

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved On: November 30, 2011
Judgment Delivered On: December 08, 2011

+ LPA 112/2011

HINDON RIVER MILLS LTD. Appellant
Through: Ms.Maneesha Dhir, Ms.Jayashree Shukla,
Ms.Preeti Dalal and Mr.Abhirup
Dasgupta, Advocates

versus

IFCI LTD. & ANR. Respondents
Through: Mr.Sanjay Bhatt, Advocate for R-1
With Ms.Sara Najmi, Manager (Law
Officer for IFCI Ltd.)
Mr.T.K.Ganju, Sr.Advocate with
Mr.Suresh Dutt Dobal, Mr.Akhilesh
Mishra and Mr.Aditya Ganju, Advocates
for R-3

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE S.P. GARG

PRADEEP NANDRAJOG, J.

1. Vide impugned judgment and order dated 21.01.2011, WP(C) No.14999/2006 filed by the appellant 'Hindon River Mills Ltd.' (hereinafter referred to as the 'Company') has been dismissed by the learned Single Judge holding:-

A. The grievance relatable to IFCI Ltd. (appointed as the operating agency by BIFR vide order dated 08.08.2005 with a mandate to prepare a scheme for revival of the 'Company') that it being one of the five secured creditors of the 'Company', IFCI Ltd. was not justified in assigning the debt

due to Kotak Mahindra Bank Ltd., could not be made a ground to challenge the assignment of the debt by IFCI Ltd. in favour of Kotak Mahindra Bank Ltd. since the proper forum to raise said plea was BIFR.

B. An identical issue raised was decided by a Division Bench of this Court in the decision reported as AIR 2007 Delhi 65 Haryana Steel & Alloys Ltd. Vs. IFCI Ltd., against which Petition seeking Special Leave to Appeal was dismissed by the Supreme Court and hence the learned Single Judge was bound by the decision of the Division Bench.

C. In the absence of any mala fide alleged in the pleadings against the decision makers in IFCI Ltd. to assign the debt to Kotak Mahindra Bank Ltd. it would be impermissible to take cognizance of the arguments relatable to mala fide.

D. There was lack of bona fide in the conduct of the 'Company' to settle the debt to the satisfaction of IFCI Ltd. and being a defaulter, equity denuded the 'Company' from seeking any discretionary relief from the Court in exercise of the Court's power under Article 226 of the Constitution of India.

2. Relevant facts to be noted are that the 'Company' set up a manufacturing unit in Dasna, District Ghaziabad, in the State of Uttar Pradesh and availed loan/credit facilities from (i) IFCI Ltd., (ii) EXIM Bank Ltd., (iii) Punjab National Bank, (iv) Indian Bank, and (v) State Bank of India. The first two creditors had a first charge on the land, building, plant and machinery of the 'Company' and the next three creditors had a second charge thereon.

3. The 'Company' prospered from the year 1972 onwards when it was incorporated but saw turbulence after

years of prosperity, requiring the 'Company' to file a reference under Section 15 of SICA 1985, before BIFR. Vide order dated 08.08.2005 the 'Company' was declared sick under Section 3(1)(o) of SICA 1985, and simultaneously vide said order, IFCI Ltd. was appointed as an operating agency under Section 17(3) of SICA 1985 with a direction to prepare the rehabilitation scheme for the 'Company', taking the cut-off date 30.09.2005.

4. The 'Company' submitted a draft rehabilitation scheme to IFCI Ltd. in its capacity as the operating agency, in which it was proposed to settle the outstanding dues of the first charge holders i.e. IFCI Ltd. and EXIM Bank Ltd. by paying 55% of the principal sum due over a period of three years and 20% of the principal sum due to the second charge holders over a period of three years. A joint meeting was held thereafter on 01.02.2006 in which the draft rehabilitation scheme was considered and the 'Company' was directed to make a better offer.

5. As per the 'Company', when it was in the process of preparing a revised scheme, behind its back and without informing it and ignoring that IFCI Ltd. was wearing two hats: (i) as an operating agency, and (ii) as a creditor of the 'Company', IFCI Ltd. issued a public advertisement on 11.05.2006 inviting offers from Banks, Financial Institutions and Non-Banking Financial Companies registered with RBI to purchase its non-performing financial asset, and relevant would it be to highlight that the additional grievance raised during arguments in the appeal was that apart from doing so, notwithstanding IFCI Ltd. being charged with a fiduciary

responsibility to prepare a scheme for rehabilitation of the 'Company', it deliberately did not disclose in the advertisement that amongst others, IFCI Ltd. intended to assign the non-performing asset held by it of the 'Company'.

6. Continuing with a narration of the relevant facts, the 'Company' submitted a revised draft rehabilitation scheme on 15.06.2006, and as against the earlier figure of 55% of the principal amount offered to the first charge holders, offered to pay 70% of the principal amount. This draft revised rehabilitation scheme was considered at a joint meeting held on 30.06.2006 and the secured creditors desired a better offer to be made. The 'Company' agreed to look into the issue and try and possibly increase the settlement offer. It revised the offer on 24.07.2006 by offering 85% of the principal sum due to the first charge holders within 6 months. The revised offer was rejected on 07.08.2006 and at this stage the 'Company' entered into a dialogue with Kotak Mahindra Bank Ltd. seeking its assistance in settling the debts to the secured creditors and the 'Company' claims that in this manner, Kotak Mahindra Bank Ltd. came under a fiduciary obligation towards it, since *vital and intrinsic information* was received by it from the 'Company'.

7. Being relevant, since learned counsel for Kotak Mahindra Bank Ltd. heavily relied upon the terms under which Kotak Mahindra Bank Ltd. and the 'Company' entered into an agreement for Kotak Mahindra Bank Ltd. to act firstly as an advisor and thereafter, if things worked out well, to possibly bring in the finances, in the e-mail dated August 26, 2006, the 'Company' clearly wrote to Kotak Mahindra Bank Ltd.:

'However no termination fee will be payable if termination is caused by participation of 'KOTAK' in auctioning process or assignment of debt by IFCI to any other institutions/party.'

8. We highlight the argument advanced by learned counsel for the 'Company' qua the final assignment made by IFCI Ltd. in favour of Kotak Mahindra Bank Ltd. It was urged that IFCI Ltd. was under a fiduciary obligation to the 'Company', being the operating agency; and Kotak Mahindra Bank Ltd. was also under a fiduciary obligation under the agreement with the 'Company' since it was to render advisory service; and in said fiduciary relationship both gathered confidential and other intrinsic information from the 'Company' and thus the two acted in breach of their fiduciary obligations and covertly, the former assigned the debt to the latter.

9. It is in aforesaid context that the e-mail in question, relevant part whereof has been extracted in para 7 above assumes importance from the point of view of the defence of Kotak Mahindra Bank Ltd., which defence needs not much intelligence to be noted, because it would be apparent that the same has to be that the 'Company' knew that simultaneously with Kotak Mahindra Bank acting as its consultant, it was keeping open the option to purchase the non-performing asset of the 'Company' from not only IFCI Ltd. but from any other financial institution.

10. Noting as aforesaid and keeping aside the legal issues which were argued and would be as noted hereinafter, we proceed to note further facts.

11. On 13.09.2006 the 'Company' submitted another revised settlement proposal in which it offered to pay 100% of

the principal sum to the first charge holder secured creditors within three months.

12. The very next day i.e. on 14.09.2006, bids received by IFCI Ltd. pursuant to the public notice dated 11.05.2006 were opened by it and in respect of the non-performing assets of the 'Company', highest bid received in sum of ₹35.51 crores was made by Kotak Mahindra Bank Ltd. The same was accepted.

13. The 'Company' not only questions the manner of the bid being accepted but imputes mala-fide, both in law and on fact, on the plea that the bids were invited as per terms notified to the bidders when the notice inviting bids was published on 11.05.2006 and relatable to the term of payment, vide clause 12 it was made clear that the successful bidder *shall deposit 25% of the consideration money including EMD within three days after adjustment of EMD* and vide clause 17, it was clearly mandated that balance 75% amount would be required to be paid within 7 days of the issue of the Letter of Assignment (LOA). As against that, IFCI Ltd. wrote to Kotak Mahindra Bank as under:-

"Re: Sale of NPAs through Assignment Route – Bidding Held on 14.9.2006 – Acceptance of Bid of in respect of M/s.Hindon River Mills Ltd.

Please refer to your bid submitted on the 14th September, 2006 in respect of the above mentioned 'Company'.

In this connection, we have to advise that your bid in respect of the above mentioned 'Company', at ₹3551 lakhs is acceptable to us subject to approval of the Competent Authority.

In the meantime, you are requested, as per agreed Terms & Conditions, to please adjust 25% of the bid amount i.e. ₹887.75 lakhs after adjusting EMD amount deposited by you within 7 days from the date of this letter.

In this connection, we have also to advise that the Letter of Intent (LOI) shall be issued shortly on receipt of the approval of the Competent Authority.”

14. As per the ‘Company’, it learnt about bids being made to purchase the NPA held by IFCI Ltd. (without knowing the names of the bidders) and thus on September 18, 2006 wrote a letter to IFCI Ltd. informing that it was willing to match the highest bid i.e. the ‘Company’ offered to settle the due with IFCI Ltd. by paying ₹35.51 crores. (Which was offered by Kotak Mahindra Bank Ltd.) Within two days thereof i.e. on 20.09.2006 the ‘Company’ offered to IFCI Ltd. that against full and final settlement of the dues to IFCI Ltd. it was prepared to offer 5% over and above the highest bid received by IFCI Ltd.

15. On 20.09.2006, after adjusting 10% EMD Kotak Mahindra Bank Ltd. paid further money to make the deposit equal to 25% of the bid amount.

16. There is a dispute between the parties whether the amount was received before or after 5:15 PM on 20.09.2006 and relevant would it be to note that said fact was also pleaded as one amongst the many acts of IFCI Ltd. from which mala fide was sought to be inferred.

17. WP(C) No.14999/2006 was filed at that stage by the ‘Company’ which claims no knowledge of the fact noted in the preceding five paragraphs, and thus there is no plea of mala-fide pleaded in the writ petition. By the time the writ petition was filed, another event, which appellant claims was not

known to it also transpired; being IFCI Ltd. writing a letter to Kotak Mahindra Bank Ltd. on 28th September, 2006 informing that the Competent Authority had accepted the bid of Kotak Mahindra Bank Ltd. and thus balance 75% of the consideration money as per the bid should be paid within seven days. The 'Company' claims no knowledge of said fact and hence no pleading relatable thereto in the writ petition, but states that as per RBI guidelines as also the terms and conditions under which the bids were invited, 25% of the bid amount had to be deposited within three days (clause 12 of the bid terms) and the balance within seven days of issue of Letter of Assignment and makes the grievance of mala-fide writ large; in that, neither was 25% of the bid amount insisted to be deposited within three days of the bid being accepted nor was it insisted that within seven days the balance should be paid.

18. On 06.10.2006 an order requiring status quo to be maintained was passed by the learned Single Judge. On 09.10.2006 Kotak Mahindra Bank Ltd. deposited the balance 75% bid amount and in this manner by said date IFCI Ltd. got ₹35.51 crores from Kotak Mahindra Bank Ltd.

19. The 'Company' reads mala-fide in said receipt of money by IFCI Ltd. by urging that it breaches the order requiring status quo to be maintained.

20. In the writ petition originally filed, Kotak Mahindra Bank Ltd. was not impleaded as a respondent. But was subsequently so impleaded.

21. The respondents filed counter affidavits to which rejoinder affidavits were filed and suffice would it be to highlight that in the pleadings by way of rejoinder affidavits,

the 'Company' raised pleas of mala-fide against IFCI Ltd. and Kotak Mahindra Bank Ltd., which have been noted by us herein above, and rejected for the reasons already stated and hence we do not burden ourselves to re-pen the same and stating same reasons reject the same.

22. Facts continued to unfold themselves even after the writ petition was filed. On 10.08.2007 the 'Company' wrote a letter to IFCI informing that it had a tie up with YES Bank Ltd. which would finance the offer made by the 'Company' and that the 'Company' offers to pay IFCI Ltd. ₹35.51 crores offered by Kotak Mahindra Bank plus 10% more i.e. ₹35.51 crores + ₹3.55 crores = ₹39.06 crores and additionally would pay appropriate carrying cost on amount deposited by Kotak Mahindra Bank Ltd. with IFCI Ltd. and within 7 days would park the funds in an escrow account which would be released to IFCI Ltd. upon approval obtained from BIFR before whom the 'Company' would make a request that the sale of surplus land of the 'Company' had a tie up, with the finance to be brought by YES Bank Ltd. On 19.12.2007 IFCI Ltd. made an offer to the 'Company' when W.P.(C) No.14999/2006 was listed for consideration before the learned Single Judge; the offer being recorded in the order of even date passed by the learned Single Judge, that the settlement offer made by the 'Company' as per its letter dated 20.09.2006 with interest @ 13% per annum on the offered amount with effect from 21.09.2006; the amount to be cleared latest by 31st December, 2007 would be acceptable to IFCI Ltd.

23. On 26.12.2007 YES Bank wrote a letter to IFCI Ltd. as under:-

“Sub: Financial assistance of upto ₹44 cr to Kasliwal Group for settlement of IFCI dues of Hindon River Mills Ltd. (HRML).

Dear Mr.Atul Kumar

We understand that under the order of Honorable High Court of Delhi dated 19th December 2007, IFCI has offered to make One Tune Settlement (OTS) of its dues with Hindon River Mills Limited (HRML)

At the request of Kasliwal Group (promoters of Hindon River Mills Ltd. we are writing to confirm that YBL has sanctioned the subject facility and we shall disburse the same on fulfillment of following conditions:

1. All conditions for disbursement of UBL facility as per our facility letter.
2. Clear title of all assets of Hindon River Mills including land to satisfaction of YBL, and
3. Standard documents required from IFCI, by YBL for OTS/loan takeover.”

24. With the help of YES Bank which provided the necessary finances, the ‘Company’ settled the dues with the other four secured creditors i.e. EXIM Bank, Punjab National Bank, Indian Bank and State Bank of India between 17th December, 2007 and 29th December, 2007 and paid 100% of the principal amount to EXIM Bank, i.e. the second first charge holder and as against principle sum of ₹8.73 crores, ₹5.05 crores and ₹14.22 crores payable to Punjab National Bank, Indian Bank and State Bank of India respectively, ₹2.50 crores, ₹1.60 crores and ₹6.04 crores respectively was paid to them.

25. On 28.12.2007 the learned Single Judge extended time by 4 days to enable the ‘Company’ to pay the amount to

IFCI Ltd. as per the terms noted in the order dated 19.12.2007. On 04.01.2008 the 'Company' sought further extension of time which was declined by the learned Single Judge.

26. The writ petition went into a state of hibernation for the reason the issue whether banks and financial institutions could assign debts to another bank or a financial institution arose. On 12.01.2009 Gujarat High Court held that the debts could not be assigned from one bank or a financial institution to another. Matter reached the Supreme Court where the view finally taken was that the non-performing assets could be assigned and the decision dated September 30, 2010 is reported as 2010 (10) SCC 1 ICICI Bank Ltd. Vs. Official Liquidator of A.P.S. Star Industries Ltd. & Ors.

27. It was only thereafter that the writ petition filed by the 'Company' could be taken up for hearing before the learned Single Judge, resulting in the decision dated 21st January, 2011 being pronounced. The writ petition has been dismissed.

28. Of the four reasons on which the learned Single Judge has dismissed the writ petition filed by the appellant, we deal firstly with the third reason i.e. the reason that since the 'Company' had not alleged mala fide in the pleadings in the writ petition, it would be not permissible for it to argue on the issue of mala fide, since the issue of mala fide sought to be argued was predicated on facts.

29. From the facts noted hereinabove, it would be apparent that when the writ petition was filed, not all events relevant on the subject of the alleged mala fide had transpired and thus unless the writ petition was amended, one could not

find any pleading in the writ petition on the subject of mala fide. But, as events unfolded, further pleadings in relation thereto came on record. The learned Single Judge may technically be right, but that would be too pedantic a view to be taken.

30. Rather than to remand the matter to the learned Single Judge, since learned counsel had debated on the subject matter of mala fide, we prefer to decide the same ourselves. The plea of mala fide was urged on five principal counts. The same were: the facts noted in para 5, 16, 17, 19 above as also the fact that when YES Bank Ltd. stepped in to bring in finances IFCI Ltd. did not grant reasonable time to the appellant to pay the agreed amount required to be paid. The grievance raised, as noted in para 5, that IFCI Ltd. did not give particulars of the non-performing assets which it intended to assign when the public notice dated 11.5.2006 was issued and hence there is malice is rejected by us for the reason, when a financial institution assigns its non-performing asset, a public notice giving the name of the debtor is likely to cause panic amongst the other creditors of the company and thus IFCI Ltd. as a prudent financier was perfectly justified in not disclosing the particulars of the non-performing assets held by it which were intended to be sold.

31. The grievance pertaining to IFCI receiving 25% of the bid amount on 25.09.2006 at 5.15 PM, assuming this to be a matter of fact, qua mala fide is akin to make a mountain out of a mole hill for the reason it hardly matters whether the amount was paid after 5:15 PM and we see no scope to infer any mala-fide if the amount was received after 5:15 PM.

32. The plea of mala fide raised and as noted in para 17 above that IFCI Ltd. granted more than 7 days' time to Kotak Mahindra Bank to pay the full bid amount not only violates RBI guidelines and the conditions of the bid, but additionally is a fact which proved mala fide against the appellant inasmuch as whereas a long rope was given to Kotak Mahindra Bank, to the appellant no such benefit was granted; ignores the reason that vide clause-12, 25% of the bid amount had to be paid within three days of bid acceptance being communicated. Vide letter dated 14.09.2006 an advance intimation was given to Kotak Mahindra Bank Ltd. that its bid was accepted subject to approval by the Competent Authority. The RBI guidelines and the terms of the auction require 25% of the bid amount to be paid within three days of the bid being accepted and this would mean an unconditional acceptance of the bid. Thus, the communication by IFCI Ltd. to Kotak Mahindra Bank Ltd. on 14.09.2006 to pay 25% of the bid amount within seven days is a requirement which IFCI Ltd. could not insist upon and merely because it did so would not be evidence of any mala-fide qua the appellant. It is in this context we have earlier on noted that it hardly mattered whether Kotak Mahindra Bank paid further amount after adjusting the EMD to make good 25% of the bid amount before or after 5:15 PM on 20.09.2006. The bid confirmation as an unconditional confirmation was communicated to Kotak Mahindra Bank Ltd. only on 28.09.2006 and thus compliance with clause 12 and 17 of the bid terms had to be reckoned with effect from said date and not prior.

33. The plea of mala fide as noted in para 18 and 19 above is again a figment of imagination for the reason the status quo required to be maintained was that IFCI Ltd. could not execute the Deed of Assignment, assigning the debt to Kotak Mahindra Bank Ltd. and not that the said bank could not tender and IFCI Ltd. could not receive the balance bid money.

34. The last fact on which mala fide was alleged was pertaining to the consent recorded in the order dated 19.12.2007, of offer made that YES Bank Ltd. would pay ₹35.51 crores i.e. the amount offered as per the bid by Kotak Mahindra Bank Ltd. together with interest @ 13% per annum on the amount offered with effect from 21.09.2006 and IFCI Ltd. paid lip service by accepting the offer but insisting upon the amount being paid latest by 31.12.2007 and refused any extension of time. Mala fide was inferred, or was required to be inferred by the Court, on the plea that this is proof of the attitude of IFCI Ltd. that come what may, we may play along with you, but would trip you.

35. The issue is not that simple as is sought to be projected. As noted by us hereinabove in para 22, YES Bank Ltd. had a tie up with the appellant on terms only known to the two, but partly evidenced from the fact that on 10.08.2007, as noted in para 22 above, the appellant made an offer that YES Bank Ltd. would pay a sum 10% in excess of the bid made by Kotak Mahindra Bank Ltd.; but not upfront. The offer was clearly tied with the sale of surplus land of the appellant and permission from BIFR. Further, even as late as 26.12.2007, with reference to the letter written by YES Bank Ltd. to IFCI Ltd. contents whereof have been noted in para 23 above, it is

clear that even till said date YES Bank Ltd. was insisting that payment which it would make would be hedged as per the conditions of its facility letter and clear title of all assets of the appellant; conditions which Kotak Mahindra Bank Ltd. had not stipulated in its bid.

36. Thus, the position would be that patience of IFCI Ltd. may have run out. It needs to be highlighted that the appellant had made the first settlement offer somewhere around November 2005 and had then offered to pay only 55% of the principal sum due and from time to time kept on increasing the offer. The year 2007 was ending, when IFCI Ltd. agreed as a last ditch effort to recover the maximum which it could when in late December 2007 it required that if paid by 31.12.2007 it was willing to settle the matter by receiving the amount offered by Kotak Mahindra Bank Ltd. with interest @ 13% per annum with effect from 21.09.2006. It cannot be ignored that IFCI Ltd. had received ₹35.51 crores from Kotak Mahindra Bank Ltd. by 09.10.2006 after bid made by Kotak Mahindra Bank Ltd. was accepted. The said bank was obviously entitled for the matter to be resolved at the earliest and if resolved in favour of the appellant, the amount deposited by it with IFCI Ltd. being returned with reasonable interest thereon and this explains IFCI Ltd. requiring the appellant to pay to it ₹35.51 crores together with interest with effect from 21.09.2006. Thus, being a commercial decision, given the surrounding background of facts in which IFCI Ltd. took the decision, it cannot be said that there is mala fide against the appellant in the decision taken by IFCI Ltd. that if

the settlement offer was not made good till 31.12.2007, that would be the end of a negotiated settlement.

37. Thus, on the subject of mala fide, the learned Single Judge may technically be in the wrong in taking a view that since no plea of mala-fide was raised in the writ petition, he would not permit the same to be argued and our reason for so saying is that the appellant had no knowledge of certain facts, which surfaced after it had filed the writ petition. Pleadings qua the same are contained in the supplementary pleadings which ought to have been taken note of by the learned Single Judge. But since we have found nothing of substance in the pleas pertaining to mala-fide alleged against IFCI Ltd. and Kotak Mahindra Bank Ltd., we hold that the impugned decision cannot be vitiated on account of mala-fides not being considered. We see no mala-fides and thus we see no scope to consider a non-existing thing.

38. The second reasoning of the learned Single Judge that the Division Bench decision reported as AIR 2007 Delhi 65 Haryana Steel & Alloys Ltd. Vs. IFCI Ltd. was binding on the learned Single Judge, was reached by the learned Single Judge on account of complete identity in the writ petitions filed by Haryana Steel & Alloys Ltd. and the appellant for the reason pursuant to the same public advertisement inviting offers i.e. the public advertisement dated 11.05.2006 the non-performing assets of Haryana Steel & Alloys Ltd. were assigned by IFCI Ltd. and the Division Bench therein had found nothing wrong. As noted hereinabove, the distinctive fact pertaining to the appellant is the events which transpired after it had filed the writ petition and thus technically one may be

correct in saying that the decision of the Division Bench was on its own facts and hence not binding as no statute was interpreted therein, but the matter takes the appellant no further for the reason the main issue between the parties would be, as would be noted by us hereinafter: Whether at all any right of the appellant had been adversely affected by the assignment of the debt by IFCI Ltd. to Kotak Mahindra Bank Ltd.

39. The fourth reasoning by the learned Single Judge that the conduct of the 'Company' was lacking in bona fide and this denuded it from seeking any discretionary relief under Article 226 of the Constitution of India is not a correct view for the reason it is based only upon the fact that the 'Company' first made an offer to settle the due by paying 55% of the principal sum due and later on increased the offer to 85% of the principal sum due and further improved the same by offering to pay 100% of the principal sum due and then increased the offer to pay the sum offered by Kotak Mahindra Bank Ltd.; from which conduct i.e. of improving the offers from time to time, lack of bona fide has been inferred. The view taken by the learned Single Judge ignores that bona fide or lack thereof has not to be considered in the context of the time consumed and offers and counter offers made by parties, but has to be considered in the context whether the party was making an honest attempt to settle the subject matter of dispute. Far from there being lack of bona fide, we see honesty and bona fide in the conduct of the 'Company' evidenced by the fact that of the five secured creditors it successfully settled the matter with four secured creditors and

paid the agreed sum to them. Merely because the settlement talks with IFCI Ltd. continued to be discussed for a long time would not mean that there is lack of bona fide in the conduct of the 'Company'.

40. The view taken by the learned Single Judge that the subject matter of the writ petition required the same to be agitated before BIFR for the reason the grievance pertained to the conduct of IFCI Ltd. (which was appointed as an operating agency by BIFR) in breaching its fiduciary obligation is not a correct view for the reason in the writ petition filed, the fulcrum of the challenge was predicated on the right conferred under Article 14 of the Constitution of India i.e. 'that in its dealing with persons, a State and its instrumentalities, must act reasonably, fairly and with a non-arbitrary approach'. The case of the 'Company' is that IFCI Ltd. being an instrumentality of the State had to act reasonably with the 'Company' and if it was willing to assign the debt to a third party at a price 'X' which was offered by the 'Company', fairness and reasonableness demanded the said price to be accepted qua the 'Company' for the reason matter was pending consideration before BIFR to revive the 'Company' and if any third party intervened it would unsettle the proceedings before BIFR. But for our reasons recorded in paras 35 and 36 above, while discussing the plea of mala-fide, we have found the action to be prudent from the point of view of business, which reasoning hold good even qua issue of reasonable conduct of IFCI Ltd.

41. This takes us to the core question debated in appeal before us. Whereas the 'Company' urged, on the

strength of various judgments, that it is now well-settled in India, that even in matters pertaining to contract, the State or its instrumentalities are bound by the principles of fairness in action enshrined under Article 14 of the Constitution of India. The contra argument, conceding to the law being as aforesaid, was that this would be contingent upon the action of a State or its instrumentality affecting the right of a person. It was urged vehemently by Sh.T.K.Ganju, learned senior counsel for Kotak Mahindra Bank Ltd. that sale of a Non Performing Asset (NPA) which is nothing but the assignment of a debt does not affect the right of the debtor whose liability remains the same and it hardly matters whether 'A' knocks at its door to ask for return of the debt or 'B' knocks at its door to ask for return of the debt. Learned senior counsel highlighted that all decisions which were cited relate to the sale of the assets of the debtor which are mortgaged with the creditor; and that the decisions highlight the principle of reasonableness and fairness in the action of the creditor to sell the mortgaged asset. Counsel urged that said decisions would have no application where a debt is assigned by a bank or a financial institution; to another bank or a financial institution for the reason such assignment does not have any impact upon the value of the securities held by the creditor or on the securities themselves.

42. In view of the stand taken by the respondents, we need not discuss the plethora of judgments cited by learned counsel for the 'Company' which pertain to sale of the assets of a company in relation to principles of justness and fairness in the action of the creditor to dispose of the secured assets and needless to state if the action of the creditor is found to be

vitiated by mala fides, unreasonableness, arbitrariness or prejudice to public interest, appropriate relief can always be granted to the party aggrieved whose right is infringed. But, if no right is infringed, we see no scope for the application of said principle of law.

43. It is no doubt true that a financial institution, as a lender, owes a duty to act fairly and in good faith with the borrower and there has to be a fair dealing between the financial institution and the borrower, but only with respect to such actions which affect the right of the borrower. Pertaining to the sale of a Non Performing Asset by way of assignment, in Mardia Chemicals Ltd.'s case (supra), while upholding sale of Non Performing Assets by way of assignments, the Supreme Court very categorically observed in para 46 of its opinion that '*Such transfer in no manner affects any right or interest of the borrower(s) (customer)*'. In para 47 of its opinion, the Supreme Court in no uncertain words opined that when a debt is assigned by a financial institution it '*is only transferring its rights under a contract and its own asset, namely, the debt as also the mortgagee's rights in the mortgaged properties without in any manner affecting the rights of the borrower(s)/mortgagor(s) in the contract or in the assets*'.

44. The law could not be stated in more clear language. The assignment of a debt does not affect the right of the debtor.

45. It is settled jurisprudence that there cannot be a duty casting an obligation upon a party without there being a corresponding right in favour of somebody else. If there is no right, there can be no duty is the norm of jurisprudence save

and except in instances such as: a man has a right to dispose of his property in any manner he chooses, but it casts no duty on him to dispose it of in a particular manner. 'A' may have a right to make a will in favour of his son, but has no duty to make such a will. But, these would be instances of rights with no corresponding duties. The instance, by way of exception to the general rule that every right has a corresponding duty and vice-versa, is explainable that the right and duty cannot be in one person. The right in a person must correspond to a duty in some other.

46. Right and interest are different.

47. We see some logic in the argument by the 'Company' that it has an interest in knowing who is its creditor and thus it could be argued that the 'Company' had an interest in knowing what IFCI Ltd. and Kotak Mahindra Bank were brewing. But, said interest cannot be raised to the status of a right. The situation at hand would be akin to a very apposite discussion by 'Salmond' in '*JURISPRUDENCE*' and we quote from the 10th Edn. under Chapter 10 pertaining to Duties and Rights. The learned author opines that '*A duty is an obligatory act, that is to say, it is an act the opposite of which would be wrong.*' But, the learned author goes on to draw the distinction between duties and wrongs falling in the category of being moral and being legal as also drawing attention that one should be careful in not confusing an interest with a right. Opining that '*Every man who has a right to anything has an interest in it also,*' the learned author clearly states '*but he may have an interest without having a right.*' The discussion terminates with a very illuminating example where the learned

author says that just as every person has an interest in the privacy of his house but there is no legal duty in the neighbour to refrain from offensive curiosity about what goes on in his house, even if the satisfaction of it does him harm by irritating him. In the situation of the kind, the learned author opines that there is clearly a moral wrong but not a legal wrong. Thus the 'Company' may have some kind of an interest in its debt to IFCI Ltd. on the subject whether IFCI Ltd. retains its character as the creditor or not, but the same is not its right.

48. Notwithstanding IFCI Bank Ltd. owing a fiduciary obligation towards the 'Company' in its capacity as an Operating Agency and notwithstanding Kotak Mahindra Bank Ltd. owing a fiduciary obligation, being appointed as a consultant, towards the 'Company'; we find that there would be no breach of the said fiduciary obligation in law and additionally on facts, the former on account of the legal position as noted herein above and on facts, for the facts which we have noted in para 7 herein above i.e. that when Kotak Mahindra Bank Ltd. was discussing the terms on which it would be acting as an advisor to the 'Company', evidenced by the e-mail dated August 26, 2006, it was made clear to the 'Company' that this would not preclude Kotak Mahindra Bank Ltd. to participate in the auction process or assignment of debt by IFCI Ltd. to any other institution. The 'Company' was clearly told that Kotak Mahindra Bank Ltd. was keeping open the option and the right to bid for the assets of the 'Company' or when the debt was assigned by IFCI Ltd. Thus, it is not a case where it can be argued that IFCI Ltd. and Kotak Mahindra Bank Ltd. acted in concert; clothing their acts in the secrecy of

darkness and not known to the 'Company'. The 'Company' was clearly told by Kotak Mahindra Bank Ltd. that notwithstanding it being appointed as a consultant by it, if IFCL Ltd. assigned the debts to a third party it was keeping its option open to participate in the bidding process.

49. We affirm the conclusions arrived at by the learned Single Judge, but not on the process of reasoning adopted by the learned Single Judge but on the process of reasoning aforesaid. The appeal is dismissed.

50. Keeping in view the weak financial position of the appellant we refrain from imposing any costs.

(PRADEEP NANDRAJOG)
JUDGE

(S.P.GARG)
JUDGE

DECEMBER 08, 2011
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