

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

Reserved on : 22.09 2010

% Date of decision : 29.09.2010

+ **WP (C) No. 234 / 2009**

SYNDICATE BANK

... .. PETITIONER

Through : Mr. Adarsh B. Dial, Sr. Advocate
with Ms. Sumati Anand and
Ms. Ananya Datta Majumdar,
Advocates.

- V E R S U S -

M/S. MULLANGIE SPINTEX PVT. LTD. & ORS.

... .. RESPONDENTS

Through : Ms. Maneesha Dhir with
Ms. Jayashree Shukla,
Ms. Preeti Dalal and
Ms. Purti Marwaha,
Advocates for R – 1.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be
reported in the Digest? | Yes |

SANJAY KISHAN KAUL, J.

1. The claim of the petitioner bank to have the exclusive
right to appropriate the insurance amount received in

respect of the hypothecated stocks and raw materials without making a reference or obtaining prior permission of the Board for Industrial and Financial Reconstruction (for short, 'BIFR'), despite a pending reference before the BIFR, has given rise to these proceedings.

2. Respondent No. 1 company is engaged in the business of cotton yarn and availed of working capital limit from the petitioner bank from 1996 onwards against hypothecated stocks, raw materials, etc. The petitioner bank had the exclusive first charge as per a Deed of Hypothecation and under the terms of the insurance policy securing the goods read with the Deed of Hypothecation, the petitioner bank was entitled to receive the amount from the insurance company directly.
3. A fire took place at the premises of respondent No. 1 on 09.04.1998 which destroyed the raw materials, finished goods, etc. A claim was lodged with the insurance company which settled the claim amount at only Rs.33.15 lakhs. Respondent No. 1 company aggrieved by the same filed a petition before the National Consumer Dispute Redressal Commission (for short, 'NCDRC) which gave a favourable verdict for an amount of Rs.1.49 crores with interest @ 12% p.a. from October, 1998 till date of payment as per the judgment dated 23.02.2007. The appeal filed by the insurance company before the Supreme Court was dismissed *in limine* on 10.07.2007.

4. Respondent No. 1 company went into financial difficulties in the meantime and, thus, filed an application under Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short, 'SICA'). Since the net worth of respondent No. 1 company stood eroded, it was declared as a sick undertaking within the provisions of the SICA on 13.03.2001. A draft scheme was sought to be propounded, but it is stated that the same was rejected on 25.04.2003. As yet, no scheme stands finally approved.

5. Respondent No. 1 company initiated discussions with the petitioner bank for one-time settlement (for short, 'OTS'). A letter dated 14.07.2007 was addressed by respondent No. 1 to the petitioner bank in the following terms :-

“Sub:Request for One Time Settlement of Mullangie Spintex Private Limited Reg.

With reference to the discussion I had with Assistant General Manager, Regional Office, I thank for the help extended by you in going for one-time settlement. As per the discussion, I hereby agree to pay One Crore Sixteen Lakhs towards full & final settlement, out of which I will pay Rs.40.00 lakhs and above on or before 31st July, 2007 and balance amount of Rs.76.00 lakhs on or before 30th September, 2007, hope my request will be considered and consent letter be issued to me for depositing the amount on No-Lien Account.”

6. In terms of the aforesaid letter, a sum of Rs.40 lakhs was paid by respondent No. 1. The settlement proposal was examined by the petitioner bank and was approved by the letter dated 04.09.2007 addressed by the Deputy

General Manager to the Asst. General Manager, Recovery

Cell, Regional Office, Bellary in the following terms :-

“Reg:Settlement proposal of M/s. Mullangie Spintex Pvt. Ltd., A/c at Bellary Main Branch.

We have for reference your office note dated 10.08.07 forwarded under cover of letter No. 2126/0617/2007/REC dated 16.08.07 recommending settlement proposal of the captioned company for Rs.116.00 lakh and subsequent letters No. 2138 dated 17.08.07 and No. 2155 dated 20.08.07.

In the light of your recommendations, the Competent Authority has permitted Bellary Main Branch to settle the dues of its captioned borrower amounting to Rs.127.57 lakhs by accepting Rs.116.00 lakhs as against the Book Balance of Rs.73.00 lakhs, involving write off of Rs.NIL and waiver of Rs.11.57 lakhs as on 30.06.2007. The settlement amount shall be paid as under and also shall comply with the following conditions:

1. Rs.40 lakhs lying in “No Lien Account” to be adjusted immediately.
2. Balance settlement amount of Rs.76 lakhs to be paid by the company before 30.9.2007.
3. Interest from 1.7.2007 to 30.9.2007 is waived.
4. Future expenses/cost, if any, shall be borne by the party.
5. This is without prejudice to the Bank’s right to recover the entire dues in the event of party’s failure to pay the compromise amount as per settlement sanction.
6. Please confirm adjustment of amount kept in “No lien a/c”.
7. Branch shall inform RO/CO about the details of payments made by the company.

If the dues are not settled as per the terms of sanction, the concession granted shall stand revoked and the entire dues shall be recovered as per the original terms.

We request you to convey the sanction to the party against an acknowledgement and their acceptance for the terms of the sanction shall be obtained, under information to Branch with

instructions to collect the offer amount as per terms of sanction.

Please keep us informed of the developments.”
(emphasis supplied)

7. A perusal of the aforesaid shows that the only concession shown was by waiver of penal interest by waiver of Rs.11.57 lakhs as on 30.06.2007. A sum of Rs.40 lakhs lying in the no-lien account (for short, 'NLA') was adjusted. The balance settlement amount of Rs.76 lakhs had to be paid on or before 30.09.2007.
8. However, soon thereafter, the petitioner bank addressed a letter dated 17.09.2007 to The New India Assurance Company Ltd. stating that since the Special Leave Petition filed by the insurance company against the order of the NCDRC had been dismissed, the claim awarded by the forum be directly remitted to the bank. In response to this letter, the insurance company on 19.09.2007 remitted the amount of Rs.2,73,54,109/- to the petitioner giving the bifurcations as under:

“Amount Awarded	Rs.1,49,44,000.00
Interest awarded @12% w.e.f.	
09/09/1998 to 19/09/2007 –	
3266 days	Rs.1,60,46,171.00
Gross Amount	Rs.3,09,90,171.00
Less TDS @ 22.66% on Interest	Rs.(-)36,36,062.00
As per Sec. 194A of IT Act	
Net Amt. Payable	Rs.2,73,54,109.00”

9. The petitioner bank having received the aforesaid amount on 19.09.2007, on the very next day of

20.09.2007, withdrew the sanction of the OTS as per the letter of that date. It is necessary to reproduce the contents of the said letter, which are as under:

“In furtherance to our letter No. 056:0600:OTS:F123-4 dated 05.09.2007 wherein the sanction of OTS was communicated to you. Vide your letter dated 14.07.2007, you have agreed to pay Rs.116.00 lakh towards OTS out of which Rs.40.00 lakhs on or before 30.07.2007 and the balance of Rs.76.00 lakh on or before 30.09.2007. You have also deposited Rs.40.00 lakhs in No Lien A/c. Earlier you have represented about the pendency of litigation against the New India Assurance Co. Ltd. upto the stage of the order of National Consumer Dispute Redressal Commission (NCDRC). You have hypothecated the entire stocks, work in process and finished goods to the Bank as the sole charge holder. In the fire accident that occurred during April, 1998, the stocks at various stages were destroyed. Your claim for compensation was for Rs.242.38 lakhs. But the Insurance Co. settled the claim only for Rs.33.15 lakhs. Therefore, you have filed a complaint against the Insurance Co. before NCDRC and the claim has been enhanced to Rs.149.44 lakhs and payable with interest at 12% p.a. from October, 1998 till payment and the amount payable will be approximately Rs.300.00 lakhs.

The bank has not received any summons in the SLP filed by New India Assurance Company against the NCDRC before the Supreme Court of India. The developments were/are being reported to the Bank by you only and the Bank purely relied upon your reporting regarding the developments before the Supreme Court of India from time to time.

At the time of consideration of your request for OTS, the fact about the order of National Commission was a material factor. The Bank was informed that the Insurance Co. had filed already a Special Leave Petition before the Hon'ble Supreme Court of India against the orders of NCDRC and the same was pending. Since the probable time that would be taken by the Hon'ble Supreme Court of India and also it was not sure whether the Supreme Court could confirm the award or reduce it, instead of waiting for the final disposal of SLP, the bank took up the proposal for OTS for

consideration. Now it is noticed that the SLP filed by the Insurance Co. was disposed off on 10.07.2007 itself dismissing the appeal filed by the Insurance Co. It is observed that the Hon'ble Supreme Court heard the counsel appearing for the parties. Hence, it is very clear that you appeared in the Supreme Court through your counsel on 10.07.2007, supported the award of NCDRC for Rs.149.44 lakh with interest at 12% and opposed the SLP filed by the Insurance Co. You are also aware that on 10.7.2007 the Supreme Court has confirmed the said award under which you would be getting a sum of Rs.300.00 lakh approximately at present. But in your letter dated 14.07.2007 which is after the order dated 10.07.2007 of the Supreme Court there was absolutely no reference about the said important factor. Having knowledge of the latest developments and the favourable order, you have purposely withheld that piece of information from the bank. The said act of yours is mala fide. Therefore, the Bank has reason to believe that you wanted to derive undue benefit of getting maximum sacrifice from the bank under the OTS by simply agreeing to pay Rs.116.00 lakh as against the assured receipt of Insurance claim of Rs.300.00 lakh approximately. Since the amount, payable relates to the stock damaged in the fire, which were solely secured by a deed of hypothecation in favour of the bank, the bank is entitled to get and adjust the insurance claim towards the full liability of the Company.

In view of the above, the OTS sanctioned to you vide our letter referred to above is forthwith withdrawn and you are informed that you are liable to pay the full liability as on the date of receipt of the insurance amount from the Insurance Co. at our end."

(emphasis supplied)

10. A perusal of the aforesaid letter shows that according to the petitioner bank, it was relying upon the information furnished by respondent No. 1 about the progress of the claim. We may notice at this stage itself that the petitioner bank was, in fact, a party before the NCDRC,

though senior counsel for the petitioner claimed that they had never appeared though served. The sole basis for withdrawal of the OTS as set out in the letter dated 20.09.2007 is that in the letter dated 14.07.2007 of respondent No. 1 proposing the OTS, no reference was made to the dismissal of the appeal by the Supreme Court on 10.07.2007, which was material for purposes of the decision-making process of the bank and that the bank had been influenced by the fact that the appeal may take time for disposal. Another letter was addressed on 21.09.2007 in terms whereof it was claimed that after adjustment of the amount of Rs.40,00,175/- submitted initially in the NLA for the OTS, a further amount of Rs.1,78,75,733/- had been adjusted against the liability of respondent No. 1 and the balance of Rs.94,78,376/- was being sent to respondent No. 1.

11. A controversy, thus, arose whether the petitioner bank could have withdrawn the OTS on 20.09.2007 primarily in view of the receipt of the amount from the insurance company on 19.09.2007 having acted on the OTS by appropriating the sum of Rs.40 lakhs ostensibly on the ground that while proposing the OTS, respondent No. 1 had not intimated the factum of dismissal of the appeal by the Supreme Court four days before, though the bank was aware of the order of the NCDRC in favour of respondent No. 1. It is the case of respondent No. 1 that

the petitioner bank being a party to the proceedings could hardly claim lack of knowledge and, in fact, knew of all the proceedings and with open eyes accepted the OTS. It is also the case of respondent No. 1 that the approval letter dated 04.09.2007 itself shows that the amount was settled at Rs.127.57 lakhs as on 30.06.2007 with only waiver of penal interest of Rs.11.57 lakhs with write off being 'NIL'. Only future interest from 01.07.2007 to 30.09.2007 was waived. Despite this, the bank appropriated a sum of Rs.1,78,75,733/- besides the sum of Rs.40,00,175/- totalling to Rs.2,18,75,908/-, which apart from any other reason, shows that huge amount has been appropriated by the bank contrary to what was due.

12. Respondent No. 1 aggrieved by this action of the petitioner bank filed an application before the BIFR under Section 22(1) of the SICA for refund of the amount on the ground that the petitioner bank had appropriated the amount without obtaining the permission of the BIFR, which it could not do. This application was contested by the petitioner bank. Respondent No. 1 is also stated to have filed a writ petition in the Karnataka High Court seeking refund of the entire compensation amount received from the insurance company.
13. The BIFR passed the order dated 23.10.2007 on the application of respondent No. 1 examining the rival

contentions including the submissions of M/s. KSIIDC, which was also one of the parties to the proceedings before the NCDRC. M/s. KSIIDC was equally aggrieved by the unilateral appropriation of the insurance amount by the petitioner bank and claimed that the petitioner bank had failed to perform the duties as an operating agency (for short, 'OA'). However, it was simultaneously submitted that in case the petitioner bank was to continue as the OA, the BIFR may direct the petitioner bank to hold the insurance claim amount in NLA to be appropriated as per the directions of the Karnataka High Court / BIFR. The BIFR after discussing all these aspects as per the proceedings recorded on 23.10.2007 *inter alia* asked the petitioner bank to explain how it could unilaterally appropriate the insurance claim amount without making a reference or obtaining the prior permission of the BIFR and directed the petitioner bank to deposit the entire amount of Rs.178.765 lakhs appropriated by them from the insurance claim amount in a NLA within two weeks. Respondent No. 1 company was also asked to deposit the amount received by it from the bank out of the insurance amount in a NLA.

14. The petitioner bank aggrieved by the order of the BIFR preferred an appeal before the Appellate Authority for Industrial and Financial Reconstruction (for short, 'AAIFR') in February, 2008. During the pendency of the appeal, a

further order came to be passed by the BIFR on 14.08.2008 recording that the amount had not been transferred to the NLA by the petitioner bank and its conduct is unbecoming of an OA. Notice was issued under Sections 30 (4) of the SICA for non-compliance and non-implementation of the directions of the Bench / BIFR. The petitioner bank was further discharged from the responsibility of an OA and Canara Bank was appointed as the OA.

15. The appeal filed by the petitioner was finally dismissed by the AAIFR on 20.10.2008. The appeal order records that the basic point urged by the petitioner bank was that respondent No. 1 company acquired the goods on the basis of loans / advances obtained from the bank and the goods were hypothecated with the bank with no other party having a charge on the goods. Since these goods had been destroyed in a fire, respondent No. 1 company was compensated by insurance company as per the orders passed by NCDRC affirmed by the Supreme Court, the bank had the first right on the compensation received. This was stated to be as per the terms of the Deed of Hypothecation and the BIFR had no jurisdiction to set aside the terms of the contract or to go into the question whether the petitioner bank was right in going back from the OTS Agreement. It had further been pleaded by the petitioner bank that no declaration had

been made under Section 22(3) of the SICA and no scheme had been sanctioned to supersede the contract between the parties. A plea was also raised of violation of principles of natural justice and that the order of the BIFR was not an interlocutory order and, if implemented, would prejudicially affect the interest of the petitioner bank. The AAIFR came to the conclusion that the proceedings of the BIFR clearly showed that adequate opportunity had been granted to the petitioner bank in the proceedings to represent its case. The plea that the order was not interlocutory in nature was also rejected since insurance money was only directed to be placed in the NLA, which implied that the final use of the money would be determined in terms of the sanctioned scheme, if any, and in case no revival is possible, further orders could be passed by the BIFR. No direction had been passed for the money to be paid to respondent No. 1 company.

16. The impugned order also states that Section 22(3) of the SICA relates to a situation falling under the purview of Sections 16, 17 and 18 of the SICA and the BIFR is empowered in the interest of the sick industrial company to halt the operation of contracts, agreements, settlements, awards or instruments in force. The BIFR, however, observed that insofar as withdrawal of the petitioner bank from the OTS is concerned, that aspect

could not be examined by the BIFR. In any case, that aspect was *sub judice* before the Karnataka High Court. The factum of the plant and machinery being charged to M/s. KSIIDC has also been noticed. The compensation awarded by the NCDRC as per its order was based upon a consideration of the total damages suffered by respondent No. 1, which included both stocks as well as machinery and, thus, the petitioner bank did not have the sole claim on the insurance compensation amount. Thus, if the action of the petitioner bank was to be sustained, it would mean that one of the two secured creditors would be fully compensated in terms of the principal and interest (total outstanding) while the other secured creditor would be left to take all the hit insofar as the concessions are concerned. It was, thus, observed that in any rehabilitation scheme, all secured creditors are given equal treatment in terms of the compensation paid on sacrifice made and the compensation paid to the petitioner bank was subject to the orders to be passed by the Karnataka High Court.

17. The present writ petition under Article 226 and 227 of the Constitution of India has been filed seeking to set aside the aforesaid order passed by the AAIFR on 20.10.2008.
18. Learned senior counsel for the petitioner-bank has once again before us argued the case as before the AAIFR. It is the plea of the petitioner that Section 22 of the SICA

would have no application to appropriation of the insurance claim especially as no special declaration had been made by the BIFR suspending the operation of any contract. In this behalf, learned senior counsel relied upon the observations of the Supreme Court in Morgan Securities & Credit (P) Ltd. v. Modi Rubber Ltd., (2006) 12 SCC 642 wherein it was observed that a statutory distinction has been made by the legislature as regard initiation and / or continuation of proceedings on the one hand and suspension thereof on the other. Thus, under Section 22(1) of the SICA, no specific order was required to be passed by the BIFR, while a specific declaration was required to be made under Section 22(3) in relation to the matters enumerated thereunder. In the former case, statutory impact was to be automatic, whereas in the latter case, the BIFR is required to apply its mind having regard to the facts and circumstances of each case.

19. Learned senior counsel also sought to derive strength from the judgment of learned Single Judge of this Court in Enchante Jewellery v. Citibank N.A., 2009 (109) DRJ 239 dealing with a suit claim for damages on account of repossession of the vehicle of the plaintiff company. It was held that the bank was entitled to take repossession of the hypothecated vehicle. The findings, however based on the facts, are that the plaintiff made a false averment of placing jewellery within the car and

jewellery having been taken away. The plaintiff had incurred liability in respect of the car without giving specific information to the defendant bank that it was a sick industrial company and the matter was already pending before the BIFR. Thus, the asset had been acquired after the proceedings of the BIFR were already pending, asset being the car. We may also notice that the only two issues framed were as to whether the plaintiff is entitled to decree of damages and whether the defendant bank had committed any breach of contract.

20. Learned senior counsel has emphasised the observations made in the judgment that there was no provision in the SICA under which the bank, which had given loan on hypothecation of vehicles, was required to go to the BIFR and seek permission for repossession of vehicles hypothecated to it in case of default in payment of EMIs. It was, however, simultaneously observed that the plaintiff had, in fact, concealed its status of sick company from the defendant bank.
21. Learned senior counsel also contended that the petitioner bank as assignee under the policy is directly entitled to receive the amount of the insurance company under the statutory provisions of the Insurance Act, 1938 (more specifically Section 38) and the Transfer of Property Act, 1882 (more specifically Sections 130 and 135). In this behalf, learned senior counsel has relied

upon the judgment of the Supreme Court in Krishna Food and Baking Industry Private Limited v. New India Assurance Company Limited & Anr., (2008) 15 SCC 631 to the effect that where there is an assignment of insurance policy in favour of the bank, the bank was entitled to get the amount from the insurance company. However, the issue of the effect of pending proceedings before the BIFR were not in question in this case.

22. Learned senior counsel also referred to the observations made in para 10 of the impugned order that the bank had the right to decide upon the terms of the settlement between itself and the contracting party and in case of breach, the matter could not be adjudicated upon by the BIFR or the AAIFR.
23. Lastly, it was contended that in view of the claim pending before the Karnataka High Court, the BIFR and the AAIFR should have held their hand.
24. Learned counsel for respondent No. 1 has emphasized on the fact that the OTS was agreed upon on 04.09.2007 and in pursuance thereto a letter was issued to respondent No.1 company on 05.09.2007 communicating the acceptance of OTS and giving time till 30.09.2007 to pay the amount settled. The sum of Rs.40 lakhs lying in NLA was immediately adjusted on 13.09.2007 and the balance of Rs.76 lakhs had to be paid on or before 30.09.2007. Before expiry of that date on 17.09.2007,

the petitioner bank wrote to the insurance company requesting that the amount awarded by NCDRC as affirmed by the Supreme Court be directly remitted to it and the insurance company duly remitted the amount of Rs.273.54 lakhs on 19.09.2007. In terms of the OTS, the petitioner could have adjusted only the amount of Rs.76 lakhs. On the other hand, having received the amount, the petitioner bank sought to revoke the OTS on 21.09.2007 on the spacious plea of being uninformed of the proceedings of the Supreme Court. Learned counsel for R-1 drew our attention to the undisputed fact of the petitioner being a party in those proceedings. At the stage when the proceedings were going on before the NCDRC, the petitioner bank even filed an affidavit, which was duly examined. Thus, the petitioner bank was keeping a full watch on all the proceedings and, thus, can hardly be said to be ignorant of the proceedings. Learned counsel has emphasized that the petitioner bank could not have withdrawn the OTS and has relied upon the judgment of the Supreme Court in Sardar Associates & Ors. v. Punjab and Sind Bank & Ors., (2009) 8 SCC 257 to contend that the bank is bound by the OTS arrived at as per the RBI guidelines.

25. Insofar as the issue of appropriation of the amount by the petitioner bank is concerned, it was submitted that Section 22(1) of the SICA is applicable as the monies

received on behalf of the company are property of the company and cannot be unilaterally appropriated by the bank without prior permission of the BIFR. The submission was that the insurance amount was actually owned by the company, but in terms of the Deed of Hypothecation and the insurance policy, the bank sought direct payment. Such amount could have been kept only in trust by the petitioner bank and more so since it was the OA at the relevant time. Learned counsel seeks to draw strength from various judgments of the Supreme Court.

26. In Maharashtra Tubes Ltd. V. State Industrial & Investment Corporation of Maharashtra Ltd. and Anr.; (1993) 2 SCC 144 where it was held that even the powers conferred under a special statute as in Section 29 and/or Section 31 of the State Financial Corporation Act, 1951 would have to yield to the provisions of Section 22(1) of SICA and no coercive action was possible under the State Financial Corporation Act, 1951.
27. Similarly in The Gram Panchayat and Anr. V. Shree Vallabh Glass Works Ltd & Ors.; AIR 1990 SC 1017, it was held that all proceedings to recover property tax under Section 129 of Bombay Village Panchayat Act, 1958 would not lie except with consent of the BIFR and in the absence of approval, the remedy is not extinguished but is postponed.

28. In Real Value Appliances Ltd. V. Canara Bank & Ors; JT 1998 (3) SC 715, a similar view has been taken in respect of pending proceedings under the Companies Act, 1956.
29. In Rishabh Agro Industries Ltd. V. P.N.B.Capital Services Ltd; (2000) 5 SCC 515, it was held that the deemed date of commencement of enquiry for purposes of Section 22 of SICA was the date of submission of reference under Section 15 of SICA. In company proceedings, where the debtor had agreed to pay instalments and failed to pay the same, an order of winding up against the company was passed. This order was stayed by the Division Bench and thereafter a reference was filed by the company under Section 15(1) of SICA. The application filed by the company before the High Court under Section 22 of SICA was held to be valid in these facts.
30. Lastly, a reference was made to NGEF Ltd. V. Chandra Developers (P) Ltd.; (2005) 8 SCC 219 where it was held that till a company remains sick, the BIFR alone shall have jurisdiction as regards the sale of its assets and even the Company Court in a winding up proceedings would not have jurisdiction.
31. Learned counsel sought to distinguish the judgments relied upon by learned senior counsel for the petitioner bank and contended that Section 22(3) of the SICA would have no application in the present case as it is concerned with suspension of award, agreement, contract, etc. The

judgment in Morgan Securities & Credit (P) Ltd.'s case (supra) was in relation to an award under the Arbitration Act.

32. Learned counsel emphasized that in Enchante Jewellery's case (supra), learned Single Judge of this Court dealt with a vehicle being a car under a hire-purchase agreement. The property being the vehicle had not passed on to the party, but was with the bank. The transaction was also without disclosing the fact to the bank that proceedings are already pending before the BIFR. In the present case, the stocks / goods are owned by respondent No. 1 company and only hypothecated to the petitioner bank. The question of hypothecation would arise once the property was with respondent No. 1. Thus, any monies received for loss of property of respondent No. 1 company would again belong to the company.
33. Learned counsel further pointed out that the judgment in Canara Bank v. Krishna Food and Baking Industry Pvt. Ltd.'s case (supra) did not even deal with a case of a sick company and there was, thus, no question of obtaining a prior permission of the BIFR.
34. We have carefully examined the rival contentions of the parties. The principal aspect, which has to be kept in mind, is that the SICA was enacted with the objective of timely detecting sick and potentially sick companies owning industrial undertakings so that speedy preventive

measures could be taken for rehabilitation of the company, if possible. It is in these circumstances that Chapter III of the SICA deals with reference / enquiries and schemes. Section 15 deals with reference to the Board / BIFR, while the provisions of Sections 16 to 18 deal with the inquiry into the working of the sick industrial company and preparation of a scheme for its rehabilitation. Section 19 refers to rehabilitation of the sick company by giving financial assistance and if no such revival is possible, the adverse opinion for winding up is forwarded to the High Court under Section 20 of the SICA.

35. The objective of Section 22 of the SICA making provisions for suspension of legal proceedings, contracts, etc. is that coercive processes against the company should be kept in abeyance till it is found out whether such rehabilitation is possible and a revival scheme may require sacrifices both by secured and unsecured creditors. The catena of judgments cited by learned counsel for R-1 show that primacy of the BIFR in respect of all matters of the sick company and that the powers to be exercised under SICA preserving the assets would supersede the powers under different statutes including specific legislations like the State Financial Corporations.
36. We are of the view that the legal position is 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’.

37. In the facts of the present case, the question of suspension of any contracts, agreements, settlements, awards, etc. is not involved for which a specific order has to be passed by the BIFR under sub-section (3) of Section 22 of the SICA. To appreciate the distinction between sub-section (1) and sub-section (3) of Section 22 of the SICA, we reproduce both of them as under:

“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 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 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.

... ..

(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 thereunder, 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 thereunder 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.

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."

38. It can hardly be doubted that the goods in question were owned by respondent No. 1 company. The property and the goods remained of respondent No. 1 company. The goods were insured. The arrangement with the insurance company was that in case of loss of goods, the amount would be directly remitted to the petitioner bank for securing the financial assistance given by the petitioner bank to respondent No. 1. Thus, the monies received in case of loss of goods by the bank were actually monies of the company, which would go towards the settlement of the claim of the bank.
39. It is in the aforesaid circumstances that learned counsel for respondent No. 1 has rightly distinguished the judgment of learned Single Judge in Enchante Jewellery's case (supra) where the vehicle in question remained the

property of the bank till the entire finance was not paid with the right to repossess the vehicle. This is, of course, apart from the fact that it was not even disclosed to the bank that the company was already before the BIFR.

40. The monies received by the petitioner bank from respondent No. 1, as observed aforesaid, were monies of respondent No. 1 company and in view of the pendency of proceedings before the BIFR could not have been unilaterally appropriated without the prior permission of the BIFR. Undoubtedly, no permission of the BIFR was obtained. The strange aspect is that the petitioner bank was, in fact, the OA, which was responsible for default of a scheme for revival. There were only two secured creditors, i.e., the petitioner bank and KSIIDC. The conduct of the petitioner bank naturally resulted in protest from KSIIDC and the failure of the petitioner bank to comply with directions of the BIFR has even resulted in a subsequent order replacing it as OA. The judgment in Canara Bank v. Krishna Food and Baking Industry Pvt. Ltd.'s case (supra), in any case, has no application as the same deals with the aspect of assignment of insurance policy and transfer of the amount to a bank, but is nowhere concerned with the rights and obligations arising from the pendency of proceedings before BIFR.
41. In the proceedings before the BIFR, the aspect of OTS is not really required to be gone into, especially as

respondent No. 1 has preferred a writ petition before the Karnataka High Court and as to whether the petitioner bank could at all have walked away from the OTS would be decided in those proceedings, but suffice to say that the change of heart of the petitioner bank arose after having appropriated the initial amount of Rs.40 lakhs and after receipt of a larger sum from the insurance company and that too within the time granted to respondent No. 1 to make the balance payment as per the OTS.

42. The petitioner bank was fully aware of all the proceedings relating to the insurance claim being a party to those proceedings. We are unequivocally of the view that the impugned orders passed by the BIFR and affirmed by the AAIFR were, in fact, in accordance with law and in the best interest of respondent No. 1 company while protecting the interest of the petitioner bank. No direction was passed for the petitioner bank to deposit the amount with respondent No. 1 company, but the direction was only to keep the amount received in the NLA as the compensation to be paid to the petitioner bank was also dependent on the fate of the proceedings before the Karnataka High Court where the aspect of the OTS had to be gone into. There was no question of the petitioner bank unilaterally appropriating the complete insurance amount without moving an appropriate application before the BIFR.

43. If the plea of the petitioner bank was to be accepted, a chaotic situation would arise where every secured creditor having some security would seek to move against the security to quickly liquidate it and appropriate the amount contrary to the interest of other secured creditors and unsecured creditors. This can hardly be permitted and would defeat the very object of the SICA where the disbursement of funds is an important aspect for purposes of rehabilitation and where sacrifices may be called for from both secured and unsecured creditors. The petitioner bank is not the only secured creditor, there being two secured creditors and the endeavour of the petitioner bank to steal a march over the other secured creditor, i.e., KSIIDC cannot be appreciated. Thus, KSIIDC rightly objected before the BIFR to such unilateral appropriation of the insurance amount by the petitioner bank leaving KSIIDC high and dry and in an unequal bargaining position in case rehabilitation scheme was to be propounded. The secured creditors are liable to be treated at par. The improper conduct of the petitioner bank has even resulted in it being replaced as OA.
44. The interim directions of the BIFR dated 23.10.2007 as contained in para 6(b) and para 6(c) directing the petitioner bank to explain its stand of unilateral appropriating the insurance claim without making a

reference to the BIFR and directing the petitioner bank to deposit the amount in the NLA cannot be faulted.

45. The writ petition being devoid of any merit is dismissed with costs of Rs.10,000/-.

SANJAY KISHAN KAUL, J.

September 29, 2010
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VALMIKI J. MEHTA, J.