

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

+ W.P.(C) 1458/2008

Date of Decision: 11th April, 2008

KOTAK MAHINDRA BANK LTD. Petitioner
Through: Mr. Neeraj Kishan Kaul, Sr. Adv.
with Ms. Nandini Gore, Ms. Prachi
Goel, Ms. Lakshmi Ramchandran,
Mr. Amit Kr. Singh, Mr. Karan
Mehta, Ms. Shikha Sarin, Adv.

versus

A.A.I.F.R. & ORS. Respondents
Through: Mr. Sandeep Sethi, Sr. Adv. with
Mr. Rajeev Ranjan Prasad,
Mr. Anirudh Sharma, Mr. Lakshay
Sawhney, Adv. for R-3.
Mr. Rajeev Nayyar, Sr. Adv. with
Ms. Sushmita Banerjee, Adv. for
R-4.

CORAM:

HON'BLE MR. JUSTICE T.S. THAKUR

HON'BLE MS. JUSTICE ARUNA SURESH

1. Whether 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

T.S. Thakur, J

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 favour 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:

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.

“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 J&N to ensure J&N's future. Moreover, all secured creditors had unanimously decided not to support the present management.”

3. The Board permitted the present promoters also to participate with a further direction that they would be given preference if their offer equalled the offer of others. The operative portion of the order passed by the BIFR was in the following words:

“Considering the facts on records and the submissions made at today's hearing, the Bench observed that there were no valid objections to the company's sickness from the parties present today and considering that the company had fulfilled the various criteria for sickness under the Act, the Bench was satisfied that the company had become a sick industrial company in terms of Section 3(1)(o) of the Act and accordingly declared it sick. On a query from the Bench, the representative of the company indicated that it would not be possible for them to work out a scheme u/s 17(2) of the Act on their own. In view of this, the Bench noted that the provisions of Section 18 of the Act would have to be explored in public interest in relation to the company. Accordingly, in terms of the powers vested with it u/s 17(3) of the Act, the Bench appointed IDBI as the Operating Agency (OA) with directions to advertise for change of management keeping in view the enclosed guidelines. The present promoters are also allowed to participate in response to the advertisement to be issued by OA and they would be given preference if their offer equalled the offer of others. The OA shall ensure wide publicity in this regard by providing the text of the offer to industry associations, federations of industrialists etc. in order to endeavour to get maximum response to the advertisement. OA shall ensure publication of advertisement within 15 days from today and in a further period of 6 weeks it shall submit a DRS keeping in view the offers received and after holding a joint meeting of all involved agencies together with its recommendations. The company shall comply with provisions of the enclosed guidelines in letter and spirit in so far as they relate to them.” (*emphasis supplied*)

4. Aggrieved by the above direction, the sick company preferred an appeal before the appellate authority for industrial and financial reconstruction, New Delhi. By an order dated 11th April, 2007 passed by the AAIFR in the said appeal it appointed SBI Capital Markets Limited for carrying out a Techno-Economic Feasibility Study and evaluation of the prospects of the company. In the meantime, ARCIL was directed to hold a joint meeting of the secured lenders to discuss

the reconstruction proposal based on the Techno Economic Viability Study and Revival Scheme (TEVS) and valuation report.

5. When the matter came up before the appellate authority on 8th January, 2008 it was reported that more than 75% of the creditors of the sick company had agreed to the rehabilitation proposal subject to minor modifications. Less than 9% of the secured creditors had expressed their objections to the scheme which provided for mobilisation of resources by sale of surplus assets at Panvel and Naihati near Kolkata. The Company proposed to settle its dues towards the secured creditors and statutory liabilities through sale of these assets under the scheme in question. It was on that basis argued on behalf of the respondent-company that the company should be permitted to sell the surplus assets through an Assets Sale Committee and to approach the High Court of Calcutta for a scheme of arrangements/compromise under Section 391 of the Companies Act. That submission was opposed by the Kotak Mahindra Bank, the petitioner herein, who also opposed the grant of any permission to the sick company to approach the High Court for a scheme of arrangement under Section 391 of the Companies Act since proceedings under SICA were pending. The petitioner insisted that the proposal of rehabilitation should be processed in accordance with the provisions of SICA alone.

6. The appellate authority, however, found that an overwhelming majority of the secured creditors, viz; ARCIL holding 47.26% of the total secured debts, Allahabad Bank holding 16.9% and Standard Chartered Bank holding 4.6% of the said debts, were all agreeable to the proposal submitted by the company. Kotak Mahindra Bank, the petitioner herein, in comparison held just about 2.02% of the secured debt which it had acquired from the Fuji Bank Ltd. but was opposing

the scheme or the grant of permission to the sick company to approach the High Court under Section 391 of the Companies Act. The Appellate Authority was of the view that there was no inconsistency between the provisions of Section 32 of SICA on the one hand and Sections 391 to 394 of the Companies Act on the other. It observed:

“The question at issue is the effect of Section 32 of SICA vis-a-vis provisions of Section 391 to 394 of the Companies Act. The overriding effect of Section 32 will come in play only in a situation where the provisions other laws are inconsistent or not in conformity with the provisions of SICA. In our opinion, there is no inconsistency between the aforesaid two provisions. SICA was enacted to make the sick industrial company financially viable and independent. Similarly, the provisions of Section 391 and 394 of the Companies Act are also enacted with the similar object to facilitate merger, demerger, corporate restructuring and scheme of arrangement/compromise to establish viable corporate entities. Therefore, the provisions of both the statutes are supplemental to each other and are not inconsistent.”

7. It was further of the view that accepting the suggestion made by the petitioner-company would mean that while a scheme of compromise/arrangement is permissible under Section 391 of the Companies Act for a healthy company with the consent of 75% of the secured creditors, the same would not be permissible for a sick industrial company just because Section 19(2) of SICA requires consent of all the secured lenders. Relying upon the decision of the Supreme Court in Manohar N. Somnath Vs. Morotrao (1979) 4 SCC 93, the Appellate Authority held that a harmonious interpretation could be adopted to effectuate the legislation especially when the Court was dealing with a piece of beneficial legislation for which the interpretation had to be liberal with a view to giving effect to the

purpose for which the legislation was enacted. Allowing the appeal filed by the petitioner-bank the appellate authority granted permission to the respondent-company under Section 18(1)(e) of SICA to approach the High Court for submitting a scheme of arrangement/compromise for the secured creditors of the company. It observed:

“In view of the aforesaid facts, we set aside the impugned order dated 20.4.2006 and remand the case to BIFR. The company is granted permission under Section 18(1)(e) of SICA to approach the appropriate High Court for submitting a scheme of arrangement/compromise qua secured creditors of the company. BIFR should incorporate the provisions of the scheme of arrangement/compromise as and when approved by the appropriate High Court as part of the rehabilitation scheme of the company”

8. Pending the proposed action under Section 391, the Appellate Authority also constituted an Assets Sale Committee comprising the representative of ARCIL, representative of the department of Industries, Government of Maharashtra and the Managing Director of the Company. The sale proceeds of the surplus assets were directed to be kept in an separate bank account with Allahabad Bank, the lead bank in an 'interest bearing no lien account' to be disbursed as part of the rehabilitation scheme after the same is sanctioned by BIFR. The present writ petition calls in question the legality of the above order as already noticed earlier.

9. Appearing for the petitioner, Mr. Kaul strenuously argued that the order passed by the appellate authority was legally bad inasmuch as neither the BIFR nor the appellate authority could grant permission to the sick company to approach the High Court under Section 391-394 of the Companies Act so long as proceedings under SICA were

pending before them. Reliance in support was placed by Mr. Kaul upon the decision of the Supreme Court in NGEF Ltd. Vs. Chandra Developers (P) Ltd. & Anr. (2005) 8 SCC 219.

10. On behalf of the respondents, it was *per contra* argued by M/s Sethi and Nayyar, senior counsel that there was no bar to the institution of proceedings under Section 391-394 of the Companies Act or even for winding up of a company pending formulation of a revival scheme under SICA. It was further contended that Section 22 of SICA clearly empowered the Board as also the Appellate Authority to permit institution and continuance of proceedings referred to therein including those under Section 391-394 of the Companies Act as the said proceedings fell within the expression “like” used in Section 22. It was further argued by learned counsel that the petitioner had not disclosed complete facts in the present writ petition and was, therefore, dis-entitled from seeking any relief from this Court. In particular, the petitioner had suppressed the fact that in a meeting of the secured creditors held on 29th October, 2007 it had consented to the sale of assets by the Assets Sale Committee and sharing of the sale proceeds in the ratio mentioned in the minutes of that meeting. It was contended that there was in the instant case no delegation of power or abdication by AAIFR in favour of the High Court and that an order granting permission under Section 18(1)(e) was considered necessary as the provisions of Section 19(2) of SICA were ineffective unless all the secured creditors consented to the scheme of arrangement/compromise proposed by the company.

11. We have given our careful consideration to the submissions made at the bar and perused the record. Section 22 of the SICA is by far the only provision under which the petitioner may claim a bar to any proceedings referred to therein. Section 22, however, specifically

empowers the Board and the Appellate Authority, as the case may be, to permit proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof or for recovery of money, enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to such a company. It reads:

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

12. A careful analysis of the above would show that where in respect of an industrial company, an inquiry under Section 16 is pending or a scheme under Section 17 is under preparation or consideration or a sanctioned scheme is under the implementation or where an appeal under Section 25 relating to industrial company is pending then notwithstanding anything contained in the Companies Act or any other law including any memorandum or articles of association or any other instruction having the effect under the said

Act or other law, no proceedings for the winding up of the industrial company or for execution distress of the like against any of the properties of the industrial company shall lie or be proceeded with except with the consent of the Board or as the case may, the Appellate Authority. What is significant is that even when proceedings under Section 16 & 17 or an appeal under Section 25 of the Act are pending as is the position in the instant case, the BIFR or the Appellate Authority may permit the filing/institution or continuance of proceedings for the winding up of the industrial company or for execution distress or the like against any of the properties of the industrial company. They may also permit a suit for recovery of the money or guarantee in respect of any loans or advance granted to the company to be instituted or continued. It follows that proceedings in the nature of winding up, distress and sale of the assets of the company and those for recovery of money and enforcement of security etc. if already instituted would remain suspended or may be permitted to be instituted and continued depending upon whether the BIFR or the Appellate Authority grant permission to do so. The Appellate Authority has, in the instant case, not only directed sale of the surplus assets of the sick company for effectuating the scheme of arrangement/compromise formulated by it vis-a-vis its secured creditors but also directed the sick company to approach the High Court for sanctioning a scheme/compromise under Sections 391-394 of the Companies Act. To the extent the AAIFR directed the sale of the surplus assets of the sick company and appointed an Assets Sales Committee, Mr. Kaul had no difficulty, for even according to him it was only either the BIFR or the AAIFR who could direct such a sale. That apart, even the petitioner-company appears to have consented to the sale of surplus assets of the company in a meeting of the secured

creditors convened by ARCIL on 9th October, 2007. The following passages appearing in the minutes of the said meeting are in this regard relevant:

1. Sale of Assets at Panvel

Majority participants, namely, representatives from Arcil, SIDBI, Canara Bank, Indian Overseas Bank, Union Bank of India, Unit Trust of India, Punjab National Bank, Kotak Mahindra Bank and Standard Chartered Bank (representing 68% in the secured debt) gave their consent for sale of secured assets at Panvel.

Further, representatives from Allahabad Bank and Oriental Bank of Commerce (representing 21% in the secured debt) mentioned that they are actively considering the proposal and shall revert to Arcil shortly on their opinion.

The Secured lenders also felt that the proposed sharing of proceeds with the Company in a structured form needs to be improved for secured lenders.

Sharing Ratio of Sale Realization

The representatives from Arcil, SIDBI, Canara Bank, Indian Overseas Bank, Union Bank of India, Punjab National Bank, Kotak Mahindra Bank and Standard Chartered Bank (representing 6.1% in the secured debt) gave their consent for proposed sharing ratio of 60:40 between term lenders and working capital lenders.

Representative from Unit Trust of India suggested a sharing ratio of 75:25 between term lenders and working capital bankers.

Representatives from Allahabad Bank and Oriental Bank of Commerce mentioned that they are actively considering the proposal and shall revert to Arcil shortly on their opinion.

Process of Sale Secured Assets at Panvel:

The lenders suggested that the secured assets at Panvel should be sold by an Asset Sale Committee comprising of secured lenders (two term lenders, one working capital lenders and Company representative) by a public auction process. It was proposed that Asset Sale Committee may comprise of Arcil, UTI,

13. In the light of the above, it is difficult for the petitioner to find fault with the order passed by the AAIFR directing sale of the surplus assets of the sick company or oppose the settlement of the dues payable to the secured creditors.

14. The only other aspect that remains to be examined is whether the permission granted by the Appellate Authority to the company to approach the jurisdictional High Court for sanctioning a scheme of arrangements/compromise with the secured creditors suffers from any illegality. According to Mr. Kaul, the grant of permission was impermissible in law inasmuch as proceedings under SICA would operate as a complete bar to any other proceedings being instituted in any other Court against the company especially if such proceedings are aimed at revival of the sick company or a step in aid of any such attempt. Heavy reliance is sought to be placed upon the decision of the Supreme Court in *NGEF Ltd. Vs. Chandra Developers (P) Ltd. & Anr. (2005) 8 SCC 219* in support of that contention. That was a case where the NGEF Ltd. had been declared sick in terms of the provisions of SICA. The company had been, with the permission of BIFR and its secured creditors, selling surplus land for purposes of paying wages to its workers and refund of loans borrowed from financial institutions. In the course of disinvestment of the shares held by the State Government in the sick company, Chandra Developers, a private company submitted a proposal for purchase of 40.45 acres of land. In the meantime, the BIFR had held that the company could not be revived and sent its recommendation to the High Court for winding up of the company. Insofar as sale of the assets was concerned, the BIFR passed an order stating that the

company shall have to seek a proper direction from the High Court concerned. In the High Court of Karnataka, Chandra Developers, the private company, filed an application praying for a direction upon the company to execute a deed of sale in its favour in respect of the land held by the company on the premise that a concluded contract regarding the said sale had come about between the parties. The High Court allowed that application and later dismissed a review petition filed against the order passed by it. The matter was, in that background, brought to the Supreme Court in appeal after the appeals before a Division Bench had failed. It was in that background that a question fell for the consideration of the Apex Court whether the order passed by the High Court was legally competent. Their lordships examined the legal position and held that SICA was a special enactment which would prevail over the provisions of the Companies Act. The Court noted that the provisions of SICA contained *non obstante* clauses. The act was, therefore, a complete code in itself. The jurisdiction of the Company court in relation to winding up of a sick company, declared their lordships, would arise only when BIFR or AAIFR, as the case may be, had exercised their jurisdiction under Section 20 of SICA. The Court further held that under Section 536 (2) of the Companies Act the Court could not *ipso facto* direct sale of the assets of the sick company and that the said powers had to be exercised subject to the provisions of the special statute (SICA) on the subject. In terms of Section 20(4) of SICA the sale of assets of the industrial company could be authorized only by the BIFR in such manner as it may deem fit. Leave of the company Court for doing so was not required. BIFR could in the event it directed a sale forward the sale proceeds to the High Court for orders of distribution in accordance with Section 529 (A). The Court

observed:

“In terms of Section 20(4) SICA, BIFR is authorised to sell the assets of the sick industrial company in such a manner as it may deem fit. Leave of the Company Court, therefore, is not required. By reason of Section 20(4) SICA, BIFR is also empowered to forward the sale proceeds to the High Court for orders for distribution in accordance with Section 529-A and other provisions of the Companies Act, which in no uncertain terms would mean that the distribution of the sale proceeds would be for the purpose of meeting the claims of the creditors in the manner laid down therein. The scheme suggests that BIFR retains control over the assets of the Company and in terms of the aforementioned provisions may either prevent any sale or permit any sale of the assets of the sick industrial company. A company declared to be sick in terms of the provisions of SICA, continues to be sick unless it is directed to be wound up. Till the company remains a sick company, having regard to the provisions of Section 20(4) BIFR alone shall have jurisdiction as regards sale of its assets. Such a power in BIFR remains till a winding-up order is passed by the High Court and a stage arrives for the High Court for issuing orders for distribution of the sale proceeds.”

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 favour 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, therefore, 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, therefore, advance the case of the petitioner. So also the decision of the High Court of Bombay in Ashok Organic Industries Ltd. Vs. Asset Reconstruction Company (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. In the result this writ petition which fails and is hereby dismissed with costs assessed at Rs.25000/-.

T.S.THAKUR,J

ARUNA SURESH, J

APRIL 11, 2008
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