to the parties. In the meanwhile, the first respondent filed an application for revival of its company petition on 15.7.2010 and took out notice to the company. When the notice sent by registered post acknowledgment due



was returned with a refusal shara, the Court held the service as sufficient and thereafter proceeded to pass the impugned order of winding up on 22.9.2010. It is against the said order the present appeal is filed.

3. Sri A.N.Jayaram, learned senior counsel for the appellant contended even if the proceedings before the BIFR was terminated as on 5.1.2010, when an appeal was filed within the time prescribed under law and the appeal was pending, Section 22 of the Act is attracted and no order of winding up could have been passed by the Company Court. Therefore, he submits without going into the merits and other grounds urged in the appeal memo the order impugned is liable to be set aside on the short ground of want of jurisdiction of the company Judge to pass the order.

4. Per contra, Sri S.Vijaya Shankar, learned senior counsel for the first respondent contended that the application for revival was filed after the proceedings before the BIFR stood abated. The first respondent had no notice of the appeal filed by the company. As this court has reserved



the liberty to the first respondent to revive the company petition, after taking out notice to the company, the company Court being satisfied with all the ingredients as contemplated under Section 434, has proceeded to pass the order of winding up, which is in accordance with law and this appeal is wholly misconceived.

5. Sri Naganand, learned senior counsel appearing for the third respondent - IFCI Limited that contended the provisions of SARFAESI Act overrides all other provisions including the Companies Act and the Act. Having regard to the language employed in the third proviso to Section 15(1) of the Act, once the conditions prescribed therein are fulfilled by operation of law, proceedings before the BIFR stands abated. Though the Board has recorded the rival contentions, noticed the various judgments and then recorded the proceedings as abated, in law it is not the order holding the proceedings as abated that matters but proceedings as abated by operation of law and therefore no appeal is contemplated against the abatement under Section 25 of the Act to AAIFR and therefore mere pendency of an



appeal would in any way in law make any difference and therefore he submits the company Court had the jurisdiction to pass the winding up order and Section 22 of the Act has no application.

6. In the light of the aforesaid facts and contentions the only point that arise for our consideration is whether Section 22 of the Act operated as a bar on the company Court to pass an order of winding up on 22.9.2010?

Section 22 of the Act reads as under:

**22. Suspension of legal proceedings,
contracts, etc –**

(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 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 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 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.

(2) Where the management of the sick industrial company is taken over or changed in pursuance of any scheme sanctioned under Section 18 notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or in the memorandum and articles of association of such company or any instrument having effect under the said Act or other law –

(a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;

(b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.



(3) *Where an inquiry under section 16 is pending or any scheme referred to in section 17 is under preparation or during the period of consideration of any scheme under section 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified by the Board :*

PROVIDED that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate.



(4) Any declaration made under subsection (3) with respect to a sick industrial company shall have effect notwithstanding anything contained in the Companies Act, 1956, or any other law, the memorandum and articles of association of the company or any instrument having effect under the said Act or other law or any agreement or any decree or order of a court, Tribunal, officer or other authority or of any submission, settlement or standing order and accordingly-

(a) any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration, and all proceedings relating thereto pending before any court, Tribunal, officer or other authority shall remain stayed or be continued subject to such declaration; and

(b) on the declaration ceasing to have effect-

(i) any right, privilege, obligation or liability so remaining suspended or modified, shall become revived and enforceable as if the declaration had never been made; and



(ii) any proceeding so remaining stayed shall be proceeded with, subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded.

7. A bare reading of the aforesaid proviso makes it very clear where in respect of an industrial company an inquiry under Sec.16 is pending or any scheme referred to under Sec.17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Sec.25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956, no proceedings for the winding up of 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.

8. It is not in dispute after filing of the company petition by various creditors, when the matter was referred to the Board and the Company was declared as sick industrial unit under the Companies Act, taking note of the aforesaid provision this Court passed an order dismissing all company petitions. However, liberty was reserved to the creditors to seek revival of the company petition after the proceedings ended before the BIFR.

9. In the instant case, the proceedings before the BIFR came to an end by virtue of a request made by one of the creditors in view of the third proviso to Section 15(1) of the Act. It reads as under:

“Provided further that no reference shall be made to the Board for Industrial and Financial Reconstruction after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002,

where financial assets have been acquired by any securitisation company or reconstruction company under sub section (1) of section 5 of that Act.

Provided also that on or after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where a reference is pending before the Board for Industrial and Financial Reconstruction, such reference shall abate if the secured creditors, representing not less than three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under sub-section (4) of Section 13 of that Act.”

10. In this connection it is useful to refer to the fact that parliament enacted the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 to regulate securitisation and reconstruction of financial assets and enforcement of

security interest and for matter connected thereto. The said Act enables the banks and financial institutions to realise long-term assets, manage problems of liquidity, asset liability mis-match and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. The SARFAESI Act amended the Act by inserting the third proviso as aforesaid. As it is clear from the aforesaid proviso that after commencement of the SARFAESI Act, where a reference is pending before the Board, such reference shall abate if secured creditors, representing not less than 3/4 in the value of the amount outstanding against financial assistance disbursed to the borrower or such secured creditors, have taken any measures to recover their secured debt under sub-section (4) of Section 13 of the Act. Relying on the said provision one of the creditors who was already before the BIFR, filed an application for an order holding that the proceedings before the BIFR abates. After notice the representative of the company brought to the notice of the BIFR that the



proceedings initiated by the said creditor is challenged before the Debt Recovery Tribunal and an interim order of stay of all further proceedings have been granted on 22.12.2009 and the same is extended till 15.1.2010 and he sought time to get the said proceedings set-aside. The fact that there was an order of stay upto 15.1.2010 issued by the Debt Recovery Tribunal is not in dispute. In spite of the said fact BIFR proceeded to pass the impugned order on 5.1.2010 holding that the proceedings are abated. The legality of the said order which was challenged by preferring an appeal before the AAIFR on 23.1.2010. Notices were issued by the Appellate Authority on 20.4.2010.

11. In a proceedings initiated against the third respondent by the company in S.A.116/2010 the Debt Recovery Tribunal set aside the proceedings. Against the said order the third respondent preferred an appeal in RSSA 99/2010 which came to be allowed on 29.11.2010. In the meanwhile, the first respondent filed an application for revival of the winding up petition on 15.7.2010 and the order



of winding up is passed on 22.9.2010. On the day the company court passed the order on 22.9.2010, firstly, the proceedings initiated by the third respondent had been set-aside on 12.3.2010 and it was restored only on 29.11.2010. In other words, on 22.9.2010 there was no proceedings. The proceedings initiated by the third respondent was restored only on 29.11.2010 by allowing the appeal. It is submitted that the order passed by the DRT has been stayed by the Appellate authority.

12. From the aforesaid proceedings it is clear the correctness of the order dated 5.1.2010 was challenged in appeal and the appeal was pending. The correctness of the proceedings initiated under Section 13(4) was challenged before the DRT and the said proceedings has been set aside, the matter was in appeal where there was an interim order of stay. It is in this context, it was contended on behalf of the respondents when the abatement is by operation of law either the pendency of the appeal or the challenge to the proceedings initiated under Section 13(4) and setting aside of .



the same is immaterial. In support of the said contention reliance was placed on a judgment of the Apex Court in **MITHAILAL DALSANGAR SINGH AND OTHERS Vs. ANNABAI DEVRAM KINI AND OTHERS** reported in **AIR 2003 SC 4244** dealing with the abatement under Order 22 Rule 9 of Code of Civil Procedure where it has been held as under:

“Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record if allowed, would have the effect of setting aside the abatement as the relief of setting aside

abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for."

13. Again the Apex Court in **PERUMON BHAGVATHY DEVASWOM PERINADU VILLAGE Vs. BHARGAVI AMMA (DEAD) BY LRS AND OTHERS** reported in **(2008) 8 SCC 321** dealing with the abatement under the provisions of Code of Civil Procedure at para - 5 held as under:

"Having regard to the wording of Rule 4, it is clear that when a respondent dies and an application to bring his legal representative on record is not made, abatement takes place on the expiry of the prescribed period of 90 days, by operation of law. Abatement is not dependent upon any judicial adjudication or declaration of such abatement by a judicial order. It occurs by operation of law. But nevertheless "abatement" requires judicial cognizance



to put an end to a case as having abated. To borrow a phrase from Administrative Law (used with reference to void orders), an appeal bears no brand on its forehead that it has "abated", nor does it close itself automatically on abatement. At some stage, the court has to take note of the abatement and record the closure of the case as having abated (where the deceased was a sole respondent) or record that the appeal had abated as against a particular respondent (if there are more than one and the cause of action survives against the others)."

14. The abatement is by operation of law and there cannot be any dispute about it. In the case of abatement of an appeal or suit on account of death of a party, if the death of the party is not disputed, all that has to be done is to calculate 90 days from the date of his death and from then whether any order is passed or not, in law the appeal or suit abates. Nonetheless as pointed out by the Apex Court in the aforementioned two judgments a judicial order is required to



recognise such abatement. The said principle has no application to a case of abatement where if certain conditions have to be fulfilled before the law applies. In such cases, the court has to apply its mind, find out whether such condition is complied with and if it holds that it is complied with, then the law operates and what the Court does is only recording the said legal effect.

15. In the instant case, it is only when 3/4 of the secured creditors initiate proceedings under the SARFAESI Act abatement can take place. The said initiation of proceedings could be challenged by the company. In fact in this case it is challenged and an order of stay was obtained. On the day the BIFR passed an order, there was an order of stay in operation. Though the said order was brought to the notice of BIFR, the BIFR proceeded to pass an order. In that view of the matter, the order passed by the company Court directing winding up of the company is *void ab initio*, one without jurisdiction, *non est* in the eye of law and



consequently all orders passed in pursuance of the said void order, are also void and are set aside.

16. The abatement contemplated under Section 15(1) of the Act, is a conditional one. The words, used are “such reference shall abate if the secured creditors”, satisfy the condition mentioned therein. Therefore only on such condition mentioned in the provision being satisfied, in law abatement occurs. Whether the said condition is satisfied or not is a question of fact to be decided and a finding is to be recorded. The said exercise has to be done by the Board. Therefore the Board has to pass a considered order recording the existence of the said condition. Then the order of abatement is automatic. The order has to be passed by the Board regarding the existence of the said condition, is subject to statutory appeal. It is only when the said finding regarding the existence of the condition reaches finality, the abatement takes place, though from the earlier point of time. Therefore mere filing of an application by the secured creditor informing the Board that he has taken measures to

recover their secured debt under sub-section (4) of Section 13 of the SARFAESI Act would not result in abatement. In spite of stay order whether abatement takes place, whether the person who moved for abatement had satisfied the other legal requirements stipulated under the third proviso to Section 15(1) of the Act are matters which requires consideration. The Court has to take note of the said facts and only on satisfaction of those conditions it can record the closure of the case as having abated. If these things are disputed and still an order is passed and the statute provides a right of an appeal, the party has a right to challenge the said order of abatement and an appeal is continuation of original proceedings. Even otherwise the statute i.e., Section 22 of the Act specifically provides if an appeal is pending, no company petition could be entertained much less an order of winding up could be passed during the pendency of the proceedings under Section 25 of the Act.

17. The contention that SARFAESI Act has a overriding effect on other provisions or other enactment has

nothing to do with the power of the company Court to entertain and proceed with the winding up petition when an appeal under Section 25 of the Act is pending. The language employed in Section 22 is absolute and mandatory and the company Court is prohibited from proceeding with the winding up proceedings much less to pass winding up order.

18. It is made clear that any order passed by the Company court or by this Court in this proceeding would not affect the proceedings taken by the secured creditors under the provisions of the SARFAESI Act.

Accordingly, appeal is allowed. No costs.

Sd/-
JUDGE

Sd/-
JUDGE

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