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

Reserved on: 06.07.2012
% Date of decision: 31.07.2012

\+ WP (C) No.4854 of 2011

CONTINENTAL CARBON INDIA LTD. ….PETITIONER
Through: Mr. P.S. Sudheer, Mr. Rishi Maheshwari & Ms. Anne Mathew, Advs.

Versus

MODI RUBBER LTD. ....RESPONDENT
Through: Mr. Rajeeve Mehra, Sr. Adv. with Mr. Ajay K. Jain, Mr. Atanu Mukherjee & Mr. Prateek Dwivedi, Advs.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VIPIN SANGHI

SANJAY KISHAN KAUL, J.

1. The present writ petition raises the following question of law:

> "Whether on approval of a scheme by the BIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as the 'SICA'), an unsecured creditor has the option not to accept the scaled down value of its dues, and to wait till the scheme for rehabilitation of the respondent-Company has worked itself out, with an option to recover the debt with interest post such rehabilitation?"

2. The scheme of rehabilitation of the respondent-Company was approved on 8.4.2008 under the SICA. The dues of the unsecured creditors was dealt with in para 5.1.3 of the sanctioned scheme. The unsecured creditors were identified as raw material suppliers,

acceptances, dealers and C & F and inter-corporate deposits. The unsecured creditors could exercise one of the three options:

> "a. To accept 30% of the principal outstanding as full and final payment. The payment shall be made within 3 months of the sanction of the scheme by the BIFR; or
> b. To accept 40% of the principal outstanding as full and final payment. The payment shall be made in 3 equal installments from the cut off date (i.e. 31.3.2008). The first installment shall be payable within 3 months of the sanction of the Scheme by the BIFR; or
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> c. To accept 50% of the principal outstanding as full and final payment. The payment shall be made in one go at the end of 3rd year from the sanction of the Scheme."

3. After incorporating the three options, the aspects of dues to raw material suppliers has been dealt with in the following words:

> "Raw-material Suppliers: MRL has already entered into Memorandum of Understanding with 30 Suppliers out of total 36 Pressing Raw Material suppliers. They have accepted for payment as per option (a). Discussions with others are underway by the company management."

4. The petitioner is a carbon black supplier with whom no settlement was possible. We may notice that it is the say of the petitioner that the debts recorded in the scheme due to the petitioner are much less than the actual debts. The petitioner, thus, aggrieved by the scheme preferred an appeal before the AAIFR to the extent it provided a dispensation for payment of unsecured creditors. The appeal was dismissed on 23.6.2011 which is assailed in the present writ petition. We may note that prior to the impugned order also the appeal was dismissed as barred by time but the matter was

carried further and ultimately the AAIFR had to decide the matter on merits.

5. The impugned order records that the respondent-Company was declared sick on 17.5.2006 in terms of Section 3 (1) (o) of the SICA and IDBI(Industrial Development Bank of India) was appointed as the operating agency under Section 17 (3) of the SICA to examine the viability of the company and submit its report.

6. The petitioner-Company contended before the AAIFR that the respondent owed a huge amount of ₹18,30,49,030.00 inclusive of interest up to 31.3.2008 and since the respondent-Company had also failed to furnish Form 3-B under Section 4B (2) of the UP Sales Tax Act within the prescribed period, the UP Sales Tax Department had raised a demand of ₹45,37,036.00 together with penal interest of ₹63,59,413.00 amounting to ₹1,28,96,449.00. It was, thus, the say of the petitioner that BIFR does not have the power to direct the petitioner to sacrifice its dues as no relief/concession/sacrifice was envisaged under Section 19 of the SICA in respect of unsecured creditors.

7. The aforesaid plea was negated by the AAIFR based on its earlier decision in Appeals Nos.233/2006, 301/2007, 247/2006 & 248/2006 titled M/s. ATE Enterprises Pvt. Ltd. Vs. BIFR & Ors. decided on 2.9.2007 where it was observed that though the SICA did not contain any provision for compelling unsecured creditors to provide concession, there is no specific clause which makes it incumbent for BIFR to obtain the consent of unsecured creditors while sanctioning a revival scheme. The provisions of the

Companies Act, 1956 (hereinafter referred to as the 'Companies Act') were resorted to, to determine the issue of settlement of dues of unsecured creditors. In terms of Section 391(2) of the Companies Act a scheme for arrangement for settlement of dues of the creditors of any particular class is considered and the consent of majority of the creditors of that class constituting more than 3/4th of the value of the debt is required to be obtained. Except one creditor all had accepted the terms/payment and quantum of sacrifice and, thus, it was observed that this majority view should prevail especially as the scheme is more advantageous to safeguard the interests of the creditors rather than the winding up option. In case of winding up under the provisions of Section 529A of the Companies Act the unsecured creditors would receive a priority lower than the secured creditors and, thus, the chances of receiving their amounts is highly remote. Section 19 (1) & (2) of the SICA were resorted to, to indicate that any relief or concession that may be required of an unsecured creditor does not require any prior approval or consent.

8. The AAIFR, thus, concluded that in view of the three options given in the present case to the unsecured creditors, they cannot be allowed to put the entire sanctioned scheme of revival of the respondent-Company in jeopardy. Since it was not a case where the petitioner was required to give any financial assistance, Section 19 (1) of the SICA would have no application. This issue, we may note, is no more *res integra* in view of the judgement of a Division Bench of this Court in Lords Chloro Alkali Limited Vs. Bharat Heavy Electricals Limited & Anr. 181 (2011) DLT 46 (DB),

penned down by one of us (Sanjay Kishan Kaul, J.). It was held that a pure commercial transaction of supply of goods and corresponding entitlement to recover balance unpaid price would not fall within this category and benefit of provisions of Section 19 (2) of the SICA are not available to such a party.

9. The AAIFR also took note of another aspect, i.e., the BIFR will retain jurisdiction over the company in terms of provisions of Sections 18 (12) and 18 (9) of the SICA till the end of the rehabilitation period as envisaged in the scheme. Thus, it is not so that a sanctioned scheme cannot be implemented as a whole once the company's net worth has turned positive and the company is discharged from the purview of the SICA. The plea of the Income Tax Department that once the net worth of a company becomes positive and the BIFR chooses to discharge the reference, then the protective umbrella of the provisions of the SICA or the sanctioned scheme will automatically stand withdrawn was negated and it was held that the Department ought not to be in a position to recover its dues *de hors* the concessions incorporated in the sanctioned scheme [WP (C) Nos.1940/2011 titled Director General of Income Tax (Admn.) & Ors. Vs. BIFR & Ors. and connected matters decided on 23.3.2011]. We may note that the Special Leave Petition directed against this order was dismissed in *limine* after condoning the delay in CC No.18818/2011 titled Director General of Income Tax (Admn.) & Ors. Vs. BIFR & Anr. decided on 21.11.2011.

10. The question of law framed at the inception was the only issue pressed for adjudication when the present writ petition was listed

on 13.7.2011 for admission when it was recorded so while admitting the petition, i.e., the petitioner is prepared to wait for the scheme to work itself out and only thereafter to enforce its claim after the company has attained positive net worth. It is, thus, only the said question which is required to be answered though we have set out the relevant facts and the legal position which has culminated in filing of the writ petition.

11. Learned counsel for the petitioner sought to submit arguments on the legal issue on two different claims. The first was that the denial of full price and compelling the petitioner to accept a lesser amount would tantamount to taking away the right to property in the goods without appropriate consideration and would be violative of Article 300A of the Constitution of India. The second claim was that the scheme of the SICA provides for preparation and sanction of the scheme for rehabilitation under Section 18 of the SICA. Sub-clause (e) of sub-section (1) of Section 18 of the SICA provides for *preventive, ameliorative and remedial measures* as may be appropriate, while Section 19 of the SICA deals with *rehabilitation by giving financial assistance* qua such preventive, ameliorative and remedial measures. It was the submission of the learned counsel that the same would apply to a class of creditors which did not include unsecured creditors like the petitioner and, thus, there was no specific provision in the SICA which authorized the BIFR to deprive the petitioner of its full value of unsecured debt. Section 22 of the SICA was also referred to in the context of suspending legal proceedings, contracts, etc. In order to buttress his submissions learned counsel relied upon the judgement of the

Supreme Court in ICICI Bank Ltd. (since substituted by Standard Chartered Bank) Vs. Sidco Leathers Ltd. & Ors. (2006) 10 SCC 452. While dealing with the issue of *inter se* priority of debt amongst the secured creditors, the general principles were discussed in paras 41 to 43 on which learned counsel for the petitioner relied and which read as under:

> "41. While enacting a statute, the Parliament cannot be presumed to have taken away a right in property. Right to property is a constitutional right. Right to recover the money lent by enforcing a mortgage would also be a right to enforce an interest in the property. The provisions of the Transfer of Property Act provide for different types of charges. In terms of Section 48 of the Transfer of Property Act claim of the first charge holder shall prevail over the claim of the second charge holder and in a given case where the debts due to both, the first charge holder and the second charge holder, are to be realized from the property belonging to the mortgagor, the first charge holder will have to be repaid first. There is no dispute as regards the said legal position.
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> 42. Such a valuable right, having regard to the legal position as obtaining in common law as also under the provisions of the Transfer of Property Act, must be deemed to have been known to the Parliament. Thus, while enacting the Companies Act, the Parliament cannot be held to have intended to deprive the first charge holder of the said right. Such a valuable right, therefore, must be held to have been kept preserved. [See Workmen of M/s Firestone Tyre and Rubber Co. of India (P.) Ltd. vs. Management & Ors. (1973) 1 SCC 813]
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> 43. If the Parliament while amending the provisions of the Companies Act intended to take away such a valuable right of the first charge holder, we see no reason why it could not have stated so explicitly. Deprivation of legal right existing in favour of a person cannot be presumed in construing the statute.

It is in fact the other way round and thus, a contrary presumption shall have to be raised."

12. On the other hand, the gravamen of the submissions of the learned senior counsel for the respondent was that the SICA did not envisage any prior consent from unsecured creditors. Despite this the dues of such unsecured creditors can be completely or partially written off under a revival scheme framed under Section 18 of the SICA. Even in case of secured creditors it has been held that a single secured creditor cannot be permitted to frustrate the revival scheme with 3/4th or more of the secured creditors in value having agreed to the scheme [Oman International Bank SAOG Vs. AAIFR 169 (2010) DLT 618 (DB)]. The petitioner is alleged to be constituting only 8.14 per cent of the unsecured debt. It was an insignificant part, i.e., 2.9 per cent of the total debt. Even if the debt owed to suppliers of raw material as a class was taken, the debt of the petitioner was stated to be 23.95 per cent of the total debt owed to the suppliers. It was contended that the intention of the legislature has to be derived from the words of the statute and if the legislature intended to include unsecured creditors within the ambit of the persons from whom the consent is required, it would have stated so. The scheme once approved was pleaded to be binding with no option to the petitioner to sit outside and wait till the respondent-Company is rehabilitated to claim the full debt. A contrary view would, thus, entitle any unsecured creditor to stand outside the revival scheme and post revival, claim full debts even though the rehabilitation is a consequence of the sacrifices made

by the banks, financial institutions, workers and even unsecured creditors, who have been paid under the scheme.

13. Learned senior counsel contended that the power of the BIFR cannot be circumscribed by the provisions of Section 22 (3) of the SICA for suspending contracts, agreements, assurances, settlements, awards, standing orders, etc. The said provisions have to be read in the context of statements of aim and objects. If everybody would not make sacrifices, the result would be the winding up of the company, which would be less advantageous as secured creditors may get even a lesser share while unsecured creditors may be left empty handed.

14. A catena of judgements were referred to by learned senior counsel for the respondent and we propose to discuss them one by one.

15. In National Small Industries Corporation Ltd. Vs. Singer India Ltd. & Anr. (2010) 103 SCL 385 (Delhi), a Division Bench of this Court held that it was within the powers of the BIFR to have directed reduction of share capital and issue of further capital at specified rates without going through the process of special resolution. The power conferred on the BIFR under Section 18 (2) (f) of the SICA dealing with reduction of interests or rights of shareholders in the sick company was read with Section 32 of the SICA stipulating that the provisions of the SICA would have effect notwithstanding anything contained in any other law except the provisions of Foreign Exchange Regulation Act, 1973 and Urban Land (Ceiling and Regulation) Act, 1976. Reliance was placed on the earlier judgement of the Division Bench in Sarin International (P) Ltd. Vs. AAIFR (1997) 89 Comp. Cas. 842 (Delhi). Thus, the

plea emanating from the petitioner-Company therein on the ground that it was a Government Company and was, thus, covered under Section 19 (1) of the SICA was negated.

16. In Syndicate Bank Vs. Mullangie Spintex Pvt. Ltd. & Ors. 2010 (173) DLT 29, a Division Bench of this Court observed, authored by one of us (Sanjay Kishan Kaul, J.), that the legal position was quite clear that remedy of courts and specialized tribunals to recover amounts is not permissible for a creditor so long as the proceedings are pending before the BIFR and the BIFR alone is the 'master of ceremonies'. It was, thus, held that there could not be any unilateral appropriation of the insurance amount by the petitioner bank leaving the other bank high and dry in an unequal bargaining position in case rehabilitation scheme was to be propounded and the secured creditors are liable to be treated at par.

17. Tata Motors Ltd. Vs. Pharmaceutical Products of India Ltd. & Anr. (2008) 7 SCC 619 was referred to for the purposes of advancing the submission that the provisions of SICA would prevail over the provisions of the Companies Act. The petitioner therein was an unsecured creditor and the scheme enlisted only a select few creditors (secured & unsecured) as a result of which a large number of creditors had to be excluded including the Appellant.

18. In Lords Chloro Alkali Limited case (supra) it was held that Section 19 (1) of the SICA deals only with provision made for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from relevant entities. Thus, the financial assistance under the said sub-section of the SICA has to be of this kind to avail of the benefit of Section 19 (2) of the

SICA and unpaid price of goods supplied would not fall within the definition of a loan or advance or a guarantee.

19. Oman International Bank SAOG case (supra) was referred to for setting out the scheme of the SICA. A reference was made to the third proviso of Section 15 (1) to come to a conclusion that the majority secured creditors giving consent to a scheme cannot be over ridden by minority secured creditors who refused to give consent to the scheme involving payment of debts of the sick industrial company to its secured creditors. As a result of amendment of Section 15 by Section 41 of the The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the third proviso was inserted in Section 15 (1) of the SICA whereby secured creditors who represented not less than 3/4th of value of amount outstanding against the financial assistance disbursed can bring about an abatement of proceedings pending before the BIFR and, thus, the legislature had thought it fit that, at least, 75 per cent of the secured creditors must join hands to bring about an abatement in the proceedings before the BIFR. Thus, it was held that no one secured creditor could bring about abatement proceedings in the BIFR.

20. One must, however, keep in mind that the questions dealt with in these various judgements are slightly different from the question raised in the present writ petition, i.e., this issue does not appear to have been directly decided by any court as submitted by learned counsels and the judgements have been referred to only advance their case. The judgements have dealt with different factual

positions and the legal implications arising from the applicability of the SICA in those eventualities.

21. The crucial question in the present case would be, in our considered view, as to whether the contract *inter se* the parties arrived at whereafter the company has become sick, can be compulsorily over ridden by the provisions of the SICA even if a person is willing to wait by the side till such time as the company is financially rehabilitated and then claim its dues. The plea that it can do so is really predicated only on the provisions of Section 22 (3), (4) & (5) of the SICA providing for suspension of legal proceedings, contracts, etc. and reads as under:

> "**22. Suspension of legal proceedings, contracts, etc**.
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> …. …. …. …. …. …. …. …. …. ….
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> (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 there under, 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 there under 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:
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> 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 sub-section (3) with respect to a sick industrial company shall have effect notwithstanding anything, contained in the Companies Act, 1956 (1 of 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. ”

22. Section 22 of the SICA deals with suspension of legal proceedings, contracts, etc. Sub-section (3) of Section 22 of the SICA details a position where *inter alia* a scheme is sanctioned resulting in suspension of the rights, privileges, obligations and liabilities accruing or arising thereunder. However, the proviso circumscribes such suspension by putting a restriction of time limit, i.e. not exceeding two (2) years, extendable by one (1) year

at a time subject to a maximum period of seven (7) years aggregate. In terms of sub-section (4) of Section 22 of the SICA, such a declaration made under sub-section (3) of Section 22 of the SICA is to have effect notwithstanding anything contained in the Companies Act or any other law, etc. and in terms of sub-section (5) of Section 22 of the SICA the period for such enforcement remain suspended is to be excluded while calculating limitation for enforcement of rights.

23. In the Commentary, 'The Law of Sick Industrial Companies (Law, Practice and Procedure)' 2nd Edition, 1999 by S.A. Naik, second edition, while examining the scope of Section 18 (2) of the SICA it has been observed that in view of clauses (a) to (l) there are certain matters beyond the reach of the scheme which include:

> "(1) Liquidation of any encumbrance of the sick company, except by satisfaction.
> (2) **Reduction or scaling down of the liabilities of the sick company, without the consent of the concerned creditors**.
> (3) Abatement of any action or legal proceeding pending against the sick company.
> (4) Compulsory conversion of any debentures issued or loans raised by the sick company into shares of that company for allotment to such debenture holders or lenders.
> (5) Compulsory discontinuance of the services of any executives or employees of the sick company.
> (6) Sale or lease of any other undertaking of the sick company, that is to say, other than its industrial undertaking; and
> (7) Sale of any other assets of the sick company, that is to say, other than the assets pertaining to its industrial undertaking."

24. The learned author notes at page 185, note 18.10, the rational as to why it cannot so provide. The word 'liabilities' does not appear in

clause (a) of Section 18 (2) of the SICA as well as in Section 45 (5) of the Banking Regulation Act. This omission is stated not to be unintentional or accidental as it is coupled with the fact that clause (f) of Section 18 (2) of the SICA does not refer to reduction of interest or rights of creditors of a sick company unlike clause (f) of the relevant provision in the other three Acts, i.e., The Industrial Reconstruction Bank of India Act, 1984; The Banking Regulation Act, 1949 and The Industries Development and Regulation Act, 1951. There is also no provision in Section 18 (2) of the SICA for payment to creditors in satisfaction of their claim 'as so reduced' unlike clause (g) in the other three Acts. However, Section 18 (8) of the SICA has been amended by the Amendment Act of 1993 to make the scheme binding on the creditors of the sick company. It has been observed that this may be regarded as based on their consent being obtained under the usual legal procedure. The inference drawn from all this would be that a scheme made under Section 18 of the SICA cannot provide for discharge of any encumbrance created by the sick company (except by payment in full) or for reduction or scaling down of its liabilities to the creditors (except with their consent). For the purposes of this discussion, no distinction has been made while referring to creditors between secured and unsecured creditors.

25. He also observes that this position is not to be altered even on the basis of clause (b) of Section 18 (2) of the SICA referring to the transfer to the transferee company *inter alia* of the liabilities of the sick company "on such terms and conditions as may be specified in the scheme". Scaling down of the liabilities of the sick company

before transfer to the transferee company has, thus, been observed to be impermissible except with the consent of the concerned creditors.

26. Section 18 of the SICA has been observed not to be providing for holding of a meeting of creditors for considering the scheme though Section 18 (3) (b) of the SICA speaks of the BIFR taking into account the suggestions and objections of such creditors and, thus, a scheme cannot touch the creditors adversely except with their consent.

27. Note 18.11, of the above Commentary, proceeds to deal with the procedure for obtaining creditors' consent. If the consent is not available then the company may apply to BIFR for suspension of the relative contract of deposit under Section 22 (3) of the SICA during the period of implementation of the scheme subject to a maximum of seven (7) years which in turn would suspend the legal remedy of such depositor to recover the dues as provided in Section 22(4).

28. However, simultaneously in Note 18.12 while discussing the legal position of creditors, there are observations to the effect that the aforesaid position has perhaps undergone a change with the 1993 amendment of sub-section 8 of Section 18 of the SICA which makes the scheme binding on creditors, which reads as under:

> "**18. Preparation and sanction of Schemes.**
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> …. …. …. …. …. …. …. …. …. ….
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> (8) On and from the date of the coming into operation of the sanctioned scheme or any provision thereof, the scheme or such provision shall be binding on the sick industrial company and the transferee company, or as the case may be, the other

company and also on the shareholders, creditors and guarantors and employees of the said companies."

The learned author observes that there has been simultaneous amendment of sub-section (3) (a) of Section 18 of the SICA requiring publication of the draft scheme in daily newspapers. There is a requirement of the BIFR under sub-section (3) (b) of Section 18 of the SICA to consider the suggestions and objections received from the creditors. A reduction or postponement of the claim of the creditors can be regarded as a necessary supplemental matter within the meaning of sub-section 2 (m) of the SICA without which the revival of the concerned sick company would become difficult. Of course, Section 19 of the SICA requiring the consent of the concerned party for any sacrifice on its part as part of the scheme does not extend to other creditors other than those mentioned in the Section. It has, thus, been observed that in the light of these facts perhaps a better view may be that a scheme may provide for some sacrifice to be made on the part of "miscellaneous creditors" without obtaining their consent to the extent it is necessary for revival or rehabilitation of the sick company though this position is not to be free from doubt. It, however, stands clarified in the discussion that the reference to the term 'creditors' includes 'unsecured creditors, fixed deposit holders, debenture holders, suppliers of raw material and other miscellaneous creditors of a sick company.

29. In order to appreciate and answer the question of law framed by us we have to keep in mind the objective with which the SICA was enacted. The public interest underlining the provisions of the

SICA is to secure the timely detection of the sick and potentially sick companies owning industrial undertaking and for an expert body to take ameliorative steps. If the net worth of a company is wiped out, it is a sick industrial company within the meaning of the provisions of Section 3 (o) of the SICA. It is at this stage that the BIFR examines an application on a reference being made with the objective of examining whether it is possible to pull out a company from the woods. A scheme of rehabilitation is, thus, a result of a detailed scrutiny where the stakeholders are heard. A hiatus period is provided for the company to, once again, stand on its legs and this entails naturally sacrifices by stakeholders. There are also creditors waiting in the wings who may not have the capacity to wait for years and would be satisfied on an assured amount being paid to them albeit lesser than the amount owed under contracts. Section 18 of the SICA prescribes for one or more measures specified therein to be adopted. However, there is no provision made for a reduction or scaling down the liability of a sick company without the consent of the concerned creditor(s) though the legal proceedings against the company are kept at bay. The provisions of Section 18 (8) of the SICA, thus, providing for a scheme to be binding on the creditors of a sick company has to be read along with other provisions and is, thus, based on a consent being obtained under the usual legal procedure. There can, thus, be deferred payment or part payment with consent of the creditors. The mandate of BIFR is not to ensure that once the scheme has worked itself out, the company has to become debt free. BIFR is, therefore, under no obligation under the law, and has no authority

to mandatorily wipe out the debt owed to unsecured creditors, unless they consent to it.

30. A situation may, thus, ensue, as in the present case, where a creditor for its best interest is unwilling to join in the scheme of rehabilitation, conscious of the fact that if there is no rehabilitation and the net worth of the company is wiped out it may not have any means to recover any debt or even a part thereof. Such a party would also have to face the consequences of the legal remedies being kept in abeyance for a period, which may extend up to a maximum of seven (7) years.

31. It is no doubt true that it is not incumbent for the BIFR to obtain consent of unsecured creditors while sanctioning a revival scheme but simultaneously there is no provision in the SICA to even compel an unsecured creditor to provide concession. Here the concept of a majority view prevailing would not apply merely on the ground that had the scheme not been formulated, the unsecured creditor may not have got any amount whatsoever, i.e., even the scaled down value being offered.

32. We are not in agreement with the views expressed by the AAIFR that an unsecured creditor must be compelled to adopt one of the options offered as if it is not so, the sanctioned scheme of revival of the company can be put in jeopardy. No doubt, the facts of the present case are not one where any financial assistance has to be given by the petitioner and, thus, undoubtedly Section 19 (1) of the SICA would have no application. However, this cannot prevent an unsecured creditor to say that it is not willing to take a scaled down amount but would like the rehabilitation scheme to work

itself out and thereafter take recourse to the legal remedy available. An alternative view, in our opinion, would amount to re-writing the contract without the consent of the parties for which there is no provision in the SICA.

33. We may again emphasise that there is again no quarrel with the proposition that BIFR retains the jurisdiction over the company in terms of Section 18 (12) & 18 (9) of the SICA till the end of the rehabilitation period as envisaged in the scheme and, thus, the implementation would continue even if the company's net worth has turned positive discharging it from the purview of the SICA. The view taken by the Division Bench of this Court in WP (C) Nos.1940/2011 titled Director General of Income Tax (Admn.) & Ors. Vs. BIFR & Ors. and connected matters decided on 23.3.2011 referred to in para 8 aforesaid has received the imprimatur of the Supreme Court by dismissal of the SLP in *limine* and, thus, the protective umbrella of the provisions of the SICA or the sanctioned scheme does not automatically stand withdrawn merely on account of the fact that the net worth of the company has become positive.

34. The AAIFR has failed to appreciate the distinction between the absence of requirement of consent of an unsecured creditor and compelling an unsecured creditor to write off a part of its dues overriding the provisions of the contract. The absence of the provisions in SICA are qua both the issues but they are separate from each other. Thus, what the petitioner cannot do is to block the scheme which even a secured creditor cannot do, if 3/4th or more of the secured creditors agree to the scheme [Ref: Oman International Bank SAOG case (supra)].

35. Reference to Section 391 of the Companies Act, to our mind, is of no avail for the respondents. Section 391 of the Companies Act envisages the convening and holding of meetings of different class of creditors of the company wherein they decide whether, or not, to accept the propounded scheme for compromise or arrangement. The BIFR does not follow any such procedure. There is no collective application of mind by the creditors of a particular class, and no collective decision by at least 75% of the creditors of a particular class (in terms of value), in the present case, to accept the reduction in liability or to make sacrifices by the unsecured creditors as envisaged under the scheme prepared by BIFR. Therefore, Section 391 of the Companies Act has no role to play in the present case.

36. It is not necessary that the petitioner as unsecured creditor must accept the scheme but the right of the petitioner to claim the debt would stand postponed by reason of the scheme being approved. It is only whence the net worth of the company has become positive and the scheme has worked itself out that the petitioner would have an opportunity to claim its debts. There is, in our view, nothing wrong with such a process as the company would stand rehabilitated by that time and the very purpose of the scheme is to give a hiatus period to the company to rehabilitate itself under the scheme. We have already noticed that though learned senior counsel for the respondent referred to a catena of judgements, none of them dealt with the matter in issue. They were qua different legal propositions. In fact, while examining these judgements in paragraphs 14 to 18 aforesaid we have dealt with the issues

decided in those cases and thereafter observed that the legal question liable to be answered in the present case is slightly different from the questions raised in those cases. Judgements are not to be read like statutes and apply in their own facts and keeping in mind the legal question sought to be addressed [Ref: Smt. Kesar Devi Vs. Union of India & Ors. (2003) 7 SCC 427].

37. We are unequivocally of the view that the contract *inter se* the parties arrived at whereafter the company has become sick cannot be compulsorily overridden by the provisions of the SICA if the creditor is willing to wait till such time as the company is financially rehabilitated to claim its dues. There would be only suspension of legal proceedings as envisaged under Section 22 of the SICA. In fact, it is only such an interpretation which could give meaning to Section 22 of the SICA as otherwise this provision would really become otiose. The enforcement of the remedy remains suspended and that is why even in computing period of limitation, the period is excluded as per sub-section (5) of Section 22 of the SICA.

38. The legal question framed in para 1 aforesaid is accordingly answered in favour of the petitioner by holding that the petitioner as an unsecured creditor has the option not to accept the scaled down value of its dues and wait till the scheme of rehabilitation of the respondent company has worked itself out with an option to recover its debt post such rehabilitation. The impugned order of the AAIFR 23.6.2011 is set aside clarifying that it is not necessary for the petitioner to opt for one of the three options set out in para 5.1.3 of the sanctioned scheme approved by the BIFR on 8.4.2008.

39. The writ petition is accordingly allowed leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

JULY 31, 2012 VIPIN SANGHI, J.
b'nesh