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

Reserved on: 3rd October, 2013

% *Date of decision: 24th April, 2014*

+ W.P.(C) 5010/2011 & 10169/2011

RR KABEL LIMITED Petitioner

versus

M/S INCAB INDUSTRIES LTD. & ORS. Respondents

+ W.P.(C) 5971/2011

PEGASUS ASSETS
RECONSTRUCTION PVT. LTD. Petitioner

versus

TATA STEEL LIMITED AND ORS Respondents

+ W.P.(C) 5954/2011 & C.M.No.12050/2011

INCAB SRAMIK SANGH & ORS Petitioners

versus

APPELLATE AUTHORITY FOR
INDUSTRIAL & ORS Respondents

+ W.P.(C) 5197/2011 & C.Ms.No.10541/2011, 219/2012,
3077/2012.

ALL INDIA INCAB INDUSTRIES EMPLOYEES
FEDERATION & ORS. Petitioners

versus

AAIFR & ORS. Respondents

Present:

Mr Rajiv Nayyar, Sr.Adv. with Ms B.Sunita Rao,

Mr Darpan Wadhwa, Mr Anil, Adv. for R.R.Kable Ltd.

Mr Prateek Jalan, Mr Aditya Sharma, Adv. for Fesqua and Kamla Mills.

Mr Vivek Sibbal, Sr.Adv. with Mr.Ankur S.Kulkarni, for INCAB Industries.

Mr R Dushyant Dave, Senior Adv. with Mr Tarun K.Banga, Adv. for respondent/Tata Steel Ltd.

Mr Vikas Singh, Sr.Adv. with Mr Sanjiv Sen, Mr Sameer Dewan, Mr S.C.Pant, Adv. for respondents No.14,20,21,27,36,53,58 in CWP No.5010/2011, respondents No.14,21,22,28,36, 47, 59 in CWP No.5971/2011, respondents No.15, 22, 23, 29, 46 in CWP No.5197/2011, respondents No.15, 22, 23, 28, 46 in CWP No.5954/2011.

Mr Barun Kumar Sinha, Adv. with Ms Pratibha Sinha and Mr Aayush Raj, Adv. in WPC Nos. 5954/11, 5197/11, 5010/11, 5971/11.

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MR. JUSTICE R.V. EASWAR

R. V. EASWAR, J.:

1. In these proceedings, under Article 226 of the Constitution of India the petitioners have called in question the order passed by the Appellate

Authority for Industrial and Financial Reconstruction (“AIFR”), New Delhi on 30.6.2011 in the following circumstances.

2. M/s Incab Industries Ltd (hereinafter referred to as IIL) was a sick industrial company. Some time in October, 1999 a reference was made by it to the Board for Industrial and Financial Reconstruction (hereinafter referred to as “BIFR”) and it was declared a sick industrial company by an order passed by BIFR on 4.4.2000. The State Bank of India (“SBI”) was appointed as the Operating Agency (“OA”) under section 17(3) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as “SICA”) to examine the viability of the company and submit a rehabilitation scheme. There were several teething troubles in the preparation of the rehabilitation scheme, the details of which need not detain us. After several years there were three proposals submitted by the following companies for rehabilitation of the sick company : Silver Jubilee Infrastructure Ltd. (SJIL), R.R. Kabel (RRK) and Land Lease Co. Ltd. (LLC). These proposals were examined by the OA which also held discussions with the propounders. Several rounds of litigation followed thereafter. In the meantime two other companies also joined the fray and they are Pegasus Assets Reconstruction Pvt. Ltd. (PARL) and TATA Steels Ltd. (TSL). They had also submitted draft rehabilitation schemes.

The matter reached the Delhi High Court and the Supreme Court which gave certain directions vide order dated 14th May, 2009. Pursuant to this order three bidders were permitted to submit the Draft Rehabilitation Scheme (DRS) and they were (1) RRK, (2) TSL and (3) PARL. Pursuant to the orders of the Supreme Court, hearings took place before the BIFR on 2.7.2009, 19.8.2009 and 22.9.2009. In these proceedings the BIFR allowed several workers' associations to join the proceedings if they so desired subject to furnishing of proof that they were recognized unions of the sick company.

3. In the hearing which took place on 22.9.2009 before the BIFR the coram was represented by Mr K Cherian Verghese, Chairman, Mr Pawan Raina, Member and Nirmal Singh, Member. On that date, the BIFR considered the report of the OA dated 1.9.2009 and directed the OA – (a) to give a further report in a tabular form setting out the parameters, (b) to hold a joint meeting with all the concerned parties and (c) submit a further report containing the valuation of the three proposals from RRK, TSL and PARL as per the parameters laid down by the Supreme Court.

4. Pursuant to the above, the OA conducted a joint meeting on 20.10.2009 and through its report dated 26.10.2009 gave its comprehensive and

comparative analysis of all the three schemes and reiterated its earlier opinion that the scheme propounded by TSL was best suited and the future of the workers of the sick company would be much secure with TSL whose proposal was the best so far as the interest of the workers and their job security is concerned. It also noted that the schemes propounded by RRK and PARL were not worthy of consideration; RRK's scheme was such that the net worth of the sick company cannot become positive and PARL had no experience in running a manufacturing unit as it was only an asset reconstruction company. The OA also noted that the motive of RRK and PARL appeared to be to grab valuable real estate of the sick company as was evident from their proposal to sell the immoveable assets of the sick company to finance their schemes which invited strong objections from the workers. Compared to this, TSL did not propose to sell any of the immoveable assets to finance their rehabilitation scheme. This was the gist of the report dated 26.10.2009.

5. The report was submitted to the BIFR which held a hearing on 12.11.2009. On this date, the parties opposing the scheme prepared by TSL objected to the report of the OA, upon which the BIFR directed them to file written objections; the OA as well as the sick company were directed to give their comments on the objections received. The coram of

the BIFR was represented by Mr K Cherian Verghese, Chairman, Mr Pawan Raina, Member and Smt Saroj Bala, Member. The parties submitted their respective written objections to the report of the OA.

6. On 20.11.2009 the OA submitted its comments to the objections raised by RRK and PARL to the BIFR in compliance with the BIFR's order dated 12.11.2009.

7. On 24.11.2009 the BIFR held a hearing in which the coram was represented by Mr K Cherian Verghese, Chairman and Mr V K Malhotra, Member. It considered the report dated 26.10.2009 of the OA, the objections of the parties to the same and sought further clarifications from the parties. The OA was directed to reconcile the figures mentioned in the report and to recast the report and submit a supplementary report. Accordingly, the matter was adjourned to 30.11.2009.

8. On 27.11.2009, the OA gave its supplementary report of the same date in which also it made clear that the scheme presented by TSL was the best on all the parameters, including the protection of the interest of the workers.

9. In the hearing which took place on 30.11.2009 before the BIFR, the coram was represented by Mr K Cherian Verghese, Chairman and Mr

V K Malhotra, Member. The BIFR sought written submissions to the report of the OA dated 27.11.2009 and also sought clarifications from the three propounders as well as from the OA. They were all directed to give their objections/clarifications by 2.12.2009, the OA was also directed to give its views on the clarifications given by the propounders. It was declared by the BIFR on that date that its decision will be announced on 9.12.2009.

10. On 2.12.2009 RRK, PARL and others opposing the scheme of TSL submitted their respective exhaustive written submissions to the BIFR. On 7.12.2009, the OA by its letter of the same date, gave its comments to the written submissions of the parties opposing the scheme of TSL.

11. On 9.12.2009, the coram of the BIFR was represented by Mr K Cherian Verghese, Chairman and Mr V K Malhotra, Member. The BIFR considered the three revival proposals, heard the worker's unions and took into consideration all the reports of the OA and passed a comprehensive final order, holding that the scheme submitted by TSL was the best amongst the three bidders and satisfied all the parameters set by the Delhi High Court and the Supreme Court. Accordingly it directed

TSL to submit its Draft Rehabilitation Scheme in terms of the provisions of section 18 of the SICA within the period prescribed in the said order.

12. Appeals were preferred to the AIFR by RRK and two of its workers' unions supporting it against the order passed by the BIFR on 9.12.2009. An appeal was also filed by PARL. These appeals were filed before the AIFR which issued notices. On 27.7.2010 the Supreme Court directed BIFR to hear all the six appeals on day-to-day basis from 1.9.2010. Hearings were concluded by the BIFR on 9.5.2011 and judgment was reserved.

13. Before the AIFR several pleas were taken by the appellants with regard to the merits of the rival schemes. One of the contentions raised before the AIFR by the appellant was that the Bench of the BIFR which passed the final order on 9.12.2009 (impugned in appeal before the AIFR) was not the Bench which heard the entire proceedings and therefore could not have passed the final order. TSL resisted the contention by submitting that it is not possible for the same members to hear the proceedings before BIFR since the proceedings go on for several years during which members of the BIFR regularly change on account of retirement etc. It was further submitted that BIFR adopts the procedure

regularly to record the gist or the summary of proceedings of each hearing in the subsequent orders. It was pointed out that in its order passed on 9.12.2009, the BIFR followed the same procedure and recorded the gist of the meetings of each and every previous proceedings relevant for the purpose of coming to the final decision. It was submitted on behalf of the TSL that effective arguments were heard by the BIFR only on 24.11.2009 and 30.11.2009 and on these two dates the Bench consisted of Mr K Cherian Verghese, Chairman and Mr V K Malhotra, Member and it was this Bench which also pronounced orders on 9.12.2009 and therefore it cannot be said that the matter was disposed of by a Bench which did not hear the proceedings. It was also pointed out that thanks to the practice of BIFR to record the gist or summary of the proceedings of each hearing in the subsequent orders, Mr V K Malhotra, the Member of the BIFR could apprise himself of the earlier submissions as the gist of the earlier proceedings was on record. It was argued that it would be absurd to contend otherwise, as it would result in absurd consequences as the proceedings have to be re-heard every time a member changes and thus the proceedings before the BIFR will never come to an end, but would indefinitely go on. It was further contended that in any case none of the appellants had objected to the proceedings

before the BIFR on this ground and therefore they were estopped from assailing the impugned order of the BIFR in the appeals filed before the AIFR. Reliance was also placed on section 10 of the SICA which stipulated that the proceedings of the Board were not to be questioned on the ground merely of any defect in its constitution or in the constitution of the AIFR. It was accordingly contended by TSL that the proceedings before the BIFR were valid and the order passed by the Bench consisting of the Chairman and Mr V K Malhotra, Member was perfectly in order.

14. On this argument, the majority of the AIFR pronounced as follows:

“(i) A question has been raised about the judicial propriety of the bench which has delivered the impugned order as this Bench was different from the Bench which heard the final arguments on 12.11.2009. We are inclined to agree with the arguments that the BIFR records the summary of proceedings of the previous hearings in the proceedings of the subsequent hearings and, therefore, there is always continuity of knowledge and information relating to the developments in a particular case before the BIFR. In this case, the same thing has happened. If it is accepted that with every change of a member in the composition of the Bench, a case needs to be re-heard, it will lead to constant rehearings as a result of which the adjudication and decisions in BIFR cases can be indefinitely prolonged, which, in the context of revival of such companies will not be a desirable consequence. Moreover, Section 10 of SICA clearly lays down the following: -

“Vacancies, etc., not to invalidate proceedings of Board and Appellate Authority – No act or proceeding of the Board or, as the case may be, the Appellate Authority shall be questioned on the ground merely of the existence of any vacancy or defect in the constitution of the Board or the Appellate Authority or any defect in the appointment of a person acting as a Member of the Board or the Appellate Authority.”

Therefore, we feel that the objectivity of evaluation and adjudication has been by no means compromised because of the fact that the Bench that gave the impugned order was partially different in composition from the Bench that heard the final arguments. Therefore, we think this does not constitute any legal infirmity. In the interest of expeditious justice, we hold that the impugned order has been validly delivered by the Bench and does not suffer from any infirmity on the aforesaid account.”

15. The majority also dealt with the merits of the different rehabilitation schemes and eventually upheld the decision of the BIFR that the scheme propounded by TSL was justified.

16. The minority view of the AIFR (the Chairman) on this issue was different. The relevant portion of his view is as below: -

“2. But, so far as order passed in Appeal No.16/10, 37/10, 38/10 and 40/10 are concerned, with due regards to my Brother, I am unable to agree with his findings

recorded in this appeal and final order passed and signed by them. Today, I am demitting my Office on completion of my tenure. As such, I am unable to write a detailed order in the matter and also it could not be possible for me to go through the full text of the order due to paucity of time. However, on seeing the findings and final opinion recorded in the order, prima facie, according to me, these appeals should be remanded back to the BIFR for re-consideration particularly on the ground of judicial propriety of the passing of the order by the Bench of the BIFR. As per the finding recorded in para 44 sub-para (i) at page 65 of the order prepared by Shri A.K. Mohapatra, he has considered the question of judicial propriety of the Bench of the BIFR which has delivered the impugned order. The Bench which passed the order was different from the Bench which heard the final arguments on 12.11.09. In my opinion, this will make the whole order liable to be set aside as another Bench which has not heard the final arguments cannot pass the order. This reasoning that there is always continuity of knowledge and information on record is available, is not acceptable. Therefore, in my view, the impugned order of the BIFR dated 9.12.09 is liable to be set aside on this ground alone.”

17. So far as the merits of the rival schemes are concerned, the Chairman of the AIFR took the view that the OA did not act as an independent agency in considering the three schemes and did not record its findings properly on proper evaluation of the schemes; accordingly he remitted the matter to the BIFR with the direction that it should consider the three schemes afresh objectively.

18. We have heard arguments of all the parties before us only on the preliminary question as to whether the order passed by the BIFR suffers from the vice of “*hearing by one, decision by another*”. After the conclusion of the hearing on the preliminary point the parties were requested to file brief written submissions which they have done; they have also been taken into consideration.

19. Mr. Rajiv Nayar, learned senior counsel for the petitioner in W.P.(C) No.5010/2011 (R.R. Kabel Ltd.) put forth the following submissions: -

(a) It is a well settled principle that the same Bench which heard the arguments shall pass the orders, but this principle has been given a go-by in the present case by the BIFR as pointed out by the minority view of the AIFR.

(b) Final arguments were heard on 12.11.2009 by the BIFR (Coram: Cherian Verghese, the Chairman, Pawan Raina and Saroj Bala, Members) but the final order was passed on 09.12.2009 by a different Bench consisting of Cherian Verghese, the Chairman and V.K. Malhotra, Member. The hearings which took place on 2 dates in between i.e. on 24.11.2009 and 30.11.2009 were not on the issue

of the comparison of the three schemes propounded by R.R.K., PARL and TSL, but were on a different issue. It is not known why Pawan Raina and Saroj Bala were not on the Bench on 09.12.2009 though they continued to be the members of the BIFR.

(c) Oral arguments were concluded on 12.11.2009 and the aforesaid three propounders were to file written submissions by 16.11.2009 and the next hearing was to take place on 24.11.2009. However, on 24.11.2009 the Bench consisted of Cherian Verghese, the Chairman and V.K. Malhotra. This Bench did not have the benefit of the oral arguments on the comparison of the rival schemes which were concluded on 12.11.2009.

20. According to Mr. Nayar the procedure adopted by the BIFR was strange to say the least. He contended that in the above circumstances, it would be clear that the Bench heard the oral arguments on 12.11.2009 did not pass the final order on 09.12.2009 on the question as to which of the three schemes was best suited and thus the proceedings before the BIFR suffers from a serious vice and were in violation of the rule that the person who heard the matter, should also pass the order. In support of these submissions Mr. Nayar cited the following judgments: -

- (i) *G. Nageswara Rao v. Andhra Pradesh State Road Transport Corporation*, AIR 1959 SC 308
- (ii) *Rasid Javed & Ors. vs. State of UP & Anr.*, (2010) 7 SCC 781 at 796 para 51
- (iii) *Union of India vs. J.V. Subhaiah*, (2011) 2 SCC 258 at 295 paras 80, 83 & 84

21. The learned counsel appearing for the workers' union of Incab in W.P.(C) No.5197/2011 adopted the arguments of Mr. Rajiv Nayar. He pointed to paragraphs 36 to 59 of the order passed by the BIFR and submitted that the final hearing stood concluded on that day even according to these paragraphs and this finding not having been questioned by any one and thus having attained finality cannot now be disturbed. If that is so, it is a clear case of "*hearing by one, decision by another*". Reliance in support of this proposition was placed on *Ishwar Dutt vs. Land Acquisition Collector*, (2005) 7 SCC 190 at 197 paragraphs 14, 19 and 24.

22. Learned counsel for PARL, the petitioner in W.P. (C) No.5971/2011 adopted the arguments of Mr. Rajiv Nayar; additionally he relied on the judgments of this Court in *Smt. Chatro Devi And Ors. vs. Union Of India and Ors.*, (2007) 137 DLT 14.

23. The arguments of Mr. C.S. Vaidyanathan, learned senior counsel appearing for TSL, one of the respondents, are as follows: -

(a) The preliminary point taken now in the present proceedings was not taken before the BIFR at any point of time and even before the AIFR, this plea was taken only by the Incab workers' union. Therefore, it should not be allowed to be taken at such a late stage in writ proceedings, which fall under the discretionary and equitable jurisdiction of this Court.

(b) The BIFR was considering the scheme of the operating agency with respect to the sick company and the measures to be taken for the proper management of the company by change in, or takeover of the management of the company in accordance with Section 18(1)(b) of the SICA. Sub-sections (1) and (2) of Section 18 does not even contemplate a hearing. Therefore, to say that since oral arguments were concluded before a particular Bench on 12.11.2009, but orders thereon were passed by a different Bench on 09.12.2009 and, therefore, the entire proceedings of the BIFR are vitiated is untenable. The BIFR was actually examining the scheme prepared by the OA in accordance with sub-section (3) of

Section 18 of the SICA. The duty cast on the BIFR is only to examine the scheme submitted by the OA. When copious record of the proceedings is left by the Bench which heard the submissions on 12.11.2009 and that record had in fact been taken into consideration by the later Bench, though constituted by different Members, there is no violation of any principle of natural justice.

(c) The petitioners have not demonstrated any prejudice. Their arguments and the written submissions have all been taken note of by the Bench of the BIFR which passed the orders on 09.12.2009. On 12.11.2009 oral objections were raised to the report of the OA dated 26.10.2009. On 24.11.2009, these objections were put in writing before the BIFR. Though on 24.11.2009 the Bench of BIFR consisted of Cherian Verghese (Chairman) and V.K. Malhotra, Member which was different from the Bench which heard the oral objections on 12.11.2009, this does not in any manner vitiate the proceedings because the Bench constituted on 24.11.2009 in fact had the written objections before them. Moreover, it was only on 24.11.2009 that oral arguments were concluded. A further opportunity was given to the parties to file

written submissions on 30.11.2009. This was by the Bench consisting of Cherian Verghese and V.K. Malhotra. It was this Bench which passed the final order on 09.12.2009. Thus, it is clearly not a case where one person heard the matter, but a different person passed the order.

(d) The preliminary objection now taken by the petitioners is at a very late stage and hence should not be entertained. No objection was taken even on 09.12.2009, the day on which the BIFR pronounced orders. No such objection was taken on 24.11.2009 before the Bench consisting of Cherian Verghese, Chairman and V.K. Malhotra, Member nor was any such objection taken on 30.11.2009 when the very same Bench directed the parties to react to the supplementary report submitted by the OA. The preliminary objection taken at this late stage is frivolous and is taken to delay the proceedings further.

(e) In any case the objection is only technical in nature and even if it is assumed, for the sake of argument, to be valid, it does not vitiate the order passed by the BIFR since there was waiver or acquiescence on the part of the petitioners throughout the

proceedings before the BIFR which would estop them from raising the plea, particularly at this late stage, moreover no prejudice has been caused to the petitioners who have been given a full hearing by the BIFR Bench which passed the final order as well as by the AIFR, the appellate court. The appellate court can remedy the situation by giving a full hearing as held by the Supreme Court in *K.S. Panduranga vs. State of Karnataka*, (2013) 3 SCC 721.

24. Mr. Vikas Singh, the learned senior counsel appearing for the workers' union supporting TSL made the following submissions: -

(i) Under Section 13 of the SICA, the BIFR has the power to regulate the procedure and conduct of the business as well as procedure of the Benches. Regulation 12 (2) of the BIFR Regulation, 1987 enables the provisions of the Code of Civil Procedure, 1908 to be applied to the proceedings to the extent as may be deemed expedient by the Board, where no specific provision has been made in the regulations to cover a particular situation. Therefore, Section 99 of the Code of Civil Procedure applies to proceedings before the BIFR, according to which no decree shall be reversed or substantially varied nor shall any case

be remanded in appeal on account of, *inter alia*, “any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court”.

(ii) Order XVIII Rule 15 of the CPC also applies to the present case. This provision enables a successor-Judge to deal with any evidence or memorandum taken down or made by the predecessor-Judge as if such evidence or memorandum had been taken down by him or under his direction and he may proceed with the suit from the stage at which his predecessor had left it on account of death, transfer or other cause. This principle equally applies to the proceedings before the BIFR by virtue of the Regulation 12(2). If so, the Bench of the BIFR constituted by Cherian Verghese, the Chairman and V.K. Malhotra, Member was competent to continue the proceedings from the stage at which they were left by the predecessor-Bench and pass final orders. In any case, the successor-Bench had the benefit of the written objections filed by the parties on 12.11.2009 to the report of the OA. There was thus no violation of the rules of natural justice or the salutary principle that it is the judge, who heard the matter, who should pass the order.

(iii) Section 10 of the SICA also provides that any defect in the constitution of the Board shall not invalidate any act or proceeding of the Board.

(iv) The petitioners cannot raise the preliminary objection not only because it is being raised at a very late stage, but also because that such an objection cannot be taken after they have lost, when they knew that they should have taken this objection at the earliest stage but did not do so and allowed the proceedings to go on, and also made submissions on merits, as held by the Supreme Court in *G. Sarana vs. University of Lucknow and Ors.*, (1976) 3 SCC 585, reiterated in *Vijendra Kumar Verma vs. Public Service Commission, Uttarakhand and Ors.*, (2011) 1 SCC 150. The petitioners did not demur to the constitution of the BIFR on 24.11.2009 and 30.11.2009 on which dates there were full-fledged hearings; even on 02.12.2009 when the parties complied with the direction of the BIFR to react to the supplementary report of the OA and to file clarifications, the petitioners did not take up this objection but in fact wanted more time to file written submissions. In many places in the order passed by the BIFR on 09.12.2009 there are references to the written submissions filed by the parties.

Thus full and complete opportunity was given to the petitioners to present their case before the BIFR. Merely because they have lost, they are now taking up the preliminary objection that the Bench which passed the order is different from the Bench which heard the matter.

25. The learned counsel who appeared for the first respondent in W.P.(C) No.5010/2011 (Incab Industries Ltd.) supported the arguments of the petitioner only to the limited extent that in the final order passed by the BIFR there is reference only to the *directions* of the earlier Bench but not to the proceedings in entirety and, therefore, there was no continuity of the proceedings. He submitted that the hearing which took place on 12.11.2009 before the Bench constituted by Cherian Verghese (Chairman), Pawan Raina and Saroj Bala, (Members) was the final hearing. Pawan Raina, Member retired only in July, 2010 and Saroj Bala, Member retired only in November, 2012. These Members were, therefore, available in the BIFR even when final orders were passed on 09.12.2009.

26. Mr. Kirti Uppal, who appeared for Incab Industries Ltd. supported the arguments of Mr. Vikas Singh. He further submitted that the

objection raised by the petitioners was a mere technicality and it should not be accepted as it will result in “*setting the clock back by several years*”.

27. In W.P.(C) No.5197/2011, the learned counsel appearing for the All India Incab Industries Employee’s Association put forth two points. The first was that the provisions of the Code of Civil Procedure were not fully applicable to the proceedings before the BIFR. Section 13(1) permitted the BIFR to devise its own procedure, which excludes the operation of the CPC. Moreover, under Section 13(3) of the SICA, only certain provisions of the CPC are made applicable to proceedings before the BIFR. Clause (f) of Section 13(3) has not been triggered by prescribing anything under the rules so far. In these circumstances, says the learned counsel, the argument based on Section 99 and Order XVIII, Rule 15 of the Civil Procedure Code is totally off the mark.

28. The second point put forth is that under Section 13(2) of the SICA, the workers have a right to be heard but neither on 24.11.2009 nor on 30.11.2009 were the workers heard. They were, however, heard on 12.11.2009. It was accordingly submitted that final orders were passed

on 09.12.2009 by a Bench which did not have the benefit of hearing the workers.

29. Mr. B.K. Sinha appearing for the workers' union in W.P.(C) No.5010/2011 submitted as follows: -

(a) On 24.11.2009, arguments were concluded and only the details were to be submitted to the Bench. The workers were not heard on that day. Orders were to be pronounced on 30.11.2009. Thus after 24.11.2009 and before 30.11.2009 no hearing took place before the BIFR.

(b) The supplementary report prepared by the OA was not given to any of the propounders of the schemes on 30.11.2009. The workers were also not given a copy thereof. This was in violation of Regulation 20(2) and (3) as well as the proviso to Regulation 40.

(c) It is wrong to say that no prejudice was caused to the workers. Prejudice was caused to the workers by reason of the fact that a scheme of revival or rehabilitation which was not fully tied up was selected by the BIFR. The selected scheme provides for downsizing of the work force which is to their prejudice. The workers were not given an opportunity of hearing on 30.11.2009

by the Chairman of the BIFR; this issue was even raised before the AIFR.

30. In his rejoinder to the arguments of the respondents, Mr. Rajiv Nayar raised the following points: -

(i) There was no continuous process of hearing as contended by Mr. Vaidyanathan, appearing for TSL and Mr. Vikas Singh appearing for the workers' union supporting TSL. The hearing came to a close on 12.11.2009 which is accepted by all the three Members who constituted the BIFR on that date.

(ii) The contention that the appellate court can remedy the situation by giving a full hearing at the appellate stage is fallacious because a hearing in the appellate court is not a substitute for hearing in the trial court and cannot cure the fatal flaw as held by *Megarry, J.* in *Leary's* case (1970) 2 All ER 713. The said principle is followed in India in the following cases: -

(a) *Institute of Chartered Accountants of India vs. L.K. Ratna & Ors.*, (1986) 4 SCC 537

(b) *Oxy Fisheries (P) Ltd. vs. Union of India*, (2010) 13 SCC 427

(c) *State of U. P. vs. Mohammad Nooh*, AIR 1958 SC 86

(iii) The contention of the respondent that this objection is taken for the first time at a very late stage is without merit, because it is impossible and improper to tell the BIFR that it cannot constitute different Benches for different hearings. Moreover, a fundamental error of jurisdiction, correctible by a writ of certiorari, can be taken at any stage and can be taken for the first time before the High Court as held by the Supreme Court in *Rattan Lal Sharma vs. Managing Committee, Dr. Hari Ram (Co-Education) Higher Secondary School*, (1993) 4 SCC 10.

(iv) The arguments based on the provisions of the CPC are without merit. The BIFR can only prescribe in its rules as to which provision of the CPC are applicable, as permitted by Section 13(3)(f) of SICA. This cannot be done through the Regulations. Though, Section 36 of the SICA empowers the BIFR to make rules, so far no rules have been framed and there is thus no prescription as to the applicability of

provisions of the CPC. Order XVIII, Rule 15 of the CPC provides for several contingencies and also an omnibus or residuary clause permitting the continuance of the proceedings for “*other causes*”, in addition to the death, retirement, etc. of the predecessor-Judge. The expression “*other cause*” cannot be so sweepingly interpreted as to include the whims and fancies of the authority competent to constitute the Benches, which in the case of BIFR, is its Chairman. The provision, even if it is held to be applicable to the proceedings before the BIFR, is confined to the recording of the evidence by the predecessor-Judge, which can be continued by the successor-Judge who need not record the evidence all over again.

(v) No such contingency as is mentioned in Section 10 of the SICA arises in this case, and therefore that Section is not attracted.

(vi) The combined effect of the proceedings conducted before the BIFR is that the rules of natural justice have been severely breached.

31. On the last day of the hearing before us on the preliminary point i.e. on 03.10.2013, Mr. Dushyant Dave, learned senior counsel, who appeared for TSL on that date pointed out that on 12.11.2009, it is not seen recorded that the hearing is concluded or is part heard. Written submissions were permitted to be filed. It was only on 24.11.2009 that the matter was heard on merits but the hearing remained inconclusive. The hearings which took place subsequent to 12.11.2009 were also on the merits. The petitioner in W.P.(C) No.5010/2010 did not raise any objection either before the BIFR or in the written submissions filed. Even before the AIFR it was not raised by RRK, but was raised only by one of the workers' union.

32. We have given utmost consideration to the rival arguments. We have also taken the written submissions filed by the parties into consideration.

33. We are not inclined to uphold the objection of the petitioner to the effect that the proceedings before the BIFR offend the rule that the person who decides must hear.

34. The following issues *inter alia* arise for consideration and decision:

(a) What is the nature of the proceedings before the BIFR? In particular, do they require personal hearing to be given to the parties?

(b) Was the hearing before the BIFR complete at any time before 24.11.2009?

(c) (i) Even if the answer to (b) is in the affirmative, can it be said that the Bench consisting of the Chairman and V.K. Malhotra, Member did not have the benefit of the earlier proceedings and the arguments/ submissions made therein? Could they not have proceeded on the basis of the record of the earlier proceedings without breaching the rules of natural justice? (ii) Do the provisions of the Code of Civil Procedure apply to the proceedings before the BIFR?

(d) Are the petitioners estopped from raising the objection before the AIFR or this court? Did they acquiesce in the proceedings, thus disabling themselves from raising the objection at any time later?

(e) Was any prejudice caused to the petitioners?

35. So far as the issue (a) is concerned, it cannot be and nor was it seriously disputed that the proceedings before the BIFR are *quasi-judicial* proceedings. The point raised by the learned senior counsel appearing for TSL however was that the impugned proceedings before the BIFR were under section 18(1) & (2) which do not contemplate any hearing and therefore the complaint that the earlier Bench “*heard*” the matter and therefore the later Bench could not pass orders thereon is without any merit. Section 17(3) empowers the BIFR to appoint an operating agency to prepare a scheme providing for measures for the revival of the company which are specified in section 18, having regard to the guidelines laid down in the order appointing the agency. Section 18(1) enjoins a duty upon the OA to submit a scheme to the BIFR providing for any of the measures specified in clauses (a) to (f) of the sub-section. It is not in dispute that the proceedings concerned clause (b) which provides for “*the proper management of the sick industrial company by change in, or take over of, management of the sick industrial company*”. Section 18(2) prescribes what all can be provided for in the scheme submitted by the OA. Section 18(3) empowers the BIFR, once the OA submits the scheme, to examine it and make necessary modifications thereof; thereafter a copy of the scheme, as modified, shall be sent to the sick

company and the OA. If there is provision in the scheme for any amalgamation, the scheme shall be sent to the company involved in the amalgamation. Once this process is completed, the BIFR shall publish the scheme, which is referred to as “*the draft scheme*”, in brief, in newspapers “*for suggestions and objections, if any, within such period as the Board may specify*”. If any suggestions or objections are received, the BIFR may, under section 18(3)(b) make such modifications to the draft scheme as it considers necessary in the light of the suggestions and objections. Objections or suggestions may also be received from any company involved in the amalgamation (if any), any shareholder or any creditor or employees of the company. Section 18(4) empowers the BIFR to sanction the scheme and specify the date on which it shall come into force.

36. These provisions do not *per se* contemplate any hearing, as contended on behalf of TSL; however, such a requirement is in our opinion implicit in the provisions of clause (b) of sub-section (3) of section 18 for it is difficult to see how the objections and suggestions can be taken into consideration and the draft scheme be modified in their light unless those who have raised the objections or made suggestions are heard. When there is a requirement to consider the suggestions and

objections to the draft scheme, we believe that there is a duty to act judicially.

37. So far as issue (b) is concerned, the question is whether the petitioner, who included the unsuccessful propounders, were given an opportunity of being heard at the stage of considering their objections. It cannot be disputed that oral arguments were heard on 12.11.2009 as to the objections to the report of the OA dated 26.10.2009. On 12.11.2009, the Bench consisted of the Chairman, Mr. Pawan Raina and Ms. Saroj Bala, Members of the BIFR. They directed the parties to file written objections on 16.11.2009. Accordingly, TSL, RRK and PARL filed the written objections on 16.11.2009. On this, parties before us are agreed. The next hearing took place on 24.11.2009, on which date the Bench consisted of only the Chairman, BIFR and Mr. V.K. Malhotra, Member. On this date, though the Bench was of a different composition, the written objections of the parties were already on record and were taken into consideration by the Bench. The petitioners do not deny that there was a hearing on 24.11.2009 in which they participated; even Mr. B.K. Sinha, the learned counsel appearing for the workers' union, was heard on that date. Thus there is no material to hold that the hearing was complete at any date prior to 24.11.2009. What had taken place prior to that date, i.e.,

on 12.11.2009 was of course a hearing by the BIFR consisting of the Chairman and two Members of the BIFR but it had not concluded on that date. Oral arguments were advanced by the concerned parties (including secured creditors, Government of West Bengal and workers' union) and certain directions as per paragraph 2.19 of the proceedings were issued on that date. This is the case even of Mr. Rajiv Nayyar, the learned senior counsel appearing for RRK; the respondents do not deny it. The point of difference between them is that while Mr. Nayyar contends that the hearing was concluded on 12.11.2009, and therefore the same Bench ought to have passed the orders and not a different Bench, both Mr. Vaidyanathan and Mr. Vikas Singh, appearing for TSL and the Tata Workers' union (supporting TSL) respectively, contend to the contrary and submit that the matter was effectively heard only on 24.11.2009 and 30.11.2009 and therefore there was nothing improper in the Bench which heard it on those dates (Chairman and Malhotra, Member) passing final orders upholding the rehabilitation scheme submitted by TSL. Having regard to the course the hearings took, it is not possible to accept the claim of Mr. Nayyar. A robust approach would be to ask oneself the question: if the hearing stood concluded on 12.11.2009, what was the need to have further hearings on 24.11.2009 and 30.11.2009? The

petitioners would have, if they had also thought that the hearing stood concluded on 12.11.2009 (as they claim before us), certainly brought it to the notice of the BIFR on 24.11.2009 and asked for orders to be passed by the Bench which concluded the hearing on 12.11.2009. Without bringing in the notions of estoppel or waiver or acquiescence for the present, one would have expected the petitioners to at least bring it to the notice of the Bench constituted on 24.11.2009 that the hearing had already concluded on 12.11.2009. The fact that they did not, is an indication that they also thought that the hearing had not concluded on that date.

38. Let us assume for the sake of argument that the hearing before the BIFR was concluded on 12.11.2009 before a Bench consisting of the Chairman and Mr. Pawan Raina and Ms. Saroj Bala, Members, as claimed by the petitioners. Even if such an assumption is made, we are of the opinion that there was no impropriety in another Bench consisting of the Chairman and V.K. Malhotra, Member continuing the hearing on 24.11.2009. The reason is that the earlier Bench had directed the parties to file written objections to the report of the OA dated 26.10.2009 and these were filed on 16.11.2009. These written objections were on record when the Bench consisting of the Chairman and Mr. V.K. Malhotra took

up the hearing on 24.11.2009. They had the opportunity to go through the written objections as also the comments made by the OA and placed on record on 20.11.2009. After going through these material, the Bench on 24.11.2009 directed the parties to file further clarifications and the OA was directed to reconcile the figures and recast its report and file a supplementary report. These directions would demonstrate the application of mind by the Bench which heard the matter on 24.11.2009 to the issues before it. Unless this Bench had applied its mind to the material already on record, including the written objections filed on 16.11.2009 and the comments of the OA filed on 20.11.2009, it would not have been possible for that Bench to issue such directions to the parties as well as the OA. The direction to the OA to file a supplementary report, in particular, also reinforces this conclusion.

39. The further proceedings which took place on 30.11.2009 before the same Bench (the Chairman and Mr. Malhotra) also support our conclusion that there was application of mind by this Bench to the issue before them which arose under Section 18(3) of the SICA. On this date the Bench directed the parties to react to the supplementary report of the OA which had been filed on 27.11.2009 and file their clarifications, which direction was complied with on 02.12.2009. On 07.12.2009 the

OA submitted its report on the submissions made by the parties on the supplementary report. All these were undoubtedly taken into consideration by the Bench composed of the Chairman and Mr. V.K. Malhotra. It is quite a normal practice of Courts and Tribunals to continue to hear the proceedings in the aforesaid manner. One of the purposes of calling upon the parties to file written submissions is to ensure that even if the constitution of the Bench changes and different Members or Judges sit and hear the matter on subsequent dates, there is a record of the earlier proceedings which will facilitate the consideration and application of mind to the matter by the later Bench and would also ensure continuity of the proceedings. There is nothing *per se* improper in this manner of hearing the proceedings which is often the case in the Courts and the Tribunals. The exception to this is when a Bench hears arguments and also takes on record written submissions and then marks the matter as “part-heard”. If a matter is thus marked as part-heard then it is only the same Bench which is entitled to hear the matter, until it is released from that category. Mr. Dushyant Dave, learned senior counsel appearing for TSL, pertinently highlighted the fact that the proceedings which took place before the BIFR on 12.11.2009 were not marked as “part-heard”. The Bench which heard the matter from 24.11.2009 also

heard it on merits and the reason why we say so is, as pointed out earlier, that not only this Bench had the benefit of the earlier proceedings, but the Bench also applied its mind to the record and issued further directions to the OA as well as the parties. If the contention taken on behalf of the petitioners is accepted, the result would be that the hearings before the Courts and the tribunals would ever remain inconclusive; with every change in the constitution of the Bench, the entire matter will have to be reargued from the inception. This would clog the judicial and quasi-judicial machinery and matters will get stuck without being disposed of.

40. It needs mention here that when a different Bench consisting of the Chairman and Mr. Malhotra, Member took up the hearing of the proceedings under Section 18(3) on 24.11.2009, no objection was raised by the petitioners that the Bench should not continue with the hearing since the matter was earlier heard by a different Bench for a considerable period of time during which considerable arguments have been advanced. Mr. Nayar, as noted earlier, raised the point that it would be impossible or impractical for the litigant to object to the constitution of the Bench. It is true that under Section 12(2) of the SICA, it is the prerogative of the Chairman to constitute the Benches. However, there would be in our view nothing improper if a request is made in a given case to the

Chairman of the BIFR to continue the constitution of the earlier Bench, if the parties agree that considerable progress has been made in the case before the earlier Bench. We do not think that the Chairman of the BIFR would have been so unreasonable as to reject such a request, if jointly made by the parties. This does not in any case affect the prerogative of the Chairman to constitute the Benches. But in the present case no such request was made by the petitioners; if the matter had progressed and reached such an advanced stage that only the formality of winding-up the hearing remained, nothing prevented the petitioners from bringing this to the attention of the Chairman who, we do not doubt, would have certainly taken note of the same in the right spirit and perspective and passed appropriate orders. It is only because the proceedings had not reached the stage of final arguments and were still at the stage of exchange of the pleadings, written submissions, clarifications, written objections, etc. that even the petitioners believed that the proceedings had not reached such a crucial stage that a change in the constitution of the Bench would have put them to prejudice. The later Bench consisting of the Chairman and Mr. Malhotra continued the proceedings and it was before this Bench that considerable progress was made not only in the completion of the exchange of papers, written submissions, written objections, etc. but also

in the matter of oral arguments and this Bench also issued directions to the parties to react to the supplementary report filed by the OA and once the reaction of the parties was brought on record in writing, directed the OA to submit its reply, which completed the proceedings. All this was done from 24.11.2009 to 07.12.2009 and on 09.12.2009 the orders were pronounced by the BIFR. Thus there was no breach of the rules of natural justice.

41. There was considerable debate before us as to whether the provisions of the Code of Civil Procedure are applicable to the proceedings before the BIFR. It is not necessary to pronounce finally upon this point but the relevant provisions may be noted. Section 13(3) of the SICA provides that the BIFR and the AIFR shall have the same powers as are vested in a Civil Court under the CPC while trying suits, for the purpose of holding any inquiry or for any other purpose under the SICA. Such powers are in respect of the following matters: -

- “(a) the summoning and enforcing the attendance of any witness and examining him on oath;*
- (b) the discovery and production of document or other material object producible as evidence;*
- (c) the reception of evidence on affidavit;*

- (d) *the requisitioning of any public record from any court or office;*
- (e) *the issuing of any commission for the examination of witnesses;*
- (f) *any other matter which may be prescribed.”*

42. Section 14 says that the proceedings before the BIFR and AIFR shall be deemed to be judicial proceedings for the purposes of certain Sections of the Criminal Procedure Code and the Indian Penal Code. Section 10 provides that no act or proceeding of the BIFR or AIFR shall be questioned on the ground merely of the existence of any vacancy or “*defect in the constitution of the Board*”. Regulation 12 of the BIFR Regulations, 1997 reads as under: -

“12. Effect of non-compliance and application of Code of Civil Procedure. –

(1) Failure to comply with any requirement of these regulations shall not invalidate the proceeding merely by reason of such failure, unless the Board is of the view that such failure has resulted in mis-carriage of justice.

(2) Subject to the provisions of sub-section (3) of section 13, where no specific provision has been made in these regulations, the Code of Civil Procedure, 1908 (5 of 1908), to the extent as may be deemed expedient by the Board, shall apply to the proceeding.”

43. It seems to us that much can be said in favour of the view that the provisions of the CPC are applicable to the proceedings before the BIFR, with the rider that those provisions will apply only where no specific provision is made in the regulations and that too only to the extent as may be deemed expedient by the Board. Order XVIII, Rule 15 of the CPC provides for the contingency where a Judge is unable to continue with the proceedings after recording evidence or a memorandum, for reasons of death, transfer or any other cause. In such a case the successor-Judge can continue the suit without having the need to record the evidence or the memorandum over again. The provisions of the SICA do not specifically provide for a situation where a particular Bench, after recording evidence or a memorandum is unable to continue with the proceedings for some reason or the other. In such a case, having regard to Regulation 12(2), the provisions of Order XVIII, Rule 15 *prima facie* seem to apply. In any case we are unable to demur to the proposition that the principles behind the provisions of the CPC can be properly invoked in the absence of any specific provision in the SICA to cover the situation. The argument of Mr. Rajiv Nayar, however, was that this can be permitted only in the case of death or transfer of the Members of the BIFR and not otherwise. But if it is the prerogative of the Chairman to constitute the Benches and such

prerogative was not questioned by the petitioners, there is no reason why the principle behind Order XVIII, Rule 15 of the CPC should not be invoked and applied. Mr. Vikas Singh in this behalf has rightly drawn our attention to the observation of the Supreme Court in *Kiran Singh and Ors. vs. Chaman Paswan and Ors.*, AIR 1954 SC 340 where it was observed that the policy underlying Sections 21 and 99 of the CPC is that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice or there has been a prejudice on merits. Section 99 of the CPC, which embodies this principle is partly reflected in Section 10 of the SICA which, *inter alia*, says that no act or proceeding of the Board shall be questioned on the ground merely of the existence of any defect in the constitution of the Board. Regulation 16(3) also states that subject to the other provisions of the Regulations, “*every order made or act done by a Bench in exercise of its powers shall be deemed to be the order or act, as the case may be, of the Board*”.

44. So far as the issues (d) and (e) are concerned, it is possible to hold that the petitioners, having not raised the objection before the BIFR itself, cannot raise the question either before the AIFR or this Court in writ

proceedings. There are two ways of looking at this. First, that the petitioners were well aware that they could validly raise the objection before the BIFR on 24.11.2009 but consciously waived the same. This assumes that the hearing was concluded on 12.11.2009 before the Bench consisting of the Chairman, and two other members. We have already attempted to show that this is not the factual position and therefore in a technical sense it cannot be said that the petitioners consciously waived their right to object to the proceedings being continued before another Bench or acquiesced in the same. The second possibility is that the petitioners themselves were aware that there was no conclusion of the hearing on 12.11.2009 and therefore there is no question of any waiver of their right to claim that the same Bench should continue the proceedings or any acquiescence. This is the correct position according to us. It is for this reason that we say that there can be no question of any waiver or acquiescence on the part of the petitioners.

45. So far as the question whether any prejudice was caused to the petitioners is concerned, we have no doubt that no such prejudice was caused. The petitioners as well as the workers' unions were heard on 12.11.2009. They had put forth their arguments on the comparison of the schemes. RRK, PARL and others opposed the report of the OA dated

26.10.2009 holding that the scheme submitted by TSL was the best. These objections which were raised in the course of the arguments were directed by the Bench to be considered by the OA. There were directions to file written submissions on or before 16.11.2009. These directions were complied with and the written objections were in fact filed by the parties on 16.11.2009. Thus the petitioners did have full opportunity of submitting their case. Even on 24.11.2009 the Bench consisting of the Chairman and V K Malhotra directed the parties to file further clarifications etc. and the OA was directed to recast its earlier report and file a supplementary report. The supplementary report was filed on 27.11.2009. On 30.11.2009 the aforesaid Bench directed the parties to react to the supplementary report and file their submissions/clarifications. This direction was complied with by the parties on 2.12.2009. The OA filed its reply to the submissions of the parties on 7.12.2009. Thus at every stage of the proceedings - not only before 24.11.2009, but also on that date as well as the subsequent hearings - the petitioners were given full and complete opportunity to put forth their case which they did. In these circumstances, it is idle on their part to contend that any prejudice was caused to them by reason of the change of the Bench on and from 24.11.2009.

46. We may now briefly refer to the authorities cited before us. The judgment of the Supreme Court in *Gullapalli Nageswara Rao and Ors. V. APSRTC and Anr.* (supra) cited by the petitioners, is a case which arose under the Motor Vehicles Act, 1939. That Act and the rules framed thereunder imposed a duty on the State Government to give a personal hearing. The Rules provided that it was the duty of the Secretary of the Transport Department of the State to hear and the Transport Minister to decide. By a majority of 3 : 2, the Supreme Court held that such a procedure defeats the object of personal hearing and such divided responsibility is destructive of the concept of judicial hearing. It was held that personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear his doubts during the arguments and the party appearing is enabled to persuade the authority to accept his point of view by a reasoned argument. It was held that if one person hears and another decides, then personal hearing becomes an empty formality. This case which arose under the administrative law does not have any application to the case before us. There is no divided responsibility in the present case which can be said to be destructive of the concept of judicial hearing. Herein there are no two authorities – one to hear and another to decide. The authority which hears *and* decides is

the same, namely the BIFR. The BIFR acts through its Benches and we have already seen that as per regulation 16(3), every order made or act done by a Bench in exercise of its powers shall be deemed to be the order or act as the case may be, of the Board. Regulation 3(b) defines “Board” to mean the BIFR and includes, where the context so requires, a Bench exercising the jurisdiction, powers and authority of the Board. Keeping these regulations in view, it is difficult to accept the proposition that the earlier Bench consisting of the Chairman and two Members and the later Bench consisting of the Chairman and V K Malhotra were different authorities entrusted with a divided responsibility which could destroy the concept of judicial hearing. It is the very same authority, namely the BIFR, which hears and decides through its Benches and such Benches could be differently constituted at different times. The position may however be different if a proceeding is marked as “part-heard”, in which case it is that Bench alone, unless otherwise directed by the Chairman for valid reasons, that can continue to hear the proceedings. The decision is therefore of no help to the petitioners in the present case. The judgment of the Supreme Court in *Rasid Javed and Ors. V. State of UP and Anr*, (*supra*) cited on behalf of the petitioners, reiterates the principle of *Gullapalli* (*supra*) and this judgment is therefore of no assistance in the

present case. The judgment of the Supreme Court in *Automotive Tyre Manufacturers Association V. Designated Authority and Ors.*, (2011) 2 SCC 258 on which also reliance was placed on behalf of the petitioners lays emphasis on personal hearing, if the statute does not exclude the same. The Supreme Court held that if there is no such exclusion, the requirement of giving a reasonable opportunity of being heard would be generally read into the provisions of the statute. This judgment takes care of the submission of Mr Vaidyanathan that Section 18 of the SICA does not contemplate any hearing. We have already held that having regard to the object and purpose of Section 18(3)(b), it is necessary for the BIFR to give parties a reasonable opportunity of being heard. This judgment is not of relevance to the present case since in the case before the Supreme Court, admittedly the entire material had been collected by the predecessor – DA, who had allowed the interested parties and their representatives to present the relevant information before him in terms of the applicable rule, but the final findings in the form of an order were recorded by the successor – DA who had no occasion to hear the appellants before the Supreme Court. It was in these circumstances held that the final order passed by the successor-DA offended the basic principle of natural justice. It would be apparent from the aforesaid

narration that the present case stands on a different footing on facts. Whereas in the case before the Supreme Court, the predecessor-DA had collected all the relevant material and information from the parties and the successor-DA merely passed orders without collecting any further information or material and without giving a hearing to the parties, in the present case not only did the Bench which heard the matter on and from 24.11.2009 collected further material by issuing appropriate directions to the parties and the OA, but also applied its mind to the material so collected and also to the material already brought on record by the earlier Bench and after giving several opportunities to the parties on 30.11.2009, 2.12.2009 and 7.12.2009, proceeded to pronounce the final decision on 9.12.2009. The present case is therefore completely distinct on facts from those before the Supreme Court in the judgment cited above. Therefore, the said judgment has no application.

47. In *B K Srinivasan and Ors. V. State of Karnataka and Ors.*, (1987) 1 SCC 658 cited by Mr. Vikas Singh, there was a provision validating certain acts and proceedings. It was provided therein that the failure to serve a notice on any person, where no substantial injustice has resulted from such failure or any omission, defect or irregularity not affecting the merits of the case would not invalidate any act done or proceeding taken

under the main legislation. It was noticed by the Supreme Court that it is a relevant consideration that the appellants (writ petitioners) failed to plead want of publication of the notice or want of knowledge in the first instance and that the defect or irregularity in not publishing the plan in the official gazette was a curable defect. This case was cited for the purpose of showing that the petitioners ought to have raised the objection in the very first instance before the BIFR on 24.11.2009. Mr Vikas Singh also cited *Rasiklal Manikchand Dhariwal*, (2012) 1 SCC 196. In that case, the right of the defendants to cross-examine the plaintiff was closed on 28.2.2005. The matter was then fixed for 17.3.2005 for the remaining evidence of the plaintiff. On that day, none appeared for the defendants although the matter was called out twice. The Judge ordered the suit to proceed ex-parte against the defendants. He heard the arguments of the plaintiff and closed the suit fixing the pronouncement of the judgment on 28.3.2005. Thereafter, he was transferred and a new Judge took over on 28.8.2006. The defendants made certain applications which were dismissed by him and he pronounced the judgment on 7.3.2007 decreeing the suit in favour of the plaintiff. It was held by the Supreme Court that the defendants, having lost their privilege of cross-examination of the witnesses of the plaintiff and of advancing oral arguments cannot be

permitted to raise any grievance that the successor-Judge who pronounced the judgment did not give them an opportunity of making oral arguments. The Supreme Court further held that there was no violation of the fundamental principle of law that “one who hears must decide the case”. This was because of Order XVIII, Rule 15 of the CPC. We have already held that there is no bar on the principles of the CPC being invoked to the proceedings before the BIFR. This judgment supports the contention of Mr Vikas Singh. The judgment of the Supreme Court in the case of *Dr. G. Sarana (supra)* cited by Mr Singh lays down that if there is any objection to the constitution of the Selection Committee that should be brought out at the earliest point of time by the candidate and he should not be permitted to question the constitution of the Selection Committee after voluntarily appearing before it and having lost. The Supreme Court observed that the appellant wanted to take a chance to secure a favourable report from the Tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising a technical point. The position appears to be that such objection should be taken at the earliest point of time before any decision is taken by the Tribunal or the body constituted for the purpose of taking a decision. One cannot be

permitted to take a chance and raise the objection after he has lost. To the same effect is the judgment of the Supreme Court in *Vijendra Kumar Verma V. Public Service Commission, Uttarakhand (supra)*.

48. We have to now deal with the decisions cited by Mr Rajiv Nayar, the learned senior counsel for the petitioners, in support of his contention that it is no argument to say that the lack of opportunity given to a person of being heard by the trial court can be cured by such opportunity being given by the appellate court. He cited the judgment of the Chancery Division (*Megarry, J*) in *Leary V National Union of Vehicle Builders (supra)*. In this judgment, it has been held that where the Act and the Rules combine to give a person the right to a fair trial and then a right of appeal, he should not be told that he ought to be satisfied with an unjust trial and a fair appeal. It was held as a general rule that “*a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body*”. This principle has been echoed by our Supreme Court in *Institute of Chartered Accountants of India V. L K Ratna and Ors.* (1986) 4 SCC 537 and also in *Oryx Fisheries Pvt. Ltd. V. Union of India* (2010) 13 SCC 427. This rule however has no application on the facts of the present case. We have already seen that full opportunity of being heard was afforded to the petitioners by the BIFR

itself as shown by us hereinabove. At no stage of the proceedings were the petitioners denied any opportunity nor was it their case that they were not afforded any opportunity of being heard by the BIFR. Their only grievance right through i.e. before the AIFR for the first time and thereafter before this Court, is that the hearing was given by one Bench, but the decision was taken by another.

49. For the aforesaid reasons we reject the preliminary question raised by the petitioners in the writ petition to the effect that the proceedings before the BIFR offends the fundamental principle of natural justice that the one who hears, must decide. The writ petitions would, therefore, have to be heard on merits. For this purpose, they be listed before the roster Bench on 05.05.2014.

(R. V. EASWAR)
JUDGE

(BADAR DURREZ AHMED)
JUDGE

APRIL 24, 2014
hs/vld