

M/S. BHARAT STEEL TUBES LTD. ETC. A

v.

IFCI LTD. & ORS.

(SLP (Civil) No(s) 9728-9729 of 2011)

APRIL 4, 2011 B

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

COMPANIES ACT, 1956:

ss. 4A(1)(ii) and 4A(2) Proviso (i) – Industrial Financial Corporation of India Limited (IFCIL) – HELD: Provisions of sub-s.(1) of s.4A stand independent of sub-s.(2) of s.4A and recognize the financial institutions mentioned therein to be public financial institutions which are not covered by embargo enforced by proviso to sub-s.(2) – Further, IFCIL was covered by Proviso (i) to sub-s.(2) of s.4A since it was constituted under the Companies Act which is a Central Act – High Court rightly held IFCIL entitled to take recourse to provisions of SARFAESI Act to enforce a “security interest” which had accrued in its favour – Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 – Industrial Finance Corporation (Transfer of Undertaking and Repeal) Act, 1993 – s. 5. C D E

The instant special leave petitions were filed by the petitioner-company challenging the judgment and order dated 9-7-2010, passed by a Division Bench of the High Court holding that the respondent, Industrial Finance Corporation of India Limited, was a “financial institution” u/s 4A(2) of the Companies Act, 1956, read with s. 2(1)(m) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, and that, as a consequence, the respondent IFCI Ltd. would be entitled to take recourse to the provisions of the SARFAESI Act, 2002 in order to enforce a “security F G

A interest” which had accrued in its favour. The petitioner also challenged an order passed by the Single Judge of the High Court vacating the injunction order earlier passed in the suit.

B It was primarily contended for the petitioner that at the relevant time, the Central Government did not hold or control 51% or more of the paid up share capital of the respondent institute as envisaged by proviso (ii) to s. 4 A (2) of the Companies Act, 1956 and, as such, it was no longer covered by the definition of “public financial institution” in s. 4A of the Companies Act, 1956 and was not, therefore, entitled to invoke the provisions of the SARFAESI Act, 2002, notwithstanding the provisions of s. 5 of the 1993 Act.

D Dismissing the petitions, the Court

HELD: 1.1. The provisions of sub-s. (1) of s. 4A of the Companies Act, 1956 stand independent of sub-s. (2) and the financial institutions named in sub-s. (1) of s.4A recognize the financial institutions mentioned therein to be public financial institutions which are not covered by the embargo enforced by the proviso to sub-s. (2) of the said Section. The proviso controls the width of sub-s. (2) which refers to the powers of the Central Government to specify by notification in the Official Gazette and subject to the provisions of sub-s. (1), such other institutions as it may think fit to be a public financial institution. Sub-s. (2) of s. 4A is applicable only to institutions which are not mentioned in sub-s. (1). It is the latter category of financial institutions to which the proviso applies. In view of s. 4 A(1)(ii) of the Companies Act, 1956, the Industrial Finance Corporation of India was admittedly regarded as a ‘public financial institution’ for the purpose of the said Act. [para 14] [213-D-G]

H 1.2. The conversion of the Industrial Finance

**BHARAT STEEL TUBES LTD. ETC. v. IFCI LTD. & 207
ORS.**

Corporation of India into a Company did not alter its position and status as a financial institution in view of s. 5 of the Industrial Finance Corporation (Transfer of Undertaking and Repeal) Act, 1993, which was in the nature of a saving clause, whereby all matters, including all benefits, relating to the Corporation, stood wholly transferred in favour of the new Company. [para 14] [213-G-H; 214-A-B]

1.3. Clauses (i) and (ii) are not conjunctive but disjunctive and even though Clause (ii) may not have any application to respondent No.1 Company, it was covered by clause (i), since it was constituted under the Companies Act, 1956, which is a Central Act. [para 15] [214-C-D]

1.4. There is no reason to interfere with the judgment and orders of the High Court impugned in these special leave petitions. [para 16] [214-D-E]

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 9728-9729 of 2011.

From the Judgment & Order dated 9.7.2010 & 10.9.2010 of the High Court of Delhi at New Delhi in WPC No. 7097 of 2008 & CSOS No. 1886 of 2009 & IA No. 12908 of 2009.

Rakesh Dwivedi, M. Dutta, Amit Duggal, Vivek Malik, Amit Dhupav, Rishi Maheshwari, P.S. Sudheer for the Petitioners.

K.K. Venugopal, Subramonium Prasad, Shweta Mazumdar, Shyam D. Nandan, Rajat Khattry for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Permission to file Special Leave Petitions is granted.

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A 2. In these Special Leave Petitions, M/s Bharat Steel
 Tubes Ltd. has challenged the judgment and order dated 9th
 July, 2010, passed by a Division Bench of the Delhi High Court
 in WP(C) No.7097 of 2008, holding that the Respondent,
 Industrial Finance Corporation of India Limited is a “financial
 B institution” under Section 4A(2) of the Companies Act, 1956,
 read with Section 2(1)(m) of the Securitisation and
 Reconstruction of Financial Assets and Enforcement of Security
 Interest Act, 2002, (hereinafter referred to as ‘the SARFAESI
 C Act’) and that, as a consequence, the Respondent IFCI Ltd.
 would be entitled to take recourse to the provisions of the
 SARFAESI Act in order to enforce a “security interest” which
 had accrued in its favour. The Petitioner has also challenged
 an order passed by a Single Bench of the Delhi High Court on
 10th September, 2010, in I.A.No.12908/09 in CS(OS)No.1886
 D of 2009 vacating the injunction order earlier passed in the suit.

3. Appearing for the Petitioner, Mr. Rakesh Dwivedi,
 learned Senior Advocate, firstly drew our attention to Section
 4A of the Companies Act, 1956, which was introduced by way
 of an amendment with effect from 1st February, 1975, defining
 E “Public Financial Institutions”. It provides that the various
 financial institutions specified in Sub-Section (1), including the
 Industrial Finance Corporation of India, established under
 Section 3 of the Industrial Finance Corporation Act, 1948, is
 to be regarded for the purposes of the said Act, as a public
 F financial institution. Learned counsel also pointed out that Sub-
 Section (2) of Section 4A also provides that subject to the
 provisions of Sub-Section (1), the Central Government may, by
 notification in the Official Gazette, specify such other institutions
 as it may think fit to be a public financial institution. A limitation,
 G however, has been imposed on the said powers of the Central
 Government by the proviso to Sub-Section (2) which provides
 that no institution is to be specified as a public financial
 institution unless:-

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**BHARAT STEEL TUBES LTD. ETC. v. IFCI LTD. & 209
ORS. [ALTAMAS KABIR, J.]**

- (i) It has been established or constituted by or under any Central Act; or **A**
- (ii) Not less than 51% of the paid-up share capital of such institution is held or controlled by the Central Government. **B**

4. Mr. Dwivedi submitted that while clause (i) of the proviso to Sub-Section (2) of Section 4A of the above Act is not attracted to the facts of this case, the second clause would have been attracted, but for the fact that at the relevant point of time and even now the Central Government does not hold or control 51% or more of the paid-up share capital of the institution concerned. Mr. Dwivedi submitted that on account of disinvestment at regular intervals, the Central Government does not hold any share in the Company and the day it ceased to hold 51% or more of the paid-up share capital, it ceased to enjoy the benefits of Section 4A(ii) and became a private company which could no longer be covered by the definition of "public financial institution" in Section 4A of the Companies Act, 1956. It was submitted that even if the Central Government continue to hold shares in the Company, its status would be that of any other private shareholder and the Corporation could no longer enjoy the status of a Public Financial Institution given to it under Section 4A of the Companies Act, 1956. **C**
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5. In order to bolster his submissions, Mr. Dwivedi referred to the Industrial Finance Corporation (Transfer of Undertaking and Repeal) Act, 1993, hereinafter referred to as "the 1993 Act", whereunder the nature and character of the Industrial Finance Corporation of India underwent a change and the Corporation was incorporated as a Company as defined in Section 1(i)(b) of the aforesaid Act. Mr. Dwivedi pointed out that under Section 3, the undertaking of the Corporation was to vest in the Company on a date to be appointed by notification in the Official Gazette and on the said date the undertaking of the Corporation would stand transferred and vested in the newly- incorporated Company. It appears that the **F**
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A appointed date was subsequently notified as 1st July, 1993.

6. It was also pointed out by Mr. Dwivedi that Section 4 of the 1993 Act mentions the general effect of vesting of an undertaking in the Company to be so incorporated. By virtue of Sub-Section (2) of Section 4, the undertaking of the Corporation, which was transferred to and vests in the Company under Section 3, shall be deemed to include all the various items set out in Sub-Section (2) of Section 4. In addition, under Sub-Section (3) of Section 4, all contracts, deeds, bonds, guarantees, powers of attorney, other instruments and working arrangements subsisting immediately before the appointed date and affecting the Corporation would cease to have effect or to be enforceable against the Corporation and would be of full force and effect against or in favour of the Company, in which the undertaking of the Corporation had vested.

7. Reference was then made to Sub-Section (5) of Section 4, whereunder with effect from the appointed date, fiscal and other concessions, licences, benefits, privileges and exemptions granted to the Corporation in connection with the affairs and business of the Corporation under any law for the time being in force would be deemed to have been granted to the Company. Mr. Dwivedi contended that under the said provision, it could not be said that the status given to the Respondent Company was saved or continued under Section 5 of the Act and, accordingly, once the Central Government ceased to hold 51% or more of the paid-up share capital of the Company, it ceased to enjoy the benefits under Section 5 of the 1993 Act.

8. Mr. Dwivedi submitted that since the Respondent No.1 Company no longer fulfilled the criteria contained in Clause (ii) of the proviso to Sub-Section (2) of Section 4A of the Companies Act, 1956, it had lost the status given to it under Clause (ii) of Sub-Section (1) of Section 4A thereof and was not, therefore, entitled to invoke the provisions of the

SARFAESI Act, 2002, notwithstanding the provisions of Section 5 of the 1993 Act. A

9. Mr. Dwivedi also pointed out that the fact that the Respondent No.1 Company was no longer a public company under the control of the Central Government, had also been admitted on behalf of the Respondent No.1 before the Delhi High Court in Writ Petition (Civil)4596 of 2006, which would be reflected from the judgment delivered therein on 17th August, 2010. Mr. Dwivedi pointed out that in paragraph 10 of the judgment it had been mentioned by the learned Single Judge that a submission had been advanced on behalf of the Respondent No.1 Company that it was neither substantially financed by the Central Government nor did the Central Government hold any share whatsoever in the Respondent No.1 Company. B
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10. Mr. K.K. Venugopal, learned Senior Advocate, appearing for the Respondent No.1 Company, on the other hand, contended that Section 5 of the aforesaid Act was in the nature of a saving clause, whereby all matters relating to the Corporation stood wholly transferred in favour of the new Company after its incorporation, including, the status which had been afforded to the Corporation under Clause (ii) of Section 4A(1) of the Companies Act, 1956. Mr. Venugopal submitted that in exercise of the powers conferred by Sub-Section (2) of Section 4A of the aforesaid Act, the Central Government issued Notification No.S.O.98(E) dated 15th February, 1995, specifying the Industrial Finance Corporation of India Limited formed and registered under the Companies Act, 1956, to be a financial institution and, accordingly, amended the Notification issued by the Government of India, Ministry of Law, Justice and Company Affairs (Department of Company Affairs) No.S.O.1329 dated 8th May, 1978, to include the Industrial Finance Corporation of India Limited in the said notification. E
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11. Mr. Venugopal urged that the mere fact that the Respondent No.1 Company was no longer under the control of H

A the Central Government did not affect or alter its status under
Section 4A(1)(ii) of the Companies Act, 1956, as a public
financial institution and that, in effect, more than 4,000 cases
filed by the Respondent No.1 Company in its capacity as a
public financial institution were pending and would be rendered
B infructuous if the interpretation being sought to be given on
behalf of the Petitioner in relation to the status of the
Respondent No.1 Company was to be accepted.

12. Having regard to the large number of cases filed by
the Respondent No.2 Company, in its capacity as a public
C financial institution, which are said to be pending, we have
given our anxious consideration to the submissions advanced
on behalf of the respective parties and the provisions of the
Companies Act, 1956, and the Industrial Finance Corporation
(Transfer of Undertaking and Repeal) Act, 1993.

D 13. Section 4A of the Companies Act, 1956, as far as the
Industrial Finance Corporation of India Limited is concerned,
provides as follows :-

E 4A. *Public financial institutions.*-

(1) Each of the financial institutions specified in this sub-
section shall be regarded, for the purposes of this Act, as
a public financial institution, namely:-

F (i)

(ii) the Industrial Finance Corporation of India, established
under Section 3 of the Industrial Finance Corporation Act,
1948 (7 of 1948);

G (iii)

(iv)

(v)

H (vi)

(vii)

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(2) Subject to the provisions of sub-section (1) the Central Government may, by notification in the Official Gazette, specify such other institution as it may think fit to be a public financial institution:

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Provided that no institution shall be so specified unless-

(i) it has been established or constituted by or under any Central Act, or

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(ii) not less than fifty-one per cent, of the paid-up share capital of such institution is held or controlled by the Central Government."

14. In our view, the provisions of Sub-Section (1) of Section 4A stand independent of Sub-Section (2) and the financial institutions named in Sub-Section (1) of Section 4A recognize the financial institutions mentioned therein to be public financial institutions which are not covered by the embargo enforced by the proviso to Sub-Section (2) of the said Section. The proviso controls the width of Sub-Section (2) which refers to the powers of the Central Government to specify by notification in the Official Gazette and subject to the provisions of Sub-Section (1), such other institutions as it may think fit to be a public financial institution. It appears to us that Sub-Section (2) of Section 4A is applicable only to institutions which are not mentioned in Sub-Section (1). It is the latter category of financial institutions to which the proviso applies. In view of Section 4 A(1)(ii) of the Companies Act, 1956, the Industrial Finance Corporation of India was admittedly regarded as a 'public financial institution' for the purpose of the said Act. The conversion of the Industrial Finance Corporation of India into a Company did not alter its position and status as a financial institution in view of Section 5 of the Industrial Finance Corporation (Transfer of Undertaking and Repeal) Act, 1993,

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A which, as pointed out by Mr. K.K. Venugopal, was in the nature of a saving clause, whereby all matters, including all benefits, relating to the Corporation, stood wholly transferred in favour of the new Company.

B 15. Mr. Dwivedi has submitted that the Notification dated
C 15th February, 1995, had been issued under Section 4A(2) of
D the Companies Act which will have to conform to the proviso thereto. Mr. Dwivedi has contended that both the conditions in the proviso would have to be fulfilled in order to be eligible for being specified as a public financial institution. We are unable to accept such contention in view of the fact that clauses (i) and (ii) are not conjunctive but disjunctive and even though Clause (ii) may not have any application to the Respondent No.1 Company, it was covered by clause (i), since it was constituted under the Companies Act, 1956, which is a Central Act.

D 16. We, therefore, find no reason to interfere with the judgment and orders of the High Court impugned in these Special Leave Petitions, which are, accordingly, dismissed.

E 17. There shall, however, be no order as to costs.

R.P. Special Leave Petitions dismissed.