

(2010) 05 DEL CK 0135

In the Delhi High Court

Case No : O.M.P. 95 of 2010, I.A. No. 1826 of 2010, Arb. P. 287 of 2007, I.A. No. 9269 of 2007 and OMP 411 of 2007, I.A. 9268 and 11974 of 2007

M.K. Modi

APPELLANT

Vs

U.K. Modi

RESPONDENT

Date of Decision : 19-05-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 22(3), 5, 9

Income Tax Act, 1961 — Section 72A

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 26

Citation : (2010) 05 DEL CK 0135

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Dushyant Dave and Arvind K. Nigam, Vivek Sibbal and Bharti, for the Appellant; Rajive Sawhney Malini Sud, Deepak Khurana and Manisha Dhir, for the Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.—This common order will dispose of three proceedings an application u/s 11(6) of the Arbitration and Conciliation Act, 1996 (hereafter called "the Act", being A.A. 287/2007), and two petitions u/s 9 of the Act, bearing OMP 411/2007 and 95/2010. The parties in all the proceedings are common, i.e. Sh. M.K. Modi (hereafter referred to as "M.K.") being the petitioner and Sh. U.K. Modi (hereafter referred to as "U.K.") being the respondent.

2. The undisputed common facts emerging from the pleadings are as follows. M/s. Modi Industries Limited (hereafter referred to as "MIL"), a company in which both the parties, i.e. M.K. and U.K. have significant equity shareholdings, applied for reference under the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), before the Board for Industrial and Financial Reconstruction (BIFR) in 1990. On 14.03.1991, the BIFR declared MIL to be a "sick company". The MIL thereafter explored various options for its revival. Apparently, a scheme was prepared in 1993 and approved by the MIL's Board of Directors and submitted to

BIFR. However, the BIFR issued a Show Cause Notice for the winding up of the company, in 2005. That order was impugned before this Court, which suspended its operation. The order was appealed against, to the Appellate Authority for Industrial Reconstruction (AIFR).

3. In the background of these proceedings, M.K. and U.K. entered into a Memorandum of Understanding (MoU) on 17.11.2006. The primary concern of the MoU was the liquidation of liabilities of MIL and the future course of action for its revival, and management. It is not disputed that in terms of the MoU, two units, called as the SPV I and SPV II were to be created; they were to be exclusively administered by one party each, i.e. M.K. and U.K. These units, SPV I and SPV II were entrusted with 3 and 6 units of the MIL. In terms of the MoU, six of such units were to be managed by M.K, and three were to be managed by U.K. The other broad features of the MoU were that U.K. and M.K. were to be the Managing Directors of MIL; (60% of the said company's, (i.e. MIL's) corporate assets were to be controlled by U.K. and 40% were to be controlled by M.K). The share of liabilities was also to devolve in the same ratio.

4. The important terms of the MoU, which included Clause 26 that envisioned a dispute resolution mechanism are extracted below:

XXXXXX XXXXXX XXXXXX BIFURCATION OF MIL INTO SPV I/SPV II AND RESIDUAL MIL

1. It is agreed that MKM shall take six units of MIL presently under his control and management. Likewise, UKM shall take the three units under his control and management. The Corporate Office assets and liabilities including contingent liabilities, which are not identified with any unit as also the value of the shares held by the two subsidiary Companies shall be shared in the ratio of 40% and 60% respectively in value between MKM and UKM.

2. To give effect to this agreement

(a) MIL will be split into three parts as under:

(i) Special Purpose Vehicle (SPV) I consisting of six units of MIL presently being managed and controlled by MKM along with their assets including lands and buildings presently in their possession) and their liabilities whether crystallized or uncrystallised (contingent) but excluding their identified secured liabilities of the Financial Institutions (IFCI, IDBI, LIC, GIC and its subsidiaries), Allahabad Bank and the Debenture Holders on "as is where is" basis. SPV I will also take over certain specified assets presently held by the C.O. as given in Annexure A. SPV I will be taken over by MKM in the manner as provided in Clause 3 below.

(b) Special Purpose Vehicle (SPV) II consisting of the three units of MIL presently being managed and controlled by UKM along with their identified assets (including land and buildings presently in their possession and their liabilities whether crystallized or uncrystallised (contingent) including the secured liabilities of the six units, i.e. of the Financial Institutions (IFCI, IDBI, LIC, GIC and its

subsidiaries) Allahabad Bank and Debenture Holders on "as is where is" basis. SPV II will also take over certain specified assets presently held by the C.O. as given in Annexure B along with the entire liabilities of C.O. towards Debenture holders, liability of redeeming the preference shares and Fixed Depositors. SPV II will be taken over by UKM in the manner as provided in Clause 3 below.

XXXXXX XXXXXX XXXXXX 3(a) SPV I and SPV II will be created in a manner so as to give MKM majority control (xxxx not legible) in SPV I and UKM majority control (51%) in SPV II and also ensure that there is no interference by any other Third Party including any Modi family member in SPV I and II. The scheme for ensuring the above will be prepared by a professional(s) to be jointly appointed by MKM and UKM.

(b)The intention of the parties is that neither MKM nor UKM would hold any shares in each other's SPVs. However, if as a result of the restructuring, any shares in each others SPV accrue/remain with either MKM or UKM, the same will be transferred in the other on mutually agreed terms. In the event of no agreement being arrived at on this issue, MKM or UKM will be free to sell their respective shares in each others SPV's in the market in accordance with the principles of first right of refusal.

XXXXXX XXXXXX XXXXXX 5. SPV I and SPV II shall be entitled to the assets of the residual MIL in the ratio of 40:60 respectively. Similarly, they will be responsible to pay the liabilities including contingent liabilities crystallized and uncrystallized of the residual MIL in the ratio of 40:60.

XXXXXX XXXXXX XXXXXX 8. UKM will lead the negotiations with the Financial Institutions, Banks, Debenture holders and Fixed Depositors and Preference Shareholders (wherever common outstandings/dues are involved) and try to arrive at a One Time Settlement and obtain payment terms in the best advantage of MIL. Sri R.P. Khosla, Corporate Adviser of Modi Industries will be fully associated with all such negotiations. MKM may, where he considers it necessary, nominate a representative to assist with such negotiations.

9. A scheme for the rehabilitation of MIL, incorporating the OTS settlement and separation/split of MIL on the above lines, will be got prepared by a professional(s) appointed for this purpose jointly by MKM and UKM. The said scheme would be forwarded to the OA/BIFR for its approval, after its approval by the Board of Directors of MIL. Further neither party shall henceforth submit or pursue any separate scheme for the rehabilitation of MIL and if any scheme is submitted by a third party, the same shall be jointly opposed by both MKM and UKM.

XXXXXX XXXXXX XXXXXX 22. In the event of the assignment of the secured debt of MIL, UKM will ensure that such securities as may be required by the assignee of the debt will not include the assets of the six units under the management of MKM. If for any legal reason vacation of a charge on the six units cannot be implemented, UKM will ensure through appropriate procedures that the various

rights in respect of the assets of MIL accruing to the assignee do not apply to the six units under the management of MKM. The assignee of the Debt will have no right to change the structure of the Board or appoint any Director to the Board of MIL and SPV I. Further, the Assignee will not be given the right of conversion of Loan into equity of MIL. The six units shall have the right to sell/mortgage their assets in any manner they deem fit. For transparency purposes the assignment will be finalized in consultation with MKM.

23. MKM and UKM will jointly try and get the charge on the assets of the six units released at the earliest.

XXXXXX XXXXXX XXXXXX 26. In case of any dispute or difference between the parties relating to or touching upon any clause of the Agreement or implementation thereof such dispute or difference shall be referred to a person mutually appointed by UKM & MKM, whose decision will be final and binding on the parties hereto.

XXXXXX XXXXXX XXXXXX

5. It is contended that the MoU is subject matter of challenge before this Court by Sh. B.K. Modi and Sh. D.K. Modi, in Suit No. 2712/1998 through applications in pending proceedings; the attempt of those applicants to seek restraint of the MoUs was not successful, against which they approached the Division Bench. The Division Bench (submits M.K) did not interfere with the refusal of injunction by the learned Single Judge. It is submitted by M.K. that one Sh. R.P. Khosla, Corporate Advisor of MIL had acted as Coordinator between him, M.K. and U.K. and by his letter of 24.11.2006, formed a Committee of Executives comprising of representatives of both groups to facilitate implementation of the agreement. M.K. submits that the Committee met on two occasions and its minutes were duly recorded by the Company Secretary and G.M. Corporate Affairs (of MIL). It is contended in all particulars a proposal, based almost exclusively on the contents of the MoU were jointly placed by M.K. and U.K. before the MIL Board of Directors, for approval, on 08.11.2006, which concurred with them and directed their implementation and restructuring of the Company. Reliance is placed upon minutes of meeting of the Board of Directors dated 08.12.2006. It is also stated that the Operating Agency (OA) appointed by BIFR, i.e. IDBI was informed of this development whereby the MoU was arrived at through letters dated 15.12.2006 and 20.12.2006. M.K. submits that in a hearing before the BIFR (after its previous order issuing Show Cause Notice in 2005 was set aside and the matter was remitted for reconsideration) he (M.K) confirmed that he stood by the agreement/MoU but also indicated that its implementation depended on support and concurrence of his brothers and cousins. M.K. further submits that any proposal for assignment of any debt of MIL to UK or his group companies? control, in terms of the MoU, was unacceptable as it violated Clause 22. In these circumstances, BIFR, on 12.03.2007 directed the promoters of MIL to submit a fully tied up proposal.

6. M.K. alleges in the application for appointment of arbitrator as well as in OMP 411/2007 that on 30.05.2007, U.K. sought to resile from the Agreement/MoU and indicated that he would not perform his obligations. It is submitted that having acted upon the proposal, made statements before the BIFR, and even submitted the proposals jointly with M.K. before the Board, U.K. could not have turned around and submitted as he did, that the arrangements under the said agreement were not binding on him and that they stood frustrated. For these reasons, M.K. seeks a direction from the Court for appointment of arbitrator in terms of Clause 26 of the MoU.

7. In OMP 411/2007, (which was preferred on the same day as AA 287/2007), almost identical allegations are made. It is contended that M.K. was under the impression that in terms of the MoU, discussions were being held by U.K. with financial institutions, towards restructuring of MIL for the benefit of both the parties. M.K. submits that instead of doing that, U.K. committed to significant proposals of IDBI and other secured lenders (of MIL) assigning debts in favor of his group companies or nominees, clearly contravening Clause 22. M.K. also mentions about his readiness and willingness to adhere to the terms of the MoU and also that he, by his letter dated 03.06.2007, asked U.K. to either withdraw the letter dated 30.05.2007 or agree for appointment of an arbitrator. M.K. also avers about the AIFR order of 05.06.2007 (in Appeal 167/2007), suspending operation of BIFR order, and directing the parties, including financial institutions, banks and MIL to maintain status quo. It is argued that having regard to these background circumstances, U.K. should be restrained from submitting any separate claims or proposals for rehabilitation of MIL in contravention of MoU and also injunct it from giving effect to any separate claim or proposal to that effect.

8. During the pendency of the proceedings, an application, an application, I.A. No. 11974/2007 was moved by M.K. seeking to restrain assignment of debt by IDBI, favoring SBEC Sugar Ltd, which is a group company of U.K., and controlled by the latter. This Court had, by an order dated 12.10.2007, directed the parties to maintain status quo in respect of the MoU.

9. OMP 95/2010 reiterates the factual narrative in the other two proceedings, adding about the assignment of debt to the IDBI. It seems to have been triggered by U.K.'s proposal to assignment of debt of MIL by the IFCI in favor of another group company allegedly owned by him. It is submitted that IFCI, one of the creditors of MIL had sought clarification by moving I.A. No. 3349/2008 in respect of the status quo order vis ? vis MoU, made on 12.10.2007 in OMP 411/2007. M.K. alleges that despite this Court not having made any orders on that request, the IFCI proceeded to act unlawfully and attempted to assign MIL's debt to a group company of the respondent. It is contended that in these circumstances, U.K. should be restrained from creating, effecting, acting upon or acting in furtherance of any assignment of debt of MIL by IFCI or seek any benefit from such transaction after it is made in favor of any company or corporate entity under or controlled by him, his nominees or his group

companies. A similar restraint order is sought in respect of assignment of debt of MIL by LIC, GIC, Standard Chartered Bank or any other creditor of MIL.

10. M.K., arguing through his learned senior counsel, Sh. Dushyant Dave and Sh. Arvind Nigam, submitted that the MoU dated 17.11.2006 constitutes a binding and enforceable agreement, which was acted upon by the parties. It is argued that in concert and in furtherance to the MOU, M.K. and U.K. cooperated in the creation of a Committee of Executives, who represented their interests in the MIL. It is submitted that the Committee took decisions for the effectuation of the MoU. The Minutes of Meeting of the Board of Directors of MIL is also relied upon, to say that the company and all parties had agreed to give full effect to it. M.K. argues that having regard to the pattern of shareholding of the parties in MIL (M.K.'s shareholding being 18% and U.K.'s shareholding being 7.5%), the MoU created enforceable rights that were to be strictly adhered to as between both of them, to bring the company back into shape. An important component of this package was that U.K. would on behalf of MIL and M.K. lead the negotiations with the financial institutions as part of his assigned duties, for the MIL. Yet there was an in built check on him; in that the rights of M.K. in the MIL, either in the assets or the liabilities, towards third parties, could not be dealt with in such a manner as to cause prejudice. Particular emphasis is placed upon the stipulation in Clause 22 of the MoU that the assignees would not be given the right of conversion of loan into equity and that units under the control of M.K. would have the right to sell or mortgage their assets as deemed appropriate, and further that any assignment in respect of the said units were to be finalized only in consultation with M.K.

11. It is argued that having regard to the intention of the parties, U.K. was delegated only with the power to negotiate with third party financial institutions with the overall objective of settling MIL's liabilities, but not so as to prejudice other shareholders' rights, which would invariably have been disturbed, if he (U.K.) contrived a situation by which the financial institutions assigned MIL's debts to companies controlled by him. It is argued that the fabric of the settlement embodied in the MoU has been disturbed by U.K.'s endeavor to have MIL's debts assigned to his group companies; the specific instance of IDBI, IFCI and PNB assigning their debts to U.K. controlled companies, such as SBEC Sugar and SBEC Bio Energy Ltd. is highlighted. Learned senior counsel argued that in terms of the settlement with IDBI, MIL's outgoings were only Rs. 12.32 crores; IDBI's real outstandings were Rs. 83 crores. The benefit of the compromise really accrued to U.K. since his share of the amount payable was Rs. 8.3 crores, as against the M.K.'s liability of Rs. 3 crores. It is argued that similarly, the debt liability towards PNB was settled at Rs. 28.13 crores, of which the entire outgoings were from U.K. whereas M.K. had settled his liabilities ten years ago. So far as IFCI is concerned, the one time settlement amount whereby the debt was assigned or settled (in favor of U.K.'s group company) was for a consideration of Rs. 7.75 crores. M.K.'s share of this worked out to Rs. 2.72 crores whereas U.K.'s share was Rs. 5.03 crores. These figures, say learned

senior counsel, clearly reveal that the real and true beneficiary of such transactions was U.K. and that he acquired control and hold over companies and units in which M.K. had a substantial stake, thereby disturbing the balance which was the basis for the MoU dated 17.11.2006.

12. Learned senior counsel contend that having regard to the judgment of the Supreme Court in Punjab State and Others Vs. Dina Nath, there can be no doubt that Clause 26 constitutes a valid and binding arbitration agreement, which the Court has to respect. Having regard to the nature of disputes which have arisen between the parties, submits M.K., the Court should exercise its power u/s 11(6) of the Act and appoint an Arbitrator. It is also submitted that unless the interim orders sought for are granted, and U.K. appropriately injuncted from acting upon the arrangements arrived at with IFCI and IDBI and also directed not to be party to any of his group companies, exercising rights as assignees of the debts, the M.K.'s rights and interest in MIL, flowing out of the MoU would be gravely impaired, if not entirely extinguished.

13. In reply to the three proceedings, the U.K. argues that the MoU does not constitute a valid, binding and enforceable contract, as it was more in the nature of a nominal document or arrangement to stave off the impending winding up of MIL pursuant to the notice issued by the BIFR, in the year 2005. U.K. argues that AIFR's subsequent order, in 2006, reveals that the parties actively started negotiating about MIL's revival and that all jurisdiction over revival of the company is vested exclusively with the BIFR. It is pointed out that the kind of disputes which are sought to be referred concern the rights, not only of U.K. and M.K., but also other shareholders of the company, who are not parties to the agreement. It is argued that importantly, the Board of Directors did not sanction the MoU, which is relied upon by M.K., to agitate a so called dispute. In the absence of any endorsement, of such arrangement, neither is the company, nor are the shareholders bound by it.

14. Mr. Rajive Sawhney, learned senior counsel for the U.K. argues that besides the circumstance of the MoU arrived at between two shareholders to a company being intrinsically unenforceable by reason of exclusion of vitally interested parties, the entire subject matter of the agreement cannot be examined by a Civil Court, having regard to Section 26 of the SICA, which bars civil jurisdiction and vests exclusive jurisdiction over sick companies with the BIFR, which is tasked to explore all avenues for their revival and rehabilitation. It is submitted that the record reveals that an Operating Agency (OA) was appointed which is submitting and reacting to proposals, and furthermore, that both U.K. and M.K. as well as other shareholders and creditors are before BIFR, making pro active positive suggestions in this regard. This being the position, no agreement for inter se control of a company, which is under supervision of BIFR or subject to its control, can be subject matter of an enforceable agreement, and in any event, any disputes arising out of such arrangements are not arbitrable.

15. It is submitted that in any event, Clause 26 cannot be construed as an

arbitration agreement as it addresses MoU itself as premised upon a previous family arrangement of 1989. Learned Counsel submits that the Supreme Court had, in its judgment, reported as *K.K. Modi v. K.N. Modi* 1998 (3) SCC 593, clarified that the so called arbitration clause in the family arrangement of 1989 could not be construed as an arbitration agreement. Such being the position, the present MoU being only a species of that branch, can be no better. It is argued that the BIFR order dated 12.03.2007 was in fact, appealed against by the concerned authorities aggrieved, and that even as late as on 12.04.2010, it was observed by BIFR that a joint scheme by M.K. and U.K. was not possible. In these circumstances, argues U.K., neither does the Court possess jurisdiction over the dispute between the parties nor is the dispute per se arbitrable.

15. The previous discussion would show that the Court has to decide whether Clause 26 constitutes a binding and enforceable arbitration agreement; secondly, whether the bar u/s 26 SICA operates so as to prevent the reference to arbitration of such disputes, by the Civil Court and thirdly, that if the answer to the first question is in the affirmative, is the plaintiff entitled to the interim reliefs sought.

16. U.K.'s argument on the first question is that the MoU does not constitute a valid and enforceable contract since it was entered into only with the objective of presenting revival schemes in respect of MIL which is before the BIFR, for rehabilitation. M.K. obviously submits that the MoU constitutes a binding arrangement. There can be no two opinions that the nomenclature of a document is never conclusive; the description of the document in this case as a Memorandum of Understanding would not, therefore, conclude the issue. The Court would have to delve into its contents and discern whether it amounts to a valid and enforceable contract, containing the arbitration agreement.

17. The MoU refers to a previous MoU dated 24.01.1989, which was subject matter of the Supreme Court in *K.K. Modi's* case. It recites the desire of the parties to have mutually agreed terms for the management of MIL. Significantly the MoU records, in Clause 9, that the arrangement would be recorded jointly by M.K. and U.K., and forwarded to the O.A. for its approval after clearance by the Board of Directors. The MoU proposes that Special Purpose Vehicles SPV I and SPV II would be created for the purpose of future management. It, however, does not notice the shareholdings of the respective parties nor even reflect the rights and liabilities of other shareholders, who might or might not have a controlling interest. M.K. relies upon some minutes of meeting, held in December 2006, whereby proposals were put to the Board of Directors. It is claimed that the agenda note for the Board meeting in effect assimilates or incorporates the contents of the MoU. The agenda note and the Board Resolution are part of the record. However, the attention of the Board of Directors, to the MoU itself has not been drawn. The M.K. stresses upon the circumstance that the U.K. cooperated with him on the presentation of the proposal with the Board which cleared the agenda notice and also that his nominees were represented in two

Committee meetings, for submitting that the intention of the parties was to give effect to the MoU and not towards it merely as a reference paper.

18. A careful consideration of the MoU would reveal that the parties were conscious about the pending proceedings before BIFR. Though the documents do not refer to the pending proceedings, as a matter of fact, winding up notice had been issued in 2005, which was stayed, and the matter was referred back later, to the BIFR, for consideration. The Court is unclear as to the precise nature of shareholding of U.K. and M.K., but is expected to assume that either individually or put together, they had sufficient control to influence the functioning of MIL. The materials on record, on the other hand, disclose that the shareholding pattern as on 30.06.2007 reveal that M.K. Modi, his family and associated companies control 17.66% whereas U.K. Modi and members of the other group (including M/s. K.K. Modi, V.K. Modi and S.K. Modi) were controlling in excess of 29% of the shareholding. No doubt, Clause 22 mentions that the arrangements should be made and settlement made, if any, to be entered into by MIL could not prejudice U.K.'s rights in respect of the units over which he was agreed to be given control, under the MoU. Yet the Court is mindful of the fact that the entire question of rehabilitation of the company which had been declared as "sick" so far back as in 1991, was under the supervision of BIFR. In the circumstances, the BIFR could not be precluded from examining any number of proposals that involve control of any of the assets of MIL, including the nine assets mentioned in the MoU. Clause 9, in fact, is recognition of the fact that the entire gamut of the parties' agreed arrangement was to be subject to the approval of O.A./BIFR. It is nobody's case that the MoU constitutes what can be termed as family settlement; nor can it in its terms be so because none of the other branches of the family or any other shareholders within the family or outside of it are parties to it. In these circumstances, the terms of the MoU, to the extent they create so called rights, or place limitations on the freedom of choice of one or the other shareholder; cannot be said to bind them. In any event, they are not so binding as to preclude examination on the merits of any proposal by the BIFR. Such being the position, that U.K. or someone on his behalf took steps which could give the impression that the MoU was being implemented, would not, in the opinion of the Court, constitute an estoppel or admission to that effect. At best, the MoU constituted a proposal, which the parties consciously agreed to workout on, and later, if necessary, formalize with the approval of BIFR, into binding arrangements. In view of these observations, it is held that the MoU did not constitute a valid and enforceable contract; consequently, Clause 26 does not amount to arbitration agreement based on which a reference can be made.

19. So far as the second question is concerned, it would be necessary, at this stage, to extract the relevant provisions of SICA, which are as follows:

XXXXXX XXXXXX XXXXXX 26. Bar of jurisdiction. No order passed or proposal made under this Act shall be appealable except as provided therein and no civil court shall have jurisdiction in respect of any matter which the Appellate

Authority or the Board is empowered by, or under, this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

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

(2) Where there has been under any scheme under this Act an amalgamation of a sick industrial company with another company, the provisions of Section 72A of the Income tax Act, 1961 (43 of 1961), shall, subject to the modifications that the power of the Central Government under that section may be exercised by the Board without the Central Government under that section may be exercised by the Board without any recommendation by the specified authority referred to in that section, apply in relation to such amalgamation as they apply in relation to the amalgamation of a company owning an industrial undertaking with another company.

XXXXXX XXXXXX XXXXXX

20. Facially, M.K.'s submission that arbitration or civil proceedings as between him and U.K. do not concern any duty or liability of MIL, but are restricted to enforcement of obligations spelt out in the MoU appear to be attractive. However, the Court has ruled that the MoU does not have the force of an enforceable and valid contract. Besides, the terms of MoU are such that restrictions on the exercises of rights of one or the other shareholders to approach the BIFR, in pending proceedings, are envisioned. These stipulations limit the choices that the BIFR would then be left with; on the other hand, acceptance of the agreement would mean that one shareholder can compel the other shareholder not to approach the BIFR with proposals under SICA; which is contrary to the objectives of the said enactment. The public policy perspective underlined here which the Court cannot ignore is that every available proposal, from whichever source, i.e. shareholder, financial institutions or creditors, for the revival and rehabilitation of the company and relief, pouring in from any quarter; is obliged to be considered and explored. It is with that end that the jurisdiction of the Civil Courts stands barred. M.K. and the other parties were conscious of this and in fact elected to apply to the AIFR on more than one occasion. M.K. does not dispute that proceedings are pending before the BIFR and as recently as on 12.04.2010, certain proposals mooted for rehabilitation did not find favor.

21. The effect of operation of SICA, as juxtaposed to provisions of Arbitration

and Conciliation Act, 1996, were in fact considered by the Supreme Court in its judgment reported as *Morgan Securities and Credit Pvt. Ltd. v. Modi Rubber Ltd.* 2006 (12) SCC 642. Relying upon a previous decision *ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others*,) the Court held the contention that the provisions of SICA prevail over the Arbitration and Conciliation Act, 1996, in the following terms:

XXXXXX XXXXXX XXXXXX The non obstante nature of a provision although may be of wide amplitude, the interpretative process thereof must be kept confined to the legislative policy. Only because the dues of the workmen and the debt due to the secured creditors are treated *pari passu* with each other, the same by itself, in our considered view, would not lead to the conclusion that the concept of *inter se* priorities amongst the secured creditors had thereby been intended to be given a total go by.

A non obstante clause must be given effect to, to the extent the Parliament intended and not beyond the same.

Section 5 of the 1996 Act also provides for a non obstante clause. It has, however, a limited application aiming at the extent of judicial intervention. Its application would be attracted only when an order under Sub-section (3) of Section 22 is required to be passed. If the said provision is to be given effect to, the Board would not intervene in the matter of the implementation of the award. It would merely suspend the operation of it. It may even pass an order suspending the liabilities or obligations of the industrial company under the award. Even otherwise in the fact of the present case it stands suspended.

XXXXXX XXXXXX XXXXXX

22. The above view (that in the event a reference is made under the SICA, arbitration proceedings cannot continue) has been endorsed in *Jay Engineering Works Ltd. Vs. Industry Facilitation Council and Another*, . In view of these clear rulings, it is held that provisions of SICA prevail over the Arbitration and Conciliation Act, 1996 and that even if the Court were to hold that Clause 26 constitutes a valid and binding arbitration agreement, once a reference is made for rehabilitation or revival of a company to the BIFR, so long as proposals are subject to its exclusive power and jurisdiction, no disputes touching upon the management of such company (as MIL undoubtedly is) can be a subject matter of civil or arbitration proceedings.

23. This leaves the Court to consider the last question, i.e. whether assuming the MoU is a valid and enforceable contract, containing valid arbitration clause, if the interim orders sought for by the petitioner, M.K. should be granted. M.K.s heavily relies upon Clause 22 of the MoU to press his claim for interim injunction. At the cost of repetition, the Court notes that the said condition obliged U.K. to desist from assigning debts that comprise assets of those units under the management of M.K. The latter part of Clause 22 stated that the assignee of the debt would have no right to change the structure of the Board or appoint any Director to the

Board of MIL, SPV I; and that the assignee would not be given the right of conversion of loan into equity, of MIL.

24. At the centre of this area of dispute lie the conversion clauses, which empower MIL's creditors to opt for equity shareholding, in the event of default in payment of loans and other liabilities owed to them. Such conditions are commonplace enough and find mention in most financial arrangements between institutional creditors and corporate borrowers. Clause 22 comprises of two in the first, U.K., as the lead negotiator, is obliged to ensure that if there is any assignment of debt (of MIL), the same would not adversely impact upon M.K.s rights to six units forming part of SPV I, created under the MoU. The second part of Clause 22 visualizes that the assignee of such debt would not be entitled to exercise the option to convert debt into equity.

25. The Court has previously ruled that the MoU is not a binding and enforceable contract. This was premised on the Court's holding that the parties were alive to pending proceedings before the BIFR and further that the nature and content of the agreement was such as to preclude fuller examination of all options by the BIFR for rehabilitation of MIL. Now, there is no dispute that Clause 8 empowered U.K. to lead negotiations with the financial institutions/creditors of MIL and secure the most favorable terms for settlement of its liabilities. M.K.s objection here, to the settlement with IDBI and IFCI is not so much as to the terms or that the MIL's larger interest have been sacrificed as much as the fact that the control of six units assigned to him under the MoU would be disturbed. The Court is of the opinion that once it is conceded that the MIL is a "sick" company, subject to the orders of BIFR or any scheme approved and finalized by it, unless any shareholder or person interested in the company is able to point out that the interests of the MIL were sacrificed or that no favorable terms were negotiated, inter se arrangements between the shareholders appointed contrary to one or some units owned by the MIL would not constitute a dispute.

26. The Court is mindful of the fact that the nine units that are subject matter of MoU, are after all, assets of MIL to be used to its best advantage, having regard to the overall objectives, for its revival, rehabilitation or restructuring, as the case may be. At the present juncture, the question of what are the most favorable conditions for a revival scheme can only be a matter of speculation as there is a considerable fluidity on the aspect. The BIFR and indeed all other participating institutions and shareholders are left with every option. In this background, the assignment of debt of a creditor, who may choose to settle with MIL, has to be seen not from the perspective of one of its shareholders struggling to control it or one of its units, but from the perspective of the company itself. Whether the six units ultimately devolve on M.K. or are permitted to be transferred to him by the BIFR is a matter of conjecture, at this stage. The relief, however, is that three financial institutions have agreed to settle with MIL and assign their debts. The terms being favorable, the Court cannot injunct the assignee from exercising such of the entitlements flowing from such arrangement

if the larger interests of MIL are sub served through such assignment. The Court notes significantly that none of the assignees are parties, either individually nor through any nominated Director and that M.K. is seeking to secure a blanket injunction against such entities or corporate groups, by description. Such injunction is clearly not available, having regard to the overall circumstances.

27. In view of the above conclusion, the Court is of the opinion that the petitioner is not entitled to relief in any of the proceedings. OMP 95/2010, A.A. 287/2007 and OMP 411/2007 are accordingly dismissed with costs; the petitioner shall bear the costs quantified at Rs. 50,000/ for each of the proceedings, to be paid to the respondent, within two weeks.