

(2014) 07 DEL CK 0102

In the Delhi High Court

Case No : W.P. (C) 4350/2013 & C.M. No. 10067/2013

Indusind Bank Ltd.

APPELLANT

Vs

ITI Limited

RESPONDENT

Date of Decision : 11-07-2014

Acts Referred:

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

Constitution of India, 1950 — Article 226

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 13, 15, 17, 18, 18(2)

Citation : (2014) 211 DLT 723

Hon'ble Judges : Vibhu Bakhru, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : Ravinder Sethi, Sr. Advocate, Ajay Monga, Ateev. K. Mathur, Amol Sharma and Devmani Bansal, Advocate for the Appellant; Jayashree Shukla Dasgupta, Vinita Sasidharan, Advocates and Suhail Malik, Dy. Advocate General, Sunil Kumar, T.P. Singh, Ashwani Bhardwaj, Advocates, Sanjay Kumar, Proxy Counsel and Kamal Sawhney, Sr. Standing Counsel, Advocate for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—By these proceedings under Article 226 of the Constitution, an order of the Appellate Authority for Industrial and Financial Reconstruction ("AAIFR") made under the Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA") dated 27.05.2013 has been impugned.

2. The brief facts of the case are that the first respondent (hereafter referred to variously as "ITI" and "the company") approached the Board for Industrial and Financial Reconstruction ("BIFR") set up under SICA, on the basis of its having lost the net worth; this led to a reference, registered by the BIFR in which the cut-off date for preparation of the scheme was directed to be 31.12.2005. This was subsequently changed to 31.03.2009. Originally, the petitioner bank had sanctioned working capital limits to the tune of Rs. 40 crores (half of which was fund-based and the other, non fund-based limits) renewable annually. The BIFR

had appointed the State Bank of India ("SBI") as the Operating Agency ("OA"). At the time of formulation of scheme itself, it is alleged that the petitioner had expressed reservations and decided to exit the consortium arrangement entered into between the participating banks and financial institutions.

3. The Consortium Agreement had been entered into by various banks, including the petitioner, all of whom were creditors of ITI, on 20.03.2002. The purpose and underlying objective of the Consortium Agreement was to enable the participating creditors to work in tandem towards the ultimate goal of realization of their dues from the ITI. On 19.08.2009, the Central Government sanctioned a grant of Rs. 28.20 crores to the ITI to discharge its liability. Taking note of this, the petitioner claims that it reduced the fund-based limits to Rs. 1.3 crores, to the ITI.

4. Whilst the proceedings were pending before the BIFR for the finalization of the Draft Rehabilitation Scheme ("DRS") under the SICA, a direction was issued on 07.04.2011 to all banker members of the consortium to take expeditious action in releasing the credit limits that were envisioned in terms of the proposals made to it. Consequently, ITI requested the petitioner bank to release the limits/raise the credit limits to the originally sanctioned level on 28.04.2011. Responding to this, the petitioner bank, on 25.05.2011, expressed its intention to quit the consortium. In this letter, a reference was made to the previous letter of 04.10.2004 written to the OA where for the first time, the bank had expressed its intention to quit the consortium and the Scheme. It was pointed-out by the petitioner that the working capital limits were sanctioned annually and were to be renewed annually based on operational and financial performance. The bank further stated that no assessment of requirements had been made by the OA for several years. In the circumstances, in a meeting of the consortium members on 20.08.2011, the petitioner reiterated its decision to exit or quit the consortium arrangement.

5. In the light of these events, when the BIFR took on record the DRS dated 31.05.2012, it elicited objections by its order dated 29.06.2012. By the letter dated 28.08.2012, the petitioner reiterated its resolve not to continue as a member of the consortium. The said letter of the petitioner bank of 28.08.2012, written to the OA, in its material particulars is extracted below:

This is with reference to draft rehabilitation scheme (DRS) of M/s. ITI Ltd. vide BIFR board's order dated 29.06.2012 (notification published in newspapers dated 3.07.2012).

We would like to highlight our objection to the DRS wherein it is required that the Banks/FIs shall de-freeze the limits or restore them to the original level and Limits proposed against Indusind Bank Ltd. is mentioned as Rs. 2000 lacs.

Our objection is on the following grounds:

a. Although the company was sanctioned fund based limit of Rs. 2000 Lacs and

non fund based limit of Rs. 2000 Lacs in 2003, we had renewed only our fund based limit of Rs. 1800 Lacs based on the actual level of utilization by ITI as on 30.06.2004, pending assessment of working capital limits by the Lead Bank (State Bank of India). No assessment of requirements has been done by the Lead Bank for past several years. Lead Bank assessment was last done on 20.03.2002.

b. As per our letter dated 04.10.2004, we had communicated to State Bank of India, the Lead Bank and to the company of our intention to exit the account i.e. well before the company was declared sick. The company was declared sick on 03.10.2005. Company's representative had also then stated that they would arrange for take-over of our limits by other Bankers.

c. That subsequently, outstanding in the Fund Based limit has been further reduced to Rs. 90 lacs by the Applicant Company. Working capital limits are sanctioned for one year and are to be renewed annually based on operational and financial performance. No assessment of requirements had been done by lead bank viz. State Bank of India for past several years and any working capital limits sanctioned more than 8 years back can no longer be available for utilization by borrowers.

6. Before the BIFR, the petitioner reiterated its disinclination to continue with the consortium. This submission was also made by the Development Credit Bank Limited. The BIFR, by its order of 27.11.2012 however, issued directions approving the DRS. The order rejected the petitioner's contentions and directed it to continue in the Scheme and also participate in the de-freezing of credit limits, to be made available to ITI. The petitioner thereupon preferred an appeal to the AAIFR, being Appeal No. 23/2013, which was dismissed by the impugned order.

7. The AAIFR in its impugned order, after setting-out the relevant provisions of the Consortium Agreement held as follows:

The above part of the agreement clearly provides that if the existing members and/or new banks to be admitted in the consortium are not willing to take up the share of the concerned bank which desires to get out of the consortium, the said bank should continue in the consortium with its existing facilities without demur and not delay the implementation of rehabilitation scheme. The appellant is bound by this consortium agreement and BIFR in its impugned order has only reiterated this position. The appellant cannot decline to fulfil their obligations under the consortium agreement on the pretext of filing objections to DRS. Moreover, the DRS approved by BIFR was recommended by the consortium banks including the appellant in the meeting held on 29.2.2012. The consortium in its meeting on 22.5.2012 has again decided as follows:

The consortium decided that the indusind bank and the DCB need to release the limits to the company as per the original sanction letter issued in 2002, and these Banks can exit the consortium or reduce the limits, only after an

alternative arrangement is made for taking over their exposure either by existing member Banks or new banks.

3. In view of above, prima facie, there seems to be no infirmity or illegality in the impugned order, which may require any interference from this Authority. There is no merit in the appeal and the appeal is liable to be dismissed.

8. It is argued on behalf of the petitioner that since the assessment had not been carried on by the lead bank/OA as to the sanctioned working capital limits for more than 8 years, the intervening development had a bearing and that in these circumstances, the petitioner could not be compelled to continue as a participant of the consortium arrangement. The petitioner refers to a series of correspondence expressing reservations and reiterating its resolve to stand out of the consortium and submits that the AAIFR overlooked the fact that the credit limit originally sanctioned- Rs. 40 crores was reduced to Rs. 1.3 crores after 28.02.2009 and further reduced to Rs. 1 crore after 29.03.2011, on account of availability of grants by the Central Government. It was submitted that in these circumstances, the direction to continue to participate in the consortium and fund ITI's rehabilitation and revival was not warranted.

9. It was argued that no one can be compelled to enter into a contract without its consent and that participation in the Consortium Agreement as a creditor has to be based upon volition and not compulsion. Learned counsel relied upon Section 19(4) of the SICA as well as the decision of the Supreme Court in *Tata Motors Ltd. Vs. Pharmaceutical Products of India Ltd. and Another*, . Reliance was also placed upon the decision of the Bombay High Court in *Ashok Organic Industries Ltd. Vs. Asset Reconstruction Company (India) Limited (ARCIL)*, .

10. The ITI which contested these proceedings submitted that this Court should refrain from interfering with the impugned order. It urged that if the petitioner were to be permitted the relief it sought, the Rehabilitation Scheme, in all likelihood, would have fallen apart. Learned counsel highlighted in this regard, that even though the petitioner's exposure in the consortium is to the tune of 3%, accepting its argument would pave the way for similar requests by other consortium members which would undermine the larger objective of the DRS and allow individual members to walk out. Deriving strength from a Division Bench ruling of this Court in *Oman International Bank S.A.O.G. Vs. Appellate Authority for Industrial and Financial Reconstruction*, , it was argued that the interpretation placed upon Section 19(1) is conclusive in that no single creditor-and a minority creditor at that, can withdraw from a DRS otherwise approved by the BIFR. Learned counsel also relied upon Section 19(1) of SICA and urged that the impugned decision is also in conformity with an order of a Division Bench in *W.P. (C) 12873/2009* dated 05.04.2010. Learned counsel also relied upon the judgment of the Karnataka High Court reported as *Canara Bank Vs. M/s. Shimcga Steels Limited* and Appellate Authority of Industrial and Financial Reconstruction (AAIFR) .

11. The question falling for determination by this Court, therefore, is, whether the BIFR and AAIFR could have refused the petitioner Bank's request to withdraw from participating in the consortium and compelled it to thereby continue to extend credit facilities.

12. The relevant provision of SICA are extracted below:

18. Preparation and sanction of schemes.--(1) Where an order is made under sub-section (3) of Section 17 in relation to any sick industrial company, the operating agency specified in the order shall prepare, as expeditiously as possible and ordinarily within a period of ninety days from the date of such order, a scheme with respect to such company providing for any one or more of the following measures, namely:--

(a) the financial reconstruction of the sick industrial company;

(b) the proper management of the sick industrial company by change in, or take over of, management of the sick industrial company;

(c) the amalgamation of--

(i) the sick industrial company with any other company; or

(ii) any other company with the sick industrial company; (hereafter in this section, in the case of sub-clause (i), the other company, and in the case of sub-clause (ii), the sick industrial company, referred to as "transferee company";

(d) the sale or lease of a part or whole of any industrial undertaking of the sick industrial company;

(da) the rationalisation of managerial personnel, supervisory staff and workmen in accordance with law;

(e) such other preventive, ameliorative and remedial measures as may be appropriate;

(f) such incidental, consequential or supplemental measures as may be necessary or expedient in connection with or for the purposes of the measures specified in clauses (a) to (e).

Section 18(2) The scheme referred to in sub-section (1) may provide for any one or more of the following, namely:--

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(h) any other terms and conditions for the reconstruction or amalgamation of the sick industrial company;

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(m) such incidental, consequential and supplemental matters as may be necessary to secure that the reconstruction or amalgamation or other measures

mentioned in the scheme are fully and effectively carried out.

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"Section 18(3)

(a) the scheme prepared by the operating agency shall be examined by the Board and a copy of the scheme with modification, if any, made by the Board shall be sent, in draft, to the sick industrial company and the operating agency and in the case of amalgamation, also to any other company concerned, and the Board shall publish or cause to be published the draft scheme in brief in such daily newspapers as the Board may consider necessary, for suggestions and objections, if any, within such period as the Board may specify.

(b) The Board may make such modifications, if any, in the draft scheme as it may consider necessary in the light of the suggestions and objections received from the sick industrial company and the operating agency and also from the transferee industrial company and any other company concerned in the amalgamation and from any shareholder or any creditors or employees of such companies:

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Section 18(4)

The scheme shall thereafter be sanctioned as soon as may be, by the Board (hereinafter referred to as the "sanctioned scheme") and shall come into force on such date as the Board may specify in this behalf:

Provided that different dates may be specified for different provisions of the scheme.

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"Section 19. Rehabilitation by giving financial assistance

19. Rehabilitation by giving financial assistance. (1) Where the scheme relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial company, the 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, a public financial institution or State level institution or any institution or other authority (any Government, bank, institution or other authority required by a scheme to provide for such financial assistance being hereafter in this section referred to as the person required by the scheme to provide financial assistance) to the sick industrial company.

(2) Every scheme referred to in sub-section (1) shall be circulated to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation or within such further period, not exceeding sixty days, as may be allowed by the Board, and if

no consent is received within such period or further period, it shall be deemed that consent has been given.

(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 from the date of such sanction the scheme shall be binding on all concerned.

(3-A) On the sanction of the scheme under sub-section (3), the financial institutions and the banks required to provide financial assistance shall designate by mutual agreement a financial institution and a bank from amongst themselves which shall be responsible to disburse financial assistance by way of loans or advances or guarantees or reliefs or concessions or sacrifices agreed to be provided or granted under the scheme on behalf of all financial institutions and banks concerned.

(3-B) The financial institution and the bank designated under sub-section (3-A) shall forthwith proceed to release the financial assistance to the sick industrial company in fulfilment of the requirement in this regard.

(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.

13. In *Oman International Bank SAOG* (supra), the facts were that the petitioner Bank extended working capital credit facilities to the sick company; its persistent default in repayment of dues led to winding up notice. Recovery proceedings could not be initiated as the borrower was a sick company. BIFR appointed an OA which prepared a draft scheme for the revival of the sick company. Before approval of the draft scheme, the secured creditors had a detailed joint meeting to consider the scheme before it was submitted to BIFR. Despite general agreement that the company could be revived, there was some disagreement in respect of the mode of settlement with secured lenders. The petitioner Bank did not favour any settlement with the company and sought permission to proceed against the company after obtaining permission in terms of Section 22(1) of SICA. BIFR overruled the objection of the petitioner and sanctioned the scheme, which resulted in the petitioner filing an appeal before AAIFR contending that u/s 19(4) of SICA, BIFR is not empowered to sanction the scheme when no consent was given by the Bank. This Court held that a conjoint reading of Section 18(3) (b), Section 19(1) and Section 19(4)

...shows that the other measures which are talked of in Section 19(4) would be the modification of a scheme in the light of the objections of a secured creditor, however, the same cannot mean that the objections can prevent the drawing up and implementation of a sanctioned scheme by an obdurate minority secured creditor. In fact, we must point out that a company becomes sick only because its net worth is eroded and it is unable to pay its creditors and when we talk of

revival and rehabilitation of sick company as a first step and measure ordinarily and in a vast majority of cases, at the outset, BIFR has necessarily to bring about a composition between the creditors by bringing about reduction of their claims and dues of the sick company towards the creditors by adopting a principle which would treat the secured creditors fairly and equally, depending of course on the facts and circumstances of each case.

9. There is yet another reason why we cannot accept the arguments as urged on behalf of the petitioner that a single creditor can prevent BIFR in bringing about a scheme which envisages reduction in the dues payable by the sick company to its secured creditors. This additional reason is the amendment which has been brought about to SICA by Section 41 and schedule of the Act 54 of 2002 which amended Section 15 of SICA after promulgation of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. As a result of this amendment, a third proviso has been brought about in sub-Section (1) of Section 15 that the secured creditors who represent not less than 3/4th in the value of the amount outstanding against financial assistance disbursed to the sick company can bring about an abatement of proceedings pending before BIFR. This proviso reads as under:

Provided also that on or after the commencement of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where a reference is pending before the Board for Industrial and Financial Reconstruction, such reference shall abate if the secured creditors, representing not less than three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under sub-section (4) of section 13 of that Act.

A plain reading of this proviso added by the Act 54 of 2002 shows that the consent of at least 3/4th of the secured creditors is necessary for the proceedings before BIFR to abate. This proviso further brings into focus the legislative intent that a minority creditor cannot frustrate the proceedings before BIFR for rehabilitation and revival of the sick industrial company. The Legislature has thought it fit that at least 75% of the secured creditors must join hands to bring about an abatement to the proceedings before BIFR. If that be so, it cannot be understood as to how one secured creditor can in fact bring about an abatement of the proceedings before BIFR because giving of financial concessions by reducing the dues payable by a sick industrial company is always the heart and basic structure of any scheme for revival and rehabilitation of a sick industrial company. After all, if no financial concession in the form of reduction of dues payable by a sick company to its creditors is given, then, what will be the use of other measures u/s 18 such as change of management or sale/lease of assets of a sick company and so on. None of these other measures would in themselves help in rehabilitation and revival of the sick industrial company and which measures could have been adopted by the sick company

without being a sick company governed by SICA. It is for this reason that the Legislature has advisedly and intentionally used the expression "one or more" as found in Section 18, and which aspect we have already adverted to above that the Board may take one or more measures i.e. it is not confined only to one measure of refusing financial assistance by means of concession to a sick industrial company. Revival of a sick industrial company is a complex process involving discussions with secured creditors, other creditors, labour and other personnel employed with the company, dues of the revenue authorities and so on. If such complex procedure can be frustrated and set at naught by a single secured creditor, then, what is the purpose and use of enactment of SICA.

14. The Court also observed that:

11. There are two other aspects which we must note in support of the interpretation which we seek to give to Section 19(4) of the Act. The first aspect is that even when a company is not sick and proceedings are resorted to by the company u/s 391 to Section 394 of the Companies Act, 1956 to bring about a composition and settlement with its creditors, it is the majority of the secured creditors who do prevail, meaning thereby minority secured creditors cannot frustrate a scheme which is propounded by the majority of the secured creditors. If a minority secured creditor cannot frustrate a scheme of composition u/s 391 to Section 394 of the Companies Act, 1956, there is no reason why a minority shareholder should be able to frustrate the revival and rehabilitation of a sick industrial company by refusing to accept a reduced amount and a statutory settlement which is brought about by approval of a rehabilitation scheme by BIFR as per the proposal of the operating agency and arrived at after duly considering the suggestions and objections of all the concerned stake holders including the creditors u/s 18(3)(b) of the SICA. SICA after all is for imposition of a valid statutory settlement which forms part of a sanctioned scheme. The second aspect is that by virtue of Section 529-A of the Companies Act, the dues of the workers are to be treated as equal to the dues payable to a secured creditor. Therefore, dues of even one of the workers can be in a manner of speaking be said to be the dues claimed by a secured creditor, but can it be contended that one worker can frustrate a rehabilitation and revival scheme as proposed by BIFR after duly taking into consideration the views, suggestions, objections and contentions of the majority of the workmen? Surely not. Therefore, in our opinion, a minority creditor or any minority group cannot frustrate the majority by putting a spoke in the wheel by objecting to the sanction of a rehabilitation and revival scheme of a sick industrial company so as to cause the frustration in the object of revival of a sick company...

15. In *Ashoka Organics (supra)*, the Bombay High Court had to contend with a fact situation where the creditor of a sick company refused to consent to the DRS; the company relied on a decision u/s 391 of the Companies Act and argued that since under that provision, the decision of a majority (of its creditors) was binding upon all the creditors, the reluctant minority creditor before BIFR could

nevertheless be directed to fall in line and accept the rehabilitation scheme (DRS). After reviewing the scheme and various authorities, the High Court rejected the argument, holding that:

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 contributors 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...

16. The above view received approval-though not directly-by the Supreme Court in *Tata Motors* (supra), where the concurrent application of SICA and the

Companies Act was ruled out; it was held that in view of the special nature of SICA's provision as well as the fact that it was enacted later than the Companies Act, the SICA prevailed over the Companies Act. The analogy drawn by Oman Bank SAOG (supra) with the provisions of the Companies Act, which enables a minority dissenting creditor's view to be overridden by that of the majority, therefore, is not apposite; in any case we notice that the reasoning of the Bombay High Court (which is in departure from the ruling in Oman Bank) found approval by the Supreme Court in Tata Motors (where the Division Bench had approved a scheme u/s 391 of the Companies Act, in a matter that was pending before the BIFR). The Supreme Court in the operative portion of its judgment held that:

We are, therefore, of the opinion that the judgment of the High Court cannot be sustained. We may furthermore notice that the decision of the learned single judge has 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). It is also not possible to harmonize the provisions of Sections 391 to 394 of the 1956 Act with the provisions of SICA.

For the views we have taken, it is not necessary to consider the other contentions raised at the bar.

Significantly, Tata Motors (supra) appears to have escaped the notice of this Court in Oman Bank (supra).

17. There is another dimension to the issue. In the present case, the question has to be seen also from the perspective of terms spelt out in the Consortium Agreement.

18. In the present case, the Consortium Agreement inter alia provided as follows:

3. Notwithstanding anything to the contrary contained in or arising out of or implied by the said Consortium Agreement and/* or the Joint Deed of Hypothecation and/or the Second Charge, it is hereby agreed and declared by and between the said Banks as follows:

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In the event of a member bank desiring to opt out of the consortium, it is hereby agreed to abide by the following:

(1) In the first instance, such member bank desiring to opt out and/or to reduce its share should offer its share to one or more amongst the other member banks in the consortium and/or to one or more new banks willing to join the consortium, and in the event of such share being taken up by either the existing members and/or new banks to be admitted into the consortium, such member bank will be permitted to either opt out or to reduce its share.

(2) In the case of a weak/sick unit, where a rehabilitation package is being formulated or has been formulated, a bank may opt out or reduce its share or

may not take the enhanced share provided other member banks or one or more new banks to be admitted are willing to take up its share. Such member bank opting out may also offer to other member banks and/or new banks to be admitted its shares by discounting of its debt. However, in the event of existing members and/or new banks to be admitted are not willing to take up such share or such discounted debt, the concerned bank should continue in the consortium with its existing facilities without demur and not delay the implementation of the package for revival/rehabilitation of such sick/weak units. Further, if a member bank does not take up its additional share for one reason or the other, the consortium of banks will have the right to defer the repayment, if any, due to that bank under the said package till such time as it takes up its due share or dues of the other member banks have been repaid in full.

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19. From the above, it is clear that the Consortium Agreement itself provided for review/opting out by a member bank and the consequence of such decision. These peculiar circumstances were not in issue before the Court in Oman Bank SAOG (supra). There is a larger issue in question which again was not considered in Oman Bank SAOG (supra). Though a bank, a secured creditor, enters into a consortium agreement with the other creditors (which may entail sacrificing its rights to the extent of recovering amounts/which are payable to it—a situation which is, by and large akin to the sacrifice which a secured creditor has to undertake under a scheme for compromise and arrangement u/s 391 of the Companies Act) in a DRS, something more fundamental is involved. Most rehabilitation packages cast an obligation upon the participating banks/creditors (who might be entitled to claim outstanding dues from the sick company) to not only forego some part of the interest liabilities or even accept a lumpsum settlement, but also to do something positive, i.e. to increase/enhance or continue with recurring funding of a venture which otherwise would be wound-up. The public interest in ensuring the revival and rehabilitation of industrial units, no doubt, cannot be lost sight of; however, at the same time, the contractual rights of the participating creditors, such as a bank (which is also answerable to its shareholders and depositors) to take a commercial decision on whether to continue to extend funding cannot be undermined. As noticed in the decision of the Bombay High Court in Ashok Organic (supra) and confirmed in different matters by the Supreme Court, the nature of scheme u/s 391 which can override the views of a minority shareholder or creditor is fundamentally different from that of the scheme under the SICA where the creditor may be called upon to make further payments or continue with existing credit limits, thus exposing itself to the real contingency of loss. It is in such circumstances that contractual rights where the consortium participants spell-out their inter se obligations and the consequences thereof have to be recognized and given effect to and there cannot be a blanket recourse to the power u/s 19(4). Such power may be appropriately invoked in the given circumstances of a case.

20. In view of the above discussion, in the present case, since the consequences of opting out from the Consortium Agreement were factored in by the participating secured creditors, this Court is of the opinion that neither the BIFR nor the AAIFR could have compelled the petitioner Bank to continue in the DRS. The result of its opting-out would mean that it would stand out in respect its rights to realize the outstanding dues from the sick company, which would be postponed in terms of the Consortium Agreement with the other secured creditors. The impugned order is accordingly set aside. The writ petition has to succeed and is allowed without any order as to costs.