

(2008) 01 BOM CK 0079
In the Bombay High Court
Case No : Company Petition No. 108 of 2006

Ashok Organic Industries Ltd.	Vs	APPELLANT
Asset Reconstruction Company (India) Limited (ARCIL)		RESPONDENT

Date of Decision : 25-01-2008

Acts Referred:

Bonus Act, 1965 — Section 34
Civil Procedure Code, 1908 (CPC) — Section 20
Companies Act, 1956 — Section 391, 392, 393, 394, 433
Constitution of India, 1950 — Article 254, 39
Income Tax Act, 1961 — Section 72A
Limitation Act, 1963 — Section 10, 11, 12, 13, 14
Presidency Small Cause Courts Act, 1882 — Section 18
Railways Act, 1890 — Section 80
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 34
Registration Act, 1908 — Section 17, 17(1), 17(2), 7
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 16, 17, 18, 19

Citation : (2008) 3 BomCR 78 : (2008) 110 BOMLR 531 : (2008) 114 CompCas 144 : (2008) 3 CompLJ 61

Hon'ble Judges : S.J. Vazifdar, J;F.I. Rebello, J

Bench : Division Bench

Advocate : C.J. Joy, Bharati Mahant and Madhuri Gaikwad, Shyam Mehta and N.C. Parekh, instructed by Mansukhlal Hiralal Shroff and Co. in Company Petition No. 108 of 2006, Janak Dwarkadas, N. Engineer and H. Toor, instructed by Crowford Bayley and Co. and Anand Grover and Firdaus Moosa, for Workers in Company Petition No. 468 of 2006, for the Appellant; Viraj V. Tulzapurkar, Rita Rahimtoola, Faizal Sayed, D. Khanapurkar and Pooja Sood, instructed by Manilal Kher Ambalal and Co. and D.J. Khambatta and J.K. Bhatia and Manorama Mohanty, instructed by . S.K. Srivastava and Co. in Company Petition No. 108 of 2006, for the Respondent

Final Decision : Dismissed

Judgement

F.I. Rebello, J.—The Reference for our consideration is:

Whether an Industrial Company which has made a reference u/s 15 of Sick

Industrial Companies Act, can during the pendency of such reference, apply to this Court for sanctioning a scheme of arrangement or compromise with its creditors and shareholders and whether this Court can take cognizance of such an application during the pendency of the reference and pass necessary orders thereon as are permissible in law.?

2. The Company, Ashok Organic Industries Limited made a reference to the Board of Industrial Finance and Reconstruction (BIFR) under the provisions of the Sick Industrial Companies (Special Provision) Act, 1985, hereinafter referred to as "SICA". They were informed by letter dated 15th May, 2002 that the case was registered under No. 195/02.

During the pendency of these proceedings before BIFR, the Company resolved on 9th December, 2005 that subject to the sanction of the appropriate Court as may be required under law and subject to such permission of such Authority as may be necessary, a scheme of arrangement between Ashok Organic Industries Ltd. and its shareholders and creditors and Mr. Pankaj Kadakia, Ashok Kadakia and Anil Kadakia in their dual capacity as promoters and guarantors be made on the broad basis as referred to in the scheme of arrangement. A petition u/s 391 and 394 of the Companies Act, 1956, hereinafter referred to as Companies Act was filed praying that the arrangement embodied in the Scheme be sanctioned with or without modification and to declare the same as binding on petitioner and its secured and unsecured creditors. The petition was presented on 9th January, 2006. On 20th October, 2005 in Company Application No. 690 of 2005, directions were issued to convene a meeting of the equity shareholders, secured and unsecured creditors of the petitioner company for the purpose of considering the scheme. Pursuant to the meeting held on 12th December, 2005 the Chairman of the Committee submitted a report. The report indicated that the scheme was approved by the requisite majority in numbers of equity shareholders of the petitioner company representing more than 3/4th in value of equity shareholders present at the said meeting and voting. Similarly in so far as the secured creditors were concerned 80.05% of the total secured debtors voted in favour of the scheme of arrangement and one secured creditor voted against the scheme, who represented 19.95% of the secured debtors. The scheme, therefore, was approved by the requisite majority in number of secured creditors of the petitioner company having more than 3/4th of value of the secured debtors. Similarly, in so far as unsecured creditors are concerned 99.91% of the unsecured creditors voted in favour of the scheme of arrangement. The Regional Director filed an affidavit setting out that the Scheme is not prejudicial to the interest of the shareholders and unsecured and secured/ creditors.

Dena bank a secured creditor filed an affidavit on 24th March, 2006 opposing the scheme and at the same time raised a preliminary objection to the maintainability of the petition contending that as the company had invoked the jurisdiction of B.I.F.R. and B.I.F.R. had ordered a special investigative audit and the proceedings were pending the petition filed under Sections 391 and 394 of

the Companies Act, 1956 is not maintainable.

3. A learned Judge heard Counsel for the parties who appeared. The attention of the learned single Judge was invited to the Judgments of co-ordinate Benches of this Court in *National Organic Chemical Industries Limited and Ors. v. N.O.C.I.L. Employees Union* 2005 (126) Comp Cas 922, *In Re: Sharp Industries Ltd.*, and in *Pharmaceutical Products of India Ltd. in re* (2006) 131 Comp Cas 747, where co-ordinate Benches have taken a view that the provisions of SICA and the Companies Act, in the matter of sanction of a scheme for re-arrangement of the companies business by way of amalgamation, demerger or compromise were not inconsistent and consequently the Company Court inspite of proceedings pending before the B.I.F.R. u/s 22 of the S.I.C.A. and inspite of Section 32 of S.I.C.A. would have jurisdiction to grant sanction of the scheme under Sections 391 and 394 of the Companies Act, 1956. To hold that the provisions of the two Acts were not inconsistent, and the Company Court would have jurisdiction, the learned Judge noted that the provisions of Sections 15 to 19 of SICA, pursuant to which a company which has become sick can register itself with B.I.F.R., which is vested with the power under the provisions of the SICA, to make enquiry and provide for a scheme for rehabilitation of the company or make the company viable so that the business of the company can continue. The Court also noted that the provisions of Sections 391 to 394 of the Companies Act, 1956, also similarly provide for rearrangement of the companys business by way of amalgamation, demerger or compromise, which also has the very same purpose and object to revive and/or make the company more viable and efficient. The Court observed that the provisions of the Act though provide for different methods of doing so, they are not inconsistent with each other. The Court noted that the provisions of SICA operate in a slightly different sphere i.e. in a case where the net worth of the company has become negative, whereas the provisions of Sections 391 to 394 of the Companies Act have no such requirement as condition precedent and this provision can even operate in cases where the companies are doing well and seek to rearrange their business for the efficient management or better business prospects and thus seek to amalgamate or demerge business operations of the Company. This view of the learned Single Judge was followed in *Sharp Industries Limited* (supra) and *Pharmaceutical Products of India Ltd.* (supra).

The Referral Judge, in his unreported judgment in Company Petition No. 108 of 2006 with Company Application No. 690 of 2006 from which order this Reference arises was of the opinion that it was not possible to accept the submissions of Counsel for the company that both the Company Court and B.I.F.R. exercise concurrent jurisdiction. The Court observed that if such construction is upheld, there will be chaos and confusion. A Company declared to be sick in terms of the provisions of SICA, continues to be sick, unless it is directed to be wound up. Till the company remains a sick company having regard to the provisions of Sub-section (4) of Section 20, BIFR alone shall have jurisdiction as regards sale of its assets till an order of winding up is passed by a Company Court and as such the

provisions of SICA would prevail. The learned Judge quoted with and relied on the judgment of the Supreme Court in NGEF Ltd. Vs. Chandra Developers Pvt. Ltd. and Another, , which according to the learned Judge has taken a view that the provisions of SICA would prevail over the provisions of the Companies Act and consequently disagreed with the views taken in National Organic Chemicals Limited (supra), Sharp Industries Limited (supra) and Pharmaceutical Products of India Ltd. (supra). Consequently the learned Chief Justice was pleased to refer this matter for consideration by this Bench.

4. It may be noted that Counsel has drawn our attention to the judgment of the learned Division Bench of the High Court of Himachal Pradesh in Gountermann Peipers (India) Ltd. Vs. Union of India (UOI) and Others, and of the Gujarat High Court Phlox Pharmaceuticals Ltd., ,both of which have taken a view that the provisions of SICA and Sections 391 to 394 are not inconsistent and the Company Court would continue to have jurisdiction inspite of the proceedings pending before the BIFR. The Gujarat High Court relied on the judgment in National Organic Chemical Industries Ltd. (supra). Our attention was also invited to unreported judgment of the High Court of Judicature at Madras in Ponni Sugars & Chemicals Ltd. in Company Petition Nos. 110 and 119 of 2000 & Another where a contention was raised that though the company was before the B.I.F.R. nothing precludes the Court from sanctioning the scheme of arrangement. The scheme was sanctioned. The issue of inconsistency was neither raised nor answered.

5. On the other hand a learned single Judge of the High Court of Punjab and Haryana in Pasupati Spinning and Weaving Mills Ltd. Vs. Industrial Finance Corporation of India and Others, placing reliance on the judgment of the Supreme Court in NGEF Ltd. (supra) noted that the Division Bench of the Karnataka High Court in BPL v. Inter Modal Transport Technology Systems (Karnataka) Ltd. (in Liquidation) 2001) 107 Company Cases 313, had considered the scope of the Company Court in the matter of sale of assets by B.I.F.R. under the provisions of the SICA and held that it is BIFR which will have absolute control of the affairs of the Company until the order of winding up is made. The learned Judge noted that this judgment was approved in NGEF Ltd. (supra) On the facts before it the Court noted that BIFR had appointed an operating agency to prepare a scheme u/s 17(3) of the SICA and held that the Company Court would have no jurisdiction when the scheme of rehabilitation is under preparation by the operating agency in terms of the order passed by the B.I.F.R.

At this stage it may be noted that the learned Single Judge in National Organic Chemical Industries Limited (supra), had observed and rightly, that the provisions of SICA operate only in cases where the net worth of the company has become negative. In other words the provisions of SICA will apply to a class of companies whose net work has become negative. We are concerned with this class of cases and not to the other class of cases to whom the provisions of Sections 391 to 394 would continue to apply. It is in this context that the

question referred for our consideration will have to be answered.

6. Before answering the issues we may consider the object of the SICA Act. As the Preamble indicates, it is an Act to make, in the public interest, special provisions with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined and for matters connected therewith or incidental thereto. The statement of objects and reasons set out, that the ill effects of sickness in industrial companies such as loss of production, loss of employment, loss of revenue to the Central and State Governments and locking up of investible funds of Banks and financial institutions are of serious concern to the Government and the society at large. It then observes that it has been the experience that the existing institutional arrangements and procedures of revival and rehabilitation of potentially viable sick industrial companies are both inadequate and time consuming. A multiplicity of laws and agencies makes the adoption of coordinated approach for dealing with sick industrial companies difficult. A need has, therefore, been felt to enact in public interest a legislation to provide for timely determination by a body of experts of the preventive, ameliorative, remedial and other measures that would need to be adopted with respect to such companies and for enforcement of the measures considered appropriate with utmost practicable despatch.

The Act has been amended from time to time to deal with the issues which have arisen consequent to interpretation of different provisions of the Act and the manner in which these provisions had facilitated a rehabilitation or winding up of sick industrial companies. One of the existing legislation was the Companies Act. The object and reason clause was noted by the Supreme Court in *Navnit R. Kamani and Others Vs. R.R. Kamani, , Maharashtra Tubes Ltd. v. State Industrial & Investment Corporation of Maharashtra Ltd. and Anr.* (1993) 3 SCC 144. The Supreme Court observed that the object of SICA was to prevent sickness and in cases of sick undertakings to prepare schemes for their rehabilitation by providing financial assistance by way of loans, advances or guarantees or by providing reliefs, concessions or sacrifices from Central or State Governments, scheduled banks, etc. The basic idea was to revive sick units, if necessary, by extending further financial assistance after a thorough examination of the units by experts and only when the unit is found to be no more capable of rehabilitation, that the option of winding up may be resorted to. On a construction of the provisions of SICA and the State Financial Corporation Act 1951 the Court was pleased to hold that both the Acts are special statutes dealing with different situations and the 1985 Act being a subsequent enactment, the non obstanate clause therein would ordinarily prevail over the 1951 Act in case of sick industrial companies.

In *Jay Engineering Works Ltd. Vs. Industry Facilitation Council and Another*, what

was under consideration were the provisions of SICA and the Impact of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993. Dealing with SICA the Court observed as under:

The 1985 Act was enacted in public interest. It contains special provisions. The said special provisions had been made with a view to secure the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts for preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined and for matters connected therewith or incidental thereto.

In *Bombay Dyeing and Mfg. Co. Ltd. Vs. Bombay Environmental Action Group and Others*, considering the SICA as a Special Statute the Court observed as under:

...SICA was enacted for giving effect to the policy of the State towards securing the principles specified in Clauses (b) and (c) of Article 39 of the Constitution of India. It would prevail over other statutes including MRTTP and the Regulations framed thereunder.

In *Morgan Securities and Credit Pvt. Ltd. v. Modi Rubber Ltd.* AIR 2007 SCW 350, the issue before the Supreme Court was whether the provisions of Arbitration & Conciliation Act 1996 would prevail over the provisions of SICA. The Company was before the BIFR wherein an application has been made to dispose of the shares. That was rejected. That order was challenged before the Delhi High Court. The petition was allowed. The shares were sold and the sale proceeds deposited with the Board. Analysing the statutory provisions and considering the Scheme of SICA and the non obstinate clause, it was held that the provisions of SICA would prevail as they contemplated a larger public interest to seek and achieve a higher goal. The observations in *N.G.E.F. Ltd. (supra)* were referred to. The Counsel for the petitioner company has drawn our attention also to the following observations in the judgment of Balasubramanyan, J.

Occasions are not infrequent when not so scrupulous debtors approach B.I.F.R. to stall the proceedings and to keep their creditors at bay. The delay before the B.I.F.R. is sought to be taken advantage of. The Parliament has apparently taken note of this and has repealed SICA by the Sick Industrial Companies (Special Provisions) Repeal Act, 2003. But, so far, the provisions of the Amending Act and the Companies Act introduced, have not been brought into force. It appears to be time to consider whether these enactments should not be notified.

Considering these judgments and the provisions of the two enactments we will have to consider the issue referred for our consideration.

7. It will be appropriate at this stage to consider what has been held by the Supreme Court in *NGEF Ltd. (supra)*. In that case, in proceedings before it, BIFR decided to recommend the winding up of the company and send the same to the

High Court. A request was made by the Company for sale of its assets. An observation was made by BIFR that the Company would have to seek appropriate direction from the High Court concerned. During the pendency of the proceedings before the Board the Company with the permission of B.I.F.R. and its secured creditors had been selling some of its surplus lands. One such bidder at a global tender was Chandra Developers (P) Ltd. Chandra Developers (P) Ltd., prayed for a direction that the Company be directed to execute a sale deed in its favour. The Application was allowed. The learned Company Judge, however, in another case rejected the application by another Company holding that the Company Court had no jurisdiction. Before the Supreme Court it was contended that the B.I.F.R. retains the control over the assets of the company in terms of Sub-section (4) of Section 20 of SICA and it was BIFR alone which could have issued directions as regards the sanction of the sale of the assets of the company. The Company Judge had no jurisdiction at any rate to issue a direction to the company to execute a sale deed. On behalf of the respondent company it was submitted that the power of the company as also B.I.F.R. being concurrent the latter could ask the company to approach the High Court for a direction as regards the sale of its surplus land. It was further submitted that the provisions of both the Statutes must be read together and so read it will be manifest that on winding up proceedings being initiated under the recommendations of the B.I.F.R. in terms of Section 20(1) the power of the Company Court to order approval of scheme prior to passing of winding up order would not in any manner be affected by the provisions of SICA. It is in the context of these contentions that the Supreme Court was considering the relevant provisions of the Companies Act and SICA Act. On a consideration of the provisions of the two enactments the relevant paragraphs of the judgment of the Supreme Court which are relevant for our purpose are reproduced hereinafter:

41. It is difficult to accept the submission of the learned Counsel appearing on behalf of the respondents that both the Company Court and BIFR exercise concurrent jurisdiction. If such a construction is upheld, there shall be chaos and confusion. A company declared to be sick in terms of the provisions of SICA, continues to be sick unless it is directed to be wound up. Till the company remains a sick company having regard to the provisions of Sub-section (4) of Section 20, BIFR alone shall have jurisdiction as regards sale of its assets till an order of winding up is passed by a Company Court.

42. The provisions of SICA would prevail over the provisions of the Companies Act. Section 20 of SICA relates to winding up of the sick industrial company. Before BIFR or AAIFR, as the case may be, makes a recommendation for winding up of the company, an enquiry is made in terms of Section 16 thereof wherefore all relevant facts and circumstances are required to be taken into consideration. Before an opinion is arrived at in that behalf, the parties are given an opportunity of hearing. The satisfaction arrived at by BIFR that the Company is not likely to become viable in future and it is just and equitable that the Company should be wound up must be based on objective criteria. The High Court indisputably on

receipt of such recommendation of BIFR would initiate a proceeding for winding up in terms of Section 433 of the Companies Act. Sub-section (2) of Section 536 ipso facto does not confer any jurisdiction upon the Company Court to direct sale of the assets of the sick company. It has to exercise its power thereunder subject to the provisions of the special statute governing the field. Despite the fact that the procedures laid down under the Companies Act would be applicable therefore but they must be read with Sub-section (4) of Section 20 of SICA which contains a non obstante clause and in terms thereof, BIFR is authorised to sell the assets of the sick industrial company in such a manner as it may deem fit. By reason of the said provision, BIFR is also empowered to forward the sale proceeds to the High Court for orders for distribution in accordance with Section 529A and other provisions of the Companies Act which in no uncertain terms would mean that the distribution of the sale proceeds would be for the purpose of meeting the claims of the creditors in the manner laid down therein. The intention of Parliament in enacting the said provision becomes clear as in terms of Section 22A of SICA, BIFR is empowered to issue any direction in the interest of the sick industrial company or its creditors or shareholders and direct the sick industrial company not to dispose of its assets except with its assent. Section 32, as noticed hereinbefore, again contains a non obstante clause. The scheme suggests that BIFR retains control over the assets of the Company and in terms of the aforementioned provisions may either prevent any sale or permit any sale of the assets of the sick industrial company. Such a power in BIFR remains till a winding-up order is passed by the High Court and a stage arrives for the High Court for issuing orders for distribution of the sale proceeds.

44. SICA was furthermore enacted subsequent to the provisions of the Companies Act. It is not, thus, possible to accept the submission that the High Court exercises a concurrent jurisdiction.

45. It may be true that the High Courts jurisdiction is that of the Appellate Authority but keeping in view the terminology contained in Sub-section (4) of Section 20 read with Section 32 of the Act, it leaves no manner of doubt that the provisions of SICA shall prevail over the provisions of the Companies Act. For the aforementioned purpose, it was not necessary for Parliament to mention specifically the provisions of Sub-section (4) of Section 20 that the same shall prevail over Section 536 of the Companies Act. The construction of the provisions of both the Acts, as suggested by the learned Counsel, that both the provisions of Sub-section (4) of Section 20 and Section 536 should be read conjointly so as to enable an applicant to obtain a sanction of both BIFR and the Company Court, thus, do not appeal to us.

46. It is inconceivable that in law not only will the approval have to be taken from both the courts; in case of any private sale, the Company will have to obtain the consent of both the Company Court and BIFR. While interpreting the provisions of the two statutes, the court cannot remain oblivious of the fact that in a given case, possibility of a conflict in the orders passed by the two courts may

arise, which must be avoided.

8. We may first deal with the contentions as urged on behalf of the Company and the Assets Reconstruction Company (India) Limited, the Intervenor, that the judgment in NGEF Ltd. (supra) would not cover the issue in question. It is submitted that the sole question before the Supreme Court was whether or not a company Court could direct a sale of sick company's assets in a case where BIFR continues to have jurisdiction over the Company under SICA. The judgment it is contended is an authority only for what it actually decides and not for anything else and that one additional or different fact may make a world of difference and the disposal of cases by blindly placing reliance on a decision is not proper. It is submitted that the broad resemblance on one case to another is not decisive and the Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact-situation of the decision. Reliance is placed on the judgment in Ashwani Kumar Singh Vs. U.P. Public Service Commission and Others, . Lord Denning's speech has been quoted with approval by the Supreme Court in Ashwani Kumar Singh (supra) in the matter of precedents:

Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent would be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches, else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.

In The Divisional Controller, KSRTC Vs. Mahadeva Shetty and Another, as to what was binding, the Supreme Court observed as under:

...A decision often takes its colour from the question involved in the case in which it is rendered. The scope and authority of a precedent should never be expended unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. The task of finding the principle is fraught with difficulty as without an investigation into the facts, it cannot be assumed whether a similar direction must or ought to be made as measure of social justice. Precedents sub silentio and without argument are of no moment. Mere casual expression carry no weight at all. Nor every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement having the weight of authority.

Applying these tests can it be said that the ratio of the judgment of the Supreme Court in NGEF Ltd.,(supra) would be restricted only in respect of sale of assets

when proceedings were pending before BIFR and the company is not wound up though BIFR has forwarded to the Company Court its proposal for winding up of the company. In our opinion considering the scope and object of the SICA which we have referred to from the judgments of the Supreme Court and the questions raised before the Supreme Court in NGEF Limited and the consideration of the various provisions of SICA, it would be clear that the Supreme Court was not dealing only with the issue of sale of assets of a company which was before the BIFR. The Court was considering the scope and ambit of the two Acts, bearing in mind the rules of construction when there be two special statutes and also the effect of a non obstante clause. Thus the issue for consideration was whether when the company was before B.I.F.R. the Company Court would have jurisdiction. Secondly the issue had to be decided in the context of the sale of land and the proceeds. It has been answered by elaborate reasoning. The ratio that emerges would be that it is the provisions of SICA which would be applicable to the exclusion of the Companies Act in the case of a Sick Company. In our opinion after the judgment of the Supreme Court in NGEF Limited it will be clear that to the extent where the net worth of the company has become negative the company by operation of law has to move under the SICA by virtue of Section 15 of the SICA. Once it so moves and the reference is registered it is BIFR which alone will have and continue to exercise jurisdiction to the exclusion of the Company Court in respect of the matters for preparation and sanction of a scheme as set out u/s 18 as also appointment of an agency u/s 16 of the Act.

We are, therefore, clearly of the opinion that the ratio of the judgment in NGEF Limited (supra) lays down a proposition that in those matters which ordinarily would be covered by Sections 391 to 394 of the Companies Act once the Company becomes sick and is before B.I.F.R. it is the provisions of SICA which alone would be applicable and to that extent the provisions of the Companies Act being inconsistent would stand excluded.

9. On behalf of the Intervenor (RCL) it is sought to be contended that the issue framed and referred by the learned Judge is too wide and too general. It is submitted that u/s 391 of the Companies Act there may be various types of schemes for different purposes that may be presented to the Company Court u/s 391, for example, (i) Scheme by way of compromise; (ii) Scheme by way of arrangement; and (iii) Scheme for reconstruction of the company. A scheme of arrangement includes a scheme for re-organization of share capital. It is set out that there may be various schemes which can be presented to Company Court u/s 391 of the Companies Act. Reliance is placed in the judgment of Bank of India v. Ahmedabad Manufacturing & Calico Printing Co. Ltd. (1992) Vol. 42 Company Cases 211. It is submitted that SICA may not be at all relevant in respect of some of the Schemes which may be presented u/s 391 even in respect of a Sick Industrial Company whose reference is pending before the BIFR, for example, Schemes for buy-back of the Companys shares, for reduction of its share capital, for altering the face value of the Companys shares or for consolidation or sub-division of the share capital of the company. Further, a Scheme for compromise

with the company's creditors or class of its creditors merely by reducing the extent of the debts due by the Company to such creditors, would not be concerned with the provisions of SICA. The aforesaid are only illustrative instances of schemes u/s 391 of the Companies Act in relation to which the provisions of SICA will not be relevant at all.

We have considered the said submissions. In our opinion what the learned Judge was considering and what has been referred for our consideration is the issue, as to when a company is before B.I.F.R. what scheme can be framed. The learned single Judge was considering the issue in the context of co-ordinate Benches of this Court having taken a view that the provisions of SICA and the Sections 391 to 394 of the Companies Act are not inconsistent with each other. As we have noted earlier in *National Organic Chemicals Limited* (supra) which was the earliest judgment and which was subsequently followed by another co-ordinate Bench the learned Judge has himself noted that the provisions of SICA operate only in those cases where the net worth of the company has become negative whereas the provisions of Sections 391 to 394 would be applicable to all other classes of cases. For the purpose of rehabilitation of "Sick" company all measures necessary can be taken. It is, therefore, not possible to countenance the argument advanced on behalf of the intervenor. At least we have no hesitation in understanding the issue and answering it as referred to us. As noted by the learned single Judge in so far as the Company Court is concerned, a scheme of arrangement requires the sanction of a percentage of creditors and shareholders. In so far as the scheme to be framed under BIFR even the objections by a sole financial institution is sufficient for BIFR to reject the scheme. There is, therefore, inconsistency between the provisions of SICA and the Companies Act to that extent. What we are called upon to answer is the question referred for our consideration and the question as referred can be answered.

10. We may also consider the issue independently as the matter was argued at length on the issue of whether the two acts are inconsistent with each other and our attention was invited to the following observations in *Basti Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Another*, :

..."Inconsistent", according to *Black's Legal Dictionary*, means mutually repugnant or contradictory; contrary, the one to the other so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other. So we have to see whether mutual co-existence between Section 34 of the Bonus Act and Section 3(b) of the U.P. Act is impossible. If they relate to the same subject-matter, to the same situation, and both substantially overlap and are co-extensive and at the same time so contrary and repugnant in their terms and impact that one must perish wholly if the other were to prevail at all -then only then, are they inconsistent. In this sense, we have to examine the two provisions. Our conclusion, based on the reasoning which we will presently indicate, is that inconsistency between the two provisions is the produce of ingenuity and consistency between the two lays flows from

imaginative understanding informed by administrative realism.

In the matter of interpretation and construction of statute on behalf of Dena Bank their learned Counsel had also sought to apply the test of repugnancy under Article 254. It was submitted on behalf of the company that the test of repugnancy considering the language of Article 254 would only apply when there is a conflict between the Central and State legislation in respect of a law made pursuant to the field of legislation in Part III of the VIIth Schedule.

In our opinion it is not necessary for us to address ourselves to the said two issues as we can independently consider the arguments based on the following tests:

(i) A general law and a special law.

(ii) Two Special laws, one being later, in which event the rule of implied repeal will have to be considered.

(iii) The effect of a non obstante clause. When there be two central statutes, in a case of inconsistency between the two statutes, the following test would be applicable to determine which of the two statutes must prevail viz:

(a) *Leges posteriores priores contrarias abrogant* (The later law abrogates the earlier contrary law). This principle is based on the reasonable premise that Parliament, with full knowledge of a previous law enacted by it, nevertheless intended to pass a subsequent and inconsistent law and hence intended that the subsequent law, being the later will of Parliament should prevail. [*Ashoka Marketing Ltd. and another Vs. Punjab National Bank and others*, ; *Allahabad Bank v. Canara Bank* AIR 2000 SC 155 ; *Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another*, . It was held that where both enactments are special and both contained competing non-obstante provisions, the subsequent or later statute should prevail].

(b) The aforesaid principle is subject to the exception embodied in the maxim: *generalia specialibus non derogant* (a general provision does not derogate from a special one) i.e. that a special law will abrogate and prevail over a general law. Hence even a previously existing special statute will prevail over a subsequent but general law. [*Ashoka Marketing Ltd. and another Vs. Punjab National Bank and others*, ; *Allahabad Bank Vs. Canara Bank and Another*, .

(c) However where both Parliamentary statutes are special in nature, there is a third rule which has been resorted to for resolving a situation of inconsistency. The Supreme Court in these circumstances has resolved the inconsistency by reference to the principles and policy underlying the two enactments. [*Ashoka Marketing Ltd. and another Vs. Punjab National Bank and others*, *Morgan Securities and Credits Pvt. Ltd. v. Modi Rubber Ltd.* AIR (2007) SCW 350.

11. Inconsistency between two statutes made by the same legislature can be in at least one of two different ways:

(A) There may be direct conflict between the provisions of the two statutes.

(B) The Complete Code Test; When Parliament enacts a statute dealing or intending to deal exhaustively on any particular subject matter i.e. by enacting a complete code with respect to the subject matter, it is deemed to be a matter of legislative intent that any other provisions of law (albeit enacted by Parliament) on the said subject matter were not intended to also be operative. The very existence of two sets of legal provisions, one a complete code and the other not, by itself and without more leads to an inference of mutual irreconcilability or fatal inconsistency. The complete code then impliedly repeals the other statute. This result follows even without there being a non obstante clause. These principles have been laid down in several judgments including the following:

(i) *Ratan Lal Adukia and Another Vs. Union of India*, . In this case Section 80 of the Railways Act, 1890 (as amended in 1961) was held to be a complete code with regard to the place of serving the Railways in suits for compensation for loss of life, personal injury or property. It was held to override the provisions of Section 20 of the CPC 1908 and Section 18 of the Presidency Small Causes Court Act 1882. The Supreme Court concluded that the latter two provisions were impliedly repealed by virtue of the enactment of the amended Section 80 of the Railways Act, 1890 on the basis that Section 80 was a complete self contained special law as regards the subject matter as to the place of the filing of such suits and in this regard held as follows:

"The doctrine of implied repeal is based on the postulate the legislature which is presumed to know the existing state of the law did not intend to create any confusion by retaining conflicting provisions. Courts in applying this doctrine are supposed merely to give effect to the legislative intent by examining the object and scope of the two enactments. But in a conceivable case, the very existence of two provisions may by itself, and without more, lead to an inference of mutual irreconcilability if the later set of provisions is by itself a complete Code with respect to the same matter. In such a case the actual detailed comparison of the two sets of provisions may not be necessary. It is a matter of legislative intent that the two sets of provisions were not expected to be applied simultaneously."

(ii) *Hukumdev Narain Yadav Vs. Lalit Narain Mishra*, . The Supreme Court held that the provisions of Sections 4 to 24 of the Limitation Act did not apply (though not expressly excluded) to the proceedings under the Representation of the People Act, 1951. The Supreme Court held that what had to be seen was "whether the scheme of the special law, i.e. in this case the Act, and the nature of the remedy provided therein are such that the Legislature intended it to be a complete code by itself which alone should govern the several matters provided by it." As the Representation of the People Act was a self contained code, the provisions of the Limitation Act were impliedly excluded.

(iii). *Solidaire India Ltd. v. Fairgrowth Financial Services Ltd.* (2001) 3 SCC 71, - The Special Court (Trial of Offences relating to Transactions in Securities) Act,

1992 contained an overriding non obstante clause. The Special Court itself had accepted the principle that where there were two special statutes which contained non obstante clauses the later statute must prevail. This decision was approved of by the Supreme Court. The conflict between the Special Court Act and the SICA 1985 was resolved by holding that the Special Court Act was to prevail. Hence the Special Court Act which was also a special law and a later law was held to prevail over the SICA 1985. Inconsistency would, therefore, arise, when two provisions are such that they relate to the same subject matter to the same situation and that substantially overlap and are co-extensive and at the same time contrary repugnant in these terms and impact that one must prevail wholly if the others were to prevail at all the only authority incumbent.

12. Is there a direct conflict between the provisions of the SICA 1985 and Sections 391 to 394 of the Companies Act and if there be, is it possible to harmonize the provisions of the SICA 1985 with those of Sections 391 to 394 of the Companies Act, 1956.

On behalf of intervenor it was sought to be contended that u/s 391, various schemes for different purposes could be framed, as for example

- Scheme by way of compromise.

- Scheme by way of arrangement.

- Scheme for reconstruction of the company which would include a scheme for re-organisation of share capital and in such cases SICA may not be relevant.

On behalf of the Company it was submitted that it is only when inconsistency cannot be reconciled that the provisions of State would prevail over the other. Let us consider and compare the provisions of the two enactments.

Section 18 of the SICA 1985 provides for revival/rehabilitation of companies in several ways which are different from that provided by Sections 391 to 394. Section 391 to 394 cover all Schemes for compromise and arrangement with creditors and shareholders. Such Schemes may or may not be Schemes for revival and rehabilitation of the Company. The respective sections contain provisions that provide for completely different legal processes for the sanction of Schemes. To the extent that the Scheme is in respect of a "sick industrial company" as defined under the SICA 1985 there apparently is a direct conflict between several of the respective provisions considering the following:

(i) Section 391(1) of the Companies Act u/s 391 of the Companies Act, 1956 either the Company or creditor or member of the Company or the Liquidator (where a Company is being wound up) may apply to the Company Court for calling of meetings of creditors or members to consider a proposal for a Scheme between the company and its creditors or members as the case may be. on the other hand u/s 19A of the SICA 1985, the Sick Industrial Company itself or its institutional creditors or Central/State Government or any other public/State institutions, providing or intending to provide any financial assistance by way of

loans or advances or guarantees or reliefs or concessions, are entitled to apply to the BIFR either for :- (a) agreeing to an arrangement for continuing the operations of the Sick Industrial Company or (b) Suggesting a scheme for the financial reconstruction of the Sick Industrial Company. However, Section 19A makes it clear that this could be done "at any time before completion of the enquiry u/s 16...." The Parliamentary intent it appears is that such a scheme can be made only prior to completion of a Section 16 enquiry and not thereafter. After the Section 16 inquiry has been completed a Scheme of any nature concerning a sick industrial company and providing for any one or more of the measures enumerated u/s 18 of SICA 1985 is to be prepared only by an expert body viz. the Operating Agency appointed by the BIFR u/s 17(3) of SICA. The BIFR u/s 18(3) examines the Scheme prepared by the Operating Agency and, after completing the procedure of publication of the draft Scheme and inviting objections and suggestions shall, sanction the Scheme with or without modifications u/s 18(4). If a scheme is permitted via the Section 391 route it will directly conflict with the Parliamentary intent reposed in Section 19A of the SICA 1985.

(ii) Section 391(2) of the Companies Act: If the statutory majority (both in number as well as in value) of the creditors or the members as the case may be have agreed to the compromise/arrangement, and such compromise/arrangement is sanctioned by the Company Court, then it will be binding on all creditors or members (or of the respective classes of creditors and members) and on the Liquidator and contributories of the Company (if it has been wound up).

Section 19(2) and 3) of the SICA 1985: u/s 19(2) and (3) of SICA 1985 "every person required by the scheme to provide financial assistance" has to give his consent to the Scheme [which might be a deemed consent u/s 19(2)] Section 19(1) clarifies that a Scheme may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, public financial institutions or State level institutions or an institution or other authority. Such Government/institutions/authorities are referred to as "the persons required by the Scheme to provide financial assistance". By this definition even creditors who are required to accept anything less than their dues would be persons required by the Scheme to provide financial assistance and consequently their consent would be mandatory. This is made clear by the provisions of Section 19(4) which is reproduced below:

(4) Where in respect of any scheme consent under Sub-section (2) is not given by any person required by the scheme to provide financial assistance, the Board may adopt such other measures, including the winding up of the sick industrial company, as it may deem fit.

On the other hand if such consent is obtained, Section 19(3) provides as follows:

(3) Where in respect of any scheme the consent referred to in Sub-section (2) is given by every person required by the scheme to provide financial assistance, the Board may, as soon as may be, sanction the scheme and on and from the date of such sanction the scheme shall be binding on all concerned"

Hence under the SICA 1985 even one such creditor can refuse consent to the Scheme, requiring the BIFR to resort to the provisions of Section 19(4). Thus the legislative intent is clear viz. that in the case of sick industrial companies, the special majority, as provided in Section 391 cannot bind all the creditors. All the institutional creditors are required to concur. This Parliamentary intent will be defeated if a sick industrial company whose Scheme falls u/s 19(3) is permitted to have recourse to Section 391 and have the scheme passed overriding the minority dissenting creditors.

(iii) Section 392(1) of the Companies Act, 1956 u/s 392(1) it is the High Court that shall supervise the carrying out of the Scheme and which has the power at any time thereafter for making such modifications in the Scheme as may be necessary for its proper working.

Section 18(5), (9), (11) and (12) of the SICA 1985. Under these provisions it is the BIFR that monitors the implementation of any sanctioned scheme and has the power to review a sanctioned scheme and make such modifications therein as it may deem fit; or even to prepare a fresh scheme providing for such measures as the Operating Agency may consider necessary.

(iv) Section 392(2) of the Companies Act. The decision to wind up the company as a result of the failure of the scheme, is that of the High Court. u/s 20 of the SICA 1985, the decision that the company concerned be rehabilitated is of B.I.F.R., which is communicated to the company Court for formal winding up. This only will indicate a conflict in terms of the body entitled to decide whether in view of un-workability of a scheme, the Sick Industrial Company should be wound up.

(v) Section 391(6) of the Companies Act: Section 391(6) does not provide for any automatic stay but only permits an application to the Court for stay of certain types of proceedings against the company (and against the company alone) pending consideration of a scheme u/s 391. Section 22(1) of the SICA 1985: Certain specified legal proceedings against the Sick Industrial Company or even in respect of any guarantee in respect of loans/advances thereto are automatically stayed by operation of law and cannot be allowed and/or proceeded with further except with the consent of the BIFR or the Appellate Authority.

(vi) Section 391 Schemes: Most, if not all schemes u/s 391 do not deal only with a reduction in claims of creditors by way of compromise or arrangement. They provide for a variety of matters in respect of the financial or other reconstruction or operations of the company as has been pointed out by Counsel for Intervenor. This may include setting up of committees of management, sale of assets,

termination of legal proceedings, determination of quantum owed to creditors reduction in share capital etc.

(vii) Section 391 of the Companies Act The effective date of a scheme is as provided by the scheme itself i.e. a date of chosen by the company or its shareholders. Section 18(4) of the SICA 1985: Section 18(4) mandatorily requires the BIFR to specify the date on which the sanctioned scheme shall come into force.

13. Considering the above, SICA 1985 can be said to be a complete Code intended to be exhaustive in all matters concerning sick industrial companies (whether potentially viable or non-viable) and the provisions thereof and the objects and reasons thereof clearly indicates the legislative intent that SICA 1985 covers the whole field as regards sick industrial companies. The correct test then to be applied is not whether it is open to or possible for a sick industrial company to present a Scheme u/s 391 even whilst its reference is registered with BIFR. The correct question is whether since the SICA 1985 is a complete and exhaustive Code, an inconsistency is deemed to arise and whether such inconsistency may be resolved by applying the well settled principle that the special and later Act prevails over the general and prior Act.

Once SICA 1985 is held to be a complete code, the intent of Parliament is that the subject matter i.e. Sick Industrial company, is covered in all aspects by the provisions of SICA 1985 and by these provisions alone. If the provisions of SICA 1985 do not cover any particular detail or aspect pertaining to schemes of Sick Industrial Companies, it must be concluded that this is because Parliament did not intend such a provision to be available in respect of Sick Industrial Companies. Hence there is no question of adopting an approach of dissection or a microscopic examination of each provision of the SICA 1985 to determine whether any particular types of scheme were available u/s 391 to 394 but not under the SICA 1985. The test is do the two Acts substantially provide for the same subject matter. In our opinion the answer is in the affirmative. It is therefore not permissible to have recourse to any provisions other than SICA 1985 to supply any mechanism for sanctioning a scheme impermissible under the SICA 1985 (or indeed even to facilitate a scheme under the SICA 1985) for this would defeat Parliaments intention that the SICA Act alone would completely and exhaustively cover all aspects relating to Sick Industrial Companies including schemes in respect thereof.

The Scheme as framed does in fact provide for several matters other than a mere compromise /arrangement by reduction in creditors claims. Hence the submission advanced on behalf of ARCIL that schemes which are simpliciter for reduction of the Companys debts were not covered by the provisions of the SICA 1985, is academic and cannot arise in the present case.

14. The special and later Act (the SICA 1985) will override the general and earlier Act (Sections 391 to 394 of the Companies Act, 1956)

(i) The principles that the provisions of a special Act will override the provisions of a general Act and that a later Act will override an earlier Act are well settled as earlier discussed.

(ii) The Companies Act, 1956 is a general Act consolidating and restating the law relating to companies and certain other associations. It is prior in point of time to the SICA 1985.

(iii) The SICA 1985 is a later act and a special act that applies to sick industrial companies whether potentially viable or non-viable. It must follow that the provisions of the Companies Act which applies in general to all companies is necessarily over-ridden by the provisions of the SICA, 1985 in the case of such sick industrial companies to that extent. To the extent there is such overlap in the subject matter and inconsistency, the provisions of the SICA 1985 must override the general Act. This would be consistent with the legislative intent as contained in the objects and reasons of the SICA 1985 but also in its provisions.

As the SICA Act is a complete Code it will override the other provisions of the law since that is deemed to be the Parliamentary intent.

15. In any event Section 32 (the non obstante provision) of the SICA 1985 will have the effect of SICA 1985 overriding Sections 391 to 394 of the Companies Act, 1956.

The provisions of the SICA 1985 expressly have overriding effect over all other laws. This will include the Companies Act, 1956. Section 32 of SICA 1985 provides as follows :

32. Effect of the Act on other laws.-(1) The provisions of this Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976) for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act.

(2) Where there has been under any scheme under this Act an amalgamation of a sick industrial company with another company, the provisions of Section 72A of the Income Tax Act, 1961 (42 of 1961), shall, subject to the modifications that the power of the Central Government under that section may be exercised by the Board without the Central government under that section may be exercised by the Board without any recommendation by the specified authority referred to in that section, apply in relation to such amalgamation as they apply in relation to any amalgamation of a company owning an industrial undertaking with another company.

By virtue of its overriding non obstante clause the intention of Parliament can be gathered that the provisions of the SICA 1985 are paramount in the case of sick industrial companies and will override any provisions of the Companies Act, 1956

including those that allow schemes of any kind to be presented in respect of sick industrial companies.

The Recovery of Debts due to Banks and Financial Institutions Act 1993 ("the RDB Act") was held to override the Companies Act 1956, to the extent of any inconsistency between the Acts even though, both were Special Acts in view of the non obstante clause contained in Section 34 of the RDB Act. The SICA 1985 will be given primacy because of its higher public purpose. In *Morgan Securities and Credit Pvt. Ltd. v. Modi Rubber Ltd.* AIR2007 SCW 350 the non obstante clause in the SICA 1985 was given primacy over the non obstante clause in the Arbitration and Conciliation Act 1996 because of the high public purpose of the SICA 1985. The legislative intent is also subserved by the aforesaid interpretation.

16. It must be kept in mind that revival/rehabilitation (albeit important) is not the only purpose of the SICA 1985. The recovery or realization of the dues of Banks and Financial Institutions is also an important object. The Supreme Court has held that once a reference u/s 15 of the SICA 1985 is registered, it is mandatory for the BIFR to conduct an enquiry u/s 16. The Supreme Court has also held that "It is the legislative intention to see that no proceedings against the assets are taken before any such decision is given by BIFR for in case the Company's assets are sold, or the company wound up it may indeed become difficult later to restore the status quo ante." See *Real Value Appliances Ltd. Vs. Canara Bank and Others*, . As held in *NGEF* it is the BIFR that retains complete control over assets of a sick industrial company until a winding up order is actually passed by the High Court on the basis of a referral by the BIFR u/s 20 of the SICA 1985. This power of BIFR prevails over the provisions of Companies Act, 1956 and continues even whilst the Company Court is considering the matter of winding up of the Company u/s 20. It is the BIFR which is "the authority proprio vigore which continues to remain as custodian of the assets of the company till winding up order is passed by the High Court". If the BIFR remains as custodian of the assets of a company until this stage, it would be completely repugnant to the Scheme and object of the SICA Act, 1985 to permit the assets of such company to be dealt with even after a Scheme has been sanctioned u/s 391 of the Companies Act, 1956. In a given case the Scheme u/s 391 may also affect or make provisions as regards sales or encumbrance of assets of a sick industrial company and this would be in complete subversion of the Scheme under the provisions of the SIC Act, 1985.

The provisions of Sections 15 to 20 of SICA 1985 provide a complete and exhaustive mechanism whereby the BIFR can and is obliged to take action, including by way of enquiry and preparation of a Scheme to attempt the revival / rehabilitation of the sick industrial company or to decide on its winding up as the case may be. In *Morgan Securities and Credit Pvt. Ltd. v. Modi Rubber Ltd.* AIR 2007 SCW 350 the Supreme Court gave overriding effect to the SICA 1985 over the Arbitration and Conciliation Act, 1996 even though: the latter Act was held to

be a complete code; the latter Act was a later Act; the latter Act also contained a non obstante clause. This was on the ground that:

(a) The Arbitration and Conciliation Act contained only a limited non obstante clause; and (b) that the provisions of the SICA 1985 "have been made to achieve a higher goal....

Thus until the mandatory and complete process under the SICA 1985 is exhausted, no other authority or Court would have jurisdiction to pass any order in respect of the sick industrial company, particularly such orders as to provide for its financial restructuring or for a compromise or arrangement with its members and creditors something expressly covered by Section 18(1) and (2) of the SICA 1985. This is not a matter of choice for the sick industrial Company, once the provisions of Section 15 of the SICA 1985 are attracted, reference to BIFR is mandatory and cannot be avoided. Once that reference is made, the entire process upto Section 20 must necessarily follow.

17. It was next contended that the term instrument in Section 22(3) includes an order of the Court. The submission is that u/s 22(3), B.I.F.R. has power to suspend contracts or other instruments which would include the power to suspend the operation of an order passed by the Company Court in its jurisdiction under Sections 391 to 394.

This argument would lead to a greater conflict. An order under Sections 391 to 394 of the Companies Act is not an "instrument" within the contextual meaning of that term as used in Section 22(3) of the SICA 1985. Will the order of a Superior Court, be stayed or varied by an Authority exercising quasi judicial or administrative powers. The jurisdiction of the Company Court is being exercised by the High Court. The expression instrument will have to be considered in that context. The Proviso to Section 22(3) expressly limits the period of operation of any declaration by the BIFR u/s 22(3) to a maximum period of seven years in the aggregate. The declaration u/s 22(3) could either be one of suspension or one that permits enforceability of the contracts, instruments etc. "with such adaptations and in such manner as may be specified by the Board." The declaration thus covers even the adaptations or modifications. This suspension of the "adaptation" action of the BIFR is therefore not permanent. It is by statute limited to a maximum of seven years. After the expiry of this period of suspension/adaptation, Section 22(3) provides for the revival and enforceability of the right, privilege, application or liability which had remained suspended or modified, "as if the declaration have never been made" i.e. without the BIFR adaptations. Section 22(4)(b)(ii) also provides for continuation of proceedings from the stage it had been reached when the proceedings had become stayed. In other words even assuming whilst denying that an order of the High Court sanctioning a scheme u/s 391 of the Companies Act is an instrument u/s 22(3) and can be suspended or adapted/modified by the BIFR u/s 22(3), that suspension/adaptation/ modification would end after a maximum of 7 years and the High Court order would revive and be enforceable thereafter without any of

the BIFR adaptations. By that stage these possibilities would be the spectre of two parallel schemes, potentially in complete conflict with each other, one by the BIFR and the other the revived High Court scheme. No provision has been pointed out, much less u/s 22(3), which can resolve this conflict -- Section 22(3), therefore, when it uses the term "other instruments in force" could not, in its correct context, be construed as including an order u/s 391 to 394 of the Companies Act within the meaning of that term.

The ordinary meaning of the term instrument is "a formal legal document" [Shorter Oxford English Dictionary, 5th Edition, Vol. I. For the term "instrument" used in Section 17 of the Registration Act, 1908 a Full Bench AIR 1944 49 (Oudh) held that the term "instrument" as used in Section 17 -"cannot be held to include an order of the Court or any proceedings held in a Court" On the other hand in Mt. Savitribai v. A. Radhakrishnan Sheocharan AIR 1948 Nagpur 49 the Division Bench held that the term "instrument" in Section 7 was wide enough to cover a decree. What is important, however, is the fact that the Division Bench in AIR 1948 Nagpur 49, came to this conclusion in the context of the broad structure and language of Section 17 i.e. because Section 17(2)(v) expressly excluded any decree or order of a Court from the provisions of Sub-section (1)(b)(c). The Court therefore, held that the word "instrument" as used in Sub-section 1(b)(c) was otherwise wide enough to cover decrees. That conclusion at the highest can be reiterated in the context of the expression used in the Rehabilitation Act. The term "instrument" in a statute has necessarily to be understood and interpreted in the absence of any express definition having regard to the context in which the term is used and the object which the Legislature had in mind. See Purshotam H. Jadye and Others Vs. V.B. Potdar, , Bhagwandas Panchal v. Royal Western India Turf Club Ltd. (1969) 72 Bom LR 764 . Clearly the context in which the term "instrument" in Section 22(3) is used, given the object of the SICA 1985, cannot include orders made by High Court u/s 391 to 394 of the Companies Act. Section 32 of the SICA 1985 uses a different and distinct term viz. "other instruments having effect by virtue of any law other than this Act" The latter term could include a scheme u/s 391 to 394 which has effect by virtue of the provisions of Sections 391 to 394. In contrast the different expression used u/s 22(3) viz. "instruments in force" clearly cannot extend to such sanctioned orders and schemes; In State of Uttar Pradesh Vs. Ramkrishan Burman (Dead) by L. Rs. and Others, the Supreme Court held that a decree in invitum was not an instrument but that "A consent decree in certain case may be regarded as an instrument securing money or other property, where the decree proceeds upon a contract which had that effect, but that is only because a consent decree is a record of the contract between the parties to which is super added the seal of the Court." A scheme under Sections 391 to 394, though passed on the basis of the voluntary act of the application to the Court for sanction of the scheme, nevertheless remains a scheme having effect by virtue of the statutory operation of Sections 391 to 394 and it has statutory force by reason of those provisions. It does not remain a mere agreement. [J.K.

(Bombay) P. Ltd. Vs. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. and Others, General Radio and Appliances Co. Ltd. v. M.A. Khader (19 86) 60 Comp Cas 1013 [Hindustan Lever (2000) 9 SCC 438. Consequently the term "instrument" in Section 22(3) cannot be extended to cover a scheme sanctioned by the High Court under Sections 391 to 394. The aforesaid is also made clear by the fact that whereas Section 22(4) refers to "any decree or order of a Court "...being overridden by a declaration made u/s 22(3), Section 22(3) itself does not. If the term instrument in Section 22(3) included such decrees or orders, then they would be suspended by virtue of the declaration u/s 22(3) itself and there would be no need for the overriding provision in Section 22(4) mentioning "any decree or order of a Court..." because that decree/order would have itself already been suspended u/s 22(3). This would also support the contention raised by the company that a Scheme framed before the Company went to B.I.F.R., unless there is a power to suspend would continue to operate. Mr. Khambata does not dispute this either. This interpretation is also in consonance with the principles of comity. It is not contemplated that the BIFR can u/s 22(3) sit in appeal over or review the merits or demerits of a scheme already sanctioned by the High Court. Section 22(3) is a provision for facilitation and implementation of schemes sanctioned by the BIFR or which are under preparation by the BIFR. It cannot be construed to permit the sanctioning of a scheme by the High Court which could potentially co-operate with and pre-empt the BIFR scheme.

18. Considering the above we have to hold that once the Industrial Company makes a reference u/s 15 of the SICA, the Company Court would have no jurisdiction for sanctioning the scheme of arrangement of compromise with its creditors and shareholders and neither will it have jurisdiction to take cognisance of such an application during the pendency of the reference.

19. In the light of the above we over-rule the judgments in National Organic Chemical Industries Limited and Ors. v. N.O.C.I.L. Employees Union 2005 (126) Comp Cas 922 , In Re: Sharp Industries Ltd., and in Pharmaceutical Products of India Ltd. in re (2006) 131 Comp Cas 747. We approve the view taken by the referral Judge in the light of what we have discussed. In the light of that Company Petitions dismissed.

Reference answered accordingly.