
(2011) 07 BOM CK 0030

In the Bombay High Court

Case No : Civil W.P. No's. 6450, 6462, 6750, 6813 of 2010 with Civil Application No. 945, 940, 941 and 943 of 2011

NRC LTD. and Another

APPELLANT

Vs

Appellate Authority For Industrial and Financial
Reconstruction and Others

RESPONDENT

Date of Decision : 29-07-2011

Acts Referred:

Evidence Act, 1872 — Section 92
Industrial Disputes Act, 1947 — Section 18(3)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1), 16, 17, 17(1), 17(3)
Transfer of Property Act, 1882 — Section 53A, 54, 8
Urban Land (Ceiling and Regulation) Act, 1976 — Section 20, 20(1)

Citation : (2012) 169 CompCas 81 : (2011) 6 MhLj 873

Hon'ble Judges : U.D. Salvi, J;B.H. Marlapalle, J

Bench : Division Bench

Advocate : Sudhir Talsania, with R.V. Paranjape, Levi Rubens and Manisha Virkahre, V.A. Thorat, with K. S. Bapat and Vaibhav Sugdhare instructed by Desai and Desai Associates, Ms. N.D. Bitch Instructed by Ravindra Nair and Rahul Oak, Mrs. Gayatri Singh and Ms. Bhavana Mhatre and M.S. Singh Instructed by A.K. Singh in CAW 941 of 2011 in WP No. 6750 of 2010, for the Appellant; Sudhir Talsania with R.V. Paranjape, Levi Rubens and Manisha Virkahre, V.A. Thorat with K.S. Bapat and Vaibhav Sugdhare instructed by Desai and Desai Associates, Kamal Khata, Hiren Mehta, Parishrit Desai Instructed by S.N. Gupta and Co., Ravindra Nair, Iqbal Chagla with Naval Agarwal, Darshan Zaveri Instructed by B.R. Zaveri, A.B. Vagyani, AGP, Dhanesh Shah with Anand Singh and N.M. Ganguli (in CAW 945/2011 in WP No. 6462 of 2010, CAW 940/2011 in WP No. 6750 of 2010 and 943 of 2011 in WP No. 6813 of 2010), for the Respondent

Judgement

B.H. Marlapalle, J.—Respondent No. 1 is not a necessary party and it be deleted forthwith.

2. This group of petitions impugn the very same order passed by the Appellate Authority for Industrial and Financial Reconstruction in Appeal No. 182 of 2009

and Appeal No. 213 of 2009 on 28-5-2010 and hence they are being decided by this common judgment.

3. Rule. Respondents waive service. Petitions are finally heard by the consent of the parties.

4. The petitioner in the first petition is a company initially incorporated in the year 1946 in the name and style of "National Rayon Corporation Ltd." and its name was subsequently changed to "NRC Ltd." on 4-8-1994. It is engaged in the manufacture of viscos filament yarn (rayon), nylon tyre, nylon tyre cord yam (NTFC) and basic chemicals such as caustic soda, chlorine, sulphuric acid etc. and has a factory at Mohane, Kalyan, Dist. Thane. It was declared as a sick company in 1987 but its networth turned positive as on 31-3-1993 and, therefore, as per the order dated 10-1-1994 passed by the Board for Industrial and Financial Restructuring (BIFR) it was discharged from the purview of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short "SICA"). It claims to have undertaken expansion of its activities by pumping in about Rs. 86 crores but in the financial year 2005-2006 onwards it started incurring losses as there was severe reduction in the customs duty on import of nylon, the margins of the company were affected adversely, and there was a gradual erosion of the working capital and consequent financial crunch faced by the company and a consortium of five nationalised banks comprising of Punjab National Bank, Dena Bank, Canara Bank, Indian Overseas Bank and Bank of Baroda had sanctioned a term loan as well as working capital loan secured by the current assets as well as the fixed assets including the land. The total outstanding of this loan amount as on 31-3-2006 was approximately Rs. 147 crores. It claims to have intensified its efforts to dispose off the surplus land so as to bring in additional funds required for financial restructuring. It signed a Memorandum of Understanding on 13-4-2006 with Respondent No. 13 for the proposed sale of about 344 acres of land (at some places claimed to be about 350 acres), for a total consideration of Rs. 166.40 Crores. After obtaining the NOCs from the lending banks it signed an agreement for sale on 1-3-2007 which was registered on the very same day and a supplementary agreement on 29-9-2007 with respondent No. 13. On signing of the MOU it claims to have received Rs. 25 crores from respondent No. 13 and balance consideration of Rs. 141.40 Crores was to be paid as per the following installments :

(A) Second installment of Rs. 20 Crores payable as and when required to be utilised only to remove the first charge on the saleable land.

(B) Third installment of Rs. 48.90 Crores on receipt of Labour NOC, Kalyan Dombivli Municipal Corporation NOC, completion of fencing and the vacant possession of non colony land etc. and

(C) Fourth installment would be of Rs. 72.50 Crores.

5. However, it could not achieve its object of restructuring for improving the performance and to achieve positive results during the year 2006-2007 and,

therefore, on 25-5-2007 it submitted a proposal to the consortium for Corporate Debt Restructuring (CDR) under the CDR mechanism by using the land sale proceeds and the proposal was referred to the CDR Empowered Group of Punjab National Bank. In November, 2007 it discontinued the production activities of nylon plant.

On 21-1-2008 the CDR Empowerment Group approved the package for restructuring of the debts and even then it could not improve its financial business position for the financial year ending on 30th June, 2008. It noticed that there was erosion in working capital due to galloping losses incurred and, therefore, production of rayon plant was also stopped. In its efforts to control further erosion it claims to have signed a settlement with the recognised union on 5-9-2008 and in September, 2008 it declared an Early Retirement Scheme (ERS). It claimed that out of a total employment strength of 3725, about 577 employees opted for the said scheme. It started negotiations with Respondent No. 13 in September, 2008 for the payment of third installment of Rs. 48 Crores but the recognised union raised the issue of payment of bonus in October, 2008 and the labour unrest resulted in giving up the revival plans. It restarted the chemical plant.

6. However, on 3rd December, 2008 the company submitted an application u/s 15(1) of SICA for being declared as a sick company and the said application was registered as BIFR Case No. 55 of 2008. In January, 2009 respondent No. 13 declined to release the third installment of Rs. 48 Crores and, therefore, the company could not pay the legal dues of all the 577 employees who opted for ERS.

7. The BIFR passed an order u/s 17(3) of SICA on 16-7-2009, declared the applicant as a sick company and appointed the Punjab National Bank as the operating agency and fixed the cut off date as 30th July, 2007 as indicated in the CDR Scheme. The BIFR issued the following directions by the said order :-

(i) The Company shall submit a fully tied up DRS to the OA (Punjab National Bank) (PNB) within a period of three months. The sale of 350 acres of land stated to be approved by the CDR Empowered Group (EG) and the secured creditors may form part of the DRS. The details of the land to be sold including survey numbers should be clearly specified. The company shall give similar details of the remaining land and confirm that it is adequate for the functioning and viability of the company on long term basis. The OA (PNB) shall convene a joint meeting of all concerned and submit a fully tied up DRS, if it emerges, along with the minutes of the joint meeting within a further period of one month.

(ii) Bank of Baroda (BOB) shall submit an authenticated copy of the CDR scheme approved by consortium of banks within a period of 15 days.

(iii) PNB (OA) shall confirm to the Board within a period of 15 days under copy to the company that all the secured creditors who had charge over the land had approved sale of 350 acres of land belonging to the company at Kalyan, Thane

Dist. to K. Raheja Universal Pvt. Ltd. For a sum of Rs. 166.40 crore. The secured creditors who had charge over the land shall clearly indicate whether the company had obtained their approval before entering into MOU and agreement for sale of 350 acres of land with K. Raheja Universal Ltd. under copy to the company the OA (PNB) and the Board. Secured creditors shall also similarly submit copy of their approval for sale of investments, giving details of the investments. OA shall also submit copies of the approvals given by the secured creditors for the sale of the said land along with the copies of valuation report and the details of the valuer and the procedure followed based on which the sale consideration of Rs. 166.40 crores was arrived at. OA shall also submit copy of the approvals by secured creditors for sale of investment giving details of the investments. The company shall fully co-operate with the OA in furnishing the documents / details required by them.

(iv) The company shall submit within 15 days under copy to the OA (PNB) copies of the No Objection Certificates for sale of land and release of charge issued by all the charge holder lenders and the State Government in respect of 350 acres of land for which MOU and agreement of sale are stated to be entered into in 2006 and 2007 respectively with K. Raheja Universal Pvt. Ltd. under copy to the PNB (OA). The company should also submit certified copies of the MOU respectively along with certified copies of the Board resolutions of the company authorizing these transactions to the OA with a copy to the Board. The company shall similarly submit full details of the investments to be sold under the CDR scheme. It is reiterated that sale of assets including investments will require the prior approval of BIFR as the company is now under the purview of SICA.

(v) The company shall submit a copy of the clearance stated to have been received from Hon'ble High Court of Bombay for sale of 350 acres of land under copy to the OA (PNB).

(vi) The secured creditors are directed u/s 22(1) of SICA not to take any coercive action against the company without prior permission of BIFR.

8. Being aggrieved by the said order passed by the BIFR, two appeals as noted earlier, one by the company and the other by the respondent No. 13, came to be filed before the AIFR u/s 25 of SICA and consequently the impugned order came to be passed. The impugned order modified the order passed by the BIFR and partly allowed the appeals. The AIFR held that the BIFR could not have fixed 30-7-2007 as the cut off date. As per the AIFR, the BIFR failed to give any reasons to justify how it was in the public interest or in the interest of the company or its creditors / employees / shareholders to pass an order u/s 22-A of SICA that too when the company had already entered into an agreement for sale of land before the company became sick company and even prior to the filing of the reference. The BIFR did not consider the impact of section 22-A on the transactions, contracts/agreements entered into between the company and the third parties prior to the filing of reference when the company was not a sick entity. The agreement for sale of land is a subsisting and a continuing contract of

sale which is in the process of completion and even in the absence of conveyance and, therefore, it could not be held that the disputed land under sale is unencumbered. The provisions of section 22-A would not apply to the agreement for sale already entered into, registered and acted upon and is in the process of completion. But the BIFR failed to consider the settlement entered between the Management and the recognised union u/s 18(3) of the Industrial Disputes Act, 1947 on 5-9-2008 and the fact that all these employees were bound by the said settlement. Hence if any order passed u/s 22A would apply on all other assets of the company which are not part of the agreement for sale are absolutely and exclusively unencumbered assets of the company, the restriction imposed u/s 22A could apply to the remaining 103.15 acres and other assets of the company which were charged to the secured creditors and which are not subject-matter of agreement for sale. The AIFR further held that prior to the filing of the reference u/s 15 of SICA, a debt restructuring scheme under the CDR mechanism on 12-12-2007 and 21-1-2008, the CDR package envisaged sale of surplus land as well as sale of investments of the appellant company. Any restraint order on the sale of land, under the agreements for sale, would not only complicate the matter but would hamper the revival process and would also lead to a prolonged litigation between the parties and this will not be in the interest of revival of the sick company. The provisions of section 22A which are prospective in nature would not impact pre existing contract for sale entered into by the company before it filed reference u/s 15(1) of SICA and, therefore, the directions given u/s 22A will not apply to the agreement for sale dated 1-3-2007. The restraint order passed by the BIFR would apply to any subsequent proposals for disposal of assets of the company, if any. But these agreements will be subject to interim orders and final orders to be passed by the High Court in the pending writ petition challenging the settlement dated 5-9-2008. For all these reasons, the AIFR held that the agreement for sale cannot be part of DRS u/s 18(d) of SICA as the same is under transfer and unencumbered and legally enforceable contract exists between the appellant company and respondent No. 13. However, the AIFR held that the balance sale consideration in respect of the land to the tune of Rs. 124.64 crores receivable by the company from respondent No. 13 should form part of the means of finance in the DRS to be formulated by the BIFR for rehabilitation of the company. On payment of balance sale consideration by respondent No. 13, the same shall be deposited with an interest bearing NLA with the operating agency for utilisation as per the rehabilitation scheme to be sanctioned by the BIFR. The said scheme was for workers dues including Rs. 45 crores for ERS and appropriately crystallized amount for ex-employees dues as per the settlement dated 5-9-2008 with NRC Mazdoor Sangh. The AIFR further observed that if the BIFR considers it necessary to make payment to the workers as provided for in the agreement with the workers, before the sanction of the revival scheme, it could do so to alleviate the hardships of the workers.

9. Thus the last part of the AIFR's order directing to deposit the amount of Rs. 124.64 crores in interest bearing NLA with the operating agency is under

challenge in this petition filed by the company.

Whereas in Writ Petition No. 6813 of 2010 filed by some employees who were heard by the AIFR, challenge the impugned order for taking the land under the agreement for sale, out of the purview of section 22A of SICA and the petitioners pray for restoration of the BIFR order in its entirety. Writ Petition No. 6462 of 2010 has been filed by NRC Mazdoor Sangh which is a recognised union and Writ Petition No. 6750 of 2010 has been filed by the NRC Employees Union which mainly represents the office staff. Both these unions submitted before us that the efforts put in by this Court for bringing about an amicable settlement had crystallised in terms of an MOU signed with the company and the company had also agreed to earmark 18 acres of land for the proposed employees colony from the total land of 344/350 acres covered by the agreements for sale entered with respondent No. 13. As per both these unions, if this MOU is acted upon they would support the management in its challenge to the impugned order in Writ Petition No. 6450 of 2010. However, on failing to put in effect the said MOU, they would support the BIFR order directing the entire land covered by the agreement for sale to respondent under the purview of section 22A of SICA.

10. The preamble of the SICA makes it clear that it is an Act enacted by the Parliament to make, in the public interest, special provisions with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts of measures preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined and for matters connected therewith or incidental thereto. In the statement of Objects and Reasons it was stated, "It has been recognised that in order to fully utilise the productive industrial assets, afford maximum protection of employment and optimize the use of the funds of the banks and Financial institutions, it would be imperative to revive and rehabilitate the potentially viable sick industrial companies as quickly as possible. It would also be equally imperative to salvage the productive assets and realise the amounts due to the banks and financial institutions, to the extent possible, from the non-viable sick industrial companies through liquidation of those companies".

11. The SICA was amended by Act 57 of 1991 and thereafter by Act 12 of 1994 on 1-2-1994. By the second amendment section 22-A has been incorporated in SICA. As per section 15(1) of SICA where an industrial company has become a sick industrial company, the Board of Directors of the company shall, within sixty days from the date of finalisation of the duly audited accounts of the company for the financial year as at the end of which the company has become a sick industrial company, make a reference to the Board for determination of the measures which shall be adopted with respect to the company. As per section 16, the Board on receipt of such application may make such enquiry as it may deem fit for determining whether any industrial company has become a sick industrial company. The Board may appoint an operating agency which shall complete the

enquiry expeditiously. As per section 17(1) of SICA, if after making an enquiry u/s 16, the Board is satisfied that a company has become a sick industrial company, it shall, after considering all the relevant facts and circumstances of the case, decide, as soon as may be, by order in writing, whether it is practicable for the company to make its net worth exceed the accumulated losses within a reasonable time. As per section 17(3), if the Board decides under sub-section (1) that it is not practicable for a sick industrial company to make its net worth exceed the accumulated losses within a reasonable time and that it is necessary or expedient in the public interest to adopt all or any of the measures specified in section 18 in relation to the said company, it may, as soon as may be, by order in writing, direct any operating agency specified in the order to prepare, having regard to such guidelines as may be specified in the order, a scheme providing for such measures in relation to such company. Section 18 of SICA provides for preparation and sanction of the scheme in terms of the order made u/s 17(3) ordinarily within a period of ninety days from the date of such order and for any one or more of the following measures viz.

- (a) the financial reconstruction of the sick industrial company;
- (b) the proper 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;
- (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).

12. As per section 18(8) of SICA on and from the date of coming into operation of the sanctioned scheme or any provision thereof, the scheme or such provision shall be binding on the sick industrial company and the transferee company or, as the case may be, the other company and also on the shareholders, creditors and guarantors and employees of the said company. u/s 18(12) the Board may monitor periodically the implementation of the sanctioned scheme. u/s 21 of SICA the Board may for the proper discharge of its functions under the Act, through any operating agency, cause to be prepared with respect to a company, a complete inventory of all assets and liabilities of whatever nature as well as a valuation report in respect of the shares and assets in order to arrive at the

reserve price for the sale of part or whole of the industrial undertaking of the company or for fixation of the lease rent or share exchange ratio. u/s 22 of SICA the Board or as the case may be the Appellate Authority is empowered to suspend the legal proceedings, contracts etc. Under sub-section (3) of section 22 where an inquiry u/s 16 is pending or any scheme referred to in section 17 is under preparation or during the period of consideration of any scheme u/s 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified by the Board.

13. Section 22A has been inserted in the Act by an amendment brought into force from 1-2-1994. It states that the Board may, if it is of opinion that any direction is necessary in the interest of the sick industrial company or creditors or shareholders or in the public interest, by order in writing, direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets, during the period of preparation or consideration of the scheme u/s 18. The statement of objects and reasons for Amendment Act 12 of 1994 has set out the main features of the amendment proposed and one of them is to enhance the effectiveness of BIFR. The provisions of Chapter III and sections 15 to 22A of SICA are applicable to a sick industrial company, whereas section 25 of SICA provides for an appeal to be Filed within 45 days to the Appellate Authority against an order passed by the BIFR. The Appellate Authority has the powers to condone the delay, if satisfied of the reasons for such delay. Sub-section (2) of section 25 deals with the powers of the Appellate Authority and states that the Appellate Authority may, after giving an opportunity to the appellant to be heard, if he so desires, and after making such further inquiry as it deems fit, confirm, modify or set aside the order appealed against or remand the matter to the Board for fresh consideration.

14. In the instant case, the BIFR has set out the following reasons in para 2.10.1 of its order so as to bring the agreements between the company and respondent No. 13 within the ambit of section 22A of SICA. Said para 2.10.1 reads as under :-

2.10.1 Having considered the submissions made and the material on record, the Bench observed that there being no valid objections to the company's sickness from the parties present today and considering that the company fulfilled the various criteria for sickness under SICA, the Bench was satisfied that the company had become a sick industrial company in terms of section 3(1)(o) of

SICA. The company vide their letter dated 15-7-2009 has requested the Board to appoint Punjab National Bank as Operating Agency (OA). In view of this, the Bench noted that the provisions of section 18 of the Act would have to be explored in public interest in relation to the company. Accordingly, in terms of powers available u/s 17(3) of the Act, the Bench appointed Punjab National Bank as the Operating Agency (OA) with directions to prepare a revival scheme for the company, if feasible within an overall period of four months. The OA was directed to keep in view the provisions of section 18 of the Act and the enclosed guidelines and Checklist while carrying out this exercise. Meanwhile, it is necessary in public interest to protect the interest of the company, its creditors, employees, Government departments to whom dues are to be paid, share holders etc. and ensure that the assets of the company are used under the direction of BIFR. Accordingly, the company was directed not to dispose of, lease, sell or alienate except with the consent of the Board, any of its assets as per section 22A of SICA. However, if the unit is working, the current assets could be utilized for running day-to-day operations, subject to keeping proper records thereof and routing all transactions through the account with the company's financing bank(s) only. It is specifically directed that investments of the company shall also not be disposed of, sold or alienated without the prior permission of BIFR although the company may have classified investments under current assets. The cutoff-date (COD) for the scheme shall be taken as 30-7-2007 as indicated in the CDR scheme.

15. It is clear from the above reasoning that the BIFR examined the issue of public interest and noted that the provisions of section 18 of the SICA are required to be explored in public interest in relation to the petitioner-company and appointed the Punjab National Bank as the Operating Agency by invoking the powers u/s 17(3) of the said Act. It also considered the interest of the company, its creditors, employees as well as the Government Departments to whom dues were payable. It also considered the interest of shareholder and emphasized its responsibility to ensure that the assets of the company are used under the BIFR directions. This aspect of public interest or the interest of all the parties concerned has not been faulted by the AIFR in the impugned order. As per the AIFR, the Board was in error in bringing the surplus land sale transaction between the company and respondent No. 13 within the purview of section 22A and more so because the agreements were signed before the application was made to the Board on 3-12-2008. We have read the reasons set out by the AIFR to modify the order passed by the Board.

16. Mr. Talsania, the learned Senior Counsel appearing for the petitioner - company submitted that the reasoning set out by the Appellate Authority and its directions to deposit the entire balance amount of Rs. 124.64 crores so as to form part of the means of finance in a DRS to be formulated by the BIFR for the rehabilitation of the company, is self contradictory. As per him, the Appellate Authority in not allowing the entire amount of Rs. 124.64 crs. to be utilized for payment of the employees dues as well as for investment to make the factory

operation viable, even during the pendency of the reference, fell in gross errors. So far as respondent No. 13 is concerned, though it was an appellant before the Appellate Authority, it has not challenged the impugned order and it has been contended before us that on 17-8-2010 i.e. after the impugned order was passed, a supplementary agreement between the company and the said respondent was executed for delivering the possession of 272 acres of land on receipt of further amount of Rs. 32 crs. and the said agreement has been registered on 21-8-2010. Based on this agreement, respondent No. 13 claims to have taken possession of total of 270 acres of land on 17-8-2010. Mr. Chagla, the learned Senior Counsel appearing for respondent No. 13 urged before us that the transaction between the petitioner-company and the said respondent for sale of the land of 344/350 acres is a bona fide and transparent transaction. He pointed out that respondent No. 13 had released a public advertisement on 13-4-2008 regarding the said transaction and no objection was received. He also submitted that the transactions between the parties for the sale of the said land cannot be doubled and none of the forums below have, in fact, raised any doubts on the genuineness of the transaction. He also invoked the doctrine of part performance of the agreement u/s 53A of the Transfer of Property Act. He also submitted that the Board has no authority to nullify the agreements signed between the petitioner-company and respondent No. 13. So far as the price of the land is concerned, it was pointed out that valuations made were taken into consideration and after giving the discount, the sale price was fixed at Rs. 166.40 crs.

17. On behalf of the State of Maharashtra, the Deputy Collector and Competent Authority, Ulhasnagar Urban Agglomeration, Thane has filed an affidavit. It has been stated that from the land under the sale transaction, some land was found to be surplus and on an application submitted by the petitioner -company, an exemption u/s 20 of the Urban Land (Ceiling and Regulations) Act, 1976 was granted vide exemption order dated 16-7-1983. As per the said affidavit, the total land under exemption admeasures 12,21,471.89 sq.mtrs. and that the petitioner has not made full use of the land for industrial purpose. The petitioner cannot sell the land under transaction unless prior permission to that effect is obtained from the Urban Development Department of the Government of Maharashtra and the exemption granted u/s 20(1) of the ULC Act, 1976 has been protected by section 3(1)(b) of the Repeal Act. It has been also alleged that the agreement dated 1-3-2007 signed between the company and respondent No. 13 was against the provisions of section 5 of the ULC Act, 1976 and, therefore, it is illegal and void ab initio and not binding on the State Government. Reference has been made to the GR dated 23-11-2007 issued by the State Government and it has been stated that unless the company pays the conversion charges at a specified rates, the land under transaction cannot be allowed to be sold.

18. Two main issues arise for our considerations :-

(a) Whether the land covered by the agreement for sale signed on 1-3-2007 and

the supplementary agreement signed on 29-9-2007 is an existing asset of the petitioner-company?

(b) The scope of the powers of BIFR u/s 22(3) of SICA.

19. As per the Appellate Authority, the provisions of section 22A of SICA are prospective in nature and would not impact the pre-existing contract for sale entered into by the company before it filed the reference u/s 15(1) and, therefore, the directions given by the BIFR u/s 22A will not apply to the agreement for sale dated 1-3-2007 and consequently the restraint order passed by BIFR would apply to any subsequent proposals for disposal of the assets of the appellant-company, if any. The restrictions u/s 22A will apply only on the remaining 103.15 acres of land and other assets of the company. As per the Appellate Authority the provisions of section 22A will not apply to the agreement for sale already entered into, registered and acted upon in the process of transaction and had it been the intention of the legislature to cover the past transactions within the ambit of section 22A, the provision for suspension of existing contracts etc. would not have been provided under sub-section (3) of section 22 of SICA. Readiness and willingness of the parties to the sale agreement to honour the contract is also a paramount consideration, as per the Appellate Authority.

20. We are not impressed by the reasoning set out by the Appellate Authority so as to interfere with the order passed by the Board. Section 22A of the SICA empowers the Board to issue appropriate directions that may be necessary in the interest of the sick industrial company, its creditors, shareholders, in public interest, not to dispose off, except with the consent of the Board, any of its assets and this term "any of its assets" will have to mean, "any of its existing assets", as on the date the reference is made and the BIFR passes the order. Section 8 of the Transfer of Property Act deals with the operation of transfer, whereas section 54 of the said Act defines "sale" as a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. The said section also defines the term "contract for sale" and specifically states that it does not, of itself, create any interest in or charge on such property. In the case of *Bishundeo Narain Rai (Dead) By Lrs. and Others Vs. Anmol Devi and Others*, observed,

Section 8 of the Transfer of Property Act declares that on a transfer of property, all the interests which the transferor has or is having at that time, capable of passing in the property and in the legal incidence thereof, pass on such a transfer unless a different intention is expressed or necessarily implied. A combined reading of section 8 and section 54 of the Transfer of Property Act suggests that though on execution and registration of a sale deed, the ownership and all interests in the property pass to the transferee, yet that would be on the terms and conditions embodied in the deed indicating the intention of the parties. It follows that on execution and registration of a sale deed, the ownership title and all interests in the property pass to the purchaser unless a different intention is

either expressed or necessarily implied which has to be proved by the party asserting that title has not passed on registration of the sale deed. Such intention can be gathered by intrinsic evidence, namely, from the averments in the sale deed itself or by other attending circumstances subject, of course, to the provisions of section 92 of the Evidence Act, 1872"

Subsequently, in the case of Kaliaperumal Vs. Rajagopal and Another, , the Supreme Court stated,

It is now well settled that payment of entire price is not a condition precedent for completion of the sale by passing of title, as section 54 of the Transfer of Property Act, 1882 ("the Act", for short) defines "sale" as "a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised". If the intention of parties was that title should pass on execution and registration, title would pass to the purchaser even if the sale price or part thereof is not paid.....

Normally, ownership and title to the property will pass to the purchaser on registration of the sale deed with effect from the date of execution of the sale deed. But this is not an invariable rule, as the true test of passing of property is the intention of parties. Though registration is prima facie proof of an intention to transfer the property, it is not proof of operative transfer if payment of consideration (price) is a condition precedent for passing of the property.

After considering the above stated judgments, the Supreme Court in the case of Janak Dulari Devi and Another Vs. Kapildeo Rai and Another, observed,

10. Where the sale deed recites that on receipt of the total consideration by the vendor, the property was conveyed and possession was delivered, the clear intention is that title would pass and possession would be delivered only on payment of the entire sale consideration. Therefore, where the sale deed recited that on receipt of entire consideration, the vendor was conveying the property, but the purchaser admits that he has not paid the entire consideration (or if the vendor proves that the entire sale consideration was not paid to him, title in the property would not pass to the purchaser.

21. In the instant case, both the agreement for sale dated 1-3-2007 and the supplementary agreement for sale dated 29-9-2007 were on record before the Board as well as the Appellate Authority. We have gone through the terms and conditions of the said agreements. Undoubtedly, these are the agreements for sale and they are not sale deeds. We have also noted that the transactions are of conditional sale and it cannot be held that it is a concluded sale transaction passing on the title of the subject land to respondent No. 13 either on part payment or on full payment of the consideration. In fact, the Annual Report of the petitioner-company for 2007-2008, on the basis of which the application u/s 15(1) of SICA was moved before the Board by the company states as under about the status of the land covered by these two agreements :-

STATUS OF SALE OF LAND

The Company has received NOC from all lenders except one institution.

During April, 2006 the Company entered into a MOU with a leading developer in respect of 346 acres of land which is outside the battery limits of existing factory premises. Thereafter, in March, 2007 an Agreement for Sale (AfS) was entered into with the buyer and subsequently supplementary Agreement entered into on 29th September, 2007, subject to necessary approvals/clearances/permissions, etc. Agreement for Sale provides for total payment of Rs. 166.40 crs. In tranches, based on achievement of certain milestones stipulated in the AfS. Till date, the Company has received Rs. 41.85 crs., balance amount will be received after achieving the prescribed milestones, which include of getting NOC from Certain Govt. Agencies, vacating of colony and Conveyance and handing over the possession of the land. The Management is hopeful to complete the formalities within next few months.

22. It is thus clear that the company itself accepted in no uncertain words that the land under the agreements for sale continued to be its property/asset as on the day the reference application u/s 15(1) of SICA was submitted. Just because all the banks had given NOC for release of its charge on the subject land, it cannot be said that the Board was not empowered to bring the land within the ambit of section 22A of SICA. So long as it continued to be the asset of the company the Board has unfettered powers u/s 22A and all that it has to examine is the public interest, interest of the company, its shareholders and employees etc. The Board is a body of experts as is clear from the preamble of the Act and the scheme of section 22 and section 22A empowers the Board to take all such measures which, in the opinion of the Board, are necessary to bring the company out of its sickness and make it viable on implementation of the scheme framed by the operating agency. The Appellate Authority fell in gross errors in holding that the agreements were concluded / Finalised by the registered documents and, therefore the Board could not have exercised the powers u/s 22A of SICA. If the body of experts on the material available before it has exercised a discretion in respect of an existing property, in our opinion, the Appellate Authority ought to be slow in interfering with such discretion unless it was satisfied that the exercise of such discretion was against public interest or the interest of the company or the interest of the employees or the creditors or the shareholders or any other constituents of the company. In the case of U.P. State Sugar Corpn. Ltd. Vs. U.P. State Sugar Corpn. Karamchari Assn. and Others, , the Apex Court while dealing with the powers of the Board under sections 15 and 22A in Chapter III of SICA held, inter alia, as under :

...In respect of a sick industrial company the Board has been assigned a more active role in the sense that on receipt of a reference u/s 15 or upon information received with respect to such a company or upon its own knowledge about the condition of the company, the Board is required to make such inquiry as it may deem fit for determining whether an industrial company has become a sick

industrial company and under sections 16 and 17 the Board makes suitable order after completion of the inquiry and a scheme may be prepared and sanctioned in relation to a sick industrial company u/s 18. There is provision for rehabilitation by way of financial assistance in section 19 and express provision has been made in section 22-A empowering the Board to direct a sick industrial company not to dispose of any of its assets except with the consent of the Board during the period mentioned therein. In respect of a potentially sick industrial company the Board has been assigned a more limited role of requiring such a company to furnish periodic information as to the steps taken by the company to make its net worth exceed its accumulated losses. The Board can also require an operating agency to inquire into and make a report with respect to the matters specified in the order and on the basis of such report the Board may form its opinion that the company is not likely to become viable in future and that it is just and equitable that it should be wound up. There is no provision similar to section 22-A whereby the Board may direct a potentially sick industrial company not to dispose its assets. Such a power conferred u/s 22-A is restricted to a sick industrial company only.

23. Even otherwise also we have gone through the terms of both the agreements for sale i.e. the first agreement dated 1-3-2007 and the supplementary agreement for sale dated 29-9-2007. There is no condition in any of these agreements to hand over the possession of the land or part of it on receiving the part payments or full payments of consideration. The agreements do envisage that the ownership of the land would stand transferred to respondent No. 13 only on completion of all formalities and clearance by the competent authorities. In our considered opinion, therefore, the Board was fully justified in putting restrictions on the subject land as well and bringing it within the ambit of section 22-A of SICA. We, therefore, confirm the view taken by the Board and consequently the view taken by the Appellate Authority is unsustainable, and it is an overindulgence by the Appellate Authority.

24. Now coming to the second issue regarding the powers of the Board u/s 22(3) of SICA, there could be no dispute that the Board has no powers to annul an existing agreement between the parties i.e. the petitioner company and respondent No. 13. However, that by itself would not lead to a conclusion that the Board has no further powers in respect of a property which has been agreed to be sold by registration of an agreement for sale. Every case has to be considered by the Board in the peculiar facts and circumstances of that case with the sole intention to bring back the company out of its losses and make it a viable venture while protecting the public interest as well as the interest of all other constituents of the company. In the instant case the recovery of the Banks due from the company is in excess of Rs. 240 Crores and they are all nationalised banks. The remaining land i.e. land beyond the agreements between the petitioner company and respondent No. 13 is about 100 acres. It is not known as to the exact acreage available by way of surplus to dispose off from this 100 acres so as to raise additional finance. The petitioner was to receive Rs.

120.64 Cr (or Rs. 124 Crores) by way of balance consideration from Respondent No. 13. As per the company the payment due to the ex-employees and to the employees who opted for ERS works out to Rs. 55 crores. Admittedly the employees on the rolls have yet to receive their legal dues either as per the settlement which is under challenge before this Court or otherwise and it is the claim of the employees that the recovery of the employees' dues may be around Rs. 80 crores. During the course of hearing we were also informed that if the company has to become viable, its employees' strength has to be less than 2000 which means at least another 900 to 1000 employees will have to opt for ERS or for settlement of their legal dues on separation by any other mode legally recognised. We are informed by Mr. Talsania, learned Senior Counsel for the company that it requires Rs. 25 crores for revamping and Rs. 30 crores by way of working capital thus making a total of Rs. 55 crores and this figure is on the basis that the company was to receive Rs. 124 crores from respondent No. 13. When we asked as to what would be the realistic amount to make the company viable, we were informed that it needs a total of about Rs. 120 crores. If all these amounts are taken into consideration the petitioner - company requires more than Rs. 200 crores for being available at its disposal so as to venture into making it viable and make it operational. These are the figures which could not be disputed on the face of the record placed before us and if that be so, the amount of Rs. 124 crores which was expected to be received from respondent No. 13 may not take the company anywhere in its efforts for rehabilitation or restructuring. The company requires more funds and to be generated from its existing assets.

25. Before the Board as well as the Appellate Authority, it was submitted by the unions of employees that the consideration of Rs. 166 crores for the land under sale transaction was an underestimate and it was not a realistic market price for a total land of 344/350 crores, even if the land proposed to be reserved and admeasuring 18 acres for housing colony of employees, is deducted. Our attention was invited to the estimates received and placed before the Board as well. One estimate gives the market price of the said land at Rs. 220 crores whereas the other estimate gave the market price beyond Rs. 500 crores. The MOU for the transaction was in the year 2006 and the first public notice was issued by respondent No. 13 in April, 2008 inviting the objections. By the time the Board was considering this application for restructuring filed u/s 15 of SICA a period of more than 3 years had already gone by. The Board in its efforts to make the company viable is required to consider all the financial resources and keep in mind the possibility of no financial institution coming forward to provide for additional funds, so as to explore the internal resources like the assets and in that process we do not find any impediment in the powers of the Board to call upon the parties to vary the terms of the existing agreements between the petitioner-company and respondent No. 13. In section 22(3) of SICA, the Parliament has specifically used the words, "or shall be enforceable with such adaptations and in such manner as may be specified by the Board." The

language of section 22(3), therefore, aims at empowering the Board to modify the terms of existing agreements in respect of the assets of the company and, therefore, it would be permissible for the Board to take all such steps to ensure that the consideration of the land under sale is revised upwards. Ultimately the aim of the Board would be to make the company operations viable and in that regard the powers u/s 22(3) of SICA cannot be read in a restricted language.

26. We were informed that out of the total consideration, an amount of Rs. 76.26 crores has been received by the company and the balance consideration is Rs. 92 crores. The company and respondent No. 13 claim that they have signed one more agreement on 17th August, 2010 and pursuant to the same, respondent No. 13 has taken over possession of a total of 270 acres out of the land covered by the agreements. The order passed by the Board or the impugned order did not envisage any such step of signing the supplementary agreement so as to hand over possession of the land and in our view this development will have no bearing when the Board considers the scheme for restructuring and as would be framed by the operating agency, while exercising its power u/s 22(3) of SICA and the entire land covered by the two earlier agreements i.e. 344/350 acres continues to be an existing asset of the company.

27. In the premises, we quash and set aside the impugned order passed by the Appellate Authority, and consequently we confirm the order passed by the Board. We request the Board to take further steps expeditiously so as to implement the restructuring scheme by the company more so when its wheels have come to a stand still from November 2009.

28. Writ Petition Nos. 6462 of 2010, 6750 of 2010 and 6813 of 2010 are allowed. Whereas Writ Petition No. 6450 of 2010 is partly allowed. Rule is made absolute accordingly with no order as to costs.

29. In view of the above, Civil Applications stand disposed off.