

**(2012) 01 DEL CK 0277**

**In the Delhi High Court**

**Case No :** Writ Petition (C) 1296 of 2011 and CM No. 2723 of 2011

IFCI Limited

APPELLANT

Vs

State Bank of India and Others

RESPONDENT

**Date of Decision :** 05-01-2012

**Acts Referred:**

**Citation :** (2012) 2 BC 173 : (2012) 2 ILR Delhi 318

**Hon'ble Judges :** Sanjay Kishan Kaul, J;Rajiv Shakdher, J

**Bench :** Division Bench

**Advocate :** P.S. Bindra, for the Appellant; Rajiv Kapur and Ms. Vatsala Rai, Advocates for Respondent No. 1/SBI with Mr. P.J. Thomas, General Manager, SBI and Mr. Dinkar Singh, Advocate for Respondent Nos. 2 to 5, for the Respondent

## Judgement

Rajiv Shakdher, J.—In the captioned writ petition, a challenge has been laid to the judgment dated 06.12.2010 passed by the Appellate Authority for Industrial & Financial Reconstruction (in short, AAIFR). The AAIFR by the impugned judgment confirmed the order passed by the Board for Industrial & Financial Reconstruction (in short, BIFR) dated 18.04.2007 which infact was a clarification and/or modification of its earlier order dated 14.09.2006. The short point which arises in the present writ petition is whether the direction of the BIFR, which has been overturned by the AAIFR, to the effect that 5% of the sale proceeds, which were adjusted by the first respondent i.e., State Bank of India (hereinafter referred to as SBI), are required to be shared amongst all other secured creditors. The petitioner herein, i.e., IFCI Limited is one such secured creditor. It is important to note that the entire controversy centres around an order dated 04.05.1999, passed by the BIFR, in the first reference, filed by the sick industrial company, which is respondent no. 6 herein i.e., Prashant Industries Limited, which for the sake of convenience would be referred to as PIL. Therefore, it would be important to first incorporate herein the pertinent part of the order dated 04.05.1999, passed by the BIFR.

that banks should allow the company to operate its accounts after adjusting 5%

of all the sale proceeds. Further, if the company failed to start operating its accounts or submit stock statements within the given time limits and the bank reported this to the Board, BIFR would allow them to file recovery suits against the company.

2. As indicated hereinabove, this order of the BIFR dated 04.05.1999 was passed in the first reference preferred by PIL, being: case no. 342/1998.

3. There is no dispute that the BIFR by virtue of an order dated 08.09.2000 modified its order dated 04.05.1999. The relevant modifications carried out by the BIFR are briefly as follows :-

(i). the deduction from the sale proceeds of PIL was reduced from 5% to 2.5%;

(ii). the direction for deduction of 5% of the sale proceeds upto 31.08.2000 was made to stand;

(iii). PIL was directed to credit a corresponding amount in the account maintained by SBI, initially in the "No Lien Account" (in short, NLA) by 08.12.2000;

(iv). the amount so deposited, was directed to be appropriated towards dues of all secured creditors including IREDA on a pro-rata basis by taking the principal dues of secured creditors, as outstanding on 31.03.2000, as the base and;

(v). lastly to enable the apportionment of the above, all secured creditors were directed to convey the details of their principal dues as on 31.03.2000, to the operating agency within a period of one month.

4. The order dated 08.09.2000 passed by the BIFR, was assailed by the PIL as well as by the SBI before the AAIFR. The appeal of the PIL was registered as 405/2000, while that of the SBI was registered as 420/2000.

5. The AAIFR upon due consideration of the matter and after hearing parties in both appeals, by an order dated 03.07.2001 dismissed the appeal of the PIL and allowed that of the SBI. The relevant portion of the order which contains three (3) explicit directions are extracted herein below :-

...In view of the above discussion, the appeal no. 405/2000 filed by the company has no merit and is dismissed and allowing appeal no. 420/2000 of SBI, the impugned order dated 08.09.2000 in so far as it reduces the deductions from 5% to 2.5% of the sale proceeds, sharing of the amount so deducted, and the retention of the deducted amounts in "no lien account" and the manner of sharing of the amount so deducted as modified, is set aside and thereby BIFR's order dated 04.05.1999 stands restored.

6. As noticed hereinabove, the AAIFR by its order dated 03.07.2001 issued the following three (3) directions :-

(i). it reversed the order of the BIFR dated 08.09.2000 in so far as it reduced the deduction from 5% to 2.5% of the sale proceeds;

(ii). it also reversed the direction that required the SBI to share the amounts so deducted; and

(iii). it also set aside the direction which required SBI to retain the amounts deducted, in an NLA, as also the direction issued to share the amount so deducted.

7. Naturally, the sick industrial company i.e., PIL was aggrieved by the said order of the BIFR and hence, instituted a writ petition in the Gujarat High Court. This writ petition was numbered as Special Civil Application No. 5428/2001. It is not in dispute that the Gujarat High Court passed an interim order dated 18.07.2001, whereby it initially stayed the directions passed by the AAIFR vide its order dated 03.07.2001.

8. Against the order of the Gujarat High Court dated 18.07.2001, the SBI preferred a review petition, which was disposed of by it vide order dated 28.12.2001. The necessary consequences of the order dated 28.12.2001 was that, the interim direction of the Gujarat High Court whereby, the deduction from the sale proceeds was restricted to 2.5% of the sale proceeds was restored to 5% of the sale proceeds.

9. PIL being aggrieved by the order dated 28.12.2001 passed by the learned Single Judge in Special Civil Application (SCA) No. 548/2001, preferred a Letters Patent Appeal (in short LPA) before the Division Bench.

10. It is important to note that in the meanwhile two events had occurred; the first was that, PIL had filed a second reference with the BIFR on 29.11.2002, while the second event which transpired in the interregnum was that, the BIFR had rejected the first reference being: case no. 342/1998, on 14.02.2003.

11. In view of these events, when the LPA was taken up by the Division Bench on 09.04.2003, it naturally came to the conclusion that the LPA had become infructuous, which was accordingly so ordered by the Division Bench, by its order dated 09.04.2003.

12. As indicated hereinabove, the second reference which had been preferred by PIL, came to be registered by the BIFR as case no. 116/2003.

13. The BIFR, at the very first hearing qua the second reference, which was held on 20.09.2005, passed certain directions. It is not in dispute that at the said hearing dated 20.09.2005, BIFR declared the PIL as sick industrial company based on its balance-sheet as on 31.03.2002. Interestingly, the BIFR simultaneously issued a show cause notice to the PIL as to why it should not be wound up. There were certain other directions issued, which included a direction to the promoter of the PIL to deposit 25% of the quantified means of finance, in the NLA, with SBI, which was the operating agency, in the said reference. This direction came to be passed to enable the BIFR to gather as to whether the promoter had the requisite amount to resuscitate the sick industrial company i.e., PIL.

14. PIL preferred an appeal against the order dated 20.09.2005 with the AAIFR. This appeal was however, withdrawn by the PIL, which was so recorded by the AAIFR in its order dated 13.02.2006.

15. It appears that during the course of the hearing of the second reference i.e., case no. 116/2003, an order came to be passed by the BIFR, on 18.01.2006. Here again, several directions were issued by the BIFR. The relevant part of this order reads as follows :-

...The winding up notice dated 20.09.2005 was kept in abeyance. SBI shall share the amount lying in the NLA with the concerned secured creditors/others in accordance with the extant High Court orders...

16. Against the order dated 18.01.2006, SBI preferred an appeal being: 89/2006. The AAIFR vide order dated 13.10.2006, dismissed the appeal as having become infructuous, while granting liberty to SBI to prefer a fresh appeal against any order passed by the BIFR.

17. The PIL in the meanwhile filed an application dated 11.03.2006 with the BIFR, in the then subsisting reference i.e., second reference case no. 116/2003, wherein several reliefs were sought. What concerns us is, the relief whereby, PIL sought a direction from the BIFR that, the amount lying in the NLA or any other account received from it or on behalf of the company after filing of the first reference be invested in a fixed deposit with the Nationalized bank.

18. It is also not in dispute that in the pending writ petition on 26.04.2006, PIL had filed an additional affidavit before the Gujarat High Court, pursuant to which the Gujarat High Court passed an order dated 05.05.2006. Since submissions have been made based on this order, by the learned counsel for the appellant as well as the supporting respondents, the relevant portion of the said order is extracted hereinafter :-

...However, it is clarified that the proceedings pending before the BIFR in accordance with the amount deposited by the petitioner shall be decided within a period of 3 months from the receipt of writ of this order in accordance with law.

19. It is also not in dispute that the PIL on 18.05.2006 moved an application in the aforementioned writ petition i.e., SCA No. 5428/2001 seeking a direction from the court that its application dated 11.03.2006 be adjudicated upon by the BIFR. By an order dated 28.07.2006, the Gujarat High Court, it appears, passed a direction that the PIL's application dated 11.03.2006 be decided by the BIFR within three months of the receipt of the said order.

20. It is pursuant to the said direction that the BIFR passed its order dated 14.09.2006, which was clarified by its order dated 18.04.2007. It is these orders which were assailed in the appeal before the AAIFR by the SBI. There were other appeals also filed but we are concerned with the direction limited to the distribution of the 5% of the sale proceeds deposited by the PIL. The AAIFR, for several reasons, which have been articulated in the impugned order, have

reversed the direction qua this issue contained in orders dated 14.09.2006 and 18.04.2007. The discussion of the AAIFR on this issue is contained in paragraph 24 to 32 of the impugned judgment. The sum and substance of the discussion in the aforementioned paragraphs of the impugned judgment is that the order of the BIFR dated 08.09.2000 was reversed by the AAIFR vide its order dated 03.07.2001; a direction passed by the High Court on 05.05.2006 was first passed when, it had not been informed that the first reference being : case no. 342/1998 had already been dismissed on 14.02.2003; and lastly, the order of the BIFR dated 04.05.1999 which was restored by the AAIFR by its order dated 03.07.2001, neither directed creation of any NLA nor the deposit of any sum in the NLA. In other words, the AAIFR appears to have reasoned that the order dated 04.05.1999 basically, concerned financing banks and hence allowed SBI to adjust the sale proceeds against the banks' loan account. For these reasons, the AAIFR set aside the order of the BIFR dated 18.04.2007.

21. Before us, in support of the appeal, Mr. Bindra, Mr. Dinkar have been heard, while Mr. Kapur, who appears for the main contesting party has advanced submissions.

21.1 The sum and substance of the contention of Mr. Bindra is that the SBI had itself contended before the AAIFR even in the proceedings which culminated in the order dated 14.07.2001 that the amount deposited had to be shared between the SBI and itself (i.e., IFCI). For this purpose, Mr. Bindra drew our attention to the contentions recorded in the order of the AAIFR dated 03.07.2001, which reads as follows :-

...The SBI and IFCI had given financial assistance in respect of Textile Division and as such SBI alongwith IFCI alone are entitled to appropriate the 5% or 2 1/2% deduction out of sale proceeds routed through SBI ...

21.2. It is, therefore, Mr. Bindra's contention that SBI cannot now be allowed to renege from its stand taken before the AAIFR, as far back as on, 03.07.2001. In order to buttress his submission, he took us through the orders of AAIFR, BIFR and the Gujarat High Court, which have been referred to, by us above, to demonstrate that the direction passed by the BIFR on 18.04.2007 was justified and legally tenable. Mr. Dinkar, who appears for respondent no. 2, 3, 4 and 5 i.e., assignee of debts of erstwhile secured creditors of PIL, has supported the submissions made by Mr. Bindra.

22. On the other hand, Mr. Kapur, who appears for SBI has contended that the direction contained in order dated 04.05.1999 is explicit in nature, in as much as, it only requires adjustment of the sale proceeds deposited with it to the extent of 5%, and that, there was no direction for depositing the amount in the NLA. Mr. Kapur has further contended that this direction was passed in the first reference i.e., case no. 342/1998, which got disposed of on 14.02.2003 and therefore, there was no occasion for the Gujarat High Court to have issued further directions in respect of the said reference. Mr. Kapur also contended that SBI was

the only entity entitled to make adjustment as, undoubtedly, it was the only working capital financier of the sick industrial company i.e., PIL. It was contended that the petitioner i.e., IFCI and other secured creditors were term loan lenders, and thus, could not have taken the benefit of the order of 04.05.1999.

23. Having heard the learned counsel for the parties as well as perused the records and the orders passed by the authorities below as also those of the Gujarat High Court. On a perusal of the record, we are of the view, as indicated at the very outset, the genesis of the dispute is pivoted on the order of the BIFR dated 04.05.1999. Mr. Kapur is right in his submission that the order only required it to carry out adjustment to the sale proceeds deposited by the PIL and there was no further direction issued to deposit the amount in the NLA. The difficulty arose since the BIFR modified its order dated 04.05.1999, by an order dated 08.09.2000. There is no dispute that the AAIFR had reversed the said order explicitly by its order dated 03.07.2001. The reversal, in terms, carried out by the AAIFR pertained to even the directions passed by BIFR for deposit of amount in the NLA and its pro-rata distribution amongst the secured creditors. In this scenario, the subsequent direction which the Gujarat High Court issued, inter alia, directing the BIFR to adjudicate upon the application of the PIL, could not in law take away the right of the SBI, which was undoubtedly the only working capital financier, to adjust the sale proceeds. The reason being that the working capital financier funds an entity for carrying out its day to day activities. It is not unknown that while a reference is pending before the BIFR if, working capital finance is not made available, then the functioning of a sick industrial company could come to grinding halt in absence of such finance. The working capital finance is, ordinarily made available to fund, amongst others, the purchase of raw material and to make payroll payments to the workers/employees: it is a capital of business used to fund its day-to-day trading (see Oxford Dictionary on Accounting, First Indian Edition 2004, at Page 355). Therefore, the BIFR in its wisdom on 04.05.1999 had permitted the operation of the working capital account maintained with the SBI, only upon PIL allowing adjustment of a miniscule percentage of its sale proceeds by the SBI. The said adjustment would have concededly serviced a very small portion of the interest which, accrued on that account.

23.1 However, for reasons best known, the BIFR chose to reverse the directions by its order dated 08.09.2000, which the AAIFR, as noticed by us above, set aside by its order of 03.07.2001. The subsequent orders that the BIFR has passed i.e., orders dated 14.09.2006 and 18.04.2007 have to be looked at, in the background of these facts as noticed by us above. We are of the view that the AAIFR's order, in sum and substance, certainly recognizes this position of SBI qua the sick industrial company i.e., PIL. Therefore, the argument of Mr. Bindra that SBI had taken a stand that the amount deposited could be shared with it, in our view, cannot dilute this legal position. It is settled that concessions on law by counsel cannot bind a litigant (see *Uptron India Limited Vs. Shammi Bhan and Another*, ). Therefore, the argument that the Gujarat High Court had

knowledge of the termination of the first reference when it passed order dated 05.05.2006 contrary to what the AAIFR notes, in our view, also cannot help the cause of the secured creditors. It is pertinent to note that the only direction issued by the Gujarat High Court was, to dispose of the application dated 11.03.2006, and not, as it could not have, to dispose it of, in a particular manner. There was, no legal obligation on the part of SBI to permit PIL to operate its working capital account maintained with it, having regard to precarious financial position of PIL. Having taken the risk, it must be permitted to enjoy its fruit.

24. In these circumstances, we are of the opinion in the ultimate analysis the order of the AAIFR is both legally tenable and fair and hence, deserves to be sustained. It is ordered accordingly. The writ petition and all pending applications are disposed of.