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

\+ **W.P.(C) No. 6915/07 & W.P.(C) No. 3277/08**

Reserved on : 25th May, 2010

Pronounced on: 31st May, 2010

1. **W.P.(C) No. 6915/07**

INTERNATIONAL FINANCE CORPORATION, WASHINGTON ..... Petitioner

Through: Mr. Rajiv Nayyar, Senior Advocate with Ms. Nisha, Advocate and Ms. Anushree Tripathi, Advocate.

VERSUS

BIHAR SPONGE & IRON LTD. & ORS. ....Respondents

Through: Mr. Rajeev Sawhney, Senior Advocate with Mr. Deepak Khurana, Advocate and Mr. Rohan Dheman, Advocate for the respondent No.1.
Mr. Dinkar Singh, Advocate for the IFCI.
Mr. Gopal Parsad, Advocate for the respondent No.13.

2. **W.P. (C) No. 3277/08**

DEG-DEUTSCHE INVESTITIONS-UND ENTWICKLUNGSGESELLSCHAFT MBH .....Petitioner

Through: Mr. Amit Chadha, Senior Advocate with Mr. Ananya Kumar, Advocate, Mr. Sidharth Sethi, Advocate and Mr. Kunal Sinha, Advocate.

VERSUS

BIHAR SPONGE & IRON LTD. & ORS. ....Respondents

Through: Mr. Rajeev Sawhney, Senior Advocate with Mr. Deepak Khurana, Advocate and Mr. Rohan Dheman, Advocate for the respondent No.1.
Mr. Dinkar Singh, Advocate for the IFCI.
Mr. Gopal Parsad, Advocate for the respondent No.13.

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. These writ petitions have been filed by the two secured creditors who had given foreign currency loan (FCL) to the sick company M/s. Bihar Sponge & Iron Ltd. (BSIL) impugning the order dated 21.6.2007 passed by the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) which upheld the order dated 29.7.2004 passed by the Board for Industrial and Financial Reconstruction (BIFR). Since the issues involved in both the cases are same, both the writ petitions are being disposed of by this common judgment.

2. BSIL became a sick company though it had achieved 100% production because of the devaluation of rupee against the Deutsche Mark (DM) whereby the company's liability rose from Rs.28.6 crores to Rs.73.67 crores. On 19.12.1996, BSIL was declared a sick industrial company and IFCI was appointed as an Operating Agency(OA) to formulate the scheme for revival of the company. After various proposals were discussed including circulation of an earlier Draft Rehabilitation Scheme (DRS), ultimately an amended DRS was circulated at the joint meeting of the creditors held on 15.2.2002. This DRS was accepted by a number of creditors but was opposed by the Industrial Finance Corporation (IFC) which mooted an alternative proposal of one time settlement. It was proposed by the IFC, the petitioner in W.P.(C) No.6915/07 that a sum of Rs.135 crores be paid to the secured creditors as follows:

> "i) 65 crores to be paid upfront in cash by the promoters including the Government of Jharkhand
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> ii) Balance Rs.70 crores to be paid over a period of 10 years carrying interest @ 8% P.A. On Rupee Term Loan (RTL) and @ LIBOR on Foreign Currency Loan (FCL) loan from company's internal accruals.
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> GOJ (Government of Jharkhand) was required to furnish the guarantee for timely payment of balance Rs. 70 crores."

3. This alternative proposal put forth by IFC on 18.1.2002 with cut off date as 30.9.2001 was discussed between the creditors and accepted by them. There were further developments, discussions and proceedings before

BIFR as regards DRS. However, at the hearing held on 17.2.2003, BIFR considering the DRS passed an order as follows:

> "(i) GOJ would decide in three weeks whether they are agreeable to extend the reliefs and concessions as provided in the DRS including investment of Rs.50 crores in the company and guaranteeing the repayment of the balance OTS dues to the secured creditors.
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> However, in case GOJ is not agreeable to extend their support to the DRS as circulated by BIFR vide order dated 27.11.2002 or no agreed rehabilitation proposal is received from the private promoters, the OA would issue advertisements in leading newspapers within 2 weeks inviting offer for the takeover/leasing/amalgamation/ merger for rehabilitation with or without OTS of the dues of FIs and Banks...."

4. The Patna High Court in a writ petition filed by Bihar State Industrial Development Corporation (BSIDC) on 2.9.2003 ordered the sick company to deposit Rs.12 crores in a no lien account with the OA by 08.09.2003. The Hon'ble High Court further directed that in the event the said deposit is made within time, the OA will not proceed with the direction of BIFR for issue of an advertisement for change of management.

5. A Special Leave Petition was filed by IFC in the Hon'ble Supreme Court challenging the Patna High Court order dated 2.9.2003 and seeking transfer of the writ petitions preferred by the company and also by BSIDC. The same was listed for hearing on 23.4.2004. After hearing the parties the Hon'ble Supreme Court observed as follows:

"The reasoning of the BIFR in the order dated 17.2.2003 cannot be faulted. Sufficient opportunities appeared to have been given at every stage to the private promoters and the Government of Jharkhand to invest the amounts as proposed in the scheme of IFCI. The order for advertisement may give a better deal to the secured creditors to give a last chance to the private promoters and the Government of Jharkhand to take advantage of the scheme framed by IFCI instead allowing the appeal right away, we direct (emphasis supplied);

(1)... the private promoters shall deposit an amount of Rs.32.50 crores by 12.7.2004 with the IFCI.....

(2)....The State's offer to give Rs.32.50 crores under the IFCI scheme is also hedged in by several conditions, namely, that the assistance would be given under the provisions of the Jharkhand Industries Rehabilitation Scheme 2003; the assistance would be considered only when the BIFR approved the proposal after taking consent of the financial institutions and the State Government and only if the security would be given to the State in terms of the guidelines prescribed by the Reserve Bank of India and Nationalized Banks.

We are not prepared to impose any such conditions as far as the State's participation in the scheme is concerned. The issue of security in respect of the loan must be worked out between the State and the promoters, if it so desires. It is being made clear that the State's securities, if any, in the company's assets can only be subject to the claims of the secured creditors who are already before the BIFR...."

While approving BIFR's order dated 17.02.2003, the Hon'ble Supreme Court made certain modifications to the DRS, which had earlier been approved by all the secured creditors.

6. On 12.7.2004, when the aforesaid appeal came up for hearing, the Hon'ble Supreme Court passed the following order:

"The deposit has been made by the State of Jharkhand of an amount of Rs.32.50 crores with the operating agency, namely, I.F.C.I within

the time specified in the order dated 23rd April, 2004. This, therefore, leaves two questions to be determined, one of the approval of the draft scheme and the other is distribution of Rs.65 crores at present being held by the IFCI. Both these questions should be left to the Board of Industrial and Financial Reconstruction who will dispose of the matter within a period of two weeks from date subject to the parties communicating this order to the Board forthwith. Any objection to the draft scheme which the parties may have, may be taken before the BIFR.

As far as the second question is concerned the IFCI will in the meanwhile and, if possible, within one week, distribute the amount of Rs.65 crores amongst the secured creditors according to its calculations. In the event there is any dispute as to the quantum receivable by any secured creditor the matter may be taken up by such secured creditor before the Board.

The application for impleadment is allowed.

The civil appeal is disposed of accordingly.

The cases which are transferred, are disposed of in terms of the order dated 23.4.2004 read with the order passed today."

7. At the hearing subsequently held on 29.7.2004 before BIFR the impugned order was passed in which inter alia it was observed by BIFR as under:

> ".... The issue basically boiled down to whether the Government Guarantee could be compensated by an interest charge of 1% or 3%. He, therefore, suggested that interest on FCL could be paid at LIBOR+1%....The representative of the secured creditors agreed with the OA's suggestion. The representative of the IFCI(OA) further submitted that the amount of Rs.65 crores had been distributed among the secured creditors on the basis of rupee value of their principal outstanding dues and no cushion was available for giving higher amounts. However, cushion of 5% had been built into the scheme in respect of balance Rs.70 crores payable over the next 7 years."

8. The aforesaid shows that BIFR on considering the submission made by OA that increase of 3% interest on FCL would adversely affect the liability of the company and Debt Coverage Service Ratio (DCSR) would go below 1.33, which in turn will make the scheme non viable and duly considering the submission made on behalf of IFC suggesting that the interest on FCL should be payable at LIBOR +3% in lieu of non availability of guarantee (which was to be furnished by the Government of Jharkhand) directed that the instalments in respect of both Rupee Term Loans (RTL) and FCL would be payable at quarterly intervals and the sick company would pay 1% incremental interest to the secured creditors in lieu of Guarantee which was supposed to be given by GOJ but not given. The BIFR also observed that the rupee value of the foreign currency dues had been crystallized as on 30.09.2001 and since there was no cushion available in respect of the upfront payment made in respect of the FCL, no additional amounts could be paid to the creditors. By its order dated 29.07.2004 BIFR sanctioned the Draft Rehabilitation Scheme with certain modifications in spite of the aforesaid objections of the writ petitioners.

9. This order of BIFR was challenged by IFC by raising the two following issues:

i) Denial of interest @ LIBOR+3% for the Foreign Currency Lenders (FCL) by the BIFR was illegal as the DRS was wrongly amended by BIFR without taking consent to the petitioners/secured

creditors and which consent was mandatory under Section 19 of Sick Industrial Companies (Special Provisions) Act, 1985 (SICA)

ii) Denial of the liability of the company to make good the shortfall/deferential amount on the upfront payment which was on account of exchange rate fluctuation on the date of payment as against the cut of date of 30.09.2001 was unjustified.

Similar were the objections of DEG before AAIFR, the other secured creditor who has filed the W.P.(C) No.3277/08. It was contended by the writ petitioners before AAIFR that despite the recording of the objections taken by IFC and DEG, and the clear position where the FCL lenders had expressed their consent to the scheme only subject to payment of LIBOR+3% interest and payment of shortfall due to foreign exchange fluctuation, BIFR proceeded to pass the impugned order and recorded at para 15 concluding that the additional 1% interest would be payable in lieu of the interest as originally provided for in the scheme by all secured creditors and thereby approved the scheme providing for LIBOR+1% for FCL as opposed to the agreed LIBOR+3% interest rate demanded by the writ petitioners. It was argued that the sick company in the SLP in the Supreme Court had filed an affidavit agreeing to pay LIBOR + 3% which the company cannot back out of.

10. AAIFR, therefore, crystallized the first aspect which required its decision in paragraph 30 of the impugned judgment which reads as under:

> "30. The issue relevant for adjudicating the dispute according to the appellants is whether BIFR can scale down a liability or dilute any of the terms of sacrifices and financial assistance and compel

> a secured creditor to consent to a scheme contrary to the acceptable terms to such a creditor and (b)-whether it is open for BIFR to substitute its own discretion judgment in place of the secured creditor's business judgment."

11. Before this Court also the same arguments were raised as were raised before BIFR and AAIFR. An additional issue has also been urged on behalf of the respondent herein and which was that the order of BIFR dated 29.7.2004 was a consent order, therefore, appeal did not lie against the said order to AAIFR.

12. AAIFR on the two issues held as under:

> "41. On the first issue it is clear that in the event Government of Jharkhand had furnished guarantee the payment of OTS dues of IFC (W) and DEG would have been subject to payment of interest at LIBOR; whereas BIFR had allowed interest at LIBOR+1% since the guarantee of Government of Jharkhand was not forthcoming. However, the financial interests of IFC(W) and DEG are not adversely affected as a result of the scheme approved by BIFR.
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> 42. On the second issue the submission made in writing and suggestions/objections in respect of the DRS circulated in 2004 was considered and overruled by BIFR in the hearing held on 29.7.2004, when the impugned order was passed. In the absence of consent BIFR has the power to adopt such other measures as may be deemed fit in the interests of reviving the company."

13. So far as the issue that BIFR could not have amended the draft scheme as was approved by the secured creditors by reducing the future interest on payment of the balance amount of Rs.70 crores from LIBOR +3% to LIBOR +1%, the issue is really one that whether consent of all the secured creditors is

necessary for approval of any modification to a DRS by BIFR i.e. without the consent of the secured creditors under Section 19 of SICA can there not be modifications to a DRS which was circulated and accepted by the secured creditors. We have recently had an occasion to consider this aspect in W.P.(C) No.8644/09 titled as ***Oman International Bank S.A.O.G. Vs. AAIFR*** decided on 5.5.2010 and in which we have held that it is not mandatory to seek consent of all the secured creditors for approval of a draft scheme and modifications can be made thereto by BIFR as it thinks fit for revival of the sick company. We have, therefore, approved what has been held by AAIFR in para 42 of the impugned judgment reproduced above. Our reasoning in the case of ***Oman International Bank S.A.O.G. Vs. AAIFR*** is contained in paras 7 to 11 and 13 of the said judgment and which read as under:

> "7. The Statement of objects and reasons of SICA may be referred to at this stage, and which reads as follows:
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> "**Statement of objects and reasons** The ill effects of sickness in industrial companies such as loss of production, loss of employment, loss of revenue to the Central and State Governments and locking up of investible funds of banks and financial institutions are of serious concern to the Government and the society at large. The concern of the Government is accentuated by the alarming increase in the incidence of sickness in industrial companies. It has been recognized that in order to fully utilize the productive industrial assets, afford maximum protection of employment and optimize the use of the funds of the banks and financial institutions, it would be imperative to revive and rehabilitate the potentially viable sick industrial companies as quickly as possible. It would also be equally imperative to salvage the productive assets and realize the amounts due to the banks and financial institutions, to the extent

possible, from the non-viable sick industrial companies through liquidation of those companies.

It has been the experience that the existing institutional arrangements and procedures for revival and rehabilitation of potentially viable sick industrial companies are both inadequate and time-consuming. A multiplicity of laws and agencies makes the adoption of coordinated approach for dealing with sick industrial companies difficult. A need has, therefore, been felt to enact in public interest a legislation to provide for timely determination by a body of experts of the preventive, ameliorative, remedial and other measures that would need to be adopted with respect to such companies and for enforcement of the measures considered appropriate with utmost practicable dispatch.

The salient features of the Bill are-

(i) application of the legislation to the industries specified in the Final Schedule to the Industries (Development and Regulation) Act, 1951, with the initial exception of the scheduled industry relating to ships and other vessels drawn by power, which may however be brought within the ambit of the legislation in due course;

(ii) identification of sickness in an industrial company, registered for not less than seven years, on the basis of the symptomatic indices of cash losses for two consecutive financial years and accumulated losses equaling or exceeding the net worth of the company as at the end of the second financial year;

(iii) the onus of reporting sickness and impending sickness at the stage of erosion of fifty per cent. or more of the net worth of an industrial company is being laid on the Board of Directors of such company; where the Central Government or the Reserve Bank is satisfied that an industrial company has become sick, it may make a reference to the Board, likewise if any State Government, scheduled bank or public financial institution having an interest in an industrial company is satisfied that the industrial company has become sick, it may also make a reference to the Board;

(iv) establishment of Board consisting of experts in various relevant fields with powers to enquire into and determine the incidence of sickness in industrial companies and devise suitable

remedial measures through appropriate schemes or other proposals and for proper implementation thereof;

(v) constitution of an Appellate Authority consisting of persons who are or have been Supreme Court Judges, senior High Court Judges and Secretaries to the Government of India, etc., for hearing appeals against the order of the Board." (Emphasis added)

8. A reading of the aforesaid Statement of objects and reasons shows that the effect of sickness in industrial companies is of serious concern not only to the government but also to the society at large. The objects and reasons further show that there is a need to fully utilize the productive industrial assets and afford maximum protection to employment and it is imperative to revive and rehabilitate the potentially viable sick industrial companies. When we read the aforesaid Statement of objects and reasons alongwith Section 20 of the Act, it becomes clear that winding up of a company is to be resorted to only as a last eventuality and only when it becomes just and equitable to wind up the sick industrial company. That the proposition as was very vehemently canvassed on behalf of the petitioner has no legs to stand upon becomes clear also from the expression "one or more" as found in Section 18 of the Act. The expression 'one or more' includes 'all' i.e. all measures including financial concessions. This expression "one or more" indicates that more than one eventuality can be adopted and acted upon by BIFR to rehabilitate and revive a sick industrial company and not only one eventuality of resorting to other sub sections of Section 18 except its sub section (1)(e) **.** Section 19(4) will have to be harmoniously construed with the expression 'one or more' as found in Section 18 so as to further the object of the Act. There cannot be a reading of the provisions of Section 19(1) and 19(4) of the Act in the manner as is suggested by the learned senior counsel for the petitioner further becomes abundantly clear when we read Section 18(3)(b) of the Act alongwith the expression "the Board may adopt such other measures" as found in Section 19(4). In our opinion, this expression "the Board may adopt such other measures" cannot be restricted to only measures other than those prescribed under Section 18(1)(a) and 18(1)(e) of the Act. Section 18(3)(b) states categorically that the Board would make modification to a scheme of revival and rehabilitation of a company in case of any objection from a creditor, therefore, a

conjoint reading of Section 18(3)(b), Section 19(1) and Section 19(4) shows that the other measures which are talked of in Section 19(4) would be the modification of a scheme in the light of the objections of a secured creditor, however, the same cannot mean that the objections can prevent the drawing up and implementation of a sanctioned scheme by an obdurate minority secured creditor. In fact, we must point out that a company becomes sick only because its net worth is eroded and it is unable to pay its creditors and when we talk of revival and rehabilitation of sick company as a first step and measure ordinarily and in a vast majority of cases, at the outset, BIFR has necessarily to bring about a composition between the creditors by bringing about reduction of their claims and dues of the sick company towards the creditors by adopting a principle which would treat the secured creditors fairly and equally, depending of course on the facts and circumstances of each case.

9. There is yet another reason why we cannot accept the arguments as urged on behalf of the petitioner that a single creditor can prevent BIFR in bringing about a scheme which envisages reduction in the dues payable by the sick company to its secured creditors. This additional reason is the amendment which has been brought about to SICA by Section 41 and schedule of the Act 54 of 2002 which amended Section 15 of SICA after promulgation of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. As a result of this amendment, a third proviso has been brought about in sub Section (1) of Section 15 that the secured creditors who represent not less than 3/4th in the value of the amount outstanding against financial assistance disbursed to the sick company can bring about an abatement of proceedings pending before BIFR. This proviso reads as under:
"Provided also that on or after the commencement of 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 debut under sub-section(4) of section 13 of that Act."

A plain reading of this proviso added by the Act 54 of 2002 shows that the consent of at least 3/4th of the secured creditors is necessary for the proceedings before BIFR to abate. This proviso further brings into focus the legislative intent that a minority creditor cannot frustrate the proceedings before BIFR for rehabilitation and revival of the sick industrial company. The Legislature has thought it fit that at least 75% of the secured creditors must join hands to bring about an abatement to the proceedings before BIFR. If that be so, it cannot be understood as to how one secured creditor can in fact bring about an abatement of the proceedings before BIFR because giving of financial concessions by reducing the dues payable by a sick industrial company is always the heart and basic structure of any scheme for revival and rehabilitation of a sick industrial company. After all, if no financial concession in the form of reduction of dues payable by a sick company to its creditors is given, then, what will be the use of other measures under Section 18 such as change of management or sale/lease of assets of a sick company and so on. None of these other measures would in themselves help in rehabilitation and revival of the sick industrial company and which measures could have been adopted by the sick company without being a sick company governed by SICA. It is for this reason that the Legislature has advisedly and intentionally used the expression "one or more" as found in Section 18, and which aspect we have already adverted to above that the Board may take one or more measures i.e. it is not confined only to one measure of refusing financial assistance by means of concession to a sick industrial company. Revival of a sick industrial company is a complex process involving discussions with secured creditors, other creditors, labour and other personnel employed with the company, dues of the revenue authorities and so on. If such complex procedure can be frustrated and set at naught by a single secured creditor, then, what is the purpose and use of enactment of SICA.

10. That the Statement of objects and reasons of SICA ought to be referred to for interpreting the provisions of the Act is clear from various judgments of the Supreme Court including the judgments reported as ***KSL and Industries Ltd. Vs. M/s. Arihant Threads Ltd. & Ors. 2008 (9) JT 381: 2008 (12) SCR 702, Morgan Securities and Credit Pvt. Ltd. Vs. Modi Rubber Ltd. AIR 2007 SC 683: 2006 (14) Scale 267*** and ***M/s.***

Rishabh Agro Industries Ltd. Vs. P.N.B. Capital Services Limited AIR 2000 SC 1583: 2000 (5) SCC 515.

11. There are two other aspects which we must note in support of the interpretation which we seek to give to Section 19(4) of the Act. The first aspect is that even when a company is not sick and proceedings are resorted to by the company under Section 391 to Section 394 of the Companies Act, 1956 to bring about a composition and settlement with its creditors, it is the majority of the secured creditors who do prevail, meaning thereby minority secured creditors cannot frustrate a scheme which is propounded by the majority of the secured creditors. If a minority secured creditor cannot frustrate a scheme of composition under Section 391 to Section 394 of the Companies Act, 1956, there is no reason why a minority shareholder should be able to frustrate the revival and rehabilitation of a sick industrial company by refusing to accept a reduced amount and a statutory settlement which is brought about by approval of a rehabilitation scheme by BIFR as per the proposal of the operating agency and arrived at after duly considering the suggestions and objections of all the concerned stake holders including the creditors under Section 18(3)(b) of the SICA. SICA after all is for imposition of a valid statutory settlement which forms part of a sanctioned scheme. The second aspect is that by virtue of Section 529-A of the Companies Act, the dues of the workers are to be treated as equal to the dues payable to a secured creditor. Therefore, dues of even one of the workers can be in a manner of speaking be said to be the dues claimed by a secured creditor, but can it be contended that one worker can frustrate a rehabilitation and revival scheme as proposed by BIFR after duly taking into consideration the views, suggestions, objections and contentions of the majority of the workmen? Surely not. Therefore, in our opinion, a minority creditor or any minority group cannot frustrate the majority by putting a spoke in the wheel by objecting to the sanction of a rehabilitation and revival scheme of a sick industrial company so as to cause the frustration in the object of revival of a sick company.
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13. One last factor we must mention that the recent commercial crisis arising in the western world from insolvencies of transnational companies shows that the bedrock on which SICA was enacted was indeed a sound one on the basis of the

needs of the society as a whole, though litigants have at times misused the provisions of Act, and in view of the judgments of the Supreme Court, both BIFR and AAIFR must play a proactive role to ensure that this does not happen."

14. The first issue, therefore, that consent of all the secured creditors including the writ petitioners was necessary before BIFR could have amended the scheme, is not a contention which deserves acceptance and the same is accordingly rejected.

15. Mr. Rajiv Nayyar and Mr. Amit S. Chadha, Learned Senior Counsels, on behalf of the petitioners, sought to contend that there was a conflict between the judgment passed by this Court in ***Oman International Bank's*** case and an earlier judgment of a Division Bench of this Court in the case of ***Kotak Mahindra Bank Ltd. Vs. A.A.I.F.R. and Ors., (2008) 144 Company Cases 588 (Delhi)*** and therefore it was argued that the issue whether the consent of all the secured creditors is mandatory before approving of a draft scheme ought to be referred to a larger bench for decision. The following paragraph of the decision in the case of ***Kotak Mahindra Bank Ltd.*** was relied upon and which reads as under:

"**15.** In the instant case, the fact situation is totally different from that in the case of NGEF. Here, the sale of assets has been directed by the AAIFR which was competent to do so. There is no abdication or delegation in that regard in favour of the High Court. The order passed by the AAIFR clearly records a decision to sell the surplus assets. Even, Mr. Kaul did not find any fault with that direction. It was, however, argued by learned Counsel that so long as the proceedings under SICA are pending, the company cannot be permitted to approach the High Court even for purposes of a scheme of arrangement/compromise regarding the

debts payable to the secured creditors. The decision in NGEF's case does not, in our opinion, go that far. It is confined to examining whether the BIFR could give up its role and either delegate its powers or abdicate in favor of the High Court the exclusive power vested in the BIFR for disposal of the assets of the company. The decision cannot be torn out of the above context. The Supreme Court was not in the case of NGEF examining whether a sick company can be permitted to approach the High Court for a scheme of arrangement/compromise with the secured creditors under Sections 391-392 of the Companies Act, in a case where such an arrangement was not legally permissible under Section 19(2) of the SICA which required the consent of all the creditors. There may have been some merit in the contention of Mr. Kaul if the AAIFR was permitting something to be done in the High Court which was within its own competence, for in that case, it could be argued that if the BIFR or AAIFR are themselves competent to examine an issue or grant a relief, they should not refer the parties to the High Court for any such determination under any other enactment like the Companies Act. The fact of the matter, however, is that a scheme of arrangement was not possible under Section 19(3) of SICA unless all the secured creditors consented to the same. The AAIFR noted that while a overwhelming majority of the secured creditors were agreeable to a settlement with the company by making sacrifices, the petitioner Kotak Mahindra holding only 2% of the outstanding debt was not ready to do so. This attitude of the petitioner frustrated any such scheme being made effective under Section 19 of SICA. The only other option then was a scheme under Sections 391-394 of the Act which could be brought about even with the consent of the secured creditors holding 75% of the outstanding debts. It is manifest that the AAIFR considered it necessary to make a reference to the High Court under the Companies Act as it was not by itself competent to bring about a scheme of settlement/compromise. There was, thereforee, no question of any abdication nor was there any delegation by the AAIFR of its functions to the High Court as was sought to be contended by Mr. Kaul. The decision in NGEF's case does not, thereforee, advance the case of the petitioner. So also the decision of the High Court of Bombay in Ashok Organic Industries Ltd. v. Asset Reconstruction Co. (India) Ltd. (ARCIL) relied upon by Mr. Kaul does not lend any support to the case of the petitioner. The Court was not, in that case, concerned with Section 22 of the Companies Act nor has the court examined whether Section 22 of SICA could

be invoked by AAIFR to permit institution of proceedings under Section 391-394 of the Companies Act in the fact situation in which the said proceedings have been permitted in the instant case."

16. We are unable to agree with the contention as raised by the learned senior counsel for the writ petitioners that there is a conflict between the ratio of the decision of this Court in ***Oman International Bank*** and the ratio of the decision in the case of ***Kotak Mahindra Bank Ltd.*** The issue which arose in the case of ***Kotak Mahindra Bank Ltd,*** was whether on refusal of consent by the secured creditors, can BIFR acting under the Sick Industrial Company (Special Provisions) Act, 1985 (SICA) refer the matter to the Company Court for approval of a scheme for arrangement and composition under Sections 391 to 394 of the Companies Act, 1956. Answering this issue, it was held by the Division Bench that the matter could be referred to the Company Court. The ratio of the decision was based on the issues which have been crystallized in that case for decision and which are found in paras 1 and 2 of the said decision which read as under:

"**1**. The short question that falls for consideration in this writ petition is whether the order passed by the Appellate Authority for Industrial and Financial Reconstruction (for short 'AAIFR') granting permission under Section 18(1)(e) of Sick Industrial Companies (Special Provisions) Act, 1985 (for short 'SICA) to approach the appropriate High Court for submitting a scheme of arrangement/compromise qua the secured creditors of the company under Section 391 of the Companies Act suffers from error of law or jurisdiction. The petitioner, who claims to have secured in its favor the assignment of a debt which the respondent-sick company

> owed to M/s Fuji Bank Ltd alleges that the order passed by the AAIFR granting permission to the respondent-company suffers from an illegality inasmuch as SICA is a special enactment no authority including the High Court exercising powers under any other enactment can, during the pendency of the proceedings under SICA, entertain or sanction any scheme of arrangement or compromise. Before we examine the merits of that contention, we may briefly set out the facts giving rise to the controversy:
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> **2**. The respondent-company was declared sick by the Board for Industrial and Financial Reconstruction in terms of an order dated 20th April, 2006 passed in Case No. 395/2003. The Board noted that the respondent-company was not in a position to work out a scheme under Section 17(2) of the Act on its own and that the provisions of Section 18 shall have to be explored in public interest. The Board, accordingly, appointed the IDBI as an Operating Agency (OA) with directions to advertise for change of management keeping in view the guidelines given in the order. The Board noted that all the secured creditors had decided not to support the present management thereby necessitating a change. The following passage appearing in the order passed by the BIFR makes this position clear.
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> The Bench observed at that stage that the company in its letter dated 18.4.06 had submitted to BIFR that they were quite willing to give up control of JandN to ensure JandN's future. Moreover, all secured creditors had unanimously decided not to support the present management"

17. It is, therefore, quite clear that in the case of ***Kotak Mahindra Bank Ltd.*** it was not decided whether refusal of a secured creditor to a draft scheme would mean that a draft scheme could not be passed without the consent of all the secured creditors. In fact, the judgment proceeded on the basis that there is a refusal of the secured creditors to the DRS and whereafter the issue called upon for decision was whether or not the matter could be referred to the

Company Court, although SICA is a subsequent and special Legislation than the Companies Act, 1956. The ratio in the decision of ***Kotak Mahindra Bank Ltd.(supra)*** is not a ratio for the proposition that what are the options available to BIFR if the secured creditors refuse consent. There is no ratio in the said decision as regards whether BIFR is shackled and necessarily bound to refuse the approval of the draft scheme merely because one or more secured creditors oppose the DRS. The ratio of a judgment has to be seen in the context of the facts of the case and the language of the decision of a Court of law is not to be read as that of a statute. This has been held by the Constitution Bench of the Supreme Court in the case of ***Padma Sundra Rao Vs. State of Tamil Nadu 2002(3) SCC 533*** and in which it has been held as under:

> "**9.** Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *British Railways Board v. Herrington* 9. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."
>
> (underlining added)

18. We may also note that the ratio of the decision in the case of ***Kotak Mahindra Bank Ltd.*** stands overruled by the Supreme Court in the decision reported as ***Tata Motors Ltd. Vs. Pharmaceutical Products of India Ltd. 2008(7) SCC 619***, and in which decision, it has been held that the provisions of SICA will prevail over the provisions of the Companies Act inasmuch as the

SICA is a special and subsequent Legislation. It was held in the case of ***Tata Motors Ltd*** that once the matter is before BIFR/AAIFR, then, it is not permissible to refer the matter to a Company Court under Sections 391 to 394 of the Companies Act. We, therefore, reject the contention that the decision in the case of ***Kotak Mahindra Bank*** lays down the ratio that BIFR cannot modify a DRS approved by the secured creditors without the consent of the secured creditors.

19. The second issue which has been argued on behalf of the writ petitioners is that the scheme provided for the cut off date for payment as 30th September, 2001 and since the DRS was only approved vide order dated 29.7.2004, the authorities below erred in refusing to grant additional payment on account of depreciation in the value of the rupee from 2001 to 2004. The contention is that besides the payment of Rs.65 crores which was to be made as upfront payment as part of total payment of Rs.135 crores to the secured creditors, there should be an additional payment towards the foreign exchange rate fluctuation. It is contended that failure of the authorities below to hold in favour of the petitioners on this aspect should invite the interference of this Court under Article 226 of the Constitution of India. It was further contended that the secured creditors in the joint meeting dated 19.8.2002 before the OA had specifically raised this issue.

20. In reply, Mr. Rajeev Sawhney, Learned Senior Advocate on behalf of the respondent, invited our attention to the different paras of the draft scheme

as also the order of the Supreme Court dated 23.4.2004 in Civil Appeal No.2787/04 titled as ***International Financial Corporation Vs. Bihar State Industrial Development Corporation*** and the subsequent order dated 12.7.2004 therein. By so referring it was contended that in none of these orders before the Supreme Court or in the DRS there is any reference to the payment of Rs.65 crores as a nebulous figure which is subject to foreign exchange fluctuation. In fact, it is contended that the order of the Supreme Court of July, 2004 is in clear proximity to the impugned order of BIFR dated 29.7.2004 and in the order of the Supreme Court, reference is to a specific figure viz. of Rs.65 crores, and hence it is not permissible to urge that foreign exchange fluctuation should be paid for the period from 2001 to 2004.

21. We agree with the contention as raised by the learned senior counsel for the respondent that writ petitioners though at one point of time may have sought a higher payment on the ground of foreign exchange fluctuation, they clearly had given up this issue at a subsequent stage in the proceedings before the Supreme Court. The orders dated 23.4.2004 and 12.7.2004 of the Supreme Court refer to a crystallized/final/frozen figure of payment of Rs.65 crores without any linkage to the foreign exchange fluctuation. We have already reproduced in the earlier portion of this judgment, the order of the Supreme Court dated 12.7.2004 which clearly refers to the payment of a freezed amount of Rs.65 crores. Further, we are unable to agree with the arguments of the learned senior counsel for DEG that para 8.6(vii) of the DRS envisages the

providing of a cushion for foreign exchange fluctuation. A reference to this paragraph would show that the same only provided for short fall arising out of the delayed implementation of the schedule fixed in the sanctioned scheme or for any other such reason after the sanctioning of the scheme and not for issues prior to the sanctioning of the scheme. BIFR was justified in concluding in para 15 of its judgment that there was no cushion available in respect of upfront payment of 65 crores and hence no additional amount could be paid as urged on behalf of the respondent.

22. The last issue which calls for our decision is the issue which was urged on behalf of the respondent that no appeal lay before the AAIFR because the order dated 29.7.2004 of BIFR was a consent order. This argument is predicated on the basis of para 9 of the judgment of BIFR and which reads as under:

> "9. Shri Singh on behalf of IFCI (OA) submitted that FCL tenders accounted for 50% of the OTS and increase of 3% interest on FCL would adversely affect the liability of the company and DSCR would go below 1.33. The issue basically boiled down to whether the Govt. guarantee could be compensated by an interest charge of 1% or 3%. He, therefore, suggested that interest on FCL could be paid at LIBOR + 1% and all the secured creditors could retain the right to accelerate the repayment schedule if the cash flow of the company so warrants. <u>The representatives of the secured creditors agreed with the OA's suggestion.</u> The representative of IFCI (OA) further submitted that the amount of Rs.65 crores had been distributed among the secured creditors on the basis of the Rupee Value of their principal outstanding dues and no cushion was available for giving higher amounts. However, a cushion of 5% had been built into the scheme in respect of balance Rs.70 crores payable over the next 7 years."

23. Mr. Sawhney also drew our attention to paragraph 38 of the impugned order of AAIFR wherein in sub para 4 of the paragraph, this specific contention was raised but which argument/contention has not been decided by the AAIFR. We feel Mr. Sawhney is right and that this is an additional and independent reason why we cannot accept the contention as now raised by the writ petitioners to the judgment dated 29.7.2004 passed by BIFR. This paragraph shows that all the secured creditors including the writ petitioners had given their consent. Obviously, after giving the consent, there must have been a rethink on behalf of the petitioners and it is for which reason that subsequently IFC had given its written submissions before BIFR that it was in fact opposing the grant of interest @ LIBOR + 1% instead of LIBOR +3%. The other writ petitioner i.e. DEG raised this ground only in the appeal before the AAIFR for the first time. On this aspect, it would be profitable to refer to the observations of the Supreme Court in the case of ***State of Maharashtra v. Ramdas Shrinivas Nayak, (1982) 2 SCC 463*****,** wherein the Supreme Court has observed as under:

> "**4.** When we drew the attention of the learned Attorney-General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an enquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation." We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other

evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

5. In *R* v. *Mellor* Martin, B. was reported to have said:

"We must consider the statement of the learned Judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity."

6. In *King-Emperor* v. *Barendra Kumar Ghose* Page, J. said:

"... these proceedings emphasise the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the course of a trial before him is final and decisive : It is not to be criticized or circumvented; much less is it to be exposed to animadversion."

7. In *Sarat Chandra Maiti* v. *Bibhabati Debi* Sir Asutosh Mookerjee explained what had to be done:

"... It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment..."

8. So the Judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, but nowhere else."

24. The aforesaid observations, therefore, make it clear that it was mandatory for the writ petitioners to approach BIFR immediately after passing of the judgment on 29.7.2004 that they had never given such a concession and

the statement of fact recorded in the judgment is wrong. Admittedly, no such application was made. The matter, therefore, must rest there and in our opinion, in view of the decision of the Supreme Court in the case of ***Ramdas Shrinivas Nayak (supra)*** it is not permissible for the writ petitioners to contend that they did not given their consent to the draft scheme as stated in para 9 of the judgment of BIFR. The decision of the Supreme Court in ***Ramdas Shrinivas Nayak (supra)*** case has been followed in various judgments thereafter and some of these judgments are ***Ramvir Singh Vs. Union of India 2009 (3) SCC 97, Food Corporation of India Vs. Bhanu Lodh 2005(3) SCC 618, Commissioner of Customs Vs. Bureau Veritas 2005 (3) SCC 265*** and ***Commissioner of Endowments Vs. Vittal Rao 2005(4) SCC 120.***

25. In any case, we are satisfied that there is no financial repercussion or prejudice to the writ petitioners merely by giving the interest on future payment at LIBOR +1% because the issue argued by the petitioners was only of their risk assessment and not that of lesser payment. Admittedly, the writ petitioners are getting a higher rate of interest than they would have got if the government of Jharkhand had given the sovereign guarantee and in which latter case they would only have got the LIBOR rate. There is therefore no financial loss to the writ petitioners and so held by AAIFR in para 41 of the impugned judgment. Further, in exercise of our jurisdiction under Article 226 of the Constitution of India, we would not like to interfere with the two concurrent decisions of the BIFR and AAIFR which are specialized bodies dealing with

these issues. In fact, it is for this purpose, we put it to the learned senior counsel for the petitioners that if we substitute the rate of interest of LIBOR +1% to LIBOR +1.5% or LIBOR +2% or LIBOR +3%, then how will our judgment and estimation be better than the authorities below, who had acted upon the advice of the OA. To this direct query, there was obviously no convincing answer. We, therefore, feel that there is no illegality committed by both BIFR and AAIFR in granting interest @ LIBOR + 1% in view of the submission of the OA that increase of 3% interest on the foreign currency would affect the liability of the company and the Debt Servicing Ratio would go below 1.33.

26. In view of the above, we find no force in the writ petitions which are therefore dismissed leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J.

MAY 31, 2010 **SANJAY KISHAN KAUL, J.**
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