

(2016) 01 DEL CK 0306

In the Delhi High Court

Case No : W.P. (C) 5010/2011, C.M. No. 8680/2015, W.P. (C) 5954/2011 and
W.P. (C) 5197/2011, C.M. Nos. 219, 3077/2012

R.R. Kabel Limited and Others

APPELLANT

Vs

Incab Industries Ltd. and Others

RESPONDENT

Date of Decision : 06-01-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 18
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 17(3), Section 18,
Section 19(1), Section 20(1), Section 22, Section 3(g)(a), Secti

Citation : (2016) 3 BankJ 289 : (2016) 1 BC 688 : (2016) 227 DLT 23 : (2016)
2 DRTC 243

Hon'ble Judges : S. Ravindra Bhat and R.K. Gauba, JJ.

Bench : Division Bench

Advocate : Ankur. S. Kulkarni, Anand Srivastava and Himanshu Bagdwal,
Advocates, for the Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.—1. These three writ petitions share common questions of fact and law in respect of the order of the Appellate Authority for Finance and Reconstruction ("AAIFR" in short) dated 30.06.2011 (hereafter "the impugned order").

2. M/s. Incab Industries Ltd. (hereafter "Incab") was a sick industrial company. It preferred a reference to the Board for Industrial and Financial Reconstruction (hereafter "BIFR") in October 1999. BIFR declared it a sick industrial company on 04.04.2000. The State Bank of India ("SBI") was appointed as the Operating Agency ("OA") under Section 17(3) of the Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA") to examine feasibility of its revival and to that end, submit a rehabilitation scheme. This task encountered several impediments. As there was no viable rehabilitation scheme in sight, BIFR had directed the OA to issue an advertisement for change of management. Discussions to revive the

scheme continued; eventually Incab's original promoter, on 11.12.2002, offered during the hearing before BIFR, to transfer their shares, free of cost, to a new promoter selected in that regard by the OA and approved by BIFR. The BIFR, on 19.03.2004 expressed its prima facie opinion that Incab should be wound up under Section 20(1) of SICA. Later, on 24.09.2004, it directed publication of advertisements vis-à-vis change of management of the company (Incab).

3. Four proposals were submitted by the following companies for rehabilitation of Incab: Silver Jubilee Infrastructure Ltd. (SJIL), R.R. Kabel (RRK) Land Lease Co. Ltd. (LLC) and Pegasus Asset Reconstruction (P) Ltd. (PARL). Except RRK, i.e., the petitioner, which indicated a cut-off date of 31.03.2005, all other proposals envisioned different cut-off dates (COD). Those proposals were assessed by the OA, which conferred with the promoters. There were BIFR hearings as well, where it was directed that there should be negotiations with the workers' unions and secured creditors. The petitioner, RRK, had, in the meanwhile, deposited different amounts aggregating to Rs. 25 crores on various dates (21.03.2006, 21.04.2006, and 09.05.2006) in a No lien account under directions of the BIFR. RRK preferred an appeal against the order of 12.04.2006 by BIFR (directing re-negotiation of the dues of workers and secured creditors) before AAIFR (Appeal No. 110/2006). AAIFR directed maintenance of status quo to restrain secured creditors from creating third party rights. In this background, third party entities i.e. Kamala Mills Ltd. Fasqua Investment (Pvt) Ltd. (who according to some of the contesting respondents, i.e. Tata Steel Ltd. are sister concerns of RRK) acquired the debts of various secured creditors as assignees.

4. PARL (the Respondent No. 34 herein), filed Application No. 220/2006 impugning the assignment of debt by the creditors of Incab in favour of the third parties. The AAIFR disposed of the appeals pending before it, on 22.09.2006, directing BIFR to consider revised proposals of the four parties, which had submitted DRS. This order was impugned in three writ petitions, (W.P.(C) 942/2007 by RRK; W.P. (C) 2865/2007 by PARL and a workers' union) before this court. This Court, in its order dated 23.04.2007, permitted Tata Steel Ltd. (TSL) to furnish the draft rehabilitation scheme (DRS). On 09.04.2009, this Court disposed of the petitions pending before it, holding that BIFR had to consider the proposals of RRK and TSL. The Court had observed, inter alia, that:

"15. All the three proposals which are purported to have been submitted by the three parties essentially raise the question as to which scheme is the best and for the larger benefit of the workers of the company which has been lying closed since 1995 and has now got embroiled into litigation....."

XXXX XXXX XXXX

38. The BIFR would take into account while evaluating the schemes inter alia:--

"... .."

(b) Which of the two schemes protects the interests of the workmen better by

taking into account

(i) The payment of arrears of wages.

(ii) The wage packet and security of service.

(iii) Whether retrenchment is contemplated and if so of how many?

(c) Even if the petitioner R.R. Kabel's proposal is not found acceptable, then the amount invested by them not only in purchasing 85% of the secured debts but also the amount invested by them in the sick company has to be returned to the petitioner at the option of the petitioner with reasonable interest by the party chosen by the BIFR for reviving the company."

5. RRK filed its scheme - a third one, on 23.04.2009 pursuant to the directions of this Court. TSL and PARL felt aggrieved by the order of this Court (dated 09.04.2009) and filed SLP Nos. 12104-06/2009 and 11598 and 11600/2009 before the Supreme Court. The Supreme Court, issued directions by order dated 14.05.2009 to the BIFR to consider all three proposals (i.e. RRK, TSL and PARL). The Supreme Court also kept open the issue of validity/legality of the assignment of debt. The said special leave petitions are pending. The Supreme Court indicated that an important component of BIFR's consideration would be the interests of workers who were to be heard.

6. After the orders of the Supreme Court, hearings took place before the BIFR on 02.07.2009, 19.08.2009 and 22.09.2009. In these proceedings the BIFR allowed several workers' associations to join the proceedings if they so desired subject to furnishing of proof that they were recognized unions of the sick company. On 01.09.2009, the OA furnished its report (hereafter "the first report"). In its opinion, the scheme of TSL was the best and the interests of the workers would be well protected under that scheme. In the hearing which took place on 22.09.2009 before the BIFR the coram was represented by Mr. K. Cherian Verghese, Chairman, Mr. Pawan Raina, Member and Mr. Nirmal Singh, Member. On that date, the BIFR considered the report of the OA dated 01.09.2009 and directed the OA - (a) to give a further report in a tabular form setting out the parameters, (b) to hold a joint meeting with all the concerned parties and (c) submit a further report containing the valuation of the three proposals from RRK, TSL and PARL in terms the parameters indicated by the Supreme Court.

7. The OA conducted a joint meeting on 20.10.2009 and through its report dated 26.10.2009 gave its comprehensive and comparative analysis of all the three schemes. It re-iterated its earlier view that the TSL's scheme was best suited and the future of the workers of the sick company would be secure with TSL whose proposal was the best so far as their interest and their job security was concerned. The OA noted that the schemes propounded by RRK and PARL were not worthy of consideration; RRK's scheme was such that the net worth of the sick company could not become positive and PARL had no experience in running a manufacturing unit as it was only an asset reconstruction company. The OA

also noted that the motive of RRK and PARL appeared to be to grab valuable real estate of the sick company as was evident from their proposal to sell the immoveable assets of the sick company to finance their schemes, which invited strong objections from the workers. Compared to this, TSL did not propose to sell any of the immoveable assets to finance their rehabilitation scheme. Such was the gist of the report, dated 26.10.2009.

8. The report was submitted to the BIFR which held a hearing on 12.11.2009. On this date, the parties opposing TSL's scheme objected to the OA's report upon which the BIFR directed them to file written objections. The OA as well as the sick company were directed to give their comments on the objections received. Mr. K. Cherian Verghese, Chairman, Mr. Pawan Raina, Member and Smt. Saroj Bala, Member represented the coram of the BIFR. The parties submitted their respective written objections to the report of the OA. On 20.11.2009 the OA submitted its comments to the objections raised by RRK and PARL to the BIFR in compliance with the BIFR's order dated 12.11.2009. On 24.11.2009 the BIFR held a hearing in which the coram was of Mr. K. Cherian Verghese, Chairman and Mr. V.K. Malhotra, Member. It considered the report dated 26.10.2009 of the OA, the objections of the parties to the same and sought further clarifications from the parties. The OA was directed to reconcile the figures mentioned in the report and to recast the report and submit a supplementary report. Accordingly, the matter was adjourned to 30.11.2009.

9. On 27.11.2009, the OA furnished its supplementary report of the same date in which also it made clear that the scheme presented by TSL was the best on all the parameters, including the protection of the interest of the workers. The BIFR sought written submissions to the report of the OA dated 27.11.2009 and also sought clarifications from the three propounders as well as from the OA. All were directed to give their objections/clarifications by 02.12.2009. The OA was required to give its views on the clarifications given by the propounders. It was declared by the BIFR on that date that its decision would be announced on 09.12.2009. On 02.12.2009 RRK, PARL and others opposing the scheme of TSL submitted their respective exhaustive written submissions to the BIFR. On 07.12.2009, the OA by its letter of the same date, gave its comments to the written submissions of the parties opposing the scheme of TSL.

10. On 09.12.2009, the BIFR considered the three revival proposals, heard the worker's unions and took into consideration all the reports of the OA and passed a comprehensive final order, holding that the scheme submitted by TSL was the best amongst the three bidders and satisfied all the parameters set by the Delhi High Court and the Supreme Court. Accordingly it directed TSL to submit its Draft Rehabilitation Scheme in terms of Section 18 of the SICA within a prescribed period. The BIFR directed that:

"3.6.1.....The Board permits Tata Steel Ltd. u/s. 18 of SICA to submit a fully tied up draft rehabilitation scheme (DRS) to SBI (OA) within a period of 10 weeks as per enclosed guidelines and checklist. The cut-off date is to be taken as

31-03-2005 as ordered by the Board in the hearing held on 24-09-2004. The COD is not changed in view of the implications it may have on the obligations to be met by the company and the pending litigation. The creditors of the company are directed to maintain status quo and not to assign their dues of identified creditors..."

11. Appeals were preferred to the AAIFR by RRK and two of its workers' unions supporting it against the order passed by the BIFR on 09.12.2009; RRK's appeal was Appeal No. 16/2010. An appeal was also filed by PARL on 27.07.2010. The Supreme Court directed BIFR to hear all the six appeals on day-to-day basis from 01.09.2010. Hearings were concluded by the AAIFR on 09.05.2011 and judgment was reserved. Before the AAIFR the appellants, with regard to the merits of the rival schemes took several pleas. One of the contentions urged before the AAIFR by the appellant was that the Bench of the BIFR which passed the final order on 09.12.2009 (impugned in appeal before the AAIFR) was not the Bench, which heard the entire proceedings and therefore could not have passed the final order. TSL resisted the contention by submitting that it is not possible for the same members to hear the proceedings before BIFR since the proceedings go on for several years during which members of the BIFR regularly change on account of retirement etc. By a majority order, the AAIFR rejected the said contention of the appellant. As far as the merits of the rival schemes are concerned, the Chairman of the AAIFR took the view that the OA did not act as an independent agency in considering the three schemes and did not record its findings properly on proper evaluation of the schemes; accordingly he remitted the matter to the BIFR with the direction that it should consider the three schemes afresh objectively. The two members (the majority view) were of the opinion that the appeals lacked merit. As a result of the majority opinion, the appeals were dismissed.

12. RRK has preferred a writ petition (W.P.(C) 5010/2011) aggrieved by the order of AAIFR; the All India Incab Industries Employees Federation has preferred W.P.(C) 5197/2011 and the Incab Shramik Sangh - another workers' union has preferred W.P.(C) 5954/2011. PARL had preferred its writ petition, i.e. W.P.(C) 5971/2011. This writ petition was allowed to be withdrawn, by order dated 08.07.2014 and PARL was permitted to withdraw the Rs. 25 crores deposited pursuant to its bid/proposals. The writ petitioners urged a preliminary submission earlier, in the course of the proceedings, i.e. that the BIFR's order had to be set aside because it was decided by a coram (or bench) which had not heard the matters. These preliminary objections were heard and rejected by a judgment, delivered on 24.04.2014. A review petition was preferred against that order; the review petition was rejected on 16.04.2015. In the meanwhile, the Supreme Court had required that the present petitions be heard and disposed of within three months of commencement of hearing. RRK has apparently approached the Supreme Court, aggrieved by the order and the review order, rejecting its contention as to the preliminary submission with respect to coram.

RRK's contentions

13. RRK urges - both in its pleadings, and the submissions made on its behalf by Mr. Rajiv Nayyar, learned Senior Advocate, that the procedure adopted by BIFR is illegal because there was no common cut-off date on the basis of which a fair comparison of the rival DRS could be carried out. Such a cut-off date (COD) in every rehabilitation scheme is essential for reckoning the assets and liabilities of a sick company for the purpose of its rehabilitation proposals and assessing the worth of competing schemes. The lack of a common cut-off date, it is submitted, means that the rival schemes are not assessed on one set of criteria, but varying assumptions rendering the procedure unfair, and the results, inchoate. Besides, it can tend to be inherently unfair: in this case, more so, because TSL was permitted to bid much after the initial bidders had furnished their proposals; its COD is 31.03.2008 as opposed to an earlier COD by RRK (31.08.2005). Counsel refers to and relies on the joint meeting of the OA dated 25.08.2009 which noted the wide differences between the parties as to the cut-off date and that BIFR should fix one common COD. The subsequent meeting with the OA on 24.11.2009 indicated that the previous joint meeting noted the need to disclose figures of dues of creditors as on 31.03.2005 and the contemporaneous dues. It is urged, in this context, that RRK had moved an application (MA 150/2009) for fixing a common COD; BIFR in its order of 12.10.2009, it is submitted, stated that this aspect would be decided in the final hearing. However, BIFR's final order (dated 09.12.2009) did not advert to the matter at all. At the same time, it accepted TSL's DRS, based on a different COD (31.03.2008), even while giving it time to submit a fully tied up scheme with COD at 31.03.2005.

14. Mr. Nayyar argues that RRK had urged this ground (of different cut-offs) before AAIFR and also made submissions on this aspect. However AAIFR erroneously concluded that different CODs would not lead to any prejudice and that it was a "condonable technical flaw". The view of the Chairman (i.e. the minority opinion), he urged, correctly concluded that differential CODs was unfair and the BIFR's order had to be set aside.

15. It is next argued by RRK that TSL relied on an "Equalization" chart to overcome the inherent disparity of different CODs. This document (equalization chart) never saw the light of the day during BIFR proceedings and was submitted to the AAIFR during the hearings, for the first time in November 2010. As it was not part of the pleadings, the AAIFR should not have taken cognizance of it, leave alone have relied on it, for its findings and conclusions. Learned counsel also emphasized that there was no occasion for the OA to analyze the said equalization chart; no findings were recorded as to the facts mentioned therein. RRK also contests the methodology relied on for preparing the equalization chart.

16. It is next submitted that the views of secured creditors have not been taken into account. In this regard it is submitted that RRK has a support of 85.25 of the secured creditors of Incab. Here it is stressed that M/s. Kamla Mills, i.e., respondent No. 55 is secured creditor to the extent of 62.12% of the principal amount and 48% of the interest amount due; likewise Fasqua Investment Ltd.

(respondent No. 39) is secured creditor to the extent of 6.71% of the principal amount due and 12% of the interest amount due. RRK itself is secured creditor to the extent of 16.42% of the principal and 25% of the interest. Thus, the overwhelming amounts are due to RRK and its associate concerns, whose views were not taken into consideration. This was essential given the fact that the assignment of debts of Incab by the secured creditors was in fact upheld in the judgment of this Court of 09.04.2009 in W.P.(C) 942/2007. The appeal arising out of the SLP no doubt is pending before the Supreme Court. However, the assignment of such debts has not been disturbed which means that the secured creditor's views were to be considered. Such views were also to be taken note of by the OA and AAIFR in the impugned judgment. On the merits of this submission it is urged that the TSL's scheme contemplates a write off or discount off of 50% of the principal dues of the secured creditors. It is argued that for any scheme to be validly sanctioned by the BIFR, consent of all secured creditors is essential and no fully tied up scheme can be submitted by the TSL without the consent of all secured creditors. This question was specifically averred but not considered either by the BIFR or the AAIFR.

17. Learned counsel for the RRK argues that the BIFR did not objectively consider the relevant factors while assessing the merits of the rival schemes. Apart from the COD, there were glaring contradictions in the TSL's scheme. The BIFR's order dated 09.12.2009 reflected the TSL's internal approval at Rs. 1168 lacs. This was contrary to TSL's scheme wherein the cash flow statement was shown at Rs. 477 lacs. Clearly, there was a shortfall of Rs. 691 lacs. Secondly, urges the counsel, the OA had similarly in its report of 24.10.2009 recorded that the cost of the TSL's scheme did not tally with the means of finances but at the same time stated that Rs. 1168 lacs would be met by TSL out of his internal approvals. The figures, however, did not tally as there was a shortfall of Rs. 691 lacs. It was next argued in this context that the TSL's scheme was completely a self serving one and prejudicial to the interest of the workers, shareholders and creditors. As against the write off/discount of 50% of secured creditors' dues, TSL proposed to appropriate and pay itself 100% of its principal dues as unsecured creditor. As far as other unsecured creditors were concerned, TSL's scheme proposed a pay to the extent of 25% only of such dues. Even the 100% payment was sought to be made by conversion of 50% of the principal dues payable by the Incab into 11% cumulative preferential shares and converting 50% of the principal dues into interest bearing loans repayable from 3rd year from the date of sanctioning of the scheme, i.e., before the net worth turned positive. All these established beyond any doubt that TSL meant to help itself as an unsecured creditor and consequently its scheme was self serving one.

18. Mr. Nayar submits that against this the RRK's scheme was better suited to sub-serve the interest of the stake holders such as workers, unsecured creditors and shareholders. RRK has signed a Memorandum of Understanding ("MOU") with Labour Unions in Jamshedpur and Kolkata, both registered and recognized Unions, and also expressly committed that there would be no retrenchment of

workers. In contrast, TSL stated that employees' separation scheme would be offered to workers of Jamshedpur, Kolkata and Pune to optimize the work force to the right size. Furthermore, RRK had committed in its MOU that none of the Incab's assets would be sold unless workers' payments and dues and of secured creditors were settled. In contrast, again TSL's proposal contained a condition that employees shall not deter the new Management from disposing off the unproductive assets and leasing out of his premises. It is lastly argued that the RRK's scheme contemplates compensation for closure period to workers at Rs. 20,000/- per year and payment of 100% last drawn wage in terms of settlement dated 28.10.1998 and promises a fresh settlement within 3 - 6 months. It also holds out a promise of payment of gratuity, provident fund and other dues. None of these vital aspects were considered by the AAIFR. It is urged that consequently the impugned order has to be set aside.

Contentions of TSL

19. TSL argues that as of March 2006 there were four schemes; by RRK (with COD 31.08.2005); PARL (COD-31.03.2006); LLL (COD 31.3.2006) and SJIL (COD 31.3.2006). SJIL, LLL and PARL later withdrew. Counsel argues that RRK was well aware that the other rival proposals had different CODs but insisted that its scheme was the best, and that others' proposals should be rejected; it litigated on this ground alone before the BIFR, AAIFR and before this Court in W.P. (C) 942/2007 from 2006 to 2009. TSL points out that in the course of these proceeding, RRK never complained once that the differential COD could prejudice its scheme on merits. That apart RRK revised/improve its scheme but persisted with COD as 31.08.2005. TSL relies on a chart to demonstrate this aspect, which is reproduced below:

20. It is stressed that RRK had opportunities to revise its scheme in 3-1/2 years but persisted with the same COD (31.08.2005). On 12.10.2009. RRK filed an application was filed before BIFR because PARL had filed a revised scheme, and that it be allowed to file a revised scheme. Also RRK additionally asked BIFR to fix uniform COD. After 12.10.2009, three hearings took place before BIFR on (i) 12.11.2009, (ii) 24.11.2009, (iii) 30.11.2009 and judgment was pronounced on 9.12.2009. It is submitted that in none of those three hearings did RRK agitate the issue of a uniform COD. In the two hearings (ii) 24.11.2009, (iii) 30.11.2009 BIFR directed the proposers to file written submissions and RRK filed substantive and detailed written submissions before BIFR on (i) 16.11.2009 and (ii) 02.12.2009. In these two written submissions it did not urge the issue of a uniform COD. It is pointed out that after 12.10.2009, RRK only once took the plea regarding COD in a letter addressed to OA dated 27.10.2009. In the said written submissions (dated 27.10.2009) RRK did not demonstrate how its scheme was prejudiced because of differential COD given by the parties.

21. TSL argues that the BIFR in the hearing dated 24.11.2009 on its own raised the issue of differential COD of the parties but RRK did not pursue it and was in fact unable to answer BIFR's queries. The BIFR's order dated 24.11.2009

directed the sick company to provide to the OA and it (BIFR) details of the principal amount due to the creditors as on 31.03.2005 as COD fixed. RRK objected during the hearing nor thereafter filed any submissions on the issue. Subsequently BIFR in its order dated 30.11.2009 granted a final opportunity to all the three proposers and the sick company to file written submissions. RRK filed such submissions on 02.12.2009 but did not raise the issue of uniform COD. Thereafter, BIFR pronounced the final order dated 09.12.2009 confirming the opinion of OA and rejecting RRK's scheme. TSL submits that these facts show that that RRK itself gave up the issue of COD after taking at the belated stage, therefore, this issue of COD at the appellate stage is not maintainable.

22. It is argued further that the question of COD has no relevance as held by the AAIFR in paras 44(ii) because firstly Incab has been lying closed for several years since 2000. Despite directions by the BIFR and OA from time to time to the sick company to prepare ABSs since year 2000 till date the accounts have not been prepared and audited. In the absence of audited accounts the actual debts of secured creditors as confirmed by the secured creditors were adopted by OA, Consequently, the COD becomes irrelevant because parties do not have any audited figures to rely upon. Both TSL and RRK have provided for 100% waiver of interest. Therefore, the variation in the COD did not have any impact on the secured creditors. Secondly in so far as the assessment of workers' arrear of wages are concerned, no imbalance is created by differential COD as RRK has not proposed any amount payable towards arrears of wages whereas TSL has proposed to pay lump sum wages for the closure period. A similar offer has been made for all other components of workers' dues, provident fund, employees' cooperative society, gratuity etc. as parties have adopted to pay amount on lump sum basis. Thirdly, the bulk of the dues of the secured creditors have been assigned to Kamala Mills (KML), Fasqua, RRK and PARL (around 85%) in spite of status quo of the AAIFR. TSL states that the Supreme Court, by order dated 14.05.2009, directed OA/BIFR to evaluate the three rival schemes keeping aside the issue of assignment of secured debt. The Supreme Court, inter alia, directed:--

- (i) Interest of the sick company and workers are of paramount importance.
- (ii) OA/BIFR to evaluate the three rival schemes uninfluenced by the observations of the High Court.
- (iii) The issue of validity of the assignment shall be decided by Supreme Court if need arises.

In view of the order dated 14.05.2009 alone the issue of support of 85% of the creditors is irrelevant.

23. TSL relies on this Court's order of 09.04.2009 which held that in case RRK's scheme is not accepted then the party selected by the BIFR would refund the cost of 85% assigned secured debts. RRK and other assignees have not appealed against the said order. Therefore this part of the order has attained finality. This

Court observed as follows:

"38. The BIFR would take into account while evaluating the schemes inter alia:--

"... .."

(b) Which of the two schemes protects the interests of the workmen better by taking into account

(i) The payment of arrears of wages.

(ii) The wage packet and security of service.

(iii) Whether retrenchment is contemplated and if so of how many?

(c) Even if the petitioner R.R. Kabel's proposal is not found acceptable, then the amount invested by them not only in purchasing 85% of the secured debts but also the amount invested by them in the sick company has to be returned to the petitioner at the option of the petitioner with reasonable interest by the party chosen by the BIFR for reviving the company."

24. It is submitted that RRK has been unable to show any prejudice caused due to differential COD. RRK had at least four opportunities to revise its scheme and last revised scheme was filed in April 2009 i.e. after the order of the Supreme Court entitled it to adopt a later COD like in the case of PARL. It is argued that RRK's scheme showed that Incab's net worth was not becoming positive. Its scheme in any case was doomed to failure.

25. TSL urges that RRK's contention that the equalization chart was a new document introduced before the AAIFR for the first time is misleading. TSL prepared the chart to make good its argument that a different COD did not caused any prejudice to RRK. The figures mentioned in the equalization chart were derived from the schemes of RRK, TSL and PARL. TSL explained that the different CODs adopted by the three proposers would not make any difference to the evaluation of the scheme for the purpose of selection of the best proposer for the revival of Incab. The principles adopted in preparing the equalization chart took into account the figures as appearing in the scheme of RRK filed with the OA on 23.04.2009 with cut-off date being 31.08.2005. The same figures were assumed to be proposed by both TSL and PARL and payment as proposed by TSL and PARL in their respective schemes were adopted. This showed that TSL's proposal, even on the basis of RRK's assumptions of 31.08.2005 as COD, is higher.

26. Regarding the contention of RRK that it has the support of 85% of the secured creditors, it is stated that Supreme Court directed the BIFR in its order dated 14.05.2009 to evaluate the three rival schemes keeping aside the issue of validity of assignments and uninfluenced by the observations of this Court. The assignment issue is to be decided by the Supreme Court if the need arises. Therefore, the order of this Court upholding the validity of impugned assignments of debts with regard to the evaluation of the schemes got eclipsed

and the OA, BIFR and AAIFR did not avert to this issue. RRK or any party for that matter did not approach the Supreme Court for vacation or modification of order dated 14.05.2009. Therefore, the contention of RRK of having support of 85% of the secured creditors is irrelevant in the given facts.

27. Mr. Arvind Nigam, learned senior counsel argues that in any case RRK, Kamala Mills and Fasqua do not fall within the definition of "secured creditors" in Section 19(1) of SICA. Therefore, their consent is inessential, prior to sanctioning of the Scheme under Section 18 of SICA. TSL argues further that RRK has till date not produced any document (s) relating to assignment of debts and have not given the exact amount of debts assigned. This fact can be ascertained from para 2.4 (i), and para 2.14 (iv) of order dated 24.11.2009 wherein BIFR sought clarification from RRK to clarify the exact amount of debts assigned to it and its associates. The BIFR further stated that mentioning of mere percentage will not be meaningful; the cost and means of the scheme cannot be arrived at. Thereafter BIFR directed RRK to clarify the position. RRK's figure that it became the assignee to the tune of 85% of the secured debts is doubtful in terms of BIFR's observations. In any case this matter is pending before the Supreme Court, therefore, BIFR and AAIFR were correct in ignoring the issue.

28. It was argued by Mr. Arvind Nigam, learned senior counsel that TSL was owed the sum of Rs. 2371.97 crores and that other unsecured (sundry creditors) were owed Rs. 40 crores. The manner of repayments is an aspect which was left best to the judgment of the expert which are the OA and BIFR. Learned counsel stressed that according to the OA, in its submissions of 26.10.2009, RRK's net worth could not become positive during the period of rehabilitation. BIFR accepted this position. In fact OA reiterated this issue before the BIFR. The object of the process - of handing over management to a willing purchaser with the ability to infuse managerial input and finance, is to achieve eventual net worth as defined by Section 3(g)(a) of the SICA. Learned counsel highlighted that the RRK's scheme entails right back or reserve which in no way enables its net worth but depletes the existing resources. The motive of RRK clearly was to strip Incab of its resources and dispose of valuable assets. It is argued that, on the other hand, TSL's proposals do not entail any selling of assets.

29. Mr. Vikas Singh, learned senior counsel appearing for one of the Unions supporting the TSL scheme, urged that RRK was flawed, to start with. He urges that the OA, BIFR and AAIFR all held that RRK's scheme disclosed that Incab's net worth would not turn positive. Regarding RRK's contention that if Rs. 20 Crores out of the Rs. 25 crores promoters' contribution is taken as equity in the net worth calculation then the net worth will get positive, it is urged that RRK had provided Rs. 25 Crores as promoters' contribution and in the Projected Balance Sheet for FY 2011-12 and 2012-13 a refund of Rs. 200 lakhs and Rs. 300 lakhs respectively of loan and has not shown increase in capital in any of financial year of the Projected Balance Sheet. Therefore, RRK's contention that Rs. 20 crores be treated as equity is unacceptable, being oblique.

30. On the merits of the schemes of TSL and RRK, a comparative chart outlining the details of the two schemes, report of OA and findings of BIFR and AAIFR on the parameters set for evaluation of the schemes to show that the scheme of TSL is reliable. It is further argued that RRK is nothing but a front for acquiring INCAB on behalf of real estate and investment companies, namely Kamala Mills Ltd. and Fasqua Investments.

Contentions on behalf of workers' union

31. It is argued by counsel on behalf of the workers' union in W.P.(C) 5197/2011 and 5198/2011 that the impugned order should be interfered with because the best interests of the work force were not kept in mind in accepting TSL's proposal. It is argued that there are existing settlements under Section 18 of the Industrial Disputes Act. The Pune plant is functional since 2009 and the Jamshedpur plant, on the other hand, is not functioning. The TSL's scheme, contrary to the Supreme Court's mandate intends to down size the work force which is detrimental to the objective of rehabilitation. It is highlighted that TSL in fact intends to outsource the work, contrary to the order of the Supreme Court. Furthermore, TSL's proposals are silent as to how the wage settlement would be dealt with - either honored or disregarded, given that Section 32 of SICA overrides all previous arrangements. Besides the seniority of service of the existing workers has not been assured. This is an important element to be kept in mind if TSL resorts to retrenchment or downsizing.

32. Learned counsel urges that the BIFR's order (dated 09.12.2009) especially paragraphs 3.6.1 and 3.6.2 clearly demonstrate that the consent of the important stake holders such as the workers was not obtained. Another aspect, according to the counsel, is that TSL had no experience with manufacturing and selling cables. It was lastly urged that the OA's report was not made available to workers and consequently the decisions of BIFR and AAIFR cannot be sustained as they were finalized without following the principles of natural justice.

33. Mr. Sandeep Sethi, learned senior counsel submitted that the DRP of TSL contemplates that dues of trade creditors would be written off fully and would not be paid to them. He submits that it is settled law that for writing off dues of any creditors under the BIFR Scheme their consent must be obtained, or else their dues are to be paid fully. He relies on *Continental Carbon India Ltd. Vs. Modi Rubber Ltd.*, 2012 (131) DRJ 294 (DB). It is submitted that there has been considerable passage of time of over 9 years since RRK furnished its scheme and over 6 years since TSL gave its scheme to the BIFR. Both were based on certain assumptions regarding assets' value and liabilities payable by the Company. With the passage of time, these assumptions changed significantly and thus the Scheme has become irrelevant. It is submitted that in view of increase in value of assets, if fresh offers are invited it is likely that interested parties may bid significantly higher for take-over of the Company which will ensure to the benefit of not only to the Company but its various creditors.

34. The Schemes were submitted by RRK and TSL at different points of time i.e. on 21.03.2006 and 22.05.2009 respectively. In terms of BIFR's directions for Change of Management (COM), the offers/DRS were to be submitted by interested parties within a period of 30 days. It was contemplated that all bidders would get an equal opportunity to bid against the others and thereafter bids would be evaluated by the OA and BIFR and the best bidder was to be selected for change of management. In the present case, TSL was permitted to give its bid in 2009 and at that stage the DRS/offer of RRK was in the public domain and fully known to TSL. In this view of the matter the sanctity of the bid process as contemplated by the BIFR was not maintained and the entire bidding process stands vitiated.

35. The BIFR had specifically directed that while submitting the DRS in response to the advertisement for COM, the interested parties would take a cut-off date of 31.03.2005. RRK assumed a cut-off date of 31.08.2005 in its DRS and TSL assumed the cut-off date of 31.03.2008 in its DRS. This was done without permission of BIFR and contrary to BIFR's direction. Therefore the DRP/offers had not complied with the directions of the BIFR and this vitiated the COM process.

36. The BIFR had while declaring the company to be a sick industrial company directed the OA to conduct a detailed techno-economic viability study (TEVS) of the Company, keeping in view the industry profile as well as perspective for the next 5-7 years with appropriate demand forecasting and taking into account competition faced from other units. It had also directed that the Company's proposal would be examined in the light of the TEVS of the unit as aforesaid. It is argued that when the bids were received in 2006 and 2009 from RRK and TSL respectively and evaluated by the OA thereafter, TEVS had become outdated. Furthermore, neither scheme was examined by the OA in the context of any TEVS. Consideration of DRS by the Operating Agency thus was not in consonance with the directions of BIFR and further, such consideration by the OA was only superficial and neither a detailed examination of the proposals nor are technically and economically feasible at all. It is submitted that the Scheme of TSL is neither complete/tied up. There are various errors and shortcomings in the Scheme. It significantly it provides unequal treatment to different creditors for the same class. It further does not have the consent of majority of the secured lenders. Therefore, the BIFR and AAIFR have both erred in approving the DRP of TSL as proper.

37. Responding to the submissions of TSL, it was argued on behalf of the RRK by Mr. Darpan Wadhwa, Advocate that the reference to the previous litigation and pleadings made therein (on behalf of the RRK) in the context of the COD are irrelevant. Here, it was urged that all previous litigations in the Courts were in the context of schemes propounded by the parties during 2005-06. It was stated that RRK never filed a revised scheme but merely resubmitted the same scheme. PARL was allowed to place new scheme on the record which was never

acquiesced but on the other hand protested. It was lastly urged that the secured creditors' views were not considered and that this constituted an important omission exposing the legality of the orders of BIFR and AAIFR.

Analysis and findings

38. The previous discussion would show that there is a chequered litigation history to the entire dispute. Recapitulation of the broad facts is essential. Incab was declared sick company in 2000; BIFR even expressed its prima facie view (in 2004) that given the nature of the proposals or the lack of them, it would be better (in its prima facie opinion) to have wound it up. An attempt was thereafter made to find a new promoter since the existing promoters volunteered to divest themselves, free of cost or at nominal cost, their existing share holding. In this initiative, four companies/concerns held themselves out: RRK, LLL, SJIL and PARL. Of all these, only RRK survives. In between, during the pendency of the proceedings before the BIFR, RRK felt aggrieved and approached the AAIFR in respect of the order made sometime in 2006. AAIFR directed maintenance of status quo enjoining the secured creditors from creating further rights. The RRK felt aggrieved and approached this Court. During the pendency of proceedings in this Court (in W.P.(C) 942/2007) at the behest of a workers' union, TSL was permitted to join the process by an order dated 23.04.2007. That order records as follows:--

"CM No. 5413/2007 in WP(C) No. 942/2007

This is an application moved by the (1) Incab Industries Employees Association, (2) The Indian Cable Workers' Union, (3) Incab, Graded Staff Association and (4) Cable Karamchari Union,

INTUC. The applicants representing these Unions claimed to have vital interest in the subject matter of the petition. By this application, leave for intervention in this petition is sought as also leave to approach Tata Steel Limited for rehabilitation and revival of Incab. Mr. Neeraj Kishan Kaul, learned senior counsel on instructions, submits that Tata Steel Company had been approached for rehabilitation of the Incab Unit.

Mr. Devashish Kundu and Mr. Tarun Banga, representing Tata Steel Limited for whom they state they had filed the Power of Attorney, also pray that 30 days' time may be granted to them to respond to the workers' request and make their concrete proposal, if any. It is made clear that any proposal made by them would be without prejudice to the rights and contentions of non-applicants and the four bidders, who claim that rights have already been accrued in their favour.

Learned counsel for the applicant submits that Tata Steel Co. Ltd. has the perpetual lease and responsibility for provision of basic amenities. The company has been lying closed since 1995. On the one hand, it is imperative that an expeditious resolution must be found to end this impasse, on the other hand, it appears worthwhile to await response of the Tata, if any, for a period of 30 days.

Petitioners would file a synopsis not exceeding five pages listing out their proposals as also authorities, if any, relied on. Respondents No. 3, 24, 26, 31 to 33, 38 and 39 may also file their synopsis in response.

Renotify on 18th July, 2007.

Interim orders to continue.

XXX XXX XXX"

39. Neither RRK nor the other parties, i.e., PARL and other workers' union felt aggrieved. As a consequence, TSL filed its DRS in May, 2007. The process of evaluation of various DRSs and revised DRSs (of different parties), in the meanwhile continued. PARL was permitted to revise its COD from 31.03.2006 to 31.03.2009. TSL's COD was 31.03.2008. COD proposed by the RRK in the DRS furnished by it was 31.08.2005.

40. On 09.04.2009, this Court disposed of W.P.(C) 942/2007. In the meanwhile PARL and other parties were aggrieved by the assignment of debts by secured creditors to the extent of 85% of the principal amount and about 80% of the interest due, to sister concerns of RRK. They had articulated this grievance in writ proceedings. This Court upheld the assignment of debts by secured creditors. However, as regards other issues agitated, the Court did not render an opinion on the merits and left it to the BIFR to decide the issue. Two sets of SLPs were filed before the Supreme Court - one by RRK and the other by PARL. The SLP of RRK is pending. PARL was later permitted to withdraw its petition as it bowed out and withdrew its DRS and consequently the offer; its writ petition (as noticed earlier, was withdrawn, and so recorded by the order dated 08.07.2014).

41. The BIFR held various proceedings, which were preceded by meetings of parties with the OA. The record shows that the OA issued its report for the first time on 01.09.2009 recommending that TSL's scheme was best suited. This was discussed on 22.09.2009. On 12.10.2009 RRK sought directions that it should be allowed to file a revised proposal. The OA conducted a meeting thereafter on 20.10.2009 and by its report of 26.10.2009 again recommended TSL's proposal for revival. This was discussed by the BIFR in its meeting dated 12.11.2009. BIFR directed the proposers to file the written submissions. RRK filed its submissions subsequently on 15.11.2009. The OA submitted its reply to objections of the proposers on 20.11.2009. BIFR considered the second report of the OA dated 26.10.2009 and directed the OA to recast the report in the specified format. The OA submitted its supplementary report on 27.11.2009 in compliance with the BIFR directions (dated 24.11.2009). Again as to this report, parties were allowed to file responses and objections; RRK filed its submissions on 02.12.2009. Eventually, on 09-12-2009, it issued its final order. The appeal by RRK was dismissed by a majority opinion, in the impugned order of AAIFR.

The points to be decided

42. The contentions of the parties, in the opinion of the Court require decision on

the following points:--

- (i) Scope of the present proceedings under Article 226 of the Constitution of India;
- (ii) whether RRK was prejudiced by a different CODs propounded by the parties as well as use of the "Equalization chart by AAIFR; and
- (iii) on the merits did the AAIFR fell into error in not interfering with the decision of BIFR to the effect that TSL's DRS was the best suited for rehabilitation of Incab.

Point No. 1

43. SICA, according to its preamble, was enacted with a view to securing timely detection of sick companies, owning industrial undertakings, speedy determination - by a board of experts of the preventive, ameliorative, remedial and other measures needed to be taken with such companies and the implementation of measures deemed appropriate for their revival. The SICA in a sense is a complete code in itself; under its provisions, a company, which owns an industrial undertaking that loses its net worth, is compelled to approach the BIFR with a reference. The BIFR examines the financial health, balance sheets, commercial viability and other relevant materials and decides whether indeed the company is sick. Upon the registration of a reference, Section 22 of SICA operates and all pending proceedings are kept in abeyance to facilitate the possibility of revival. BIFR appoints an Operating Agency ("OA"). Based upon the proposals mooted and discussed, before it, rehabilitation schemes are furnished and refined. This process would involve not only the management but also other stake holders, such as secured and unsecured creditors (and wherever they exist), consortium of banks and financial institutions, workers unions etc. If the BIFR is convinced - on the basis of advice tendered by the OA - that a particular DRS is feasible and can revive the sick company, it sanctions it. BIFR maintains a continuing jurisdiction to oversee the implementation of the sanctioned revival plan, rehabilitation scheme and wherever necessary, make consequential or clarificatory directions. Upon the company achieving net worth or the successful completion of the rehabilitation scheme, BIFR may close a given reference.

44. This, broadly, being the scheme of enactment, the deep involvement of the two statutory agencies - one an expert advisory body (the OA) and the other an expert adjudicatory or quasi-judicial body (BIFR) becomes immediately apparent. The BIFR's orders - even at the interim stage - can be challenged before the AAIFR. These include orders modifying the schemes, orders permitting impleadment of parties or anything which is likely to impinge the draft proposals of one or the other parties that may eventually impact a plan for rehabilitation that is under consideration before the BIFR. Thus, an appellate body (AAIFR) exercises legal and factual appellate review over the orders of the BIFR. By statute, it is designated as the final authority as to the fact determination in a particular cause or matter.

45. It is in this background that the role and authority of the High Court under Article 226 of the Constitution is to be examined. The Court's jurisdiction - it has been reiterated time and again - does not encompass appreciation or determination of primary facts. It does not admit re-appreciation of purely fact based findings, barring rare instances of utterly unreasonable factual findings, i.e. where a body or tribunal authorized to render such findings does so in utter disregard of the record or arrives at conclusions which no reasonable body similarly circumstanced would have. The essence of judicial review is in ensuring procedural integrity in decision making (i.e. overseeing whether the decision maker has taken all the relevant factors, eschewed irrelevant factors and applied its mind to all the circumstances that decision or the process leading to the decision is not tainted by mala fides or illegality and that procedural fairness is adhered to).

46. In the words of this Court in *A.R.C. Cement Ltd. & Anr. v. AAIIR*, AIR 1998 Del 359,

"This Court cannot sit in judgment nor scrutinize the figures just to find holes in the inferences drawn by the BIFR an AAIIR under the aforesaid Act. Where an expert body including Operating Agency has scrutinized the matter, weighed it, considered it, even if it is possible to come to a different conclusion on the basis of arguments by the learned counsel for the petitioner, this Court would not exercise the present powers as an appellate jurisdiction."

47. In a similar vein, *Shri Sitaram Sugar Company Limited and Anr. v. Union of India and Ors.*, (1990) 3 SCC 223, it was held as follows:--

"47. Power delegated by statute is limited by its terms and subordinate to its objects. The delegate must act in good faith, reasonably, intra vires the power granted, and on relevant consideration of material facts. All his decisions, whether characterized as legislative or administrative or quasi-judicial, must be in harmony with the Constitution and other laws of the land. They must be "reasonably related to the purposes of the enabling legislation". See *Leila Mourning v. Family Publications Service*, , 411 US 356. If they are manifestly unjust or oppressive or outrageous or directed to an unauthorized end or do not tend in some degree to the accomplishment of the objects of delegation, court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires" per Lord Russel of Killowen, C.J. in *Kruse v. Johnson*, [1898] 2 Q.B. 91.

48. The doctrine of judicial review implies that the repository of power acts within the bounds of the power delegated and he does not abuse his power. He must act reasonably and in good faith. It is not only sufficient that an instrument is intra vires the parent Act, but it must also be consistent with the constitutional principles: *Maneka Gandhi v. Union of India*, , [1978] 1 SCC 248.

49. Where a question of law is at issue, the Court may determine the rightness of the impugned decision on its own independent judgment. If the decision of the

authority does not agree with that which the court considers to be the right one, the finding of law by the authority is liable to be upset. Where it is a finding of fact, the Court examines only the reasonableness of the finding. When that finding is found to be rational and reasonably based on evidence, in the sense that all relevant material has been taken into account and no irrelevant material has influenced the decision, and the decision is one which any reasonably minded person acting on such evidence, would have come to, then judicial review is exhausted even though the finding may not necessarily be what the court would have come to as a trier of fact. Whether an order is characterized as legislative or administrative or quasi-judicial, or, whether it is a determination of law or fact, the judgment of the expert body, entrusted with power, is generally treated as final and the judicial function is exhausted when it is found to have "warrant in the record" and a rational basis in law: See *Rochester Tel. Corp. v. United States*, , 307 US 125 (1939). See also *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, , [1948] 1 K.B. 223.

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52. The true position, therefore, is that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it."

48. It is, therefore, held that under Article 226 of the Constitution, this Court cannot put themselves in the place of the primary decision maker with a view to entering the area of fact appreciation; especially when an appellate tribunal or body has gone into the merits of the factual exercise involved in the decision making. Judicial review can be the recourse where procedural irregularity or unfairness, illegality, lack of good faith or demonstrable and manifest misappreciation of facts so glaring that no reasonable person or body charged with the duty in question would have arrived at such decision, is apparent from the record. The first point is decided in the above terms.

Point No. 2

49. This concerns the decision on one of the major arguments of RRK, i.e. that the BIFR fell into error in applying differential cut off dates in the schemes considered by it; the argument is that as a quasi judicial body, it ought to have devised a method or uniform standard, "equalizing" so to speak, the inherently different proposals (DRS) preferred before it. The reply by TSL is firstly, that RRK did not urge this on the several occasions when it could have, and secondly that the issue is really irrelevant.

50. At the outset, this Court has to keep in mind that unlike cases where DRS proposals for revival of a company are considered on merits, what is involved is the right of one or the other company (in this case, either RRK or TSL) to first take over the management of Incab. It is only thereafter that such successful

bidder (for the management) can file what is known as a "fully tied up" DRS that can be taken for the rehabilitation of the company. In other words, what was advertised was the transfer of management of the company, on the basis of a plan to be furnished to the BIFR. It cannot be said that the DRS furnished would be one carved in stone; whereas it would be indicative and broadly have to be adhered to, the company which is deemed successful after almost a decade of litigation would get a proper "look into" the sick company's finances and affairs after which it would submit proposals or modifications to the existing DRS filed before BIFR.

51. RRK filed its scheme on 21.03.2006 proposing the COD at 31.08.2005. On 12.04.2006 BIFR, directed proposers to file fully tied up scheme. RRK filed revised Scheme on 10.05.2006 with COD 31.08.2005. At the same time, it challenged the said BIFR order before AAIFR, contending that its proposal was the best. AAIFR, on 22.09.2006 upheld BIFR's order and asked parties to file a revised scheme within two weeks before BIFR. RRK did not file any revised scheme; it filed W.P. No. 942/2007 before this Court. In those proceedings, with the permission of the High Court, TSL filed its scheme on 22.05.2007 with COD 31.08.2008. RRK continued to assert that its scheme was the best. This Court finally disposed off that writ petition by order-dated 09.04.2009, by directing parties file schemes before the BIFR. Delhi High Court gave another opportunity i.e. 3rd opportunity to RRK to file fresh proposal. The third revised proposal was filed by RRK on 22.04.2009 it continued COD of 31.08.2005. During the pendency of WP 942/2007, after TSL was permitted to file its proposal (which it did in 2007), RRK never objected and raised the issue of differential COD (considering that TSL's COD was 31.03.2008). On, 12.10.2009, after the order of the Supreme Court, during the resumed proceedings before BIFR, RRK filed an application on the ground that PARL had filed a revised scheme, that it be allowed to file a revised scheme. Also RRK additionally asked BIFR to fix uniform COD. The minutes of hearing and proceedings held by BIFR on 12.11.2009, 24.11.2009, and 30.11.2009 do not reflect that this issue was urged by RRK. In this background of circumstances, it is sufficiently clear that RRK had several opportunities to urge the issue of differential COD before BIFR; more appropriately before this Court. During the pendency of reference before BIFR (after remand by this Court was upheld) it was open to it to seek orders or directions either from this Court, or the AAIFR, especially because the TSL's proposal-with a differential COD was known. The only instance when RRK sought orders was on the ground that PARL had been given opportunity to revise its proposal and that it should have been afforded the opportunity to do so.

52. The constant refrain that RRK had urged the issue of a differential cut off date, before BIFR is belied also by the fact that though in its MA 150/2009, the question was no doubt urged (preceded by observations on a particular date by the OA) the minutes of proceedings in all hearings that took place on and after 24.10.2009 are silent on this aspect. There was even a hearing before BIFR on 30.11.2009, when parties were asked to file written submissions. Even at that

stage, RRK did not urge this issue; more importantly it did not highlight how the omission to determine a common COD prejudiced it. The letter/submissions addressed to BIFR (on 02.12.2009) is silent about any prejudice ensuing due to the differential COD of the parties.

53. The AAIFR, before which the issue (differential COD) was urged, acknowledged that this was a fact. However, it took note of an equalization table furnished during the hearing and was of the opinion that the said document (chart) was a mere method of ironing out the differences between the figures (based on different COD) and that the basic assumption of liabilities, etc, were the same. It therefore concluded that the use of differential COD was a "condonable technical flaw" which did not render individual schemes fatal.

54. The position of the revised proposals, reflecting the assets and liabilities of Incab, as presented in RRK's proposal, is reflected below:

Furthermore, the final order of BIFR notes as follows:

"2.2 The Bench observed from the DRS submitted by TSL that SBI (OA) vide letter dated 4.5.2007 sent in response to the letter dated 30-4-2007 of TSL had given the position of principal dues of the secured creditors of M/s. Incab Industries Ltd. as on 31-3-2006 as Rs. 4875 lakh. The Bench asked SBI (OA) how they had arrived at the figure. The representative of SBI (OA) clarified that SBI had ascertained the figures from the secured creditors. The Board observed that TSL had taken the principal dues of the secured creditors at Rs. 4875 lakh on page 39 of the DRS and proposed to pay Rs. 2437.50 lakh (50% of principal)."

TSL's revival scheme thus, was premised on the information made available to it by Incab. Its DRS in fact states that the proposal was itself premised on the limited material made available and that it had asked the company to furnish the latest details of liabilities and dues but that they had not been compiled. Coupled with this, and the fact that PARL's revised DRS had a COD of (31.03.2010), it was up to RRK to seek opportunity to update or revise its scheme, if it felt that it was placed in a handicap. That it was given an opportunity earlier, is not disputed; however the history of the litigation shows that it never sought to highlight this aspect when matters were pending before AAIFR (after the order of this court dated in WP 942/2007). Having let the opportunity pass, it could not have contended - without proof of substantial prejudice - that the differential COD constituted an error of law.

55. If one understands that the differential COD was really a non-issue, because the two rival proposers were in fact basing their assumptions on the same set of figures (i.e. financial documents pertaining to Incab as of 31.03.2006) though their DRS contained differential COD (RRK's being 31.08.2005 and TSL's 31.03.2008, since it came into the picture in 2007) and significantly, given that RRK chose to re-present the DRS with COD at 31.08.2005 (i.e. on 22-04-2009) (Ref. page 285-286, Vol. 2/WP 5010/2011) there can be no cause for complaint. Here, the use of the equalization chart in the opinion of the Court, cannot be

characterized as an illegality or irregularity of such magnitude that it would invalidate the entire proceedings and order of AAIFR. That chart, as TSL points out, was a submission, more in aid of understanding by the appellate authority.

56. A High Court, in exercising certiorari jurisdiction, is to keep itself within well defined bounds of that authority. That necessarily means that fact appreciation is ruled out-at least ordinarily; if the Tribunal (here the BIFR and AAIFR) are conferred specific jurisdiction, it is not every error (of fact and law) which are capable of correction, but those which impinge on that special jurisdiction. In other words, the tribunal is allowed a margin of appreciation or margin of error, within the bounds of its jurisdiction. It is only when such margins are transgressed that certiorari can be invoked.¹ In the case of SICA, the Supreme Court in *Raheja Universal Ltd. vs. NRC Ltd. & Ors.*, 2012 (4) SCC 148 explained the special nature of jurisdiction in the following terms:

22. The BIFR has been vested with wide powers and, being an expert body, is required to perform duties and functions of wide-ranged nature. If one looks into the legislative intent in relation to a sick industrial company, it is obvious that the BIFR has to first make an effort to provide an opportunity to the sick industrial company to make its net worth exceed the accumulated losses within a reasonable time, failing which the BIFR has to formulate a scheme for revival of the company, even by providing financial assistance in cases wherein the BIFR in its wisdom deems it necessary and finally only when both these options fail and the public interest so requires, the BIFR may recommend winding up of the sick industrial company. So long as the scheme is under consideration before the BIFR or it is being implemented after being sanctioned and is made operational from a given date, it is the legislative intent that such scheme should not be interjected by any other judicial process or frustrated by the impediments created by third parties and even by the management of the sick industrial company, in relation to the assets of the company. In other words, the object and purpose of the Act of the 1985 is to ensure smooth sanctioning of the scheme and its due implementation."

57. The mere fact that parties persisted with submitting different CODs and - especially in RRK's case, that despite several rounds of litigation, it chose not to revise that date; or even seek revision, is sufficient indication that all of them felt that it was not inherently arbitrarily or unfair. Once the parties went to the experts: in this case, the OA, repeatedly and their proposals were appraised and discussed, up to a week before the final order, in the absence of prejudice the court is of opinion that there was no illegality in this regard; likewise, TSL's explanation that the equalization chart was an attempt to submit that the differences (seemingly of an irreconcilable at a broad and superficial level) were not fundamental, but rather to see the figures from one common perspective is neither unreasonable nor incapable of acceptance. The Court therefore, holds that the grievance on this aspect is of no consequence.

Point No. 3

58. As to the relative merits of the three proposals, the impugned order - to the extent it is relevant, is reproduced below:

62. Before we proceed to evaluate the three schemes comparatively, it will be useful to look at the cost of rehabilitation scheme and the means of finance by the three proposers. The following table gives the comparative position as submitted by the three bidders (Ref: SBI (OA)'s report dated 24.10.2009:

59. TSL proposed infusion of equity infusion of Rs. 32.01 crores; RRK proposed Rs. 25.00 crores (as did PARL). TSL's equity investment was the highest. RRK did not show any equity infusion in "the sources of application of funds", the Rs. 25 crores were treated as Promoters' loan. RRK has later argued that after withdrawing Rs. 5 crores Rs. 20 crores would be equity. It was noted that the three rival proposals did not show preference capital in means of finance. TSL showed that 50% of the principal dues of the secured creditors will be converted into 11% cumulative preference shares which will be redeemed only when the net worth of the company becomes positive. TSL did not show any interest free unsecured loan. The AAIFR observed that:

"66. RRK has proposed Rs. 1500 lacs as loan from Kamala Mills although they have not shown this in "Sources and application of funds". The OA has said that no support papers in this regard have been produced.

67. PARL has proposed Rs. 3500 lacs out of which Rs. 1000 lacs would be short term loan for which they have claimed to have received RBI permission. For the remaining Rs. 2500 lacs, they claim that they are discussing with many investors but nothing has been finalized.

68. TSL has proposed Rs. 5500 lakhs of loan which consists of a term loan of Rs. 3130 lacs and working capital loan of Rs. 2370 lakhs. The OA (SBI) has opined that TSL has submitted the supporting papers for the same.

69. RRK has shown borrowings of Rs. 3000 lakhs from banks, and a working capital loan of Rs. 3110 lakhs in the "Sources & application of funds" as against Rs. 2708.04 lakhs shown in the cost of the scheme. RRK has further said in the joint meeting convened by the OA that their working capital requirements will be met by (a) their own sources; (b) Rs. 3400 lakhs from the HDFC bank; and (c) Rs. 1500 lakhs from Dimexon Diamond Ltd.

70. PARL had proposed Rs. 4000 lakhs as working capital loan in the means of financing consisting of Rs. 2500 lakhs as loan from Government of Jharkhand (GOJ) and Rs. 1500 lakhs as working capital loan. But OA (SBI) has stated that it has received from GOJ a fax stating that they are not giving any soft loan for IIL's rehabilitation. PARL's representative had said that they have secured Rs. 2500 lakhs from the Yes Bank and are discussing with many investors for funds, however, this is not a firm tying up of means of finance.

71. TSL has not considered any sale of assets in the means of finance. RRK has proposed Rs. 2000 lakhs as sale of assets but has not given any details of assets

proposed to be sold. Pegasus has proposed Rs. 1800 lakhs for sale of assets.

72. TSL and RRK have not proposed any deferment of sales tax whereas PARL has proposed Rs. 2328 lakhs for deferment. But OA (SBI) has said that PARL has not given any document in support of sales tax deferment scheme approved by GOJ.

73. The means of finance proposed by TSL aggregate to Rs. 8701 lakhs, whereas the cost of scheme proposed by them is Rs. 9869.76 lakhs. There is a shortfall of Rs. 1168.76 lakhs. TSL has proposed to met this shortfall out of the initial accruals of the sick company (IIL) during the rehabilitation period.

74. RRK's means of finance is Rs. 8708.04 lakhs which matches the cost of finance at Rs. 8708 lakh. The sale of unproductive assets has been assumed at Rs. 2000 lakh. Sale of assets of any kind, however, is often uncertain, and may not conform to the timeliness assumed for revival.

75. PARL's means of finance totals up to Rs. 22537.11 lakhs which is much higher than the cost of the scheme of Rs. 16190.31 lakhs. If we analyze Pegasus's means of finance, we find that accruals have been assumed at Rs. 8428.17 lakhs. The sale of unproductive assets has been assumed at Rs. 1800 lakhs. And as we have discussed above, there are uncertainties in their projections of working capital, loans at Rs. 4000 lakhs and other loans of Rs. 2500 lakhs. The sale of unproductive assets is likely to cause unpredictable delay in liquefying these assets, not to speak of the; disputes and workers' opposition that may also attend such sales. Since the revival process is an extremely sensitive phase, such deals can critically imperil the revival measures.

76. The DSCR for TSL is 1.57, for RRK is 1.36 and for PARL 2.39. The net worth of IIL will become positive in the 5th year of operation in TSL's scheme, in the 6th year in Pegasus's scheme and it is not becoming positive in RRK's scheme during the rehabilitation period."

60. The OA was involved in the examination and evaluation of the proposals as well as hearings before the BIFR at various stages and later, the AAIFR. Consistently, it was of the opinion that TSL's proposals were the best for revival of the company (Incab) and also to secure the best interests of the workforce. The OA adopted a three fold criteria, viz. (a) credibility and capability of the bidder/proposer; (b) reputation in the domestic and international market and (c) strength and weakness of the scheme. In this regard, it is relevant here to notice that whereas RRK no doubt is in the business of cable manufacturing, yet, according to the OA, TSL had the competitive edge on account of its reputation financial strength and ability to command managerial and other resources.

61. The following chart (extracted from the AAIFR's impugned order) describes, at a glance the commitments made by the rival bidders towards employees' rehabilitation:

* (Note: All figures are in lakhs of Rupees)

62. It can be seen from the above that TSL has assured greater benefits, at least as far as allocations go, to the workers. The authorities below noted that TSL's average salary package for 1600 workers was Rs. 83,875/- per annum as against RRK's Rs. 62,395; TSL assured 6% benefit after three years whereas RRK assured 5% benefit after 3 years; TSL allocated Rs. 6 crores for VRS and RRK allotted Rs. 5 crores. The cost of the scheme, according to TSL's proposal, was Rs. 98.69 crores. After deduction of payouts to secured creditors, (Rs. 24.37 crores) the net cost was Rs. 74.32 crores. For RRK, the total cost of the scheme disclosed was Rs. 65.57 crores. After deduction of payments to secured creditors (Rs. 21.49 crores) the net cost worked out to Rs. 43.59 crores. After analyzing the dues payable to banks - as communicated and commented upon by the OA, the AAIFR concluded that TSL's cost of the scheme was the highest among the bidders.

63. Similarly the AAIFR noted that although the figures for capital expenditure proposed were tentative as TSL had requested for a realistic appraisal of the state of machinery and plant, it had nevertheless committed a figure of Rs. 12.65 crores as opposed to RRK's Rs. 0.50 crores (Rupees fifty lakhs).

64. After undertaking a detailed analysis of the stated and relevant parameters (credibility, commitment of funding, equity infusion, worker rehabilitation and payouts towards wage arrears and statutory dues, technology up-gradation funding commitment, capability of net worth turning positive, payout to tax authorities, payments to secured and unsecured creditors etc.) it was concluded that TSL's plan had the least loose ends and showed a possibility of Incab turning around, and regaining its net worth.

65. This Court finds unmerited RRK's submission that TSL's proposal - especially its plan of paying 100% electricity dues and writing off 50% of secured creditors' dues, is a "self serving" one. This is because every proposal is a comprehensive package. If each component is individually to be taken apart and scrutinized, the integrity of the whole would be undermined. Besides, there is nothing intrinsically unjustified or unfair in the proposal, given that RRK's proposal too envisions payouts to various bodies and entities, some of whom may be asked to sacrifice or give up a part of their rights.

66. This Court notices that the workers' submissions are articulated on two expected lines: first that there would be employment loss (due to downsizing and alleged outsourcing) and that existing settlements would not be honoured. This Court is conscious of the fact that one of the principal aims of revival of a sick company is the interest of workers, who face a loss of livelihood, in the event of an eventual winding up. At the time, the promoter or investor who wishes to take over the company has to realistically appraise itself about the possibility of a turnaround; while ensuring that the least inconvenience is caused. A look at the two proposals would reveal that both RRK and TSL proposed payment of amounts towards Voluntary Retirement Schemes (VRS). This meant that both considered VRS proposals; as far as arrears of wages went, the provisioning by

TSL was superior (at least 20% over and above the figure of arrears payable to individual workmen during the closure period, assumed for 1600 workers, by RRK). In the circumstances, this Court cannot now hold that the assurances held out by RRK are better, on a fresh or independent comparison. Furthermore, even as regards other dues (PF, gratuity etc) the amounts committed by TSL are higher.

67. This Court holds as insubstantial and meritless, the argument on behalf of Incab's existing management that (a) TSL's offer should not have been considered and that (b) an accurate appraisal could not have been made, since the value of assets of the company would have changed vastly. As noticed earlier, the stage of involvement of the BIFR here is not strictu sensu consideration of a "fully tied up" rehabilitation scheme for revival of Incab; rather it is one aimed at changing the management, to ensure that the best promoter (in substitution of the existing one) assumes control, infuses capital, and presents a viable DRS for consideration and ultimate acceptance. A perhaps simplistic though fitting metaphor, which springs up, would be the exercise of choosing a good spouse; the successful suitor here would be the company (proposer) who would be allowed to take charge, deploy fresh resources (financial and managerial) and bring back Incab, the sick company, on to its rails. This would entail the responsibility of taking over the liabilities: both towards secured and unsecured creditors, but also revenue and workers' dues. Given that the consideration period of assessing the best-suited company to take over management itself has spread over 9 years, the note for greater accuracy (considering Incab's existing management abysmal track record in handling its affairs) is hollow. Furthermore, this court has been tasked to consider the correctness of the AAIFR decision, not to engender another round of litigation.

68. The surviving argument: pressed by both RRK and the workers-was that the consent of the secured creditors was not obtained, before BIFR accepted the proposal. At the outset, the Court notices that the OA is itself a secured creditor - in fact, the lead secured creditor. None of the secured creditors, who participated in the BIFR proceedings voiced their objections to the scheme propounded by TSL and backed by the OA. Two, the present exercise of assessing the best proposal is the first in a two part series of Incab's rehabilitation. This first step is to change the management. At this stage, the proposal (by TSL and RRK) are outlines, laying out what can be expected if the company given charge of Incab would do, in terms of resources, finances, payment of dues, etc. This step culminates in the handing over of management. The second step would be the finalization of the DRS and its acceptance leading to the actual operation of the scheme that is "fully worked" out. The BIFR's acceptance of TSL's proposal (loosely described as DRS) meant that the latter had to submit a final DRS which was to be assessed and implemented. It is at that stage, the views of creditors would be considered in detail and appropriate orders made, under Section 18 of SICA. Furthermore, the Court is also of the opinion that TSL itself was conscious of these eventualities; its proposal clarified that Incab's books and financial

condition was not known to it fully; during the hearings too, on more than one occasion, its counsel submitted that the stage of considering a detailed scheme had not arisen and that if the proposal sanctioned by BIFR were to be ultimately upheld, TSL would be legally bound to take into account all obligations of Incab and deal with them. Therefore the lack of consent of all secured creditors being an impediment to the change of management of Incab cannot be a valid argument.

Conclusions

69. In view of the foregoing discussion and findings on all the three points of controversy, the Court is of opinion that no interference with the orders of BIFR and AAIFR are called for. The writ petitions consequently, fail and are dismissed without order as to costs.

1Ref. T.C. Basappa v. T. Nagappa , AIR 1954 SC 440 (that a writ court "does not review or reweigh the evidence upon which the determination of the inferior Tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior Tribunal."); also Hari Vishnu Kamath v. Syed Ahmad Ishaque , 1955 SCR 1104 to the effect that. "It may therefore be taken as settled that a writ of certiorari could be issued to correct an error of law. But it is essential that it should be something more than a mere error: it must be one which must be manifest on the face of the record."