

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

%

Judgment delivered on: 08.02.2011

+ **W.P.(C) 13887/2009**

M/S DWARIKADHISH SPINNERS LIMITED

..... Petitioner

versus

UCO BANK & ORS.

..... Respondents

**Advocates who appeared in this case:**

For the Petitioner : Mr Amit Sibal with Mr Saurabh Seth, Mr Jayant Bhatt & Mr Shravanth Shankar.

For the Respondents : Mr Rajeev Nayyar, Sr. Advocate with Ms Sushmita Banerjee for R- 2,3 & 4.  
Mr Ajant Kumar, for R-5.

**CORAM:-**

**HON'BLE MR JUSTICE BADAR DURREZ AHMED**

**HON'BLE MR JUSTICE MANMOHAN SINGH**

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

**BADAR DURREZ AHMED, J (ORAL)**

1. This writ petition is directed against the order passed by the Appellate Authority for Industrial & Financial Reconstruction (AAIFR) dated 16.09.2009 whereby the petitioner's appeal under Section 25 of the Sick Industrial Companies (Special Provision) Act, 1985 (hereinafter referred to as 'SICA') was dismissed. The said appeal before the AAIFR was in turn directed against the order dated 04.09.2006 passed by the Board for

Industrial and Financial Reconstruction (BIFR) whereby the reference made by the Board of the petitioner company under Section 15 of SICA was rejected as non maintainable on the grounds that the company (petitioner) did not approach the BIFR with clean hands and had failed to avail the opportunities given by the Board to present its case.

2. Mr Amit Sibal, the learned counsel appearing on behalf of the petitioner, mainly canvassed two points. The first point that was urged by him was that neither the BIFR nor the AAIFR have returned any finding as to whether the petitioner company is a sick industrial company or not. According to him, this determination is the duty of the BIFR as mandated by the provisions of SICA. He further submitted that once a company is determined to be sick under the provisions of SICA, then, that company can be dealt with only as provided under the said Act. The jurisdiction in respect of such determination, that is with regard to the sickness of the concerned company, is at the sole authority of the BIFR and there is a complete bar as provided under Section 26 of SICA for approaching any other Court including Civil Courts to enter into this domain. Mr Sibal further submitted that once the BIFR, or as the case may be, AAIFR comes to a determination that a company is a sick industrial company, the further question would have to be answered as to whether the said company can be revived or not. In either eventuality different consequences flow. If it is decided that the company is a potentially viable company then schemes can be framed as provided under Section 18 of SICA. However, if it is felt that the company is so sick that it cannot be revived or rehabilitated then consequences of winding up, as

contemplated under Section 20, would flow. In this backdrop Mr Sibal submitted that it is, therefore, the duty cast upon the Board, as also the AAIFR, at the appellate stage, to return a conclusive finding as to whether the company in question is within the definition of a sick industrial company as defined in Section 3 (1)(o) of SICA or not. If the BIFR or AAIFR does not return any such finding then they could be regarded as having abdicated their primary or most important function. He submitted that in the present case this is exactly what has happened and, therefore, the impugned order passed by the AAIFR is liable to be set aside and the matter is liable to be remanded to the BIFR for conducting an inquiry in terms of Section 16 of SICA and for a clear determination as to whether the petitioner is a sick industrial company or not.

3. The second point urged by Mr Sibal, on behalf of the petitioner, is that BIFR, as also the AAIFR, has been unfair to the petitioner company, inasmuch as the case of the petitioner company has been dealt along with three other group companies, namely, M/s Shamken Spinners Limited (SSL), M/s Shamken Multifab Limited (SML) and Shamken Cotsyn Limited (SCL). He submitted that, as the facts would reveal, the other three companies of the group stood on a different footing from that of the petitioner company and the case of the petitioner company has been painted with the same brush as that of the other three companies. And, in doing so, both the BIFR and the AAIFR have committed a gross error. To substantiate this plea, Mr Sibal submitted that while the other three companies of the group had already filed references before the BIFR, the present company had filed its reference under

Section 15 only on 12.07.2005. At that time, the BIFR was already seized of the references filed by the other three companies and certain orders had already been passed therein. On 19.12.2005, when the reference of SSL and the other two group companies were considered by the BIFR, the petitioner company (DSL) was not represented as its first hearing was conducted much later, on 23.02.2006. However, there is a direction in the order dated 19.12.2005 that in future the cases of the four group companies i.e. SSL, SML and SCL and the present petitioner (DSL) be listed for hearing on the same date as in the case of SSL. It is in this order, that it is recorded for the first time that IDBI had an investigative Audit (IA) conducted in respect of the group companies and that the audit report of M/s ANG and Associates revealed serious financial irregularities including furnishing of false and misleading information to the Banks/Institutions, multiple financing of projects, submission of forged Bank Statements and “fabricated auditor’s certificates” for the purpose of availing disbursements, diversion of funds to group companies etc. In the said order itself it has been observed that the said IA report had not been served on the group companies and as such they had not been in a position to comment thereon. Consequently, the BIFR directed IDBI to immediately serve the IA report on the company (SSL), which was given at the hearing itself, and to all the secured creditors. SSL was allowed four weeks time to respond to the IA report with copies to the Banks/Financial Institutions and others concerned.

4. It is the contention of Mr Sibal, on behalf of the petitioner (DSL), that the IA report was given to the other group companies but not to DSL.

This is also evident from the fact that the order dated 19.12.2005 itself records that the IA report was served on the companies at the hearing itself. Since DSL was not represented, because the first date of hearing of its reference was on 23.02.2006, there was no question of the IA report having been served on the said company at the hearing on 19.12.2005. In fact, Mr Sibal, on instructions, states that even till this date the petitioner does not have a copy of the IA report in respect of DSL. Of course, there was some controversy as to whether the IA report was a composite one in respect of the four group of companies or there were separate reports. That controversy has been resolved, inasmuch as we find that the report itself comprised of four separate independent parts. It is now an admitted position that the four parts of the report pertain to each of the four group companies separately and were also furnished by the said M/s ANG and Associates to IDBI under cover of separate letters on different dates.

5. In this background, it was submitted by Mr Sibal that it was for the first time that the petitioner's reference was taken up by the BIFR on 22.03.2006, thereafter the next date was 03.07.2006 when all the group companies were directed to file their replies to their respective IAs. The next and final date before the BIFR was 04.09.2006 when the representative appearing on behalf of the petitioner had sought an adjournment. However, that adjournment was not allowed and it was observed by the BIFR that ample time had been given in the last hearings but the company had not submitted its reply to the IA report which contained very serious allegations with regard to the financial aspects of the working of the company. The

reference of the petitioner company was, therefore, rejected, inter alia, on the ground that it had failed to avail the opportunities given by BIFR to present its case. According to Mr Sibal, since the petitioner was not represented by advocates on that date i.e., on 04.09.2006 and the representative was merely requesting for an adjournment, the BIFR ought to have granted further time along with a peremptory direction that in case the reply is not given, the BIFR would proceed in the absence of such a reply. Consequently, it was submitted by Mr Sibal that a proper opportunity was not given to the petitioner to give its response to the IA report, even assuming that a copy of the IA report was available with the petitioner. In this context he further submitted that the IA report itself, as would be apparent from the proceedings before the AAIFR, was not sacrosanct and was not based on authenticated evidence but was based on unauthorized and unconfirmed information supplied by the banks to the said chartered accountants.

6. Mr Nayyar, the learned Senior Counsel appearing on behalf of the respondent nos. 2, 3 and 4, submitted that in so far as the denial of opportunity argument is concerned, the petitioner had no case. He submitted that if it were true that the petitioner company did not have a copy of the IA report, it could have made a request for the same before the BIFR on 22.03.2006 or even on 03.07.2006. In fact, even on 04.09.2006 the Authorized Representative could have said that he is seeking an adjournment because he did not have a copy of the IA report and, therefore, was unable to give a response thereto. Since this is admittedly not the case, according to

Mr Nayyar, the petitioner cannot take the plea that he was denied opportunity of responding to the IA report.

7. In so far as the plea that the BIFR had not performed its duty in returning a finding as to whether the petitioner was a sick industrial company or not, Mr Nayyar submitted that the BIFR was empowered under Section 16(1)(b) to take in any information as also under Regulation 40 to rely upon any information for the purposes of coming to the conclusion as to whether the petitioner was a sick industrial company or not. Therefore, according to Mr Nayyar, the BIFR and also the AAIFR cannot be faulted for placing reliance on the IA report of M/s ANG and Associates which was uncontroverted inasmuch as the petitioner company had not filed its response thereto. The fact that the BIFR as also the AAFIR did not proceed any further with the reference implied that the petitioner company was not a sick industrial company and, therefore, on this ground also there can be no grievance on the part of the petitioner. Mr Nayyar also submitted that while the BIFR order dated 04.09.2006 did not discuss the IA report as such the same had been discussed in detail by the AAFIR and since the BIFR order merges with the AAFIR order, whatever defect was there in the order of the BIFR stands cured by the AAFIR order dated 16.09.2006.

8. He referred to the conclusions which were arrived at by the AAFIR which are in the following terms :-

“36. To sum up, we find that the irregularities pointed out in the SIA reports were very serious in nature and the concerned companies did not clearly and convincingly rebut the specific allegations contained therein which seriously impaired the

accuracy and the credibility of the accounts. In the absence of credible accounts, any exercise aimed at determining sickness and deciding subsequent measures to deal with it were bound to be vitiated. We also find that by not granting adjournment on 4/9/2006, BIFR did not violate any principle of natural justice, equity or fairplay as the companies had participated in the hearing all along. Inability to make use of given opportunities is not denial of opportunities; such inability, especially, in matters crucial to the appellant companies is unacceptable. In the case of DSP we find that non-availability of the SIA report and the consequent inability of the company to furnish replies are not supportable arguments.

37. In view of what we have said above, we feel that the impugned orders of BIFR of 4.9.2006 do not suffer from any legal infirmity and they are just and fair. We do not see any reason to interfere with these orders. We dismiss the appeals accordingly.”  
(underlining added)

9. We have considered the arguments advanced by the counsel for the parties as well as the material on record and the statutory provisions. We find that as per the statement of objects and reasons of SICA, it has been designed to take care of not only those sick industrial companies which are potentially viable and can be revived and rehabilitated but also of the non-viable sick industrial companies. The potentially viable sick industrial companies are sought to be revived and rehabilitated under SICA whereas the non-viable sick industrial companies are to be dealt with under Section 20 of SICA in order to salvage the productive assets and realize the amounts due to the banks and financial institutions through liquidation of such companies. Before either eventuality is undertaken, the BIFR has been given the duty under the Act to determine whether an industrial company has become a sick

industrial company or not. The expression sick industrial company is defined in Section 3(1)(o) as under:

“sick industrial company” means an industrial company (being a company registered for not less than five years) which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth.”

It is apparent from the above definition that an industrial company, which has, at the end of any financial year, accumulated losses equal to or exceeding the entire net worth of the company would be termed as a sick industrial company. When an industrial company becomes sick, a duty is cast upon the Board of Directors of that company under Section 15(1) to, within sixty days from the date of finalization of the duly audited accounts of the company for the financial year as at the end of which the company has become sick industrial company, make a reference to BIFR for determination of the measures which are to be adopted in respect of the said company. We find that by virtue of Section 15(2), the Central Government or the Reserve Bank or a State Government or a public financial institution or a State level institution or a scheduled bank may, without prejudice to the requirement of the Board of Directors of an industrial company which has become sick to make a reference to the BIFR within Section 15(1), can also make a reference in respect of a company in respect of which there are sufficient reasons to believe that it has become a sick industrial company. Thus, it is clear that a reference to BIFR can be made either by the Board of Directors of the company itself or by the Central Government, RBI etc. under Section 15(2).

10. Section 16 is of material significance and, as such, it would be appropriate to set out the same:-

**“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 matter 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.

Explanation:— For the purposes of this sub section, an inquiry shall be deemed to have commenced upon the receipt by the Board of any reference or information or upon its own knowledge reduced to writing by the Board.

(4) Where the Board deems it fit to make an inquiry or to cause an inquiry to be made into any industrial company under sub-section (1) or, as the case may be, under sub-section (2), it may appoint one or more persons to be a special director or special directors of the company for safeguarding the financial and other interests of the company or in the public interest.

(4A) The Board may issue such directions to a special director appointed under sub-section (4) as it may deem necessary or expedient for proper discharge of his duties.

(5) The appointment of a special director referred to in sub-section (4) shall be valid and effective notwithstanding anything to the contrary contained in the Companies Act, 1956 (1 of 1956) or in any other law for the time being in force or in the memorandum and articles of association or any other instrument relating to the industrial company, and any provision regarding share qualification, age limit, number of directorships, removal from office of directors and such like conditions contained in any such law or instrument aforesaid, shall not apply to any director appointed by the Board.

(6) Any special director appointed under sub-section (4) shall -

(a) hold office during, the pleasure of the Board and may be removed or substituted by any person by order in writing by the Board;

(b) not incur any obligation or liability by reason only of his being a director or for anything done or omitted to be done in good faith in the discharge of his duties as a director or anything in relation thereto;

(c) not be liable to retirement by rotation and shall not be taken into account for computing the number of directors liable to such retirement;

(d) not be liable to be prosecuted under any law for anything, done or omitted to be done in good faith in the discharge of his duties in relation to the sick industrial company.”

11. A plain reading of Section 16(1) of SICA would indicate that the prime duty of the BIFR in making an inquiry is for the purpose of determining

whether an industrial company has become a sick industrial company or not. Of course, sub-section (1) of Section 16 has two parts. Clause (a) of Section 16(1) refers to a situation where the Board embarks upon an inquiry upon receipt of a reference under Section 15 of SICA. We may recall that the reference under Section 15 may be made either at the instance of the Board of Directors of the company which purports to be a sick industrial company or under Section 15(2) at the instance of the Central Government, Reserve Bank etc. where such institution has sufficient reasons to believe that an industrial company has become a sick industrial company. Clause (b) of Section 16(1) contemplates an inquiry in a situation where the BIFR undertakes such inquiry upon information received with respect to a company or upon its own knowledge as to the financial condition of such a company. In either eventuality, that is, either upon receipt of a reference or upon information, the BIFR has to make an inquiry for determining whether the industrial company in question has become a sick industrial company or not. Of course, the type and kind of inquiry that the BIFR has to make has been left to the BIFR, inasmuch as the expression used is :- “the Board may make such inquiry as it may deem fit”.

12. By virtue of sub-section (2) of Section 16 of SICA, in cases where the BIFR deems it necessary or expedient so to do for the expeditious disposal of an inquiry under Section 16(1), the BIFR may require an operating agency to inquire into and make a report with respect to such matters as may be specified in the orders passed by the BIFR in this regard. At this juncture

we would like to point out that the definition of “operating agency” given in Section 3(1)(i) is as follows:

“(i) "operating agency" means any public financial institution, State level institution, scheduled bank or any other person as may be specified by general or special order as its agency by the Board;”

In other words, the operating agency has to be appointed by the BIFR by a general or a special order as its agent for the purposes of making a report. We may also mention that by virtue of Section 16(3), it is apparent that all endeavours are to be made to complete the inquiry as expeditiously as possible and within a period of sixty days from the commencement of the inquiry. The explanation to Section 16(3) makes it clear that an inquiry is deemed to commence upon the receipt by the Board of a reference or upon its own knowledge reduced to writing by the Board.

13. In the present case since a reference has been made by the Board of Directors of the petitioner company under Section 15(1), the inquiry would be deemed to have commenced on the date on which the reference was received, that is, on 12.07.2005. Consequently, if we were to strictly comply with the provisions of Section 16(3) of SICA, the BIFR should have endeavoured to complete the inquiry within sixty days thereof, but unfortunately that did not happen and even the first date on which the petitioner’s reference was taken up by the Board was much later, on 22.03.2006. Anyhow, that is another aspect of the matter with which we are not concerned in this writ petition.

14. It is clear from the above resume with regard to the provisions of Section 16 of SICA that it is incumbent upon the BIFR to conduct an inquiry for the purpose of determining whether the industrial company has become a sick industrial company or not. Such inquiry has to be conducted upon receipt of a reference under Section 15 or upon information received by the BIFR. The inquiry has to be conducted by the BIFR itself, but as provided under Section 16(2), where it is necessary for expeditious disposal of an inquiry and where the BIFR deems it expedient to do so, the BIFR may appoint an operating agency and require it to inquire into and make a report with respect to the matters which may be specified in the order. In any event, whether the inquiry is conducted by the Board itself or through an operating agency, it is imperative that once a reference is received, such an inquiry has to be conducted for determining whether the industrial company has become a sick industrial company or not. It is not open to the BIFR to reject a reference without returning a finding as to whether the company in question has become a sick industrial company or not.

15. What has been stated by us is also borne out in Chapter IV of the Board of Industrial and Financial Reconstruction Regulations, 1987 (hereinafter referred to as the “said regulations”). The said Chapter IV deals with inquiries under Section 16. Regulation 21 specifically provides that upon a reference with respect to an industrial company under Section 15 or upon information received with respect to such company or upon its own knowledge as to the financial condition of the company, the BIFR may either itself make such inquiry, as it may deem fit, for determining whether the

company in question has become a sick industrial company or if it deems it necessary or expedient so to do, for the expeditious disposal of the said inquiry, direct by an order, an operating agency, to be specified in the order, to inquire into and make a report in respect of such matters as may be specified in the said order. By virtue of Regulation 22 the BIFR may also direct the operating agency to make a further inquiry if deemed necessary.

16. Regulation 24 is important. It reads as under:-

“24. Where the Board after completion of its inquiry or after considering the report or, as the case may be, the further report of the operating agency, is satisfied that no case exists for coming to the conclusion that the industrial company has become a sick industrial company, it shall drop further proceedings in the reference.”

It is clear that as per the said Regulation 24 also two situations are contemplated — (1) completion of the inquiry by the Board itself or (2) after considering the report of the operating agency or further report of the operating agency, as the case may be. Regulation 24 makes it clear that upon either of the two eventualities, if the BIFR is satisfied that no case exists for coming to the conclusion that industrial company has become a sick industrial company, it shall drop further proceedings in the reference. This regulation also makes it clear that it is imperative for the BIFR to record its satisfaction with regard to the question as to whether the concerned company has become a sick industrial company or not. If the satisfaction recorded indicates that the company in question is not a sick industrial company then further proceedings in the reference are to be dropped. If, on the other hand, the BIFR comes to the conclusion and is satisfied that the company in question

has become a sick industrial company, it would then, as mentioned above, have to determine as to whether the said company is one which has potential for revival and rehabilitation or one where revival is not a viable option. We have already pointed out the courses that would be followed in either eventuality.

17. The learned counsel for the respondents had referred to Regulation 40 in order to submit that it is open to the BIFR to take assistance of public financial institutions, banks, other institutions, consultants, experts, chartered accountants etc. in furtherance of its functions. They placed reliance on Regulation 40 for the proposition that the IA report submitted by M/s ANG and Associates would fall within such assistance as contemplated under this Regulation. Consequently, it was submitted that the Board committed no error in relying upon the IA report in so far as the petitioner company is concerned. Regulation 40 reads as under:

**“Assistance to the Board.**— The Board may, at any time, take the assistance of public financial institutions, banks or other institutions, consultants, experts, chartered accountants, surveyors and such other technical and professional persons as it may consider necessary and ask them to submit report or furnish any information.

Provided that if the report or information so obtained or any part thereof is brought on record of any inquiry and is proposed to be relied upon by the Board for forming its opinion or view, the party or parties to the inquiry shall be given a reasonable opportunity of making his or their submissions with respect thereto.”

One thing that immediately strikes us is that the assistance that is spoken of in Regulation 40 is invited at the instance of the BIFR. The language is clear,

inasmuch as it contemplates that the BIFR may ask any of the said institutions, consultants, chartered accountants etc. to submit a report or furnish information. The occasion for the BIFR to do so would arise only after it commences an inquiry. As we have noticed above, the inquiry commenced, in this case, on 12.07.2005, the date on which the reference received by the BIFR. Therefore, the assistance that is contemplated in Regulation 40 is one which would be sought after the commencement of the inquiry by the BIFR and not some pre-existing report.

18. Having surveyed the various statutory provisions as well as the applicable regulations, we are of the clear view that the BIFR, once it receives a reference from the Board of Directors of the company, is duty bound to determine as to whether the company has become a sick industrial company or not. In the present case, we find that the BIFR did not return any such finding either way. All that the BIFR did was to reject the reference on the plea that the petitioner company had not approached the BIFR with clean hands, inasmuch as there were serious allegations in the IA report submitted by M/s ANG and Associates. The BIFR also rejected the reference on the ground that no reply to the IA report had been submitted by the petitioner company despite repeated opportunities. We are of the view that this approach is not in consonance with the law. Irrespective of the alleged conduct of the petitioner company, once a reference is received by the BIFR it has to make an inquiry for determining whether the company in question has become a sick industrial company or not. In the present case, we find that no such inquiry, as contemplated under Section 16 of the SICA, was

embarked upon by the BIFR. On the contrary, BIFR, in fact, did not give any finding in so far as the IA report in respect of the petitioner company is concerned.

19. An attempt was sought to be made by the learned counsel appearing on behalf of the respondents to bring the IA report within Section 16(1)(b) of SICA. But, we are afraid, it would not be possible for us to agree with that contention. This is so because Section 16(1)(b) refers to information or knowledge of the BIFR with regard to the initiation of an inquiry for determining whether the company has become a sick industrial company or not. The IA report is certainly not such an information. In any event, once a reference has been made under Section 15, then, it will be Section 16(1)(a) which would apply and not Section 16(1)(b).

20. In so far as AAIFR is concerned, we are in agreement with the submission made by Mr Sibal that while the IA reports concerning SSL, SML and SCL were considered in some detail by the AAIFR, the IA report in respect of the petitioner company was not so considered. We are also in agreement with the submission made by Mr Sibal that upon reading the discussion of the IA reports concerning SSL, SML and SCL, it appears that these companies had allegedly exaggerated their figures on the assets side and this apparently puffed up their health in order to obtain loans from financial institutions. Although these are allegations, to which Mr Sibal obviously does not agree with, he states that on a demurer, even if this were to be true, it only reflects that the health of the companies had been propped up and not the other way round. What he meant was that if the allegations contained in the

IA reports were taken to be true, they would reflect that the companies were sicker than they were actually portrayed to be in the audited accounts which the said companies submitted along with their references.

In any event, we need not deal with this aspect of the matter any further, inasmuch as no such exercise had been done by the AAIFR in the case of the petitioner company.

21. Furthermore, Mr Sibal also pointed out that Bank of India, which was one of the lending organizations in so far as the group companies are concerned, had filed a complaint before the Institute of Chartered Accountants of India against Mr Kapil Dev Aggarwal who was part of M/s B. Aggarwal and Company who were the statutory auditors of the group companies including the petitioner company. The complaint essentially was that the said Chartered Accountants had wrongly certified the accounts of the said group companies as being accurate when they were allegedly not so. These very accounts were before the BIFR and AAIFR in the shape of the documents accompanying the reference. A copy of the order dated 12.06.2008 passed by the Institute of Chartered Accountants of India dismissing the complaint of Bank of India has been placed on record. Mr Sibal has taken us through paragraphs 14.1, 14.2 and certain other portions of the said order to indicate that even Mr A.N. Gupta of M/s ANG and Associates had stated before the institute that he had prepared the IA, inter alia, on the basis of unconfirmed information from unauthorized sources and that the said report comprised merely of observations and opinions based on such information.

22. On the basis of this statement Mr Sibal submitted that the IA report could not have been treated as sacrosanct as had been done by the AAIFR. It was in the light of these facts that a greater duty was cast upon the BIFR as well as the AAIFR in conducting its own inquiry and not merely relying upon the IA reports prepared by M/s ANG and Associates and that too at the instance of IDBI which was a creditor institution and was interested in opposing the reference.

23. Considering the above facts, we are in agreement with the submission made by Mr Sibal that the so-called irregularities pointed out in the IA reports ought not to have been solely relied upon by the BIFR or the AAIFR for coming to the conclusion that the said report seriously impaired the accuracy or the credibility of the accounts. In any event, there has been no discussion with regard to the IA report concerning the petitioner company and what is of greater significance even while the AAIFR considered the accounts of the other three group companies, it did not do so in the case of the petitioner company. The AAIFR was also wrong in coming to the conclusion that in the absence of credible accounts any exercise aimed at determining the sickness and subsequent measures to deal with it were bound to be vitiated. We are of the view that where the accounts presented by the company are to be trashed, it is incumbent upon the BIFR to inquire into the affairs of the company itself and to determine as to whether it is a sick company or not. In rejecting the reference by holding that the exercise of determining the sickness was bound to be vitiated, the BIFR as also the

AAIFR, has abdicated its very vital function which is mandated by Section 16 of SICA, which is to conduct an inquiry.

24. Although, we do not agree with the argument on lack of opportunity which was advanced by Mr Sibal, but, on this aspect of the matter alone that the BIFR did not return a finding with regard to the company being a sick company or not, we feel that the impugned order is liable to be set aside but, only, to the extent relating to the petitioner company in Appeal No. 242/2006. It is ordered accordingly.

25. It is made clear that while we may have made certain observations concerning the other group companies, we have not decided anything on merits in so far as those other three group companies are concerned and that the order passed by the AAIFR in respect of those group companies was also not in challenge before us. The net result of the above discussion is that the impugned order concerning the petitioner company alone is set aside and the matter is remanded to the BIFR for conducting an inquiry under Section 16 of the SICA for the purpose of determining whether the petitioner company has become a sick industrial company or not and to proceed thereafter in accordance with law. On the issue of 'sickness', also, we make it clear that we have not expressed any opinion either way.

26. The parties shall appear before the BIFR for this purpose in the first instance on 09.03.2011. It is clearly understood that a copy of the IA report concerning the petitioner company shall be supplied by the counsel for respondent nos. 2 to 4 to the counsel for the petitioner company within two weeks. We may also point out that it is expected that the BIFR will conduct

the inquiry, as expeditiously as possible, as is the requirement under Section 16(3) of the said Act.

27. This writ petition is allowed to the aforesaid extent. There shall be no order as to costs.

**BADAR DURREZ AHMED, J**

**MANMOHAN SINGH, J**

**FEBRUARY 08, 2011**  
dp