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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) No.8644/2009

Reserved on: 26th April, 2010

Pronounced on: 5th May, 2010

OMAN INTERNATIONAL BANK S.A.O.G.

..... Petitioner

Through: Mr. Adarsh B. Dial, Senior Advocate
with Mr. R.K. Pandey, Advocate and
Mr. Sushil K. Tekriwal, Advocate.

VERSUS

APPELLATE AUTHORITY FOR INDUSTRIAL AND FINANCIAL
RECONSTRUCTION

....Respondent

Through: Mr. Karan Khanna, Advocate
with Mr. N. K. Karhail, Advocate.
Mr. Vivek Sibal and Mr. Vikas
Chandel, Advocate for respondent
No.2.
Mr. Rakesh Pathak, Advocate for
respondent Nos.7 and 21.

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

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JUDGMENT

VALMIKI J. MEHTA, J

1. The petitioner by way of this writ petition raises an interesting and important question with regard to interpretation of Section 19, more particularly Section 19(4) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as the 'Act' or 'SICA'). The proposition which is sought to be canvassed on behalf of the petitioner is that even if one of the secured creditors refuses to give consent to a scheme which provides for financial assistance to a sick company, then, a sanctioned scheme has necessarily to be framed by resorting to other measures as specified under Section 18 without allowing the company the benefit of financial assistance as envisaged under Section 19(1) of the Act. Putting it differently, it is contended that though majority of the secured creditors agree for financial assistance in the form of concessions to be granted to a sick industrial company for the purpose of revival and rehabilitation of the sick company, yet, such majority secured creditors can be overridden by a minority secured creditor who refuses to give consent to a scheme which involves financial assistance in the

form of concessions and reduction of the dues of a sick industrial company to its secured creditors.

2. To appreciate the question involved, before proceeding ahead, it is necessary to refer to certain provisions of SICA which are as under:

“15. Reference to Board.—(1) Where an industrial company has become a sick industrial company, the Board of Directors of the company, shall, within sixty days from the date of finalisation of the duly audited accounts of the company for the financial year as at the end of which the company has become a sick industrial company, make a reference to the Board for determination of the measures which shall be adopted with respect to the company:

Provided that if the Board of Directors had sufficient reasons even before such finalisation to form the opinion that the company had become a sick industrial company, the Board of Directors shall, within sixty days after it has formed such opinion, make a reference to the Board for the determination of the measures which shall be adopted with respect to the company:

Provided further that no reference shall be made to the Board for Industrial and Financial Reconstruction after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where financial assets have been acquired by any securitisation company or reconstruction company under sub-section (1) of Section 5 of that Act:

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

.....

“16. Inquiry into working of sick industrial companies.—(1) The Board may make such inquiry as it may deem fit for determining whether any industrial company has become a sick industrial company—

- (a) upon receipt of a reference with respect to such company under Section 15; or
- (b) upon information received with respect to such company or upon its own knowledge as to the financial condition of the company.

(2) The Board may, if it deems necessary or expedient so to do for the expeditious disposal of an inquiry under sub-section (1), require by order any operating agency to enquire into and make a report with respect to such matters as may be specified in the order.

(3) The Board or as the case may be, the operating agency shall complete its inquiry as expeditiously as possible and endeavour shall be made to complete the inquiry within sixty days from the commencement of the inquiry.”

.....

“17. Powers of Board to make suitable order on the completion of inquiry.—(1) If after making an inquiry under Section 16, the Board is satisfied that a company has become a sick industrial company, the Board shall, after considering all the relevant facts and circumstances of the case, decide, as soon as may be by order in writing, whether it is practicable for the company to make its net worth exceed the accumulated losses within a reasonable time.

(2) If the Board decides under sub-section (1) that it is practicable for a sick industrial company to make its net worth exceed the accumulated losses within a reasonable time, the Board, shall, by order in writing and subject to such restrictions or conditions as may be specified in the order, give such time to the company as it may deem fit to make its net worth exceed the accumulated losses.

(3) If the Board decides under sub-section (1) that it is not practicable for a sick industrial company to make its net worth exceed the accumulated losses within a reasonable time and that it is necessary or expedient in the public interest to adopt all or any of the measures specified in Section 18 in relation to the said company it may, as soon as may be, by order in writing, direct any operating agency specified in the order to prepare, having regard to such guidelines as may be specified in the order, a scheme providing for such measures in relation to such company.”

.....

“18. Preparation and sanction of schemes.—(1) Where an order is made under sub-section (3) of Section 17 in relation to any sick industrial company, the operating agency specified in the order shall prepare, as expeditiously as possible and ordinarily within a period of ninety days from the date of such order, a scheme with respect to such company providing for any one or more of the following measures, namely:—

- (a) the financial reconstruction of the sick industrial company;
- (b) the proper management of the sick industrial company by change in, or take over of, management of the sick industrial company;
- (c) the amalgamation of—
 - (i) the sick industrial company with any other company; or
 - (ii) any other company with the sick industrial company; (hereafter in this section, in the case of sub-clause (i), the other company, and in the case of sub-clause (ii), the sick industrial company, referred to as “transferee company”;
- (d) the sale or lease of a part or whole of any industrial undertaking of the sick industrial company;
- (da) the rationalisation of managerial personnel, supervisory staff and workmen in accordance with law;
- (e) such other preventive, ameliorative and remedial measures as may be appropriate;
- (f) such incidental, consequential or supplemental measures as may be necessary or expedient in connection with or for the purposes of the measures specified in clauses (a) to (e).”

.....

“Section 18(2) The scheme referred to in sub-section (1) may provide for any one or more of the following, namely:—

.....

- (h) any other terms and conditions for the reconstruction or amalgamation of the sick industrial company;

.....
(m) such incidental, consequential and supplemental matters as may be necessary to secure that the reconstruction or amalgamation or other measures mentioned in the scheme are fully and effectively carried out.”

.....
“Section 18(3)

(a) The scheme prepared by the operating agency shall be examined by the Board and a copy of the scheme with modification, if any, made by the Board shall be sent, in draft, to the sick industrial company and the operating agency and in the case of amalgamation, also to any other company concerned, and the Board shall publish or cause to be published the draft scheme in brief in such daily newspapers as the Board may consider necessary, for suggestions and objections, if any, within such period as the Board may specify.

(b) The Board may make such modifications, if any, in the draft scheme as it may consider necessary in the light of the suggestions and objections received from the sick industrial company and the operating agency and also from the transferee industrial company and any other company concerned in the amalgamation and from any shareholder or any creditors or employees of such companies:

.....
“Section 18(4)

The scheme shall thereafter be sanctioned as soon as may be, by the Board (hereinafter referred to as the ‘sanctioned scheme’) and shall come into force on such date as the Board may specify in this behalf:

Provided that different dates may be specified for different provisions of the scheme.”

.....
“Section 19. Rehabilitation by giving financial assistance

19. Rehabilitation by giving financial assistance.—(1) Where the scheme relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial company, the scheme may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution or any institution or other authority (any Government, bank, institution or other authority required by a scheme to provide for such financial assistance being hereafter in this section referred to as the person required by the scheme to provide financial assistance) to the sick industrial company.

(2) Every scheme referred to in sub-section (1) shall be circulated to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation or within such further period, not exceeding sixty days, as may be allowed by the Board, and if no consent is received within such period or further period, it shall be deemed that consent has been given.

(3) Where in respect of any scheme the consent referred to in sub-section (2) is given by every person required by the scheme to provide financial assistance, the Board may, as soon as may be, sanction the scheme and on and from the date of such sanction the scheme shall be binding on all concerned.

(3-A) On the sanction of the scheme under sub-section (3), the financial institutions and the banks required to provide financial assistance shall designate by mutual agreement a financial institution and a bank from amongst themselves which shall be responsible to disburse financial assistance by way of loans or advances or guarantees or reliefs or

concessions or sacrifices agreed to be provided or granted under the scheme on behalf of all financial institutions and banks concerned.

(3-B) The financial institution and the bank designated under sub-section (3-A) shall forthwith proceed to release the financial assistance to the sick industrial company in fulfilment of the requirement in this regard.

(4) Where in respect of any scheme consent under sub-section (2) is not given by any person required by the scheme to provide financial assistance, the Board may adopt such other measures, including the winding up of the sick industrial company, as it may deem fit.”

.....

“20. Winding up of sick industrial company.— (1) Where the Board, after making inquiry under Section 16 and after consideration of all the relevant facts and circumstances and after giving an opportunity of being heard to all concerned parties, is of opinion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof is not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record and forward its opinion to the concerned High Court.”

3. The facts of the case are that the petitioner advanced credit facilities for working capital to the now sick company-respondent No.2 against hypothecation of its stocks/ receivables. On account of default of the sick company to make the payment of the dues of the petitioner, in spite of a one time settlement agreement, the petitioner issued winding up notices to the sick company, however, the company could not initiate recovery proceedings as respondent No.2 was a sick company. BIFR appointed IFCI as the operating agency which prepared a draft scheme for the revival of the sick company. BIFR chose to revive the company on the basis of the reconstruction scheme. Before ordering of approval of the draft scheme (DRS), the secured creditors had a detailed joint meeting on 16.1.06 for considering the DRS before it was submitted to BIFR for further orders. A perusal of the DRS prepared by IFCI and the minutes of the meeting indicate that

basically the DRS was a direct off shoot of the joint meeting. It was generally agreed that reliefs would have to be given to the sick company beyond RBI guidelines and, therefore, the scheme would have to be prepared with a longer period for repayment of liabilities. Though there was general agreement that the company was revivable, there was some disagreement in respect of the mode of settlement with secured lenders. The secured lenders were in favour of upfront payment preferably through the OTS route. Note was taken of the statement made by Shri Arjun Thapar who participated in the discussion that there were certain enquiries from large TV manufacturers about the Mohali unit. Oman International Bank (OIB)/petitioner was not in favour of any settlement with the company and sought permission to proceed against the company after obtaining permission in terms of section 22(1) of SICA.

4. BIFR overruled the objection of the petitioner and sanctioned the scheme which resulted in the petitioner filing an appeal No.170/07 before AAIFR contending that under Section 19(4) of SICA, BIFR is not empowered to sanction the scheme when no consent was given by the appellant. AAIFR in this regard observed and has held as under:

“12. In so far as M/s. Oman International Bank (OIB) is concerned, we are unable to accept the stand of OIB. We are of the opinion that this company is revivable at least in part. The basic philosophy underlying SICA is that in the process of revival of a sick company sacrifices would have to be made by those who have a stake in the company by way of security or direct interest. We find from the records that the majority of the secured lenders (in terms of the quantum of their debts) are in favour of revival and are also willing to make some sacrifices in this behalf. OIB is being paid the CTS amount

upfront which is more than the dispensation made for the Indian Banks. We had examined the scope of Section 19(4) of SICA in appeal No.204/04 in the case of M/s. Raj Solvex Ltd. This Authority vide its order dated 3.3.2008 has held, inter alia, as under:

“We are of the view that the settlement with respect to the dues of secured creditors who have advanced term loan/working capital loan should be fair and non-discriminatory. In the event the majority of secured creditors accounting for more than 75% of secured debt have accepted OTS, a similar dispensation should be provided to the remaining secured creditors.”

We do not agree that the disagreement of a bank which has a small share i.e. about 7.23% of the total outstanding debt, can be or should be allowed to come in the way of revival of a sick company which has nearly 4000 workers including nearly 1200 at Mohali.”

5. Before us, it has been contended by Sh. Adarsh B. Dial, Senior Advocate, on behalf of the petitioner, that the language of Section 19(1) and Section 19(4) cannot but lead to the irresistible conclusion that once consent is refused even by one of the secured creditors, then, the Board for Industrial and Financial Reconstruction (BIFR or Board) can only adopt any other measures under Section 18 except the measure of forcing a secured creditor to bring about a reduction in his claims against the sick company.

6. At the first blush, the argument as raised by the learned senior counsel on behalf of the petitioner appears to have a basis, however, once we see the provisions of Section 19(1) and Section 19(4) in their context in the scheme of the Sections forming part of Chapter III of SICA and read alongwith the Statement of objects and reasons of the Act, it is found that the proposition as raised, if accepted, would negate the very basis and existence of SICA and interpretation as

canvassed on behalf of the petitioner will make the Act and the Board powerless to further the aims and object of the Act, which undoubtedly are to protect employment, prevent winding up of a sick company to the maximum extent possible, to protect government revenue and also to prevent the ills caused to the society in general by sickness of industrial companies.

7. The Statement of objects and reasons of SICA may be referred to at this stage, and which reads as follows:

“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 debt 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.

12. The reliance placed by the senior counsel for the petitioner on the judgment of the Division Bench of Bombay High Court in the case of *Ashoka Organic Industries* (supra) is misplaced. The judgment in *Ashoka Organic Industries's* case came to be passed on a reference to decide the issue as under:

“ Whether an Industrial Company which has made a reference under Section 15 of Sick Industrial Companies Act, can during the pendency of such reference, apply to this Court for sanctioning a scheme of arrangement or compromise with its creditors and shareholders and whether this Court can take cognizance of such an application during the pendency of the reference and pass necessary orders thereon as are permissible in law ?”

It was held in that judgment that provisions of SICA will prevail over Sections 391 and 394 of the Companies Act, 1956 and that there cannot be passed a scheme under Sections 391 and 394 once the sick company makes a reference under Section 15 of SICA. Any observation in the said judgment has to be read in that context. Also the main para of that judgment relied upon on behalf of the petitioner in fact does not in any manner advance the case of the petitioner. The portion of para 12 relied upon reads as under:

“ 12. Hence under the SICA 1985 even one such creditor can refuse consent to the scheme, requiring the BIFR to resort to the provisions of Section 19(4). Thus the legislative intent is clear viz. that in the case of sick industrial companies, the special majority, as provided in section 391 cannot bind all the creditors. All the institutional creditors are required to concur. This Parliamentary intent will be defeated if a sick industrial company whose Scheme

falls under Section 19(3) is permitted to have recourse to Section 391 and have the scheme passed overriding the minority dissenting creditors.”

All that the above para says is that if consent is refused by one of the secured creditors, then the Board (BIFR) is thrown to Section 19(4), however, as already discussed above Section 19(4) allows various alternatives to BIFR to adopt ‘one or more’ measures as per Section 18(1) and Section 18(3)(b) of the Act. The last line of the above para of *Ashok Organic’s* case only deals with the issue of minority dissenting creditors being not overridden and which can take place while approving a scheme strictly in accordance with Sections 391 and 394 of the Companies Act, but, this cannot have a bearing on the interpretation of Section 19(4) when dealt with in the context of options available to BIFR when a minority secured creditor opposes a draft scheme. As already stated above in such circumstances various options under SICA including those mentioned in Section 18 can then be resorted to and Board is not limited to superseding a scheme of revival merely because of the objection of one minority secured creditor.

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. In view of the above, we dismiss the petition challenging the impugned orders of BIFR and AAIFR, leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J

SANJAY KISHAN KAUL, J

May 05, 2010
Dkg/Ne