

(2012) 04 AP CK 0103

In the Andhra Pradesh High Court

Case No : Company Application No. 1691 of 2011, Company Application No. 75 of 2012 and Company Application No. 285 of 2012

Axis Bank Limited

APPELLANT

Vs

Naturol Bioenergy Limited

RESPONDENT

Date of Decision : 24-04-2012

Acts Referred:

Companies Act, 1956 — Section 391, 392, 393, 394, 394

Constitution of India, 1950 — Article 141, 39

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 15, 15(1), 16, 17

Citation : (2012) 04 AP CK 0103

Hon'ble Judges : Ramesh Ranganathan, J

Bench : Single Bench

Advocate : S. Ravi, for the Appellant; S. Niranjan Reddy, for the Respondent

Judgement

Justice Ramesh Ranganathan

1. C.A.No.1691 of 2011 is filed by M/s Naturol Bioenergy Limited (hereinafter called as "NBL") to issue and publish notices for convening, holding and conducting of meetings of the creditors for approval of the proposed scheme of arrangement, and for the immediate implementation of the package. This Court, by order in C.A.No.1691 of 2011 dated 21.11.2011, directed that a meeting of the secured creditors of NBL be convened on 24.12.2011 at 10.30 A.M. at their registered office for the purpose of considering the reworked CDR Package, and for implementation of the MRA with NBL. Sri Ch.Pushyam Kiran, an Advocate of this Court, was appointed as the Chairman of the meeting. This Court also directed that notice be given to each creditor, and an advertisement be published in "Business Standard" (English daily) Mumbai and Hyderabad editions and "Andhra Prabha" (Telugu daily) Hyderabad edition. In its order dated 22.11.2011 this Court noted the affidavit placed on record by Sri Ch.Pushyam Kiran that he had appeared on behalf of one of the creditors of NBL. The earlier order, in C.A.No.1691 of 2011 dated 21.11.2011, was modified and, in the place of Sri

Ch.Pushyam Kiran, Sri B.S.Sivaji, Advocate, was appointed as the Chairman to convene and hold the meeting of the secured creditors of NBL on 24.12.2011 at 10.30 A.M. at their registered office, and the application was directed to be listed on 30.12.2011 for the report of the Chairman. On 30.12.2011, extension of time was sought for submission of the report of the Chairman. Thereafter, on 06.01.2012, this Court noted that Axis Bank had raised objections with regards acceptance of the Chairman's report and, hence, the application was adjourned to 18.12.2012 for Axis Bank to place on record their objections. C.A.No.75 of 2012 is filed by NBL requesting this Court to receive the additional affidavit together with the documents filed therewith. C.A.No.285 of 2012 is filed by Axis Bank Limited to recall the order passed on 21.11.2011, and the modification order passed on 22.11.2011; to declare the convening of the meeting of the creditors held on 24.12.2011, pursuant to the order passed in C.A.No.1691 of 2011, as being null and void; and to dismiss C.A.No.1691 of 2011. All the three applications were heard together, and are now being disposed of by this common order. C.A.No.75 of 2012 is allowed and the additional affidavit, and the documents filed therewith by NBL, is taken on record. In their affidavit filed in support of C.A.No.1691 of 2011, NBL have detailed their efforts to liquidate their stock to enable them to pay their debts, but attributed their inability to do so to global recession, and extreme price fluctuations of petro-crude, and crude palm oil, which constituted the main raw material for bio-diesel. It is their case that these factors resulted in erosion of the inventory value of biodiesel to an extent of Rs.30.00 crores; a joint meeting of its lenders was convened on 3.6.2009 but to no avail; Axis Bank, one of the lenders of NBL, had filed a petition before the Debt Recovery Tribunal for recovery of the amount appropriated by another creditor of NBL i.e., ICICI Bank contrary to the inter-se agreement between all the banks for apportionment of the amounts realized from NBL; thereafter NBL had entered into negotiations, with the consortium of lenders led by IDBI Bank, on the Corporate Debt Restructuring (CDR) package approved by the CDR cell constituted in accordance with the directives of the Reserve Bank of India; the CDR package provided that all the dues/debts from NBL, until the cut off date of 1.4.2009, should be restructured and repaid over a period of 10 years in a progressive manner; Axis Bank did not accept the CDR package in view of the stipulation of 1.4.2009 as the cut off date for restructuring of the debt due by NBL; as the CDR package was not accepted by all the banks, a reworked and approved CDR package was sought to be implemented between NBL and their secured creditors i.e., IDBI Bank, Andhra Bank, Central Bank of India, LIC of India, NABARD, Axis Bank and ICICI Bank; however, ICICI Bank and Axis bank did not agree to the reworked CDR package, and made it clear that they intended to stay outside the corporate debt restructuring proceedings; and pursuant to the order of this Court, in C.A.No.1691 of 2011 dated 21.11.2011 as modified on 22.11.2011, a meeting of the secured creditors of NBL was held on 24.12.2011.

2. It is the case of NBL that, while a substantial majority of the secured creditors

exceeding 85% of the total secured debt had accorded their consent to the scheme of arrangement, Axis Bank, which had also participated in the said meeting of the secured creditors, had refused to do so. After the meeting of the secured creditors of NBL was held, and in compliance with the order of this Court dated 21/22.11.2011, the Chairperson of the meeting has submitted his report to this Court. At this stage Axis Bank filed C.A.No. 285 of 2012 to recall the order of this Court, in C.A.No.1691 of 2011 dated 21.11.2011 and the modified order dated 22.11.2011 convening the meeting of the secured creditors of NBL, and to declare that the meeting of the secured creditors of NBL held on 24.12.2011 was null and void.

3. The case of Axis Bank, in short, is that they had sanctioned and disbursed Rs.16.75 crores as working capital loan for which a deed of hypothecation was executed, and a first charge was created in their favour on the current assets of NBL, as also a second charge on the land, buildings and other fixed assets of NBL; on 3.11.2010 NBL made a reference to the Board for Industrial and Financial Reconstruction (BIFR) u/s 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA); the said reference was registered by the BIFR as Case No.52 of 2010 on 30.11.2010; this material fact was suppressed before this Court by NBL; consequently their application should have been dismissed in view of the proviso to Section 391(2); once a sick industrial company is registered with the BIFR, any restructuring of the company would be governed only by the provisions of SICA; it is only the BIFR which is empowered thereafter to sanction a restructuring scheme with the consent of all the secured creditors; consequent thereto this Court would lack jurisdiction to entertain, much less accord sanction to, the proposed scheme of arrangement as such a power, on a reference being made to it, is conferred only on the BIFR; and the provisions of SICA override the provisions of the Companies Act.

4. Oral submissions were made by Sri S.Ravi, Learned Senior Counsel appearing on behalf of Axis Bank Limited, and Sri S.Niranjana Reddy, Learned Counsel appearing on behalf of NBL. Written arguments have also been submitted by Sri Ch.Pushyam Kiran, Learned Counsel for Axis Bank and Sri S.Niranjana Reddy, Learned Counsel for NBL.

5. Sri S.Ravi, Learned Senior Counsel, would submit that NBL had suppressed the fact that it was registered as a "sick company" before the BIFR under SICA; an enquiry had commenced before the BIFR consequent upon its registration u/s 15(1) of SICA; once a reference is made to the BIFR the jurisdiction of Courts, in respect of any matter which the appellate authority or the Board is empowered by or under SICA to determine, is ousted; SICA is a special statute and a self-contained code; the provisions of SICA would prevail over the provisions of the Companies Act in view of the non-obstante clause in Section 32 of SICA; any application for grant of a scheme of arrangement, or restructuring of debt, can only be moved before the BIFR, and not under the provisions of the Companies Act; in view of the bar of jurisdiction u/s 26 of SICA the jurisdiction of this Court,

u/s 391 of the Companies Act, to approve the scheme of arrangement is ousted; it is incorrect to test the jurisdiction of the BIFR/AAIFR by examining the rights of the majority secured creditors to compel the dissenting creditors to fall in line with the majority view; the language of Section 19 of SICA makes it clear that the scheme, inter alia, can be framed and operated in respect of the rights of the secured creditors; the distinction, therefore, does not lie in the absence of power of the BIFR/AAIFR to consider sacrifices by institutions; while, u/s 391 of the Companies Act, the majority secured creditors could make the minority secured creditors tow their view, the consent of each of the secured creditors is mandatory under SICA; this would not mean that the jurisdiction of the Company Court u/s 391 of the Act is distinct from the jurisdiction of the BIFR/AAIFR under SICA; the distinction or difference is based upon the nature of relief that can be granted having regard to the consent or absence of it; it is not as if there is a complete absence of jurisdiction in the BIFR/AAIFR to consider the said issues; in view of the judgment of the Supreme Court, in *Tata Motors Ltd. v. Pharmaceutical Products of India Limited*, no reliance can be placed on the judgments of the High Courts taking a contrary view; the Supreme Court, in *Tata Motors*¹, held that SICA is a special statute and the terms thereof would prevail over the provisions of the Companies Act; it is not possible to harmonise the provisions of Sections 391 and 394 with the provisions of SICA; and, in the light of the binding judgment of the Supreme Court in *Tata Motors*¹, this Court would lack jurisdiction to entertain a scheme of arrangement u/s 391 of the Companies Act consequent upon a reference being made, and registered, u/s 15(1) of SICA.

6. Learned Senior Counsel would further submit that, u/s 19(1) of SICA, "preventive" "ameliorative" "remedial" and "other measures" all relate to financial assistance being rendered to the "sick company"; the relief which this Court can grant u/s 391 of the Companies Act can also be granted by the BIFR u/s 19(1); the distinction being that the scheme of arrangement can be entertained u/s 391 when 75% of the creditors consent thereto unlike u/s 19 where consent of all the creditors, and not just 75%, is stipulated; mere "volition" or "compulsion" is of no consequence as both Section 391 of the Companies Act, and Section 19 of SICA, relate to ameliorative measures which a scheme, either by the BIFR or to be sanctioned by the Company Court is required to make, and both such schemes involve sacrifices on the part of financial institutions. Learned Senior Counsel would submit that Section 18 carves out a special jurisdiction in that it covers the entire gamut of subjects or aspects for which a scheme can be prepared; "jurisdiction" relates to the forum and, as the BIFR is seized of the matter, on a reference being made to it u/s 15(1) of SICA, the jurisdiction of this Court u/s 391 and 394 of the Companies Act is barred. Learned Senior Counsel would rely on *Tata Motors Limited*¹; *NGEF Ltd v. Chandra Developers (P) Ltd*; and *Ashok Organic Industries Ltd v. Asset Reconstruction Company (India) Ltd (ARCIL)*).

7. Sri S.Niranjan Reddy, Learned Counsel appearing on behalf of NBL, would contend that the application filed by Axis Bank is premature as they would be

heard by this Court at the stage of according sanction to the scheme of arrangement; the mere fact that NBL was registered with the BIFR did not bar this Court from exercising its jurisdiction under the Companies Act to accord sanction to a scheme of arrangement/compromise with the secured creditors; no scheme has as yet been formulated under SICA; the BIFR has merely appointed IDBI Bank as the operating agency, u/s 17(3) of SICA, to draw up and propose a scheme of rehabilitation; the said operating agency i.e., IDBI Bank, in the meeting held on 24.12.2011, had approved the present scheme/MRA u/s 391 of the Companies Act; the scheme of arrangement/MRA is broad based with applicability to all the secured creditors; sanction of the present scheme would revive the company, and their ability to service their debts; a majority of the lenders, exceeding 85% of the total secured creditors, had approved the scheme; there is no suppression of fact as invocation of jurisdiction of this Court u/s 391 is not barred merely because NBL has made a reference to the BIFR; the present company application has been filed by Axis Bank only to stall the scheme/MRA approved by a substantial majority of the secured creditors; the MRA made it obligatory for NBL to raise an investment of Rs.30.00 Crores for the successful implementation of the MRA; NBL has raised Rs.35.00 crores as fresh investment from two venture capital firms; they received a binding terms sheet from APIDC - Venture Capital Private Limited on 30.1.2012 proposing a total investment of Rs.25.00 crores in NBL; they had also received a binding investment terms sheet from UTI-Venture Fund Management Company Limited proposing a total investment of Rs.10.00 Crores; the two binding terms sheets received by NBL had an inbuilt time limit (March, 2012) after which they would lapse; implementation of the MRA would, thereafter, become improbable; subsequent to the MRA, the operating agency appointed by BIFR, i.e., IDBI had addressed a letter to the BIFR on 16.1.2012 referring to the MRA being prepared pursuant to the CDR mechanism; IDBI had also informed the BIFR that a Draft Rehabilitation Scheme (DRS) could only be proposed after the MRA was implemented leading to infusion of fresh equity and tying up of financial investment; no DRS has been prepared or submitted before the BIFR; and the BIFR cannot, therefore, be said to be seized of, or to be considering, any rehabilitation package or proposal.

8. Learned Counsel would further submit that NBL is entitled to invoke the jurisdiction of this Court under Sections 391 to 394 of the Act notwithstanding the reference pending before the BIFR under the provisions of SICA; there was no inconsistency between the provisions of SICA and Sections 391 to 394 of the Act; SICA has been enacted as a beneficial legislation for helping revival of sick companies; the scheme of Sections 15 to 19 of SICA provide for rendering financial assistance, if any, which can only be voluntary exercised u/s 19(4); if consent is not granted, such financial assistance cannot be forced upon any person; Sections 391 to 394 operate in completely different spheres; the Company Court, subject to the approval of 3/4th of the creditors, is entitled to accord consent to the scheme if it is satisfied; there is no repugnancy or inconsistency between the provisions of SICA qua the provisions of Sections 391

to 394 of the Act; SICA would not exclude the operation of Sections 391 to 394 of the Companies Act; Section 26 of SICA only provides for a bar of jurisdiction in respect of any order made by the BIFR or in respect of any matter which BIFR is empowered to decide; Section 32 of SICA, which provides for an overriding effect, also applies only in case of inconsistency between the provisions of SICA and the Companies Act; having regard to the nature of the scheme now presented before this Court, and considering that some of the secured creditors objected thereto, the scheme cannot be sanctioned by the BIFR as it is not empowered to do so; Section 26 of SICA would not exclude operation of Sections 391 to 394 of the Companies Act; SICA itself provides for the consequences of other legal proceedings, and restrictions of such proceedings, u/s 22 of SICA; it is only the proceedings against the Company which are suspended or stayed and not proceedings initiated by the Company for its benefit; the present scheme of arrangement, under Sections 391 to 394 of the Act, is clearly one for the benefit of the company; it is evident from Section 19(4) of SICA that the BIFR does not have the power to compel any financial institution to render financial assistance; the words "such other measures" in Section 19(4) can only be read ejusdem generis as any other construction being placed thereupon would render the very requirement of obtaining consent of each of the financial institution u/s 19(4) wholly unnecessary; u/s 22 of SICA the legislature has specifically provided for, and was conscious of, the fetters to be placed on "legal proceedings" consequent upon a reference being made to the BIFR; the protection accorded thereunder is only to a Sick company, and not to a third party; Section 22 does not disable the company from filing a suit for recovery of money; Section 391 and 394 of the Companies Act are not among the aspects included in Section 22 and, consequently, Section 22 cannot be said to bar exercise of jurisdiction u/s 391 and 394 of the Act; Section 26 of SICA bars jurisdiction of the Court only on aspects which the BIFR is empowered to determine, and not otherwise; Axis Bank has no legal right to have different schemes considered by the BIFR; in the absence of any legal right they cannot oppose the maintainability of these applications; the power under Sections 391 to 394 is far wider than the power conferred u/s 19(4) as an alternate scheme prepared by an operating agency would still be required, u/s 19(4) of SICA, to be consented to by all financial institutions who render financial assistance; unlike consent of the entire body of creditors u/s 19(4), consent of 75% of the creditors would suffice for this Court to examine and, if satisfied, sanction the scheme of arrangement; and, even before this Court, Axis bank could still raise objections to the scheme as is presented by NBL, if they desire to have the scheme modified. Learned Counsel would rely on *In Re: Sharp Industries Ltd*; *National Organic Chemical Industries Ltd v. Nocl Employees Union*; *In Re: Pharmaceutical Products of India Ltd.*; *In Re Phlox Pharmaceuticals Ltd.*; and *Kotak Mahindra Bank Ltd. v. A.A.I.F.R.*

9. On the question whether the Company Court has jurisdiction to sanction a scheme of arrangement, including amalgamation, under Sections 391 to 394 of the Companies Act, despite the pendency of a reference before the BIFR under

the provisions of SICA, two diametrically opposite opinions have been rendered by different High Courts. One view is that the pendency of a reference before the BIFR under SICA does not bar the jurisdiction of the Company Court to sanction a scheme of arrangement, including amalgamation, under Sections 391 to 394 of the Companies Act. In *National Organic Chemical Industries Ltd*⁵, a Learned Single Judge of the Bombay High Court held that Section 22 of SICA did not contemplate proceedings under Sections 391 to 394 of the Companies Act, 1956; likewise Section 26 of SICA had no application as it applied only when an order passed or proposal made became appealable; if the provisions of Sections 391 to 394 of the Companies Act were inconsistent with the provisions of Sections 15 to 19 of SICA then, by virtue of Section 32 of SICA, the said provisions would have an overriding effect and shall prevail notwithstanding anything inconsistent therewith under the provisions of Sections 391 to 394 of the Companies Act; there was no inconsistency between the aforesaid two provisions; the provisions of SICA were introduced to make the company financially viable and independent; the provisions providing for merger and demerger of companies, under Sections 391 and 394 of the Companies Act, had the same object of making the company viable and more efficient; the provisions of both the statutes were supplemental to each other, and not inconsistent; the Court would have the power to sanction the scheme, under Sections 391 and 394 of the Act, irrespective of the provisions of Section 32 of SICA; the provisions of Sections 15 to 19 of SICA provided for a scheme where a company, which had become sick, would register itself with the BIFR; the BIFR could, after making an enquiry, provide for a package for rehabilitation of the company and/or make the company viable so that the business of the company could continue; the provisions of Sections 391 to 394 of the Companies Act also similarly provided for re-arrangement of the company's business by way of granting amalgamation, demerger and/or by sanctioning the scheme of compromise which also had the very same purpose and object to revive and/or make the company more viable and efficient; the provisions of SICA operated in a slightly different sphere i.e., a case where the net worth of the company had become negative; whereas the provisions of Sections 391 to 394 had no such requirement as a condition precedent; these provisions could operate in cases where the companies were doing quite well, and were seeking to rearrange their business for the efficient management or better business prospects and, thus, sought to amalgamate or demerge its business operations; there was no inconsistency between the provisions of Section 32 of SICA and the provisions of Sections 391 and 394 of the Companies Act; and the Court had the power and jurisdiction to sanction the scheme under Sections 391 and 394 of the Act.

10. In *Phlox Pharmaceuticals Ltd*.⁷, a Learned Single Judge of the Gujarat High Court upheld the contention that it was immaterial that the reference was registered u/s 15 of SICA and, despite the pendency of the reference, the Court had ample jurisdiction and power to sanction the Scheme under Sections 391 to 394 of the Companies Act; the provisions of Section 22 of SICA had no

application to proceedings u/s 391 to 394, and for sanction of the scheme; Section 26 of SICA would also not apply because the bar applied only in case of an appeal, and did not apply to proceedings u/s 391 to 394 of the Companies Act; Section 32 of the Act, which has been given overriding effect, applied only to a situation where the provisions of the two statutes were inconsistent with each other, and overriding effect was only given to those provisions which were inconsistent with the provisions of SICA; the provisions of SICA under Sections 15 to 19 as well as the provisions of Section 391 to 394 of the Companies Act, being not inconsistent with each other, the said overriding effect of Section 32 would not be applicable; the Court would have jurisdiction to entertain a petition seeking its sanction for a scheme of arrangement; the provisions of the Companies Act in this regard were not inconsistent with the provisions of SICA; the provisions of SICA operated in a slightly different sphere i.e., in case where the net worth of the company had become negative, whereas the provisions of Section 391 to 394 had no such requirement as a condition precedent; and this provision could operate even in cases where the companies were doing quite well, and were seeking to re-arrange their business for the efficient management or better business prospects, and thus sought to amalgamate or merge their business operations; there was no inconsistency between the provisions of Section 32 of SICA and the provisions of Section 391 and 394 of the Companies Act; the Court had, therefore, ample power and jurisdiction to sanction the scheme u/s 391 and 394 of the Companies Act, 1956 despite the fact that a reference was pending before the BIFR.

11. In *Re: Sharp Industries Ltd*⁴ a Learned Single Judge of the Bombay High Court observed that, on a plain reading of Section 22 of SICA, it was evident that the law did not contemplate suspension of any proceedings under Sections 391 to 394 of the Companies Act, and there was no question of the proceedings being suspended by virtue of Section 22 of SICA; similarly the provisions of Section 26 of SICA had also no application as the provision applied only when an order was passed, or a proposal was made, under SICA which became appealable except as provided therein; no civil court had jurisdiction in respect of those matters which were to be decided by the appellate authority of the Board which was empowered under the Act to determine the said issues; no injunction could be granted by any Court in respect of any action taken under the provisions of the said statute; and the provisions of Section 26 also had no application.

12. In *Re: Pharmaceutical Products of India Ltd*⁶, a Learned Single Judge of the Bombay High Court, following the earlier decisions in *National Organic Chemical Industries Ltd*⁵ and *Sharp Industries Ltd*, In re⁴, held that the provisions of SICA would prevail over the provisions of the Companies Act, "in case of inconsistency" in a given subject; the provisions of the two enactments operated in different spheres and the scheme, in so far as the power of the High Court to grant sanction to the proposed scheme of arrangement was concerned, was unaffected; where the purpose of the proposed scheme of arrangement was

mainly to revive the company and infuse funds, the purpose would be consistent with the object of SICA; Section 19(4) made it clear that, if consent to the scheme was not given by any one of the persons required to give such consent to the scheme, and to provide financial assistance, the Board would have to adopt such measures including winding up of a sick industrial company; even if one bank or financial institution was to withhold consent, the rehabilitation of a sick industrial company (by giving financial assistance) would be ruled out; on the other hand a scheme of arrangement, even if opposed by such banks or financial institutions, could be sanctioned by the Court and, in that event, the direction given by the Court, in the exercise of its powers u/s 391 of the Companies Act, would bind the non-consenting bank and financial institutions as well; in such a case, a drastic order of winding up of the sick industrial company would not be resorted to; viewed in this perspective the remedy u/s 391 was the proper remedy, and directions passed in the said proceedings by the Court would, in no way, be inconsistent with the scheme or the provisions of SICA.

13. In *Kotak Mahindra Bank Ltd.*⁸ the Division Bench of the Delhi High Court, after referring to the judgment of the Supreme Court in *NGRF Ltd.*²; and the Division Bench judgment of the Bombay High Court in *Ashok Organic Industries Ltd.*³, held that the overriding effect of Section 32 would come into play only in a situation where the provisions of other laws were inconsistent, or not in conformity, with the provisions of SICA; there was no inconsistency between the provisions of Section 32 of SICA on the one hand, and Sections 391 to 394 of the Companies Act on the other; SICA was enacted to make the sick industrial company financially viable and independent; similarly the provisions of Section 391 and 394 of the Companies Act were also enacted with the similar object to facilitate merger, demerger, corporate restructuring and scheme of arrangement/ compromise to establish viable corporate entities; and the provisions of both the statutes were supplemental to each other, and were not inconsistent.

14. In *NGEF Ltd.*², the Supreme Court held that it was difficult to accept the submission that both the Company Court and the BIFR exercised concurrent jurisdiction; if such a construction was upheld, there would be chaos and confusion; a company declared to be sick, in terms of the provisions of SICA, continued to be sick unless it was directed to be wound up; the BIFR had the power to sell the assets of the Company but the High Court, until a winding-up order was issued, did not have the same.

15. The opposite view found favour with the Division Bench of the Bombay High Court, in *Ashok Organic Industries Ltd.*³, wherein it was held that the ratio of the judgment of the Supreme Court, in *NGEF Ltd.*², laid down that, in those matters which ordinarily would be covered by Sections 391 to 394 of the Companies Act, once the Company became sick and was before the B.I.F.R. it was the provisions of SICA which alone were applicable, and to that extent the provisions of the Companies Act, being inconsistent, would stand excluded. On the questions whether there was a direct conflict between the provisions of SICA and Sections

391 to 394 of the Companies Act; and, if there be, was it possible to harmonize the provisions of SICA with those of Sections 391 to 394 of the Companies Act; the Division Bench held that Section 18 of SICA provided for revival/rehabilitation of companies in several ways which were different from that provided by Sections 391 to 394; Section 391 to 394 covered 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 contained provisions that provided for completely different legal processes for the sanction of schemes; to the extent that the Scheme was in respect of a "sick industrial company", as defined under SICA, there was apparently a direct conflict between several of the respective provisions; if a scheme was permitted via the Section 391 route it would directly conflict with the Parliamentary intent reposed in Section 19-A of SICA; under SICA even one creditor could refuse consent to the Scheme, requiring the BIFR to resort to the provisions of Section 19(4); the legislative intent was clear viz. that, in the case of sick industrial companies, the special majority, as provided in Section 391, could not bind all the creditors; all the institutional creditors were required to concur; this Parliamentary intent would be defeated if a sick industrial company, whose Scheme fell u/s 19(3), was permitted to have recourse to Section 391, and have the scheme passed overriding the minority dissenting creditors; SICA could be said to be a complete Code intended to be exhaustive in all matters concerning sick industrial companies (whether potentially viable or non-viable); the provisions, and the objects and reasons thereof, indicated the legislative intent that SICA covered the whole field as regards sick industrial companies; the correct test to be applied was not whether it was open to or possible for a sick industrial company to present a Scheme u/s 391 even whilst its reference was registered with the BIFR, but whether, since SICA was a complete and exhaustive Code, an inconsistency was deemed to arise, and whether such inconsistency could be resolved by applying the principle that the special and later Act prevailed over the general and prior Act; once SICA 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, and by these provisions alone; if the provisions of SICA did not cover any particular detail or aspect pertaining to the Schemes of Sick Industrial Companies, it must be concluded that this was because Parliament did not intend such a provision to be available in respect of Sick Industrial Companies; there was no question of adopting an approach of dissection or a microscopic examination of each provision of SICA to determine whether any particular type of Scheme was available u/s 391 to 394, but not under SICA; the test was whether the two Acts substantially provided for the same subject matter; the answer was in the affirmative; and it was not permissible to have recourse to any provision other than SICA to supply any mechanism for sanctioning a scheme impermissible under SICA (or indeed even to facilitate a scheme under SICA) for this would defeat Parliament's intention that SICA alone would completely and exhaustively cover all aspects relating to Sick Industrial Companies including Schemes in

respect thereof.

16. The issue now stands resolved by the judgment of the Supreme Court. In *Tata Motors Limited*¹, the interpretation/application of the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) vis-?-vis the Companies Act, 1956 (the Act) was in question in the appeal before the Supreme Court. The said appeal arose out of the judgment and order dated 16-10-2006 passed by a Division Bench of the Bombay High Court in Appeal No. 725 of 2006, arising out of a judgment and order dated 13-2-2006 passed by a learned Single Judge of the Bombay High Court, (in *In Re. Pharmaceutical Products of India Ltd*⁶), approving a scheme filed by the respondent u/s 391 of the Act. In its order, the Supreme Court noted that the appellant was kept outside the scheme of arrangement which involved some selective secured creditors and some selective unsecured creditors; before the Company Judge, the appellant had filed an application for intervention raising objections to the said scheme primarily on the ground that the revival/rehabilitation of the company was under consideration of a specialised body formed under SICA which was a special legislation, and would prevail over the provisions of the Companies Act; the non-obstante clause contained in SICA would have the effect of overriding and excluding the provisions of the Companies Act, more so where there was an overlapping between the two Acts; considering the scheme of SICA, the revival/restructuring of the Company could not be considered by two separate forums separately; the scheme involved financial reconstruction, sale of assets of the Company and merger/take over; these issues expressly fell within the domain of the BIFR u/s 18 of SICA; and the decision of the learned Single Judge had been overruled by a Division Bench of the Bombay High Court in *Ashok Organics Industries Ltd. v. Dena Bank* (Company Petition No. 108 of 2006, disposed of on 25-1-2008).

17. Before the Supreme Court it was contended, on behalf of the appellant, that the provisions of SICA, being a special statute, would prevail over the provisions of the Companies Act; the High Court had committed a manifest error in entertaining the respondent's application for merger under Sections 391 to 394 of the Companies Act, although the matter was pending before the AAIFR; the High Court had failed to notice the binding precedent in *NGEF Ltd.*² wherein it was clearly held that SICA would prevail over the Companies Act; and Section 26 of SICA barred the jurisdiction of the Company Judge. After referring to several provisions of SICA, the Supreme Court observed that SICA was enacted to secure the principles specified in Article 39 of the Constitution of India; it sought to give effect to the larger public interest; it should be given primacy because of its higher public purpose; Section 26 of SICA barred the jurisdiction of the civil courts; what scheme should be prepared by the operating agency for revival and rehabilitation of the sick industrial company was within the domain of the BIFR; Section 26 not only covered orders passed under SICA, but also any matter which the BIFR was empowered to determine; "civil court" had a definite connotation; the jurisdiction of the Company Court was now vested in the

Tribunal; it would, therefore, be difficult to hold, in view of a changed situation, that Section 26 ousts the jurisdiction of the Company Court in totality; the special statute shall prevail over the general rule; the jurisdiction of the civil court was, thus, barred in respect of any matter for which the Appellate Authority or the Board was empowered; the High Court may not be a civil court but its jurisdiction in a case of this nature was limited; and it was not possible to harmonise the provisions of Sections 391 to 394 of the Companies Act with the provisions of SICA.

18. The law declared by the Supreme Court binds all Courts in India (Rajeswar Prasad Misra v State of W.B). The decisions of the Supreme Court are of significance not merely because they constitute an adjudication on the rights of the parties and resolve the disputes between them but also because in doing so they embody a declaration of law operating as a binding principle in future cases. The doctrine of binding precedent is of utmost importance in the administration of our judicial system. It promotes certainty and consistency in judicial decisions. (Chandra Prakash v State of U.P.). Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all courts within the territory of India. A judgment of the Court has to be read in the context of the questions which arose for consideration in the case in which the judgment was delivered. An "obiter dictum" as distinguished from a ratio decidendi is an observation by the Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have binding precedence as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a binding effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations on the points raised and decided by the Supreme Court in a given case. (Ballabhdas Mathurdas Lakhani v. Municipal Committee, Malkapur; and Director of Settlements, A.P. Vs. M.R. Apparao)

19. Sri S.Niranjan Reddy, Learned Counsel appearing for NBL, would seek to distinguish the judgment of the Supreme Court in Tata Motors Ltd¹, and submit that, in Tata Motors Ltd¹, the Supreme Court, while dealing with a case where a composite scheme requiring payment to a class of creditors, sale of immoveable properties and take over of a sick company by a new company was contemplated, held that Sections 391 to 394 of the Act could not be harmonised with the provisions of SICA; and the ratio of the judgment of the Supreme Court in Tata Motors Ltd¹ would not affect the maintainability of the application under Sections 391 to 394; on the facts of the said case the Supreme Court, in Tata Motors Ltd¹, had ordered for the sale of assets in the intervening period, after the BIFR had opined that the Company be wound up, and prior to a winding up order being passed by the Company Court; there was no inconsistency between the provisions of Section 19 of SICA and Sections 391 to 394 of the Act as the provisions of the Companies Act are substantive in nature, while the provisions of SICA are procedural merely providing for steps that could be taken by the BIFR

depending on consent being granted or withheld by the persons providing due financial assistance; even, in that view of the matter, there was no inconsistency between the provisions of SICA and the Act; if the ratio in *Tata Motors Ltd.*¹ is understood as the Company Court being divested of all jurisdiction once a reference is made u/s 15, and until orders u/s 20 for winding up are passed, it would be counter-productive to the beneficial interpretation of the legislation; and, while a healthy company can seek realignment of its credit with 75% of the creditors consenting, a sick company would require the entire 100% of the creditors to accept the proposal.

20. While the aforesaid submissions of Sri S.Niranjan Reddy cannot be said to be without merit, it must be borne in mind that the decision in a judgment of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court. (*Ballabhadras Mathurdas Lakhani*¹¹ and *M.R. Apparao*¹²). When the Supreme Court decides a principle it would be the duty of the High Court to follow the decision of the Supreme Court. A judgment of the High Court which refuses to follow the decision and directions of the Supreme Court, or seeks to revive a decision of the High Court which had been set aside by the Supreme Court, is a nullity. (*Narinder Singh v. Surjit Singh*; *Kausalya Devi Bogra v. Land Acquisition Officer*; and *Apparao*¹²). On the law having been declared by the Supreme Court it is the duty of the High Court, whatever be its view, to act in accordance with Article 141 of the Constitution of India and to apply the law laid down by the Supreme Court. Judicial discipline to abide by the declaration of law, of the Supreme Court, cannot be forsaken by any Court, be it even the highest Court in a State, oblivious of Article 141 of the Constitution of India. (*Chandra Prakash*¹⁰; *State of Orissa Vs. Dhaniram Luhar*).

21. The contention that the application filed by Axis Bank Limited, in C.A.No.285 of 2012, is premature as they would be heard by this Court, at the time of sanction of the scheme of arrangement, does not merit acceptance. It is necessary to note that, in view of the law declared by the Supreme Court in *Tata Motors*¹, any scheme for revival of a sick industrial company, whose reference is pending consideration before the BIFR, can only be sanctioned by recourse to the provisions of SICA, and not by way of a scheme of arrangement under Sections 391 to 394 of the Companies Act; and in cases where a reference, in relation to a sick industrial company, is pending consideration before the BIFR under the provisions of SICA, this Court would lack jurisdiction to entertain and consider a scheme of arrangement between the said sick industrial company and its creditors.

22. An order passed without authority of law has no effect. It neither creates any right in favour of a party for whom such order is made nor does it impose any obligation on the opposite party against whom it was passed. (*M.V. Janardhan Reddy v. Vijaya Bank*). An order passed without jurisdiction would be null, non est and void ab initio as a defect in the jurisdiction goes to the root of the matter.

(Deepak Agro Foods v. State of Rajasthan; Kiran Singh v. Chaman Paswan). The test of jurisdiction over the subject matter is whether the court or Tribunal can decide the case at all, and not whether the court has authority to issue a particular kind of order in the course of deciding the case. (Pankaj Bhargava v. Mohinder Nath). A court may recall an order earlier made by it if the proceedings culminating into an order suffer from inherent lack of jurisdiction, and such lack of jurisdiction is patent. A distinction has to be drawn between lack of jurisdiction and a mere error in exercise of jurisdiction. The former strikes at the very root of the exercise and want of jurisdiction may vitiate the proceedings rendering them and the orders passed therein a nullity. A mere error in exercise of jurisdiction does not vitiate the legality and validity of the proceedings and the order passed thereon unless set aside in the manner known to law by laying a challenge. (Budhia Swain v. Gopinath Deb).

23. Since this Court lacks jurisdiction to entertain and consider the scheme of arrangement between a sick industrial company, (whose reference is pending consideration before the BIFR), and its secured creditors, and as the reference made by NBL is pending consideration before the BIFR under the provisions of SICA, the earlier orders of this Court, in C.A.No.1691 of 2011 dated 21st and 22nd November, 2011, directing that a meeting of the secured creditors be convened and held, suffers from lack of jurisdiction; and, therefore, necessitates being recalled. As a result the order passed by this Court in C.A.No.1691 of 2011 dated 21.11.2011, as modified by order dated 22.11.2011, is recalled and is declared null and void. C.A.No.285 of 2012 is allowed, and C.A.No.1691 of 2011 is dismissed.