IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.13036 of 2008

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M/S Shree Durga Roller Flour Mill Pvt. Ltd., a company incorporated under the Indian Companies Act, 1956, having its factory at Industrial Area, Gaya, through one of it's Director Sri Shyam Prakash Saraogi, son of late Satyanarayan Saraogi, resident of 6, K.P. Road, Gaya.

.... Petitioner/s

Versus

1. The Bihar State Financial Corporation a body constituted under the provisions of the State Financial Corporation Act, 1951 having its head office at Fraser Road, Patna through its Managing Director.
2. The Managing Director, Bihar State Financial Corporation, Fraser Road, Patna.
3. The Branch Manager, Bihar State Financial Corporation, Magadh Branch, Peer Mansoorganj, G.B. Road, Gaya.

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 2316 of 2008

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1. M/S Hotel Sahu through its partner Ram Lagan Sahu, at Jagsalai near G.T. Cinema, P.S. Jamshedpur, Dist. Singhbhum East.
2. Ram Lagn Sahu, Son of Sri Ram Chandra Sahu, resident of Mohalla Jgsalai, P.S. Jamshedpur, Dist. Singhbhum East.

.... Petitioner/s

Versus

1. The Bihar State Financial Corporation, Frazer Road, Patna through its Managing Director.
2. The Managing Director, Bihar State Financial Corporation, Frazer Road, Patna.
3. The Manager, Rehabilitation, Bihar State Financial Corporation, Frazer Road, Patna.
4. The Regional Manager, Rehabilitation, Bihar, State Financial Corporation, Regional Office, Vikash Bhawan, Campus Adityapur, Jamshedpur, Distt. Singhbhum East.
5. The Branch Manager, Rehabilitation, Bihar State Financial Corporation, Regional Office, Vikash Bhawan Campus, Adityapur, Jamshedpur, Distt. Singhbhum.
6. Bishwanath Chandra Dey, son of late Lakhan Chandra Dey, resident of Abhishek Apartment, Sonari, Jamshedpur.

.... Respondent/s

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Appearance :
(In CWJC No. 13036 of 2008)
For the Petitioner/s : Mr. Raj Kishore Pd.
Mr. Tej Bahadur Roy
For the Respondent/s : Mr. Y.V. Giri
(In CWJC No. 2316 of 2008)
For the Petitioner/s : Mr. Rajeev Kumar Singh
Mr. Niranjan Kumar
Mr. Nawal Kishor Singh
For the Respondent/s : Mr. P.K. Shahi

Mr. Amresh Kumar Singh
Mr. Mrigank Mauli
Mr. Vinay Mistry

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CORAM: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA

CAV JUDGMENT

Date: 26-11-2015

Heard learned counsel for the parties.

2. The prayer of the petitioner in CWJC No. 13036 of 2008 reads as follows:-

"1(i) To issue an appropriate writ/order/direction in the nature of writ of Mandamus directing the respondents allow the petitioner to liquidate its dues under Incentive cum Loan Restructuring Scheme (ILRS-2008) as announced by the respondent Managing Director, Bihar State Financial Corporation vide memo no. 550 dated 26.6.2008.

(ii) To issuance an appropriate writ/order/direction in the nature of writ of Certiorari striking down the Clause XXVIII of the Incentive cum Loan Restructuring Scheme (ILRS-2008) as announced by the respondent Managing Director vide memo no. 550 dated 26.6.2008, being an arbitrary clause against the interest of the borrowers who wants its Honourable exist after payment of the balance outstanding dues.

(iii) To issue an appropriate writ/order/direction in the nature of writ of Certiorari for quashing the tender notice for sale of the mortgaged/hypotheticated assets of the petitioner's unit as published in daily Hindi news paper "Hindustan" dated 17.8.2008 by the Managing Director of the Bihar State Financial Corporation in purported exercise of his power under Section 29 of the State Financial Corporation Act,

1951 in so far as it relates to the petitioner's unit.

(iv) To issue an appropriate writ/order/direction in the nature of writ of Mandamus directing the respondents not to accept any tender pursuant to the tender notice published under Section 29 of the State Financial Corporation Act, 1951 by the respondents, so far the tender pertaining the sale of the petitioner's unit is concerned."

3. The prayer of the petitioners in CWJC No. 2316 of 2008 reads as follows:-

"1. That this is an application for issuance of an appropriate writ/direction, directing the respondents to accept one time settlement of petitioner no.1 in respect of such scheme and accept payment and thereafter allow the petitioners to run their hotel industry peacefully and quash annexure 12 of this writ application."

4. Learned counsel for the petitioners appearing in both the cases have primarily laid stress that the decision of Bihar State Financial Corporation (hereinafter referred to as 'the BSFC), refusing One Time Settlement in favour of the petitioners, is bad and that the petitioners should be allowed the benefit of Incentive cum Loan Restructuring Scheme (in short 'ILRS-2008') floated by the BSFC.

C.W.J.C. No. 13036 of 2008:

5. In CWJC No. 13036 of 2008, the petitioner has come out with a case that it was sanctioned term loan of Rs. 55,77,611.80/- in the year 1984 by the BSFC which was in addition to a sum of Rs.52 lac sanctioned by the Bihar State Credit and Investment Corporation

Ltd. (in short 'BICICO'). According to the petitioner of this case, though the petitioner had liquidated the entire dues of loan of BICICO and it had also issued No Objection Certificate to the petitioner on 3.3.2000, its loan against Bihar State Financial Corporation (BSFC) had remained partly unpaid and thus when in the year 2004, the BSFC had announced One Time Settlement Scheme, 2004, (in short 'OTS Scheme'), it had approached the BSFC for such OTS on the basis of its balance outstanding of Rs. 36.23 lacs as against the principal amount in addition to Rs. 128.70 lacs against the interest. It is the further case of the petitioner that on submission of the application for OTS, a communication was received by the petitioner from the BSFC that its total settlement amount was Rs. 1,30,99,105/- and after the adjustment of the application money, the petitioner was required to pay a sum of Rs. 1,27,36,805/-. The petitioner claims that it had made a protest against such calculation and when it had not made the payment of the remaining OTS amount, its application money of Rs. 3,62,300/- was forfeited by the BSFC.

6. The petitioner claims that even after refusal of the benefit of OTS scheme, 2004, it had kept on making payment to and had paid Rs. 11 lacs after the year 2004 and, thus, when in the month of July, 2008, the petitioner had received a letter written by the respondent Branch Manager of BSFC dated 19.7.2008 as with regard to

introduction of ILRS-2008 for clearing its dues of Rs. 199.59 lacs as on 31.3.2008. The petitioner had obtained the brochure of ILRS-2008 and had purchased the application form on payment of Rs. 1010/-. On 19.08.2008, according to the petitioner, while it was still intending to file its application under the ILRS-2008 Scheme, it came to know that its mortgaged asset had been advertised for sale by the BSFC on 17.8.2008 in purported exercise of its power under Section 29 of the State Financial Corporation Act, 1951 (hereinafter referred to as 'the Act') Act, 1951 showing the total balance outstanding against the petitioner to be Rs. 199.58 lacs.

7. According to the petitioner, the ILRS-2008 had actually envisaged payment of 10% of principal outstanding as the application money for restructuring the loan and the initial down payment was to be minimum 15% of the restructuring amount payable within one month from the date of application and the balance 85% was to be realized by the BSFC within 12 months in four quarterly installments. It is the case of the petitioner that as per its own reading and calculation under the ILRS-2008, it had expected that total amount payable by it will be Rs. 52.56 lacs in all, but when on a close reading and upon seeking of the information from the concerned authorities of the BSFC, it had realized that the amount could be much higher account of the mortgaged assets of the petitioner having been already

advertised for sale on 17.08.2008 as also the valuation of the assets made by the BSFC, it had sought to assail the ILRS-2008 and specially its Clause (xxviii) envisaged that if any unit stands advertised for sale and in case tenders have been received and balance amount is more than the restructured amount would be equivalent to the offered amount in sale. It had filed the present writ application for a declaration that ILRS-2008 of the BSFC was wholly unreasonable and arbitrary.

8. CWJC No. 13036 of 2008 was actually filed on 29.8.2008 and this Court on 18.12.2008 had passed an interim order, which reads as follows:-

> *"The petitioner is a defaulting unit financed by the Bihar State Financial Corporation. To settle the dues and make an honorable exit, its unit made an application in terms of Incentive-cum-Loan Restructuring Scheme-2008, but his apprehension is with regard to Clause 28 of the said scheme, the validity of which is challenged by him. The said Clause stipulates that the settlement amount would get enhanced to the level in case the unit is put up for auction and some third offers are made to purchase the unit at a higher price than settlement price.*
>
> *It is submitted that such a provision is arbitrary and discriminatory because, inter alia, it puts the petitioner and their like in a precarious position and their liability for settlement would be dependent on a third part's offer, which may or may not be bona fide or which may or may not fructify. It is further submitted that there is no date for offers of sale, as such, even after applications for settlement are filed and*

subsequently offers for purchase is received, the same would vary the settlement. These are few submissions of the arbitrariness of the said Clause.

In my view, the petitioner must make an application along with application money as prescribed under the said scheme which would be processed by the Corporation without taking into account the provisions of Clause 28 of the scheme. This would be subject to further orders of this Court.

Put up on 12th of January 2009, at the top of the list to enable the Corporation to file a comprehensive counter affidavit for disposal of the writ application at the stage of admission itself."

9. In terms of the aforementioned order of this Court, a counter affidavit had been filed by the BSFC on 12.01.2009 wherein the respondent- BSFC had questioned the maintainability of the writ application as also it had explained the ILRS-2008 and in this regard it would be relevant to quote para 4 to 10 of the counter affidavit which for the sake of clarity and convenience is quoted herein below:

"4. That in this regard it is stated that the writ petition is prima facie not maintainable. The petitioner challenges the purchase offer criteria of the Incentive-cum-Load Restructuring Scheme, 2008 (ILRS for the sake of brevity). The relation between the loanee and the respondent Corporation is based on contractual agreement and the terms of which cannot be a subject matter of writ proceedings. ILRS is primarily a modification of the original contract. Thus it is applicable only when both the parties i.e. the loanee and the BSFC agree to the terms of the offer. If the Loanee does not agree with the terms of offer made in the scheme then obviously the settlement will not be operative for him and he is welcome to continue with his normal repayment but he cannot challenge the term of the offer made under the scheme.

5. That it is submitted that claiming ILRS is not a fundamental right of *the Loanee rather it is a matter of contractual agreement which cannot be enforced through the present proceedings. Further as ILRS is not a fundamental right hence applying the concept of equality as well as non-discrimination are not relevant. The Hon'ble Apex Court has very categorically held in the matter reported in (2005) 4 SCC 456 that in matters concerning the Corporation and its debtors, a writ court has no say except in situations where (a) there is statutory violation on the part of the Corporation, or (b) where the Corporation acts unfairly ie. Unreasonably.*

6. That there has been no violation of law by the Corporation. As far as fairness or reasonableness is concerned, it is sufficient if there are reasonable reasoning behind the provisions of the Scheme. The degree of fairness/reasonableness cannot be questioned by the writ petitioner unless it is irrelevant, arbitrary or perverse.

7. That in the present context the concept of considering purchase offer is a valid reasonable and rational consideration. Existence of purchase offer implies that BSFC can recover its dues (basically public money) by sale action. Consequently there being reasonable rationale behind the provision, hence the petitioner cannot be permitted to assail the same.

8. That under the ILRS, the final restructured amount would be the highest of the following category:

(a) amount as per the restructuring formula,

(b) the valuation,

(c) the highest available purchase offer.

In fact if the valuation is higher then the purchase offer does not remain relevant in fixing the final restructured amount. In the present case the valuation of the unit is Rs. 102.96 lakhs while the available highest purchase offer is only Rs. 70 lakhs.

9. That it is stated that the Loanee has an obligation to repay the loan. In fact, the Loanee was granted loan out of the public money and he cannot sit tight over the public money and employ all sorts of strategy to avoid repayment of dues. He has not availed the opportunity provided under the OTS Scheme 2006. In fact, the present ILRS-2008 is in operation since 1.7.2008 and it is only when sale action has been pursued by the Corporation that the petitioner has filed the present application to frustrate the sale action and he obviously has no intention for repayment of his dues.

10. That as per the policy, as soon as a formal application under ILRS is filed, the sale process is kept in abeyance and any purchase offer received after the date of filing of the application is not to be taken in account."

10. Apart from the whole history and the background of the petitioner being the chronic defaulter was also spelt out in the counter affidavit in the following words:-

"12. That in so far as the facts of the present case is concerned, it is stated that two term loans amounting to Rs. 28.80 lakhs (A/C-I) and Rs. 27.40 lakhs (A/c-II) were sanctioned to the petitioner concerned. Out of that Rs. 28.48 lakhs (A/c-I) approximately and Rs. 27.30 lakhs were disbursed.

13. That payments were not made by the concern as per the terms of agreement executed by them for availing loan. Due to default, notices were issued to the concerned for payment of the dues of the respondent Corporation and the mortgaged assets were advertised for sale. One tender has been received in response to the advertisement but to give an opportunity to the petitioner concern to come forward and file application under ILRS-2008, further auction of sale has been kept in abeyance in obedience of the Hon'ble Court's order.

14. That it is stated that the concern had earlier applied for settlement of his dues under the OTS Scheme 2004 but failed to make payment as per the settlement order issued vide memo no 485 dated 22.08.2005, copy of which is placed at Annexure-3 of the writ petition and then the settlement order was withdrawn vide memo no. 769 dated 14.12.2005.

15. That the Balance Outstanding against the petitioner concern as on 31.3.2008 is as follows:

(Rs. In lakh)

Particulars	*A/c-I*	*A/c-II*	*Total*
1. Principal	*12.90*	*23.33*	*36.23*
2. Interest	*24.79*	*120.61*	*145.40*
3. Penal Interest	*03.28*	*14.30*	*17.58*
4.Interest Tax	*00.15*	*00.16*	*00.31*

5. Other Charges	*00.04*	*00.03*	*00.07*
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Total	*41.16*	*158.43*	*199.59*

11. The respondents having given the details of the amount of due existing against the petitioner against its loan taken from BSFC, had also sought to defend Clause (xxviii) of the ILRS-2008 and in this regard the explanation of the Corporation was as follows:

> *"17. That with regard to the relief prayed in paragraph i(ii) of the writ petition is concerned it is stated that Clause XXVIII of the ILRS is a part of the scheme formulated by the Board of Directors of the Corporation. This clause is in the interest of the Corporation which is a public financial institution and there is heavy dues against the petitioner to the extent of about Rs. 2.00 crores. The Corporation received tenders for purchasing the mortgaged assets. The assets of the concern is quite valuable and Corporation had already initiated action of sale against the concern for recovery of its dues and buyers are also available for purchasing the assets. To give an opportunity to the petitioner to come forward and file application under ILRS-2008, further action of sale has been kept in abeyance.*
>
> *18. That in view of the present financial position of the Corporation, its endeavour is to realize maximum recovery from the defaulting borrower concern who have not paid their legitimate dues on one pretext or other. As far as giving maximum benefit to the borrowers is concerned, the Corporation had in past introduced several liberal one time settlement schemes. Even then the borrower concern did not come forward to settle their dues in terms of those liberal schemes.*
>
> *19. That the Corporation at this present financial juncture is not in a position to give further liberal concessions to the defaulting borrowing concerns. Scheme of restructuring introduced as*

ILRS-2008 is not at all a settlement scheme but it is a scheme for giving incentives and there after restructuring the dues on the terms and conditions as enumerated in this scheme.

20. That in this regard, it is stated that incentives can be given by a lender only after looking into all aspects, namely realizable value of the assets mortgaged and not only to dole out entire dues to the defaulting borrowing concerns. In this context the Board of Directors of the Corporation has examined the matter and formulated and implemented the ILRS scheme to the maximum advantage of the Corporation."

12. At the same time the BSFC had also defended its earlier sale notice dated 17.08.2008 by taking the following stand:

"36. That with regard to the statements as mentioned in paragraph 18 of the writ petition as stated earlier, the Corporation had already initiated steps for realization of its dues u/s 29 of the State Financial Corporation Act and in that process, advertisements in respect of a number of units were published. The petitioner unit was one of them. Mere publication of the advertisement did not mean that the Corporation had already sold this unit. The sale has not been finalized and the petitioner is not debarred to apply under the Scheme. The Corporation being a statutory body cannot be restrained from performing its statutory function provided under Section 29 of the Act and unless the petitioner filed a formal application under ILRS in the prescribed form with prescribed application money his request could not be entertained.

As per the Corporation's policy, once a formal application is filed the sale auction would be kept in abeyance and also any purchase offer received after the date of filing of form application shall not be accounted for the purpose of determining the restructured amount.

13. Pursuant to the aforementioned interim order of this

Court, the petitioner is said to have filed its application for settlement for settlement of its dues under ILRS-2008 on 30.12.2008, whereafter on 03.03.2009, the BSFC had communicated its order dated 02.03.2009 wherein it was held that the total dues of the petitioner being to the tune of Rs. 2,36,13,032.12 paise and the valuation of the mortgaged assets of the petitioner being Rs. 102.96 lacs as well as highest value of offer of tender received by the BSFC in terms of the tender notice dated 17.08.2008 being 70 lacs, the amount of incentive-cum-restructured amount under ILRS-2008 for the petitioner would be at Rs. 1,02,96,000/-. The petitioner, in fact, was also informed by the Corporation by its order dated 02.03.2009 that 15% of the incentive-cum-restructured amount less application money payable by it was Rs. 11,82,158/- which was to be paid by the petitioner on or before 01.04.2009 and in the event if the petitioner failed to pay the aforesaid amount, it will mean that the petitioner was not willing to accept this offer under ILRS-2008 and the offer will be deemed to have been withdrawn as well as the application money paid under the scheme by the petitioner would be adjusted towards the normal dues of the petitioner payable to the Corporation. In the said order, the schedule for payment of balance 85% amount of the incentive-cum-restructured amount to the tune of Rs. 87,51,600/- in four quarterly installments within a period of 12 months be also paid by the petitioner of Rs 21,87,900/- each on 01.07.2009, 01.10.2009, 01.01.2010 and 01.04.2010 was also conveyed to it. The petitioner however did not make any of such payment and in fact had made a complaint before this Court by filing Interlocutory Application, I.A.No. 1802 of 2009 on 24.03.2009 with a prayer to quash the aforementioned order of the BSFC dated 02.03.2009 as also to quash Clause (iii), apart from Clause (xxviii) of the ILRS-2008 .

14. This Court, on 30.03.2009, noticing the submission of the learned counsel for the petitioner, had passed its another interim order for maintaining *status quo*, which reads as follows:

> *"The petitioner by I.A. No. 1802 of 2009 has brought on record the settlement amount as communicated to the petitioner under ILRS Scheme 2008 of B.S.F.C. He points out that B.S.F.C. intents to auction the mortgage assets of the company for liquidation of its debts.*
>
> *Petitioner had applied for settlement pursuant to the liberty granted by this Court while keeping Clause-28 of the said Scheme in abeyance. Clause-28 provides that settlement amount would not be less than a 3rd party offer for purchase. This was also attacked as vague for uncertainty. Now when application for settlement was made, the settlement order indicates that in terms of Clasue-3 of the said Scheme, petitioner is being asked to settle the dues by paying the market value of the mortgage assets as assessed by the Corporation which again is wholly arbitrary, inasmuch as, if one is required to pay the cost of its own assets to retain it then it virtually amounts to sale of the assets and consequently repurchase of the assets by the petitioner at market cost. If the assets are to be sold and purchased again at market cost what is settlement then*

of. The ability to pay for settlement or liability to pay for settlement can not be assessed on the value of the security as the value of security has no relation to liability and feasibility to enter into a settlement.

Let the Corporation respond to both the contentions. In the meantime, parties would maintain status-quo and the settlement would be subject to the orders to be passed by this Court.

Put up this case under the same heading on 20th of April, 2009."

15. Pursuant to the aforementioned order dated 30.03.2009, a supplementary counter affidavit was again filed by the BSFC in relation to averments made in the Interlocutory Application filed by the petitioner wherein it was stated that the petitioners' application for availing under ILRS-2008 in terms of the interim order of this Court, had been entertained and order for restructuring had already been passed on 20.03.2009. In relation to it, the BSFC while submitting its reply to the Interlocutory Application of the petitioners questioning the restructured amount under ILRS-2008 Scheme, had explained that the scheme was for realization of the dues from the concern to the maximum extent possible, which otherwise the BSFC could have received by the sale of the assets. It was the case of the BSFC that the scheme was not only to give maximum benefit to the defaulting concern inasmuch as from Clause (ii) and (iii) of the ILRS-2008 , it would become clear that the basic criteria for calculation of the restructured amount was in consonance with the policy of the BSFC.

The respondent BSFC had also explained that on 19.08.2008 when the offer was sent to the petitioner to avail the benefit of ILRS-2008 could not be treated to be the cut off date because the Branch Level Valuation Team (BLVT) and the Central Valuation Team (CVT) and the External Valuer had evaluated the assets and accordingly the value of assets was mentioned to the tune of Rs. 102 lacs in the order that was communicated to the petitioner on 02.03.2009.

16. It is significant to note here that at this stage, this writ application was clubbed with the two other writ applications, CWJC No. 2316 of 2008 and CWJC No. 985 of 2009. CWJC No. 985 of 2009 has since been disposed of and CWJC No. 2316 of 2008 has been heard along with this writ application wherein the prayer of the petitioner, as quoted above, is confined to issuance of a direction for making OTS.

C.W.J.C. No. 2316 of 2008:

17. The case of the petitioners of CWJC No. 2316 of 2008 is that for running a business of Hotel and restaurant, they had approached the BSFC for grant of loan of Rs. 30.68 lacs on 17.2.1981 as against which further sanction of loan, a sum of Rs. 6.30 lacs was made. According to the petitioners, they had suffered heavy loss on account of non-payment of the balance loan by the BSFC seeking rehabilitation and after negotiation at various levels, such proposal for

rehabilitation was rejected by the BSFC whereafter it had filed CWJC No. 6070 of 1993 seeking a direction to the respondents to accept the proposal of rehabilitation of Hotel Sahu which was disposed of on 10.11.1995 in which it was given opportunity to avail the opportunity of OTS within a period of three months whereafter it had deposited a sum of Rs. 5 lacs but its request for grant of OTS was neither considered nor decided and in the meantime on 16.12.2007, they came to know that an offer was given by the purchaser to purchase the mortgage asset of the petitioners. According to the petitioner of this case, the decision of the BSFC in not allowing the OTS in favour was wholly bad.

18. This case which was filed on 28.1.2008, an Interlocutory Application was filed for amendment of the relief by way of quashing of an order dated 3.4.2008, whereby and whereunder, the mortgage asset of the petitioner was subjected to auction sale for a sum of Rs. 91 lacs. The case of the petitioner in this regard was that during the pendency of this writ application, which, as noted above, was filed on 28.1.2008, the BSFC had issued an order on 13.2.2008 for sale of mortgaged asset of the petitioner in favour of one Girdhari Lal Bhartiya who had already died on 9.7.2007. It is the case of the petitioner that on 3.4.2008, a letter was issued by the BSFC informing the petitioner that since the family members of late

Girdhari Lal Bhartiya were ready to purchase the mortgaged asset of the petitioner, the Corporation had decided to sell the hotel in favour of the family members of late Girdhari Lal Bhartiya. In the Interlocutory Application, it was however claimed that the total disbursed amount to the petitioner was to the tune of Rs. 14,01,085/- out of which actual payment was made to the petitioner only to the tune of Rs. 10.36 lacs inasmuch as the BSFC had deducted a sum of Rs. 3.65 lacs against the arrear of the dues standing in the name of the petitioners. The petitioners had also come out to say that they had paid a sum of Rs. 7,17,512.85/- and, as such, the dues against the petitioner against the paid loan amount was Rs. 3,19,512/- only whereas the BSFC has raised the amount of outstanding against the petitioners to be more than crores of rupees by way of only charging the interest.

19. A counter affidavit was filed by the BSFC in this case as well in which a stand was taken that the petitioners are not entitled for any relief because they had failed to comply the order of this Court dated 10.11.1995 in CWJC No. 6070 of 1993 wherein this Court had directed the respondents to allow the petitioner to avail benefit of OTS on payment of outstanding of loans with interest within a period of three months from the date of order dated 10.11.1995 with a clear stipulation that if the petitioners fail to avail

the opportunity of OTS within a period of three months, the respondent Corporation will be a liberty to proceed and take further action pursuant to the notice of auction issued on 13.6.1993.

20. In this regard, the BSFC has come out to say that the petitioners neither came forward to reconcile their accounts with the Corporation nor applied for settlement of OTS which was in operation at that point of time and was discontinued in the year 1997. The BSFC also claimed that though efforts were made to put the mortgaged asset of the petitioner on sale but no viable offer could be received by the BSFC and, as such, the petitioner was again informed in the year 2004 about availing the OTS scheme by letter no. 668 dated 14.12.2004, which in fact was an additional opportunity given to the petitioners, inasmuch as, the OTS Scheme was also advertised in the newspaper. The BSFC has also come to say that the petitioners did not apply for settlement under the OTS Scheme as also therefore failed to avail the opportunity of OTS.

21. In the counter affidavit, it has also been claimed that yet another OTS scheme was floated by the BSFC in the year 2006 which in fact was liberal scheme and had contained a provision for waiver of massive amount of interest. According to the BSFC, the petitioner was again intimated by the Project Officer of the Corporation by letter no. 581 dated 23.9.2006 and letter no. 85 dated 17.11.2006

asking them to avail the OTS benefit under 2006 schemes but the petitioner did not file application till the OTS scheme, 2006 had remained in force that is up to 5.2.2007 and in fact this writ application had been filed on 29.01.2008 for settlement of dues under the OTS Scheme, 2006 much after expiry of the OTS scheme 2006.

22. In the counter affidavit of the BSFC, it has been also explained that subsequently in terms of the advertisement for sale of mortgage asset of the petitioners, offers were received and negotiations were held with the tenderers and the highest offer received was of Rs. 91 lacs and this highest offer was again advertised in the newspaper on 16.12.2007 to attract still better offer but when no fresh offer was received in terms of the advertisement dated 16.12.2007, the sale order had been issued in favour of the highest bidder. According to the BSFC, the effort of the petitioners is only to stall the sale and in fact the petitioners had developed a habit of approaching the Court whenever the BSFC had taken any step for sale of the mortgage assets of the petitioners, instead of making payment of the dues of the BSFC or availing the OTS scheme floated by the petitioners.

23. In the counter affidavit, it has also been stated that the total loan disbursed to the petitioner was Rs. 14,01 lacs between 29.1.1982 to 7.4.1986 and the balance outstanding against the

petitioner as on 31.8.2007 both principal and interest was to the tune of Rs. 2,63,32,430/-.

24. After filing of the counter affidavit, on 22.9.2008 the petitioner came out with yet another prayer of quashing the circular no. 01/2008-09 as with regard to ILRS-2008 and specially its Clause of retention. They had also sought to explain in the I.A. No. 5889 of 2008 that it is only on account of Clause (xxviii) of the aforesaid circular no. 01/2008-09 that the petitioners were not in a position to avail the benefit of ILRS-2008 Scheme.

25. It is very significant to note here that on 12.09.2008 on the prayer made by the petitioner, an observation was made by this Court in the order dated 12.9.2008 to allow the parties to consider the offer of the petitioner to pay under ILRS-2008 without enforcing the clause of retention price in order to make the petitioners honorable exit from the debt trap in which they had reached. The aforesaid interim order of this Court dated 12.9.2008 in CWJC No. 2316 of 2008 reads as follows:-

> *"The petitioner is a partnership firm running a residential hotel at Jamshedpur. The partners have sought financial accommodation from the Bihar State Financial Corporation in different accounts totaling of Rs. 14.01 lakhs. Petitioners were in default for various reasons. Virtually, from the very beginning and the position now that that the total demands as against them i.e. balances outstanding as on 31.08.2007 is about Rs. 63 crores. Thus, as against the principal*

disburse of about Rs. 14 lakhs liability now is Rs. 2.63 crores. The Corporation advertised the unit for sale in terms of power conferred on them under Section 29 of the State Financial Corporation Act, 1951. Petitioners have come to this Court challenging the said action.

It is surprising to note that the Corporation on the one hand has come up in January 2008 with incentive-cum-loan restructuring scheme 2008 giving an honorable exists to defaulters. But, on the other hand, is pressing for sale of property without giving a chance to the defaulting units to avail of the said incentive scheme, which is open for acceptance up to December 2008.

In the present case, in the supplementary counter affidavit on behalf of Corporation it is disclosed that for the unit they have received an offer for sale at about Rs. 91 lakhs, but, the liability under the scheme would be not less than Rs. 91 lakhs, for which sale offer has been received. Though, if some retention price is excluded then the liability would be maximum of about Rs. 40 lakhs. It is thus submitted that merely because an offer for purchase of unit has been received petitioner would be required to pay Rs. 50 lakhs above, what would be the position without an offer for sale. This appears to be quite incongruous.

I may mention here that a similar provision under the 2006 Bihar State Finance Corporation OTS-scheme was struck down by this Court and the decision of the Hon'ble Single Judge upheld by a Division Bench judgment of this Court.

Let parties consider this aspect of the matter, as prima facie, at this moment petitioner is ready to pay under the 2008 scheme. If the retention price Clause is not enforced to make an honorable exist from the debt trap, in which he has reached today.

Put up after two weeks under the same heading retaining its position.

Let a copy of this order be given to learned counsel for the Corporation."

26. The BSFC, thereafter, had filed supplementary counter affidavit on 11.11.2008 had given break-up of the restructured loan amount to the tune of Rs. 42,23,712.87/- and in this regard, it was stated as follows:-

"4. That, however, in compliance of the order dated 15.10.2008, a re-structured loan amount with details is being mentioned hereunder:

1. Restructured loan amount:

a) Principal	*Rs. 13,82,116.42*
b) 10% of unpaid interest	*Rs. 24,69,244.05*
c) 10% of unpaid interest Tax.	*Rs. 15,000.90*
d) Other charges (including external Valuer charges of Rs. 8,037.00)	*Rs. 22,037.00*
e) 10% of unpaid penal interest	*Rs. 3,35,314.50*
Total:	*Rs. 42,23,712.87*

The amount is subject to vetting of blanace outstanding by the A/c Section and is also subject to change of B.O.S. as on date of application under ILRS 2008 when actually submitted.

2. BLVT	*Rs. 77.00 lakhs*
CVT valuation (22.05.2007)	*Rs. 79.58 lakhs*
External valuers valuation (17.8.2007)	*Rs. 86.26 lakhs*
3. Sale order	
Consideration price	*Rs. 91.00 lakhs*
4. Applicable settlement amount under	
ILRS Scheme	*Rs. 91.00 lakhs*

As per ILRS 2008 scheme circular the settlement amount is highest of amount mentioned at (1), (2) and (3) i.e. Rupees Ninety one lakh only. Sale order has been issued to the purchaser vide memo no. 250/Z-IV dated 03.09.2008. A copy of the sale order has been given to the original promoter for retaining the unit as per terms of sale order within 21 days from the date of issue of *sale order. The original promoter neither filed application for ILRS nor did retain the unit within the time provided in the sale order. The purchaser concern has accepted the terms and conditions of sale order and deposited the initial sale consideration amount of Rs. 22.75 lakhs at Branch Office.*

5. *That it is stated that the applicant has not so far applied under ILRS 2008 computation of ILRS amount assuming the date of application 31.08.2008 M/s Hotel Sahu, Jamshedpur."*

27. In such supplementary counter affidavit, the other averments with regard to challenge to the circular of ILRS-2008 was replied which will be taken note of at appropriate place. After filing of the second supplementary counter affidavit, this case was tagged with the aforesaid first writ application being CWJC No. 13036 of 2008 by an order dated 31.3.2009 as the ILRS-2008 was under challenge of that writ application.

28. An intervention application in C.W.J.C. No. 2316 of 2008 (in second case) was also filed on behalf of the auction purchaser Bishwanath Chandra Dey on the ground that the mortgaged assets of the petitioner, M/s Hotel Sahu, has been sold in his favour by the BSFC on 27.08.2008 and whereafter he had already deposited Rs. 22.75 lacs being 25% amount of the auction sale on 26.09.2007 and, therefore, he should be added as party respondent to this writ application and, therefore, his prayer for being impleaded as party respondent to this writ application was allowed by order dated 20.04.2009 and he was impleaded as respondent no. 6 to C.W.J.C.

No. 2316 of 2008 and further hearing of the case was fixed for 29.04.2009.

29. This Court had purposely referred to the pleadings in both the writ petitions to firstly show that the petitioners are chronic defaulter. They have never paid the amount of loan as stipulated in the agreement. The OTS / ILRS-2008 floated by BSFC is actually not meant for the chronic defaulters. The BSFC, being a financial institution, is supposed to realize its loan amount at the best price of the mortgage assets.

30. It is actually in the factual background of the aforementioned aspect, this Court would go into the main question being canvassed by learned counsel for the petitioners in these two writ applications. The petitioners come out to say that Clause (ii) and (xxviii) of the ILRS-2008 is wholly arbitrary and unreasonable. According to them, the decision of the BSFC to fix the restructured amount in the ILRS-2008 by making it subject to best of the three, namely, the restructured amount as per the circular or the valuation of the assets or the offer of the amount received in auction, whichever is higher, will be violative of the very policy.

31. According to them, this policy of ILRS-2008 was meant to give relief to the defaulting unit. To that extent, this Court would find it necessary to quote the stand of the petitioner M/s Shri Durga

Roller Flour Mill Pvt. Ltd., which has been explained in para 20 to 25 of its writ petition and reads as follows:

> *"20. That the basic feature of ILRS-2008 are that the borrower has to pay 10% of the principal outstanding amount as application money on the date of application for restructuring of loan. The initial amount should be minimum 15% of the restructured amount payable within one month from the date of issue of order for such restructuring. The balance 85% of the restructured amount should be realized by the BSFC within further period of 12 months in four quarterly installments. The first quarter will commenced after one month form the date of the order for restructuring. The restructured amount would be principal outstanding as on date of application for restructuring in all accounts plus(+) 10% of the amount of unpaid interest plus (+) 10% of unpaid penal interest plus (+) 10% of unpaid interest tax in all accounts plus (+) other charges. However, for the purposes of determining the year of sanction and disbursement, oldest loan account appearing in the loan account of the concern will be taken into account.*
>
> *21. That as per the formula given in ILRS-2008 the total amount payable by the petitioner will be Rs. 36.23 lakhs plus (+) Rs. 16.33 lakhs. Thus total amount payable as per the calculation made by the BSFC and communicated to the petitioner vide letter dated 19.07.2008 comes to Rs. 52.56 lakhs. The petitioner is ready and willing to make payments under ILRS-2008.*
>
> *22. That however when the petitioner has carefully examined the ILRS-2008, the petitioner came to know that actually the BSFC is playing hide and sick with its borrower as on one hand the BSFC informed the petitioner to avail the opportunity of ILRS-2008 and on the other hand it advertised the unit of the petitioner for sale under Section 29 of the SFC Act. Although the last date for filing application under the scheme is 31.12.2008. As such without waiting for any offer which may be made by the petitioner for other borrowers, the unit of the petitioner has*

been advertised for sale.

23. That it is further evident from the scheme that the BSFC has put a condition for settlement under Clause XXVIII of the Scheme that if any unit has been advertised for sale and in case tenders have been received and offered amount is more than the restructured amount, in that case the restructured amount would be increased and made equivalent to the offered consideration amounting. In this connection the petitioner humbly submits that this Clause XXVIII of ILRS-2008 is totally unreasonable, arbitrary and has been put with malafide intention.

24. That the petitioner further humbly submits that this Clause XXVIII of ILRS-2008 can be understand in another way also. Such as in the case of the petitioner the restructured amount as per the records of the BSFC would be Rs 52.56 lakhs and the unit of the petitioner has been advertised for sale. Suppose a tender is received by the BSFC offering an amount of Rs. 1.50 crores, in that case the restructured amount of the petitioner would be increased and made equivalent to Rs 1.50 crores. In that situation, it will be a futile exercise of the petitioner to have a settlement under the ILRS-2008, because if tomorrow somebody came forward and offered an amount of Rs. 1.50 crores then the settlement amount would be made equivalent to the said offered amount. In that situation, the petitioner may not be able to liquidate the settlement amount under ILRS-2008. The another situation would be that if the petitioner would not be able to liquidate the increased restructured amount, all payments made the scheme including the application money would be adjusted towards normal due.

25. That in that view of the matter also the Clause XXVIII of the ILRS-2008 is totally arbitrary, capricious and unreasonable and as such the same is liable to be struck down."

32. As a matter of fact, similar analogy has been given by the petitioner of the second case namely M/s Hotel Sahu, which for

the sake of brevity is not being repeated.

33. In the considered opinion of this Court, ILRS-2008 is not meant only as a relief giving measure to the defaulting unit inasmuch as the very preamble of the ILRS-2008 reads as follows:

> *"Board of Directors in its meeting held on 19.06.2008, considered item nos. 14127 and 14155 and has decided to introduce Incentive Cum Loan Restructuring Scheme (ILRS) 2008, <u>to boost up recovery and reduce its NPA accounts</u>."*

34. It is in this background, when this Court has also closely examined the basic features of ILRS-2008, it is found that there are certain safeguards evolved by the BSFC to serve its own financial interest inasmuch as after laying down the eligibility criteria in Clause (i), it goes to define the restructured amount, in Clause (ii) and (iii) in the following terms :

> *Clause- (i) :Eligibility Criteria: All units whose accounts have become NPA as on 29.2.2008 and which has been in Doubtful and Loss category for minimum five years. Provided that the promoters of these units are fully satisfied with their accounts as maintained by BSFC Branch and also have no litigation pending against BSFC in any court of law and any other forum.*
>
> *(ii): Restructured loan amount:*
>
> *Principal Outstanding as on date of application for restructuring in all accounts. 10% of the amount of unpaid interest + 10% of unpaid penal interest + 10% of unpaid Interest tax in all accounts + Other charges (including charges for external valuation of assets wherever valuation is to be done by the external*

valuer).

Note: For the purpose of determining the eyar of sanction and disbursement, oldest loan account appearing in the loan account of the concern will be taken into account.

(iii): Provided that the restructured amount is not less than POS in all the accounts, not more than BOS and not less than valuation of the mortgaged assets to be done by the Corporation (maximum of BLVT , CVI and external valuer where applicable) and not less than offer as mentioned in sub-para (xxviii) below. In case of Composite Loans valuation of assets will not be required, because in these small loans given to artisans there are no civil constructions and only small machine/tools have been provided as such valuation of he assets will not be economical.

35. Clause (xxviii) is the part of only ILRS -2008 Scheme and in fact can be better understood if Clauses (xxvi), (xxvii) and (xxviii) of the scheme are read together which again for the sake of clarity is quoted herein below:-

xxvi) In cases where the unit has been sold and the purchaser has not executed legal documents after payment of the initial consideration amount then they will have to complete legal formalities for sale before applying for restructuring of loan. In cases of mutual sale also legal formalities would have to be completed between purchaser and promoters before the purchaser can apply for restructuring of balance loan. In case of mutual sale if the purchaser comes forward for restructuring of their loan account and make payments thereunder after issue of order of restructuring, the Corporation will not undertake any responsibility for transfer of assets inter se between the purchaser and the original *promoter/s.*

xxvii) If the unit has been advertised for sale and no worthwhile tender for purchasing the unit has been received then the sale will be kept in abeyance if valid application for restructuring of loan under the scheme is made. This sale advertisement can however be revived afresh in case the concern defaults in payment of the restructured loan as hereinbefore given in the scheme or the concern fails to accept the terms for restructuring of loan.

xxviii) In case tenders have been received and offered amount, is more than the restructured amount, in that case restructured amount would be increased and made equivalent to the offered consideration amount."

36. From the reading of Clause (ii) and (iii) as well as clause (xxviii), it would therefore become very clear that when the BSFC has put a bar as with regard to the minimum of the restructured amount by providing the calculation of restructured amount as per Clause (ii) and/or the valuation of the assets of the mortgaged units and/or the amount of the offer of sale and whichever is the highest becomes the basis for fixing the restructured amount. In doing so, B.S.F.C. has only sought to fulfill its basic object of securing its amount of dues against defaulting units to the maximum permissible limit. The concept of valuation of the assets and/or maximum offer received from the offer of sale of mortgaged assets is only in furtherance of the same object of ascertaining and fixing the maximum price fetching capacity to secure its interest of revenue.

37. Such a provision made by the BSFC in ILRS-2008

cannot be held to be unreasonable much less arbitrary. What the petitioners want is that the BSFC should not take into consideration the valuation of the assets of the mortgaged unit or the price fetching capacity, as determined in the auction sale. This stand or plea of the petitioners in fact will be itself unreasonable inasmuch as the same would in teeth of the avowed object of B.S.F.C. in its ILRS-2008 floated for bootsting it own recovery and reduce its N.P.A. accounts. As a matter of fact, the BSFC will be put to lose that even if it is in a position to get higher amount offered on the basis of application or on the basis of offer of sale, it has to be still nibbled of in fixation of restructured loan amount by restricting it to amount in Clause (ii).

38. It has to be kept in mind that clause (ii) of the I.L.R.S. 2008 lays down the criteria of principal outstanding as on date of application in all accounts plus(+) 10% of the amount of unpaid interest plus (+) 10% of unpaid penal interest plus (+) 10% of unpaid interest tax in all accounts plus (+) other charges including the charges for external valuation of assets wherever valuation is to be done by the external valuer for fixing the restructured amount. According to the petitioner, in the first case, if this Clause (ii) was given effect to, it could have been held liable to pay only a sum of Rs. 52.56 lacs but then question would be why and how could the BSFC ignore the offer of Rs. 70 lacs received against the auction sale notice

dated 17.8.2008 or the value of the mortgaged assets of the petitioner being to the tune of Rs 102 crores? The BSFC is not indulging into charity inasmuch as it has only to utilize the public fund for giving loan to the petitioners and other entrepreneurs and, therefore, its decision to secure the best of the financial interest at the time of making recovery either under the OTS Scheme or ILRS-2008 Scheme, has to be treated to be a policy decision which cannot be held to be arbitrary in any manner.

39. At end of the day, ILRS-2008 is a policy of the BSFC and the question of the policy is essentially to be decided by the State Government or the State owned agency. Such policy depends on circumstances and it is neither desirable nor advisable for a court of law to direct or sermonize the Government to adopt a particular policy which it deems fit and proper. Way back in the case of ***Bennett Coleman & Co. v. Union of India*** reported in ***AIR 1973 SC 106***, the Apex Court had held that a court cannot be propelled into the unchartered ocean of government policy.

40. It is also well settled that public authorities must have liberty and freedom in framing policies and no doubt such discretion to the public authorities is not unfettered and judiciary has control over all executive actions, but it also cannot be denied that the courts are ill-equipped to deal with these matters. In complex social,

economic and commercial matters, decisions have to be taken by governmental authorities keeping in view several factors, and it is not possible for courts to consider competing claims and conflicting interests and to conclude which way the balance tilts. There is no objective, justifiable or manageable standards to judge the issues nor such questions can be decided on a *priori* considerations.

41. This Court would not like to load this judgment with number of authorities as with regard to the power of judicial review by this Court in exercise of power under Article 226 of the Constitution of India in the policy matters inasmuch as this issue has been decided by the Apex Court in a number of cases including in the case of ***Bennett Coleman & Co.*** (supra) as also in the case of ***R.K.Garg v. Union of India*** reported in ***AIR 1981 SC 2138*** wherein it was held that there may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. In the case of ***Liberty Oil Mills v. Union of India*** reported in ***AIR 1984 SC 1271*** as with regard to import policy, it was held that the courts do not possess the expertise and are consequently incompetent to pass judgment on the appropriateness or the adequacy of a particular import policy. In ***Shri Sitaram Sugar Co. Ltd. v. Union of India*** reported in ***AIR1990 SC 1277,*** the Apex Court while examining the issue of prices of levy sugar were fixed by

the government by grouping sugar factories on the basis of geographical location, had held as follows:

> *"What is best for the sugar industry and in what manner the policy should be formulated and implemented, bearing in mind the fundamental object of the statute, viz, supply and equitable distribution of essential commodity at fair prices in the best interest of the general public, is a matter for decision exclusively within the province of the Central Government. Such matters do not ordinarily attract the power of judicial review".*

42. In the case of ***Ugar Sugar Works Ltd. v. Delhi Administration*** reported in ***AIR 2001 SC 1447,*** the Apex Court while dealing with the executive policy regulating trade in liquor in Delhi, had held that it was well-settled that the courts, in exercise of power of judicial review, do not ordinarily interfere with the policy decisions unless such policy could be faulted on the grounds of mala fide, unreasonableness, arbitrariness, unfairness, etc. In fact, the Apex Court has gone to hold in that case that the mere fact that it would hurt business interests of a party would not justify invalidating the policy. It was held therein as follows:

> *"In tax and economic regulation cases, there are good reasons for judicial restraint, if not judicial deference, to judgment of the executive. The courts are not expected to express their opinion as to whether at the particular point of time or in a particular situation any such policy should have been adopted or not. It is best left to the discretion of the State."*

43. This Court would not like to say anything more but to

be satisfied with the following observations of justice Krishna Iyer in the case of ***Fertilizer Corporation Kamgar Union*** reported in ***AIR 1981 SC 344***, wherein it was held as follows:

> *"Certainly, it is not part of the judicial process to examine entrepreneurial activities to ferret out flaws. The court is least equipped for such oversights. Nor, indeed, is it a function of the Judges in our constitutional scheme. We do not think that our internal management, business activity or institutional operation of public bodies can be subjected to inspection by the court. To do so, is incompetent and improper and, therefore, out of bounds, nevertheless, the broad parameters of fairness in administration, bona fides in action, and the fundamental rules of reasonable management of public business, if breached, will become justiciable."*

44. From a bare perusal of the object of ILRS-2008 Scheme, it would be absolutely clear that the same was devised by the BSFC to boost up its recovery and reduce its NPA account. Therefore, main concern of the BSFC was to see that whatever maximum revenue fetching capacity was already determined either by way of valuation of the property or by way of offer of sale that would be the minimum yardstick for determining the restructured amount.

45. A further will arise as to whether such valuation of the Corporation can be interfered by the Courts in exercise of power under Article 226 of the Constitution of India. In this regard, this Court will firstly keep in mind what was said by the Apex Court in

the case of ***Haryana Financial Corporation vs Jagdamba Oil Mills*** reported in ***(2002) 3 SCC 496*** wherein it was held as follows:-

> *"The Corporation as an instrumentality of the State deals with public money. There can be no doubt that the approach has to be public oriented. It can operate effectively if there is regular realization of the installments. While the Corporation is expected to act fairly in the matter of disbursement of the loans, there is corresponding duty cast upon the borrowers to repay the installments in time, unless prevented by insurmountable difficulties. Regular payment is the rule and non-payment due to extenuating circumstances is the exception. If the repayments are not received as per the scheduled time frame, it will disturb the equilibrium of the financial arrangements of the Corporations. They do not have at their disposal unlimited funds. They have to cater to the needs of the intended borrowers with the available finance. Non-payment of the installment by a defaulter may stand on the way of a deserving borrower getting financial assistance."*

46. As would be noted above, the only element on which the decision of the State Financial Corporation can be examined as to whether the same is 'public oriented'? Such 'public oriented' does not given any place to the wilful defaulters of BSFC including the two petitioners. This Court has already held in the earlier paragraphs of this judgment that the primary object of ILRS-2008 was to boost up the recovery and reduce NPA account of the BSFC. In the process, if the BSFC, therefore, in its bid to boost its recovery has either defined the restructured loan amount by specifying amount of principal outstanding + reduced rate of interest that could always be

circumscribed either with the valuation of the property which the BSFC can allegedly expect to get or the offer of a buyer proposing to buy such mortgaged asset. Therefore, the whole emphasis of the petitioners that only amount under Clause (ii) of the ILRS-2008 should be the amount of restructured loan amount would itself by contrary not only to the policy but also against public interest.

47. B.S.F.C. in fact is bound to take measure for protection of public fund by recovery of amount of loan to maximum permissible limit when it cannot recover the entire loan amount plus interest. Thus to say that since B.S.F.C. in case of petitioner Durga Roller Flour Mill could not recover its total dues of Rs. 236.13 lacs, it must accept the amount of Rs. 52.56 lacs in terms of Clause (ii) of I.L.R.S. 2008 even when B.S.F.C. had an offer to sale the mortgage assets for a sum of Rs. 70 lacs and its valuation being Rs. 102.76 lacs would itself amount to rewarding a defaulting entrepreneur at the cost of exchequer of the State.

48. As is well known Section 29 of the Act gives power to the BSFC to put the mortgage asset on sale and fetch the best price. This aspect of the matter was again clarified by the Apex Court in the case of ***Jagdamba Oil Mills*** (supra) wherein it was also held as follows:-

> *"The fairness required of the Corporations cannot be carried to the extent of disabling them from recovering what is*

due to them. The matter can be looked at from another angle. The Corporation is an independent autonomous statutory body having its own constitution and rules to abide by, and functions and obligations to discharge. As such in the discharge of its functions, it is free to act according to its own light. The views it forms and decisions it takes are on the basis of the information in its possession and the advice it receives and according to its own perspective and calculations. Unless its action is mala fide, even a wrong decision by it is not open to challenge. It is not for the courts or a third party to substitute its decision, however, more prudent, commercial or businesslike it may, for the decision of the Corporation. As was observed by this Court in U.P. Financial Corporation and Ors. vs. Naini Oxygen & Acetylene Gas Ltd. and Anr. (1995 (2) SCC 754), in commercial matters the courts should not risk their judgments for the judgments of the bodies to whom that task is assigned. As was rightly observed by this Court in Karnataka State Financial Corporation vs. Micro Cast Rubber & Allied Products (P) Ltd. & Ors. (JT 1996 (6) SC 37), in the matter of action by the Corporation in exercise of the powers conferred on it under Section 29 of the Act, the scope of judicial review is confined to two circumstances i.e. (a) where there is statutory violation on the part of the State Financial Corporation, or, (b) where the State Financial Corporation acts unfairly i.e. unreasonably. While exercising its jurisdiction under Article 226 of the Constitution of India, 1950 (in short 'the Constitution'), the High Court does not sit as an appellate authority over the acts and deeds of the Corporation. Similarly, the courts other than the High Courts are not to interfere with action under Section 29 of the Act unless the aforesaid two situations exist."

49. Let it be kept in mind that the aforesaid principle set out in the Jagdamba Oil Mills case (supra) have been again reiterated in the case of ***Karnataka State Industrial Investment & Development***

Corporation Ltd. vs Cavalet India Ltd. & Ors reported in ***2005 (2) PLJR 202 SC*** wherein it was held as follows:-

"From the aforesaid, the legal principles that emerge are:

(i) The High Court while exercising its jurisdiction under Article 226 of the Constitution does not sit as an appellate authority over the acts and deeds of the financial corporation and seek to correct them. The doctrine of fairness does not convert the Writ Courts into appellate authorities over administrative authorities.

(ii) In a matter between the Corporation and its debtor, a writ Court has not say except in two situations:

(a) there is a statutory violation on the part of the Corporation;

(b) where the corporation acts unfairly i.e., unreasonably.

(iii) In commercial matters, the Courts should not risk their judgments for the judgments of the bodies to which that task is assigned

(iv) Unless the action of the financial corporation is mala fide, even a wrong decision taken by it is not open to challenge. It is not for the Courts or a third party to substitute its decision, however more prudent, commercial or business like it may be, for the decision of the financial corporation. Hence, whatever the wisdom (or the lack of it) of the conduct of the Corporation, the same cannot be assailed for making the Corporation liable.

(v) In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold and this could be

achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer.

(vi) Public auction is not the only mode to secure the best price by inviting maximum public participation, tender and negotiation could also be adapted.

(vii) The financial corporation is always expected to try and realize the maximum sale price by selling the assets by following a procedure which is transparent and acceptable, after due publicity, wherever possible and if any reason is indicated or cause shown for the default, the same has to be considered in its proper perspective and a conscious decision has to be taken as to whether action under Section 29 of the Act is called for. Thereafter, the modalities for disposal of seized unit have to be worked out.

(viii) Fairness cannot be a one-way street. The fairness required of the financial corporations cannot be carried to the extent of disabling them from recovering what is due to them. While not insisting upon the borrower to honour the commitments undertaken by him, the financial corporation alone cannot be shackled hand and foot in the name of fairness.

(ix) Reasonableness is to be tested against the dominant consideration to secure the best price.

20. True, the exercise of the right by a financial corporation under Section 29 of the Act should be fair and reasonable. Ultimately, whether the action of the financial corporation is bone fide or not would depend on the facts and circumstances of each case.

22. -------in this regard, the object enacting Section 29 of the Act has to be kept in mind. As was observed in Gem Cap and

Jagdamba Oil Mills, the legislative intent in enacting the statute was to promote industrialization of the States by encouraging small and medium industries by giving financial assistance in the shape of loans and advances, repayable within a stipulated period. Though the Corporation is not like an ordinary money lender or a bank which lends money, there is purpose in its lending i.e. to promote small and medium industries. The relationship between the Corporation and the borrower is that of a creditor and debtor. That basic feature cannot be lost sight of . A corporation is not supposed to give loan and then to write it off as a bad debt and ultimately to go out of business. It has to recover the amounts due so that fresh loans can be given. In that way industrialization, which is the intended object, can be promoted .It certainly is not and cannot be called upon to pump in more money to revive and resurrect each and every sick industrial unit irrespective of the cost involved. That would be throwing good money after bad money. As observed in Gem Cap promoting industrialization does not serve public interest if it is at the cost of public fund. It may amount to transferring public money to private account. Further, Financial Corporation cannot wait indefinitely to recover its dues."

50. Thus, when this Court would find that Clause (xxviii) of the ILRS-2008 seeks to actually achieve the object of boosting up the recovery of the dues of the Corporation for the purpose of reducing its own N.P.A. account, it cannot be held that reference made to the auction price of the mortgaged asset will not be a relevant factor. The same in fact has been also clearly explained by the respondent BSFC in its counter affidavit filed in this case and would be evident from extract of the counter affidavit in CWJC No. 13036 of 2008, which

for emphasis is again reproduced in verbatim:-

"4. That in this regard it is stated that the writ petition is prima facie not maintainable. The petitioner challenges the purchase offer criteria of the Incentive-cum-Loans Restructuring Scheme, 2008 (ILRS for the sake of brevity). The relation between the loanee and the respondent Corporation is based on contractual agreement and the term of which cannot be a subject matter of writ proceedings. ILRS is primarily a modification of the original contract. Thus, it is applicable only when both the parties i.e. the loanee and the BSFC agree to the terms of the offer. If the Loanee does not agree with the terms of offer made in the scheme then obviously the settlement will not be operative for him and he is welcome to continue with his normal repayment but he cannot challenge the term of the offer made under the scheme.

5. That it is submitted that claiming ILRS is not a fundamental right of the Loanee rather it is a matter of contractual agreement which cannot be enforced through the present proceedings. Further as ILRS is not a fundamental right hence applying the concept of equality as well as non discrimination are not relevant. The Hon'ble Court has very categorically held in the matter reported in (2005) 4 SCC 456 that in matters concerning the Corporation and its debtors, a writ court has no say except in situations where

(a) there is statutory violation on the part of the Corporation, or

(b) where the Corporation acts unfairly i.e. unreasonably

6. That there has been no violation of law by the Corporation. As far as fairness or reasonableness in concerned, it is sufficient if there are reasonable reasoning behind the provision of the Scheme. The degree of fairness/reasonableness cannot be questioned by the writ petitioner unless it is irrelevant, arbitrary or perverse.

7. *That in the present context the concept of considering purchase offer is a valid reasonable and rational consideration. Existence of purchase offer implies that BSFC can recover its dues (basically public money) by sale auction. Consequently there being reasonable rationale behind the provision hence the petitioner cannot be permitted to assail the same.*
8. *That under the ILRS, the final restructured amount would be the highest of the following category:*
   - *(a) amount as per the restructuring formula,*
   - *(b) the valuation,*
   - *(c) the highest available purchase offer*

   Infact it the valuation is higher then the purchase offer does not remain relevant in fixing the final restructured amount. In the present case the valuation of the unit is Rs. 102.96 lakhs while the available highest purchase offer is only Rs. 70 lakhs.
9. *That it is stated that the Loanee has an obligation to repay the loan. In fact the Loanee was granted loan out of the public money and he cannot sit tight over the public money and employ all sorts of strategy to avoid repayment of dues.-------."*

51. Judged in this background, when this Court would find that the petitioner M/s Shree Durga Roller Flour Mill Pvt. Ltd. against the loan sanctioned to it of Rs. 55,77,611.80/- in between 29.6.1981 to 15.2.1988 and its repeated notices of the BSFC to pay the amount had not led to any fruitful result, the mortgaged asset of the petitioner M/s Shree Durga Roller Flour Mill Pvt. Ltd. was advertised for auction sale on 28.11.2001 and the takeover order was passed on 11.2.2002. Thereafter, on several advertisement and re-

advertisement, the Corporation could get an offer of Rs. 70 lacs and, therefore, the effort of petitioners to circumscribe the Corporation by claiming the restructured amount to be only a sum of Rs. 52.56 lacs as stated in paragraph no. 21 of the writ application will be wholly against the interest of the BSFC.

52. In this regard, it has to be kept in mind that the order dated 2.3.2009, in respect of the mortgage asset of M/s Shree Durga Roller Flour Mill Pvt. Ltd. will go to show that the total dues of the petitioner was Rs. 2.36,13,032.12/- and, therefore, its effort to deny the BSFC to even realize Rs. 70 lacs for taking into account of restructured price under the ILRS- 2008 will be wholly unjust and unreasonable. This Court, therefore, would find no error in the calculation of the restructured price of the petitioner M/s Shree Durga Rolleer Flour Milld Pvt. Ltd. as has been also explained in paragraph no.26 & 27 of the supplementary counter affidavit, which reads as follows:-

> *"26. That on 2.3.2009 order for restructuring of dues under ILRS 2008 was issued as per order of the Hon'ble High Court passed in CWJC No. 13036/08. The concern however did not pay the amount as per ILRS order.*
>
> *27. That it is relevant to state here that as per direction dated 18.12.2008 of this Hon'ble Court passed in the present case, the order for restructuring was issued vide memo no. 455/Z-IV dated 2.3.09 fixing restructured amount of Rs. 102.96 lakhs. As per order*

the concern was to pay initial acceptance money equivalent to 15% of restructured amount i.e. Rs. 11,82,158/- latest by 1.4.09. Balance restructured amount was to be paid in four installments as given below:

Due Date	*Amount*
1.7.09	*21,87,900/-*
1.10.09	*21,87,900/-*
1.1.2010	*21,87,900/-*
1.4.2010	*21,87,900/-*

No payment has been received from the concern against the aforesaid restructuring order."

53. Somewhat similar facts can be noticed even in the case of the other petitioner M/s Hotel Sahu, inasmuch as, from the sale order, it would be found that a sum of Rs. 91 lacs was the highest offer of the private respondent Bishwanath Chandra Dey and this amount could have become available to BSFC on 3.9.2008 after he had deposited 22.75 lacs as per the condition of his sale order dated 27.08.2008. The petitioner M/s Hotel Sahu, which has hardly made any payment against the loan amount in the last thirty years, therefore, cannot deprive the BSFC to sell its mortgaged assets in favour of the respondents no. 6, the auction purchaser at Rs. 91 lacs specially when the value of the asset has been arrived at Rs. 86.26 lac. Thus, the expected restructured amount for petitioner Hotel Sahu cannot be less than 91 lacs and the same, on the face of records, cannot be said to be arbitrary.

54. It has to be also kept in mind that the total dues of M/s Hotel Sahu as against the term loan to the tune of Rs. 14.95 lacs given way back in the year 2001-02 has increased to Rs. 2,95,91,710.87 paise. In this regard, paragraph no.9 of the second supplementary counter affidavit of the BSFC would itself explain the whole aspect with regard to dues vis-à-vis the restructured amount under the ILRS-2008 which reads as follows:-

> *"9 That the contention made in paragraph-2 of the Interlocutory Application is wholly incorrect and quite contrary to the agreement entered into by the petitioner with the Corporation. The BSFC has granted term loan to the extent of Rs. 14.95 lacs. Whatever payments made by the promoters of the concern has been credited to the interest, penal intrest and other charges, etc. The principal outstanding against the petitioner as on 31.8.2008 is Rs. 13,82,116.42p. The total dues against the petitioner as on 31.8.2008 has accumulated to Rs. 2,95,91,710.87p. The break-up details of the outstanding are as follows:*

Principal outstanding	*Rs. 13,82,116.42*
Interest outstanding	*Rs. 2,46,92,440.45*
Penal interest outstanding	*Rs. 33,53,145.00*
Interest tax outstanding	*Rs. 1,50,009.00*
Other charges outstanding	*Rs. 14,000.00*
Total:	*Rs. 2,95,91,710.87*

> *The Clause of the scheme referred to by the petitioner is not concerned with retention. The unit of the petitioner is on sale in exercise of power u/s 29 of the SFC's Act due to non-payment of legitimate dues of the Corporation. The Clause 28 referred to by the petitioner only indicates that in such event if the purchaser of the unit determines the market price*

of the unit which is more than the amount arrived at in terms of clause (ii) of the scheme then the restructuring would be done at the amount of market price.

This is the policy of the Corporation for all such cases and it is not the retention clause as mis-interpreted by the petitioner. The Corporation has been forced to bring out the re-structuring or one time settlement scheme because of all such promoters as petitioner who are deliberately and willfully not paying the dues of the Corporation. It is stated that by implementing such scheme the Corporation is not gaining any amount, but sacrificing much more than what it get. Such entrepreneurs have led to the present situation of the Corporation where it is not able to advance any loan and it is only engaged in payment of its liabilities."

55. As noted above, this petitioner Hotel Sahu also has been a chronic defaulter and despite number of opportunities given to avail the OTS even as per the direction of this Court, it was not availed by this petitioner.

56. Thus, in the light of aforesaid discussion, there is no escape from the irresistible conclusion that both the writ applications have been only filed to stall the recovery proceeding by raising a frivolous issue with regard to Clause-(xxviii) of the ILRS-2008. As a matter of fact, the shifting and the waivering stand of both the petitioners by projecting that yet another OTS scheme was floated by the BSFC in the year 2009 and that they should have been given the benefit of such OTS Scheme will only go to show that whenever a OTS scheme and/or any other recovery scheme including ILRS -2008

is enforced by the BSFC, the petitioners have conveniently found a way to obstruct the loan recovery measures of BSFC either by way of questioning auction sale of the mortgaged property or issuance of sale order by taking recourse to filing of writ application only with a view to scuttle and/or stall the same. This practice has to be deprecated by this Court because it finds that the petitioners have never been made any sincere effort to either repay the loan or to avail the benefit of scheme as per the stipulation made therein.

57. That being so, this Court for the reasons indicated above, does not find any merit in either of these two writ applications and both of them are, accordingly, dismissed as a consequence whereof, the interim order of status quo passed earlier in both the cases would automatically stand vacated and thus paving the way for B.S.F.C. to further steps for completion of sale of mortgaged assets of the petitioner M/s Hotel Sahu in favour of Bishwanath Chandra Dey, respondent no.6 in CWJC No. 2316 of 2008 as also taking any action for recovery of its loan against the petitioner M/s Shree Durga Roller Flour Mills Pvt. Ltd. (CWJC No. 13036 of 2008) of course in accordance with law. There would be, however, no order as to costs.

(Mihir Kumar Jha, J)

Rishi/-

Patna High Court
Dated the 26th November, 2015
N.A.F.R./Rishi/-

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