

(2008) 01 AP CK 0038

In the Andhra Pradesh High Court

Case No : Writ Petition No. 17476 of 2007

White Circles Oxides Ltd.

APPELLANT

Vs

Industrial Development Bank of India and Another

RESPONDENT

Date of Decision : 17-01-2008

Acts Referred:

Banking Regulation Act, 1949 — Section 5
Civil Procedure Code, 1908 (CPC) — Section 148A
Companies Act, 1956 — Section 529(1), 529A
Constitution of India, 1950 — Article 14, 16, 19, 21, 226
Income Tax Act, 1961 — Section 72A
Industrial Development Bank (Transfer of Undertaking and Repeal) Act, 2003 —
Section 3(1), 4(4)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13, 13(1), 13(13), 13(2), 13(3)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 15(1), 15(2),
16, 16(1)
Transfer of Property Act, 1882 — Section 69, 69A

Citation : (2008) 2 ALT 257

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : Ravichander and Milind G. Gokhale, for the Appellant; P. Guru Murhy, for the Respondent

Judgement

P.S. Narayana, J.—This writ petition is filed seeking a mandamus to declare the action of the 1st respondent-Industrial Development Bank of India in issuing Notices dated 5.2.2007 and 7.4.2007 u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity "the Act") as arbitrary and illegal and in violation of the petitioner's fundamental rights guaranteed to it under Articles 14, 16, 19 and 21 of the Constitution of India.

2. The Managing Director of the petitioner-company, who had sworn in the affidavit filed in support of the writ petition, had stated that the respondents, after issuing the notices impugned in the writ petition, lodged a caveat u/s 148-A

CPC on 7.8.2007 and they were later served with advance notices of the writ petition. He had further stated that the petitioner-company was registered in the year 1997 with the sole intent of manufacturing a highly specialized material called "spinel" which is used in the process of manufacture of Refractories and increases its potential and usage. This particular unit is a "State of the Art" unit, one of its kind in the entire Nation and mainly based upon the technology supplied by the "Advanced Research Centre for Power Metallurgy and New Materials" a Central Government body, having its office and Laboratory at Hyderabad (hereinafter referred to as "ARC-I"). Based upon the technology, the petitioner-company decided to set up an industrial unit for commercial scale manufacturing of "Magnesium Aluminates Spinel" (MAS) for marketing in national and international markets. It is further averred that the technology given by ARC-I was taken up by the petitioner-company and for the purpose of setting up the industry, ARC-I recommended the petitioner to the Technology Development Board (for short "TDB"), which, in turn, gave a soft loan of Rs. 4.9 crores to the petitioner for setting up the entire industry. The cost of the entire project was estimated at INR 21.45 crores for which purpose TDB recommended the petitioner to the respondents, especially to their venture Capital division. The respondents, after evaluating the entire project decided to fund the petitioner-company by way of "Consortium Lending" through a group of bankers. The following details are the contributions of the financial institutions.

1. Industrial Development Bank of India 4.80 crores term loan 2. Industrial Development Bank of India 3.65 crores Equity 3. State Bank of Indor 5.00 crores Term Loan 4. State Bank of India 0.98 crores Working Capital 5. State Bank of Indore 0.42 crores Working Capital

Annexures to the writ petition are sanction letters of the aforesaid Financial Institution. All these loans were given on the petitioner-company executing a Mortgage Deed in favour of the Consortium as a pari-passu charge to be equally shared as per investment by each Banker. 1st respondent-Bank herein was the lead banker. It is further averred that the industry was set up in the month of March, 2002. When production was sought to be started, the technology given by ARC-I hopelessly failed, and though the technology appeared to be possible on paper, when actual implementation was sought to be done by the petitioner-company, the technology proved to be a failure. The Managing Director of the company personally had to spend huge amounts of man hours and money for developing a new process by which successfully the end product i.e. MAS could be manufactured on a commercial basis. It is further stated that this entire process took nearly two to three years and for the first time full production of the plant could be generated during the year 2003-2004. The Company's product proved to be a huge success and the company started getting various orders nationally and internationally. However, due to the delay in developing the Technology, the Company's balance sheet was not in a happy situation and its net worth was eroded. Not only this, but at the crucial juncture when funds were required by the company, the State Bank of Indore frozen all the working capital

and refused to operate the account, due to which, an order of 500 tonnes, for which a confirmed LC for Rs. 1.5 crores opened by the Foreign company, could not be fulfilled due to lack of funds and the company lost a very valuable export order. Since the net worth of the company by this time had eroded as required under the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "SICA"), the company was duty bound to report the same to the Board for Industrial and Financial Reconstruction (hereinafter referred to as "BIFR"). Consequentially, a reference was made to the BIFR on 2.11.2005 whereupon the BIFR issued notices to all the Financial Institutions including the respondents and took up the matter for considering grant of nursing and rehabilitation scheme. After various hearings, the petitioner-company was declared a sick industry as defined u/s 2(o) of the SICA and the respondents were appointed as Operating Agency for preparing Rehabilitation Scheme. The Annexures to this writ petition are the copies of reference made to the BIFR and the Order dated 21.2.2007 declaring the Industry as Sick Unit by the BIFR. It is further averred that the action of the respondents, on the face of the record, is illegal since the reply given by the 1st respondent dated 7.4.2007 is totally silent on the petitioner's request to prepare the revival scheme for the company as directed by the BIFR. Apart from various other issues, an enquiry u/s 16 of SICA was commenced on 13.9.2005 by the BIFR vide its letter dated 28.9.2005. A resolution had been passed by the company in which the representative/Director of the IDBI was also present to refer the company as a Sick Company to the BIFR. This Resolution was not objected by the nominee Director of IDBI, and in fact, he had given his consent. Once the respondents gave consent to refer the matter to BIFR and the reference is registered, they cannot take any action under the Act. It is further averred that in the process of enquiry before the SICA, the petitioner-company also filed a reference u/s 15(1) of the SICA and the same was registered on 29.12.2005 as case No. 175 of 2005. Later, as on 5.2.2007, the date of issue of the notice u/s 13(2) of the Act by the 1st respondent, no reference u/s 15(1) of SICA was pending before the BIFR. It is further stated that during the pendency of Reference under 15(1) of SICA, all the secured creditors including the respondents representing not less than 3/4th in value of the amount outstanding against the financial assistance disbursed to the petitioner-company, did not take any measure to recover their secured debt u/s 13(4) of the Act. In fact, even the respondents also did not take any measures u/s 13(4) of the Act while the reference is pending before BIFR, and hence, as per the proviso to Section 15 of the SICA, the reference would never be abated and the company would be continued under the protection of Section 22(3) of the SICA. It is also averred that paragraph 5 of the order dated 21.2.2007 issued by the BIFR, reads as follows:

The Bench noted that IDBI, vide their letter dated 19.2.2007, had submitted that they had issued a notice to the company under the Act for recovery of their dues.

It can thus be seen that it had already brought to the notice of the BIFR that the respondents had issued notice u/s 13(2) of the Act and in spite of the same, the

BIFR, at paragraph 7 of the Order, observed as follows:

Having considered the facts on record and the submissions made at today's hearing, the Bench observed that there were no valid objections to the company's sickness from the parties present today. The company fulfilled various criteria for sickness under the Act. The Bench was satisfied that the company had become a sick industrial company in terms of Section 3(1)(o) of the Act and declared it to be so. The representative of the company indicated that it would not be possible for them to work out a scheme u/s 17(2) of the Act on their own. 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 IDBI as the Operating Agency (OA) with directions to prepare a revival scheme for the company, if feasible. The O.A. was directed to submit its report and reasoned recommendations along with the draft of a viable and fully tied up rehabilitation scheme, if it emerges within 16 weeks from today. The OA was directed to keep in view the provisions of Section 18 of the Act and the enclosed guidelines while carrying out this exercise. The company was directed not to dispose of except with the consent of the Board, any of its assets as per Section 22A of the Act. The cut off date of the scheme shall be taken as 30.6.2007.

Thus, the BIFR has made it very clear that the Operating Agency i.e. Industrial Development Bank of India was directed to keep in view the provisions of Section 18 of the Act and the enclosed guidelines while carrying out the exercise. Hence, the respondents, now, cannot take any action under the Act. It is also averred that the respondents were very much a party to these proceedings; however, by their letter dated 19.2.2007 addressed to the BIFR they stated that they do not have any comments to offer to the BIFR with respect to the erosion of the petitioner's net worth and also stated that they initiated action under the Act. The declaration of the petitioner-company as sick industry under the provisions of the SICA and the issuance of the notice dated 5.2.2007 by the 1st respondent u/s 13(2) of the Act recalling the entire loans and calling upon the petitioner to repay the entire sum of Rs. 12,00,69,8121- with future interest thereon and threatening to take over the factory/ industry by virtue of this notice are illegal. This notice was duly replied by the petitioner-company vide its communication dated 31.3.2007, in which a detailed reply was given as to why the Act should not be applied. However, without considering anything on merits and without due application of mind, the respondents mechanically rejected the contentions of the petitioner-company vide their letter dated 7.4.2007. Thereafter, the respondents filed a Caveat Petition before this Court contemplating that the petitioner-company may prefer a writ petition challenging the notice and the subsequent action u/s 13(4) of the Act. It is further averred that the admitted facts on record are that the Industrial Development Bank of India without considering the provisions of Section 15 of the SICA and the provisions of Sections 13(2) and 13(4) of the Act issued the impugned notice in a hasty manner and the same is absolutely illegal. Section 15 of the SICA is reproduced below:

Section 15: Reference to Board: (1) Where an industrial company has become sick industrial company, the Board of Directors of the company shall within sixty days from the date of finalization 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.

Provided that if the Board of Directors had sufficient reasons even before such finalization to form the opinion that the company had become a sick industrial company, the Board of Directors shall, within sixty days after it has formed such opinion, make a reference to the Board for the determination of the measure which shall be adopted with respect to the company;

Provided further that no reference shall be made to the Board for Industrial and Financial Reconstruction after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 where financial assets have been acquired by any securitisation company or reconstruction company under Sub-section (1) of Section of that Act.

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

(2) Without prejudice to the provisions of Sub-section (1), the Central Government or the Reserve Bank or a State Government or a public financial institution or a State level institution or a scheduled bank may, if it has sufficient reasons to believe that any industrial company has become, for the purposes of this Act, a sick industrial company, make a reference in respect of such company to the Board for determination of the measures which may be adopted with respect of such company;

Provided that a reference shall not be made under this Sub-section in respect of any industrial company by-

(a) the Government of any State unless all or any of the industrial undertakings belonging to such company are situated in such State;

(b) a public financial institution or a State level institution or a scheduled bank unless it has, by reason of any financial assistance or obligation rendered by it, or undertaken by it, with respect of such company, an interest in such company.

It is further stated that the petitioner company is a scheduled industry as specified under the Industries (Development and Regulation) Act, 1951 and was basically established to commercialize new technology. In view of the fact that the entire loans given were under consortium, the independent action u/s 13(4) of the Act could not be taken by the IDBI unless having obtained consent of all

the other Consortia Bankers to the extent of 75% of the outstanding amount as on a record date. Thus, being aggrieved by the action of the respondents in taking this hasty action u/s 13(2) of the Act and also arbitrarily rejecting the contentions of the petitioner-company raised by way of reply u/s 13(3A) of the Act, the petitioner has filed this writ petition raising several grounds praying for appropriate reliefs.

3. In the counter affidavit sworn in by the 2nd respondent-Deputy General Manager, it is stated that preliminary objections have been raised that the writ petition is not maintainable and the petitioner having obtained financial assistance from the secured creditors, including the 1st respondent is duty bound to repay the same with agreed rate of interest. The petitioner having not paid the dues of the secured creditors cannot file this writ petition. The petitioner cannot approach this Court or any civil Court against a notice issued by a secured creditor u/s 13(2) of the Act. The only remedy available to any aggrieved person or borrower is to prefer an appeal u/s 17 of the Act and such appeal can be preferred only against any of the measures taken u/s 13(4) of the Act. As no action has been yet taken by the 1st respondent u/s 13(4) of the Act against the secured assets of the petitioner, no right is vested in the petitioner to approach this Court under Article 226 of the Constitution of India.

4. Certain preliminary submissions are made which are as under:

(i) It is stated that the IDBI was a statutory corporation established by the Industrial Development Bank of India Act, 1964. By virtue of the Industrial Development Bank (Transfer of Undertaking and Repeal) Act, 2003 (hereinafter referred to as "the Transfer Act") read with Notification No. 8361 dated 29th September, 2004 issued by Central Government in exercise of the powers conferred u/s 3(1) of the Transfer Act with effect from 1.10.2004 the undertaking of the erstwhile I.D.B.I. was transferred to and vested in the Industrial Development Bank of India limited, a company incorporated under the Companies Act, 1956 and also a banking company within the meaning of Section 5 of the Banking Regulation Act, 1949.

(ii) At the request of the petitioner, I.D.B.I. had sanctioned to the 1st respondent financial assistance aggregating Rs. 600.00 lakhs under its Venture Capital Fund Scheme. The due repayment of the financial assistance together with interest and other monies due in terms of the loan agreements is secured inter alia by hypothecation of all the movable plant and machinery and mortgage of the immovable properties of the 1st respondent.

The details of the financial assistance sanctioned by I.D.B.I. to the 1st petitioner, the documents executed and the securities created therefore are more particularly mentioned in the Annexure to the notice issued by the 1st respondent on 5.2.2007 u/s 13(2) of the Act and also annexed by the petitioner to the writ petition. The same are not reproduced herein for the sake of brevity. This respondent craves leave to refer to and rely upon the notice dated 5.2.2007

and the loan and security documents executed by the petitioner if need be.

Further, it is averred that the petitioner defaulted in repayment of principal amounts of the loans, interest and other monies in terms of the loan agreements, and the account of the petitioner was classified by the 1st respondent in its books as a "Non-performing Asset", and hence, the 1st respondent issued a notice dated 5.2.2007 to the petitioner u/s 13(2) of the Act demanding repayment of sums aggregating Rs. 12.70 crores as on 1.1.2007 in respect of the financial assistance within 60 days of the notice. The petitioner was further advised that in case the amount due was not paid within the period of 60 days, steps would be initiated to enforce the security interest created in respect of the secured assets. The petitioner, vide its letter dated 31.3.2007 requested the 1st respondent to ignore the notice dated 5.2.2007 inter alia, on the ground of pendency of its reference before the BIFR and the proposal submitted for One Time Settlement (OTS) of its dues. The 1st respondent vide its letter dated 7.4.2007, disputed the objections raised by the petitioner to the proposed action under the Act and once again called upon the petitioner to repay the amounts due. However, the petitioner failed and neglected to pay any sum towards satisfaction of the dues of the 1st respondent. In fact, the petitioner has not repaid any loan amount to the 1st respondent towards satisfaction of its dues. Copies of the consent letters have been placed before this Court.

5. Further, para-wise comments had also been made. It is averred that the pendency of the reference filed by the petitioner before B.I.F.R. and the orders passed therein by BIFR in no way restrain the right of the secured creditors in general and of the 1st respondent in particular, from proceeding under the provisions of the Act for the enforcement of the security interest created in their favour. In fact, Section 15 of the SICA as amended by the securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 categorically provides for the abatement of the reference itself if the secured creditors representing not less than three-fourth in value of the amount outstanding against the financial assistance disbursed to a borrower have taken any measures to recover their secured debt u/s 13(4) of the Act. There is no provision whatsoever in the Act requiring the secured creditors to obtain approval of BIFR before taking action under the Act. Hence, the petitioner's contentions are not tenable or maintainable. The 1st respondent having obtained the consent of all the other secured creditors of the petitioner is entitled to take possession of the secured assets. Once the possession of the secured assets is taken, BIFR would be advised of the steps having been taken and the consequential abatement of the reference. It is denied that the 1st respondent vide its letter dated 7.4.2007 replied to the objections of the petitioner without considering anything on merits and without application of mind. It is submitted that the petitioner, in its objections, had mainly taken the plea of the reference pending before BIFR and made a cursory denial of the amounts claimed. No reasons were given by the petitioner in its letter dated 31.3.2007 to substantiate its claim that the amounts as claimed by the 1st respondent are arbitrary and incorrect. It is

submitted that the reply of the 1st respondent to the said objections was made after due consideration of the submissions made by the petitioner. The petitioner has only reproduced in verbatim the provisions of SICA without submitting as to how the provisions could be deemed to have been contravened by the 1st respondent. The 1st respondent obtained the consent of all the secured creditors for the proposal to enforce the security interest created by the petitioner. The consent of the other secured creditors is not required for issuing the notice u/s 13(2) of the Act but is required only for the Authorized Officer to take any of the actions provided u/s 13(4) of the Act. As the requisite consent has been obtained, the 1st respondent is duly entitled to proceed further for the recovery of its dues. It is further averred that the petitioner created mortgage of its immovable properties situated at the Industrial Development Area, Peddapuram, East Godavari District, Andhra Pradesh on 27.8.2001 by deposit of title deeds with the 1st respondent to secure the due repayment to the 1st respondent of the First Loan of Rs. 480 lakhs together with interest and other monies. Subsequently, the petitioner, on 23.1.2003, had created a mortgage by way of extension by deposit of title deeds by constructive delivery with the 1st respondent to secure the Second Loan of Rs. 120 lakhs together with interest and other monies. The liability to pay the dues to the 1st respondent as on 31.3.2005 has also been acknowledged by the petitioner in Form-A submitted by it to the BIFR. The duly certified copies of the particulars of charges filed by the petitioner with the Registrar of Companies in respect of the mortgages referred to above and Form No. A have been annexed by the Petitioner itself to the writ petition and this respondent craves leave to refer to and rely upon the same. Thus, the averment regarding the claim of the 1st respondent being beyond the prescribed limitation appears only to be a mischievous attempt by the petitioner to mislead this Court but made without any merit or substance. Further, it is reiterated that in terms of Section 15 of SICA as amended in 2002, notwithstanding the stage at which the reference filed by a borrower is pending with BIFR and or AAIFR, the reference shall abate when secured creditors representing three-fourth of the outstanding due from the borrower have taken any of the measures contemplated u/s 13(4) of the Act for enforcement of their security interest. The 1st respondent having obtained the consent of the other secured creditors of the petitioner on the Authorized Officer of the 1st respondent taking possession of the secured assets the reference pending before BIFR shall abate. The offer for settlement of the dues was only a proposal and nothing more. The receipt of a proposal in no way impairs the right of the 1st respondent to enforce the security interest created in its favour. A cursory perusal of the paragraphs 9 and 10 of the notice issued by the 1st respondent on 5.2.2007 u/s 13(2) of the Act would reveal that the enforcement action is contemplated only in respect of the secured assets specified in Annexure I-B thereto, and not to the assets of the guarantors. The reference in Ground "K" to Section 36 of the Act deals with limitation. Thus, the writ petition is a mala fide and vexatious one aimed at only to delay the recovery of monies of the secured creditors and hence, the same is to be dismissed.

6. In the Rejoinder affidavit filed by the petitioner-company several further averments have been made while answering the averments in the counter affidavit. The averments made in the counter affidavit are premature and absolutely incorrect. Specific stand had been taken that as per the provisions of Section 13(2) of the Act, before issuing a notice under the said provision, it is necessary for the financial institutions to notify to the borrower as to on what date the borrower has been classified as Non-performing Asset. This is so for the reason that as per Section 36 of the Act, limitation has been prescribed for the institutions to take action. As per the Limitation Act against any proceedings under the Act, action can be taken only within a period of three years from the date it has been declared as Non-Performing Asset. The following dates will show how notice u/s 13(2) is bad in law.

(i) Notice was issued u/s 13(2) of the Act on 5.2.2007

(ii) It was received by the petitioner on 7.2.2007.

(iii) It was replied to by the petitioner on 31.3.2007 as per Section 13(3)(a) of the Act.

(iv) Consent letter from State Bank of Indore (Consortium member) obtained on 3.7.2007.

(v) Consent from State Bank of India (Consortium Member) obtained by the respondent on 28.6.2007.

(vi) Consent from the Department of Science and Technology obtained on 29.3.2007.

Further, as per Section 13(9) of the Act in case of financing of a Financial asset by more than one secured creditor or Consortium financing, no secured creditor shall be entitled to exercise any of the rights conferred on him unless such exercise is agreed upon by the secured creditors representing not less than 3/4th of the value of the outstanding amount. It is humbly submitted that even issuance of notice u/s 13(2) of the Act by a secured creditor, requires the consent of Secured Creditors more than 3/4th of value of the amount outstanding, since the definition of the words "secured creditor" means not only an individual institution but also a consortium or group of bankers. In the present case, since the financing was done by consortium of bankers, even before issuance of notice u/s 13(2) of the Act, the respondents had to obtain the consent of more than 75% of the outstanding amount from the other secured creditors. In the absence of this, the action taken by the respondents in issuing notice u/s 13(2) is absolutely illegal. The facts, which clearly show the non-maintainability of the notice u/s 13(2) are that much before issuance of notice u/s 13(2) of the Act, the petitioner had approached the BIFR by way of a Reference u/s 15 of the SICA, which was registered on 29.12.2005 as a Case No. 175 of 2005 and immediately upon receipt of the registration, notices were issued to the State Bank of Indore, Technical Development Board, Government as also the

IDBI. In the proceedings dated 21.2.2007 and all further proceedings, IDBI very much participated in the proceedings, and by an order dated 21.2.2007, the BIFR was pleased to appoint the respondents herein as the Operating Agency with specific directions to prepare a revival scheme for the company. In fact, when the Bench of the BIFR sought the views of IDBI vis-a-vis rehabilitation of the petitioner-Industry, the respondents had absolutely no comments to offer and write a letter dated 19.2.2007 to the BIFR to that effect and the respondents were further directed to submit their report and reasons recommending the draft of a fully tied up rehabilitation scheme within 16 weeks from the date of the order. A period of 16 weeks already expired but till today the respondents have not obeyed the orders passed by the BIFR which is a judicial authority and have in turn sought to invoke the provisions of Section 13(2) of the Act. Pending reference and after declaration of the Company as a sick company u/s 3(1)(o) of the SICA, any proceedings for recovery would be barred u/s 22 of the SICA, which states that there shall be suspension of all legal proceedings, contracts, etc. In case the respondents wanted to invoke the provisions of the Act then they would have informed the BIFR that they have taken measures to recover their secured debt u/s 13(4) of the Act and therefore the reference can be abated. This action can be taken only during the pendency of the reference and not after the Company was declared sick. In this case, the company has already been declared sick even before any action u/s 13(4) can be contemplated. Hence, the provisions of the Act would be wholly inapplicable to the petitioner-company and they would be strictly governed only under the provisions of SICA. In these circumstances, it is humbly submitted that the action taken by the respondents is not only illegal but in contempt of the orders passed by BIFR, which is a Judicial Authority. Further, it is averred that the respondents' interest is already protected inasmuch as already, the BIFR in its order dated 21.2.2007, directed the petitioner not to dispose of any of its assets except with the consent of the BIFR as per Section 22(a) of the Act. Further, it is stated that the petitioner craves leave of this Court to file additional documents which would clearly show that after the order passed by the Bench of BIFR on 21.2.2007, immediately on 28.3.2007, vide additional document dated 28.3.2007 filed vide Ex. P27, the petitioner-company provided item-wise inventory list of all its assets and current assets with their book value as also the details of its liabilities and the details of the unsecured dues. Thereafter, the petitioner, on 13.4.2007, submitted to the respondents, the certified copies of the statement of accounts of the company's accounts maintained with the other banks as also undertaking that no amount has been kept in other banks and the said letter dated 13.4.2007 along with the Bank Statement is also being filed vide Ex.P-28. The petitioner, in spite of having complied with all the formalities as required by the BIFR for preparing the viability report by the respondents, the respondents failed to prepare any report till today to be submitted before the BIFR. Therefore, the petitioner was constrained to issue two letters dated 21.6.2007, which are filed as Exs.P-29 and P-30 reminding the respondents that since the IDBI has been appointed as O.A. and also a consortium member, the viability report and the rehabilitation scheme

are to be submitted to BIFR. In spite of this, the respondents have not taken any steps to prepare either the viability report or the rehabilitation scheme to be submitted to the BIFR. This clearly shows that the IDBI is not at all interested in supporting the survival of the industry but merely wants to destroy the industry by selling away its assets.

7. Both the parties have filed several documents as material papers.

The order impugned dated 5.2.2007 reads as hereunder:

Financial assistance sanctioned to you by IDBI Ltd. - Defaults committed - Statutory notice u/s 13 of the Act

(1) We, the Industrial Development Bank of India Ltd. (IDBI Ltd.), do hereby issue this statutory notice to you, White Circle Oxides Ltd. (formerly known as MPR Agglomerates Ltd.), u/s 13 of the Act in the circumstance narrated below:

(2) The erstwhile I.D.B.I., at your request, granted you financial assistance in the form of Rupee Term Loans under Venture Capital Fund (VCF) Scheme (hereinafter collectively referred as "the Financial Assistance") on the terms and conditions contained in the loan agreements entered into by you with IDBI ("Loan Agreements") and the security documents including the guarantees and other securities (the Security Documents), the particulars whereof are given in Annexure I-A.

(3) Pursuant to above, IDBI disbursed to you the Financial Assistance aggregating Rs. 600.00 lakhs from time to time as per the particulars given in Annexure I-A.

(4) As security for the financial assistance, you created security interest in favour of IDBI, inter alia, by way of hypothecation and mortgage of your movable and immovable properties (the Secured Assets), the particulars whereof are given in Annexure I-B.

(5) In terms of the Loan Agreements read with the Security Documents, you agreed to repay to IDBI the Financial Assistance in accordance with the amortisation schedules contained in the Loan Agreements. As you expressed difficulties in repayment of the Financial Assistance and payment of interest and other monies due under the loan agreement at your request, IDBI on two occasions vide its letters dated 23.1.2004 and 31.3.2005 granted to you certain reliefs and concessions viz. reduction in rate of interest, re-schedulement of principal, conversion of part of interest into equity at par, deferment of simple interest, etc. However, in spite of the reliefs and concessions, you failed and neglected to pay the rescheduled installments of principal amounts of the financial Assistance, interest and other monies, the particulars whereof, are given in Annexure-II. Consequent upon the defaults committed by you, your accounts in respect of the Financial Assistance have been classified as non-performing asset in accordance with the directions/guidelines issued by the Reserve Bank of India.

(6) Pursuant to the Industrial Development Bank of India (Transfer of Undertaking and Repeal) Act, 2003 (hereinafter referred to as "the Transfer Act") read with the Notification dated 29.9.2004 issued by the Central Government, with effect from 1.10.2004 the undertaking of IDBI has been transferred to and vested in the Industrial Development Bank of India Ltd., a company incorporated under the Companies Act, 1956 and having registered office at Mumbai. Further, in terms of Section 4(4) of the Transfer Act, any proceedings or cause of action pending or existing immediately before the appointed day by or against IDBI in relation to its undertaking may, as from the appointed day be continued and enforced by or against IDBI Ltd.

(7) In view of the defaults committed by you, IDBI Limited has become entitled to demand from you and call upon you to pay the entire Financial Assistance together with interest and other monies due in respect thereof.

(8) Accordingly, IDBI Ltd. hereby declares in writing that the entire outstanding principal amounts of the Financial Assistance together with interest, further interest, liquidated damages and other monies aggregating Rs. 12,00,69,8121- as on 1.1.2007 as per the particulars given in Annexure-III have become immediately due and payable by you to IDBI Ltd.

(9) In the premises, IDBI Ltd. has become entitled to and does issue this statutory notice to you u/s 13 of the Act and hereby calls upon you to pay IDBI Ltd. at Mumbai, within a period of 60 days from the date of this notice, the aforesaid sum aggregating Rs. 12,00,69,8121- as on 1.1.2007 as per Annexure - III, together with further interest thereon with effect from 1.1.2007 at the contractual rates upon the footing of compound interest until payment/realization, failing which IDBI Ltd. as a secured creditor shall be entitled to enforce its security interest without intervention of the Court or Tribunal by taking recourse to one or more of the measures under Chapter-III of the Act including (but not limited to) taking over of possession and/or management of the Secured Assets, short particulars whereof are given in Annexure I-B for realizing its dues at your own risk as to the costs and consequences thereof.

(10) Please note that after receipt of this notice, in terms of Section 13(13) of the Act, you shall not transfer by way of sale, lease or otherwise (other than in the ordinary course of your business) any of the Secured Assets described in Annexure I-B hereto, without prior written consent of IDBI Ltd.

(11) Please further note that this statutory notice is issued without prejudice to all the other rights and remedies available to IDBI Ltd. in law or contract or both, in respect of the Financial Assistance.

The other impugned notice dated 7.4.2007 reads as hereunder:

We are in receipt of your letter No. WCOL/IDBIA/CD/2007 dated March 31,2007 in response to our notice dated 5.2.2007 under the Act. In view of the objections raised by you to our proposed action under the Act, we advise as under:

(i) The assistance sanctioned by IDBI to you in September, 2000 and October, 2002 were by way of Rupee Term Loans under Venture Capital Fund Scheme. The said loans were to be repaid as per the Amortization Schedule specified in the respective Loan Agreements. However, in view of difficulties faced by you and having regard to the fact that the assistance was under Venture Capital Fund Scheme, at your request, IDBI granted reliefs and concessions envisaging re-schedulement of principal, reduction in the rate of interest, waiver of further interest/liquidated damages, deferment of interest, etc. in January 2004 and again in March 2005. Despite grant of reliefs and concessions, you failed to pay the dues to IDBI. It may be mentioned that assistance under Venture Capital Fund Scheme is not to be regarded as a grant but as a loan to be repaid in a definite time schedule and interest thereon serviced regularly. Though sufficient time and opportunity was given to come up with a proposal for settlement of dues, you failed to do so. The notice, dated 5.2.2007 under the Act has been issued after making all possible attempts to arrive at an acceptable settlement proposal.

(ii) It is denied that the notice is contrary to the provisions of either the Act or SICA. In fact, Section 15 of SICA (as amended in 2002) categorically provides that any reference pending before BIFR shall abate on the secured creditors representing 3/4th of the outstanding dues have taken action u/s 13(4) of the Act.

(iii) The averments made in paragraphs 8 and 9 of your reply, regarding the opinion on the functioning of the company and for locating an investor at the instance of IDBI are disputed and denied.

(iv) We deny that the said notice is either ambiguous or erroneous. No reasons have been given by you as to how the claim is arbitrary and not correct. We reiterate that the amounts claimed are as provided in the Loan Agreement entered into by you with IDBI on 16.2.2001 and 13.12.2002 are correct.

In view of all your objections being untenable, we call upon you to make immediate payment of the dues as claimed.

8. Apart from these impugned proceedings, the writ petitioner relied upon the Loan Agreement dated 29.3.2000, letter dated 31.10.2001, Security terms and conditions, letters dated 9.7.2002 and 12.6.2002, terms and conditions, letters dated 14.10.2002, 31.3.2007, 15.3.2007, letter Ref. No. WCOL/ BIFR/2007, dated 28.3.2007, Letter Ref. No. WCOL/BIFR/2007, dated 13.4.2007, letter Ref. No. WCOL/IDBI-VCD/2007, dated 21.6.2007, letter dated 19.2.2007, Minutes of the Meeting dated 26.9.2005 and a copy of the Caveat filed by the respondent dated 7.8.2007. The respondents along with counter affidavit had placed fax No. 022-22182562, dated 29.3.2007 with annexures, the particulars of the financial assets dated 28.6.2007 and other relevant proceedings have been placed before this Court. The respective stands taken by the parties, impugned orders and the necessary proceedings, which are placed by the parties, have also been referred

to above.

9. Sri Ravichander, representing Sri Milind G Gokhale, learned Counsel for the petitioner, has taken this Court through the contents of the affidavit filed in support of the writ petition, his stand taken against the counter affidavit and also the averments made in the rejoinder affidavit and pointed out the relevant dates and contended that if the dates are carefully examined, the impugned action cannot be sustained. The learned Counsel would further contend that the petitioner is declared to be a sick industry by BIFR by its order dated 21.2.2007 and it filed a reference u/s 15(1) of the SICA which was taken on record on 29.12.2005 as Case No. 175 of 2005. The date of notice issued u/s 13(2) of the Act is 5.2.2007 and by that time the case was admitted by BIFR. On 21.2.2007, the BIFR declared the petitioner-company as sick and appointed IDBI as Operating Agency. The learned Counsel had also drawn the attention of this Court to Sections 17 and 18 and 22 of the SICA. The learned Counsel also would submit that to the notice, dated 5.2.2007, response was given on 31.3.2007 and a further notice was issued on 7.4.2007. While elaborating his submissions, the learned Counsel would maintain that the stand taken by the respondents that the writ petitioner has an effective alternative remedy u/s 17 of the Act cannot be sustained. The learned Counsel had taken this Court and explained under what circumstances and against which orders appeals would lie u/s 17 of the Act. The learned Counsel, while further elaborating his submissions, had explained the scope and ambit of Sections 13(3A), 13(4), and 13(9) of the Act and would maintain that in the light of the clear language of Section 13(9) of the Act unless the consent of other secured creditors or appropriate time had been obtained, the question of initiating this action would not arise. The learned Counsel had drawn the attention of this Court to the clear language employed in Section 13(2) of the Act and also the options specified u/s 13(4) of the Act. The consent as contemplated u/s 13(9) of the Act is a condition precedent to invoke the provisions of Section 13(3) of the Act. If any other interpretation to be given u/s 13(9) of the Act would become an empty formality. Section 13(4) of the Act is to be read with Section 13(2) of the Act. The obtaining of subsequent consent if any would not cure the defect since the same is illegal. Language of Section 15 of the SICA is also relied upon. The learned Counsel would maintain that in the light of the order, dated 21.2.2007, issued by BIRF, Section 22 of the SICA would overrule Section 13 of the Act and by virtue of the order made by the BIFR, the petitioner is protected by the protective umbrella. I.D.B.I., issued notice on 5.2.2007 and B.I.F.R. declared the petitioner-company as a sick unit by its order dated 21.2.2007. It is also contended that the consent had been obtained subsequent to the orders dated 29.3.2007, 28.6.2007 and 3.7.3007 from the other secured creditors. This may not be taken as ratifying action. In case of pending matter of BIFR and the reference abates, then what the effect would be in relation to the decision taken u/s 13 of the Act also had been explained in his elaboration. If reference is made in the order of BIFR, Section 13 of the Act cannot be invoked. While strongly relying on the second proviso of Section 15 of

the SICA, he contended that he made an attempt to demonstrate how that provision had not been complied with. The learned Counsel also would maintain that while the order impugned was made, the guidelines of the Reserve Bank of India had been simply followed without independent application of mind. In case of huge debt like this by declaring it as Non-Performing Asset the competent authority is expected to apply his mind independently irrespective of the R.B.I., guidelines. The directions of R.B.I alone cannot be the mere guidance. If such order is made it would amount to statutory authority in performing his statutory duties. The Counsel also would maintain that the Chairman of the Bank had delegated the power to the 2nd respondent, but the statute does not empower them to make such allegations. The Board of I.D.B.I., might have taken decision since the delegation is not authorized by the statute. Even otherwise, the power given by the Chairman to them in the year 2002 cannot be extended to the present body since this body is statutorily different from that of the year 2002. The scope and ambit of the objectives of both the parties had been elaborately explained by the Counsel and the learned Counsel would conclude that in the facts and circumstances, the writ petition is to be allowed.

10. Sri P. Guru Murthy, learned standing Counsel for Industrial Development Bank of India Limited, appearing for the respondents had taken this Court through the contents of the counter affidavit and had explained Sections 13(2), 13(4) and 17 of the Act in detail. He had also drawn the attention of this Court through necessary portions of the order made by the BIFR, and contended that in order to maintain them the BIFR could have raised these objections and passed a restrictive order. The learned Counsel also laid emphasis on the alternative remedy available to the petitioner and how the writ petition as such is not maintainable. On the aspect of availability of alternative remedy u/s 17 of the Act, reliance was placed on several judgments reported in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, ; *Vijay Laghu Udyog v. Punjab National Bank* 2004 All L.J. 3737; *Arun Kumar Arora v. Union of India* 2007 (1) DRTC 63; *Ullash Chandra Sahoo v. Bank of India, Bhubaneswar* 2007 (1) DRTC 58; *Wellworth Electronics Vs. The Union of India (UOI)*, The Debts Recovery Tribunal and *Indian Overseas Bank*, ; *Punjab National Bank Vs. Mr. Anwar Sherieff*, ; *Kundanben Jayantialal Sanghvi v. State Bank of Saurashtra* (2005) 126 Comp. Cas 666 (SC); *Siddh Industries and Others Vs. Union Bank of India and Another*, and *Apex Electricals Ltd. Vs. ICICI Bank Ltd.*, . In the light of the view expressed by a Division Bench of this Court, the learned Counsel in elaboration had taken this Court through the contents of the counter affidavit and also the relevant portions of the order made by BIFR.

11. Heard the learned Counsel for both the parties and perused the respective pleadings and the material placed on record.

12. This Court, on 20.8.2007, while ordering Rule Nisi, made the following order in W.P.M.P. No. 22375of2007:

Pending further orders, the respondents are directed not to take any coercive

steps against the petitioner pursuant to the impugned order dated 7.4.2007.

The learned Counsel for the petitioner in the impugned proceedings dated 5.2.2007, specifically pointed out the under-noted portions:

Consequent upon the defaults committed by you, your accounts in respect of the Financial Assistance, have been classified as Non-Performing Assets in accordance with the directions/guidelines issued by the Reserve Bank of India.

In the light of the same, elaborate submissions were made that there is no independent application of mind by the competent authority. Further, strong reliance is placed at paragraph 6 of the proceeding which reads as under:

Pursuant to the Industrial Development Bank of India (Transfer of Undertaking and Repeal) Act, 2003 (hereinafter referred to as "the Transfer Act") read with the Notification dated 29.9.2004 issued by the Central Government, with effect from 1.10.2004, the undertaking of IDBI has been transferred to and vested in the Industrial Development Bank of India Ltd., a company incorporated under the Companies Act, 1956 and having its Registered Office at IDBI Tower, WTC Complex, Cuffe Parade, Mumbai-400 005. Further, in terms of Section 4(4) of the Transfer Act, any proceedings or cause of action pending or existing immediately before the appointed day or against IDBI in relation to its undertaking may, as from the appointed day, be continued and enforced by or against IDBI Ltd.

In the light of the same, elaborate submissions had been made relating to the non-exercise of power by the competent authority and non-conformate of power of the authority concerned to delegate in the light of the change of the respective bodies.

13. Section 13 of the Act deals with Enforcement of Security Interest. Sub-sections (1 to 4) of Section 13 of the Act along with the provisos specify hereunder:

(1) Notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or Tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under Sub-section (4).

(3) The notice referred to in Sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

3(A) If, on receipt of the notice under Sub-section (2) the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower.

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal u/s 17 or the Court of District Judge u/s 17A.

(4) In case the borrower fails to discharge his liability in full within the period specified in Sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

Further strong reliance was placed on Sub-section (9) of Section 13 of the Act which reads as under:

In case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to Sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realized from the sale of secured assets shall be distributed in accordance with the provisions of Section 529-A of the Companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realize his security instead of relinquishing his security and proving his debt under proviso to Sub-section (1) of Section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of Section 529A of that Act:

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of Section 529-A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that Section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation:- For the purposes of this sub-section-

(a) "recorddate" means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date;

(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

Section 17 of the Act deals with Right of Appeal, which is extracted hereunder:

(1) Any person (including borrower), aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor or his authorized officer under this Chapter, {may make an application along with such fee, as may be prescribed} to the Debts Recovery Tribunal having jurisdiction in the matter within forty five days from the date on which such measures had been taken.

(Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower).

(Explanation:- For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection of the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section).

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder;

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in Sub-section (4) of Section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to anyone or more measures referred to in Sub-section (4) of Section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under Sub-section (4) of Section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under Sub-section (4) of Section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under Sub-section (4) of Section 13 to recover his secured debt.

(5) Any application made under Sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time extend the said period for reasons to be recorded in writing, so however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under Sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in Sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate

Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act the Debts Recovery Tribunal shall as far as may be, dispose of application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.

(17A. Making of application to the Court of District Judge in certain cases:- In the case of a borrower residing in the State of Jammu and Kashmir, the application u/s 17 shall be made to the Court of District Judge in that State having jurisdiction over the borrower which shall pass an order on such application.

Explanation: For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons shall not entitle the person (including borrower) to make an application to the Court of District Judge under this section).

Section 36 of the Act reads as under:

Limitation: No secured creditor shall be entitled to take all or any of the measures under Sub-section (4) of Section 13, unless his claim in respect of the financial asset is made within the period of limitation prescribed under the Limitation Act, 1963.

14. In the light of the language of Sections 13(3A), 13(4) and 13(9) of the Act, which is to be complied with as a condition precedent, all the further proceedings are invalid. Emphasis was laid on the language "unless exercise of such right is agreed upon by the secured creditors representing not less than three fourth in value of the amount outstanding as on a record date, such action shall not be binding on all the secured creditors" in Sub-section 9 of Section 13 of the Act. Further, strong reliance was placed on the language in Sub-section (2) of Section 13 of the Act that "in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under Sub-section (4).

15. Section 22 of the SICA deals with Suspension of Legal Proceedings, Contracts, etc.

(1) Where in respect of an industrial company, an inquiry u/s 16 is pending or any scheme referred to u/s 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal u/s 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956, or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect

under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof shall lie or be proceeded further, except with the consent of the Board or, as the case may be, the Appellate Authority.

(2) Where the management of the sick industrial company is taken over or changed, notwithstanding anything contained in the Companies Act, 1956 or any other law or in the memorandum and articles of association of such company or any instrument having effect under the said Act or other law

(a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a Director of the company;

(b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.

(3) During the period of consideration of any scheme u/s 18 of 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 sick 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;

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate.

(4) Any declaration made under Sub-section (3) with respect to a sick industrial company shall have effect notwithstanding anything contained in the Companies Act, 1956 or any other law, the memorandum and articles of association of the company or any instrument having effect under the said Act or other law or any agreement or any decree or order of a Court, Tribunal, officer or other authority or of any submission, settlement or standing order and accordingly;

(a) any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration, and all proceedings relating thereto pending before any Court, Tribunal officer or other authority shall remain stayed or be continued subject to such declaration; and

(b) on the declaration ceasing to have effect-

(i) any right, privilege, obligation or liability so remaining suspended or modified, shall become revived and enforceable as if the declaration had never been made;

and

(ii) any proceeding so remaining stayed shall be proceeded with subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this Section shall be excluded.

16. Section 17 of SICA deals with Powers of Board to make suitable order on the Completion of Inquiry, and the same is reproduced hereunder:

(1) If after making an inquiry u/s 16, the Board is satisfied that a company has become a sick industrial company, the Board, 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 positive within a reasonable time.

(2) If the Board decides under Sub-section (1) that it is practicable for a sick industrial company to make its net worth positive within a reasonable time, the Board, shall, by order in writing and subject to such restrictions un-conditions as may be specified in the order, give such time to the company as it may deem fit to make its net worth positive.

(3) If the Board decides under Sub-section (1) that it is not practicable for a sick industrial company to make its net worth positive 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.

(4) The Board may-

(a) if any of the restrictions or conditions specified in an order made under Sub-section (2) are not complied with by the company concerned, review such order on a reference in that behalf from any agency referred to on Sub-section (2) of Section 15 or on its own motion and pass a fresh order in respect of such company under sub-action (3);

(b) if the operating agency specified in an order made under Sub-section (3) makes a submission in that behalf, review such order and modify the order in such manner as it may deem appropriate.

17. Section 18 of the SICA deals with Preparation and Sanction of Schemes, which reads thus:

(1) Where an order is made under Sub-section (3) of Section 17 in relation to any sick industrial company, the operating agency specified in the order shall

prepare, as expeditiously as possible and ordinarily within a period of ninety days from the date of such order, a scheme with respect to such company providing for any one or more of the following measures, namely:

- (a) the reconstruction, revival or rehabilitation of the sick industrial company;
- (b) the proper management of the sick industrial company by change in, or take over of, management of the sick industrial company;
- (c) the amalgamation of the sick industrial company with any other industrial company (referred to in this Section as "transferee industrial company");
- (d) the sale or lease of a part or whole of any industrial undertaking of the sick industrial company;
- (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).

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

- (a) the constitution, name and registered office, the capital, assets, powers, rights, interests, authorities and privileges, duties and obligations of the sick industrial company or, as the case may be, of the transferee industrial company;
- (b) the transfer to the transferee industrial company of the business, properties, assets and liabilities of the sick industrial company on such forms and conditions as may be specified in the scheme;
- (c) any change in the Board of Director, or the appointment of a new Board of Directors, of the sick industrial company and the authority by whom, the manner in which and the other terms and conditions on which, such change or appointment shall be made and in the case of appointment of a new Board of Directors or of any Director, the period for which such appointment shall be made;
- (d) the alteration of the memorandum or articles of association of the sick industrial company or as the case may be, of the transferee industrial company for the purpose of altering the capital structure thereof or for such other purposes as may be necessary to give effect to the reconstruction or amalgamation;
- (e) the continuation by, or against, the sick industrial company or, as the case may be, the transferee industrial company of any action or other legal proceeding pending against the sick industrial company immediately before the date of the order made under Sub-section (3) of Section 17;

(f) the reduction of the interest or rights which the shareholders have in the sick industrial company to such extent as the Board considers necessary in the interests of the reconstruction, revival or rehabilitation of the sick industrial company or for the maintenance of the business of the sick industrial company;

(g) the allotment to the shareholders of the sick industrial company of shares in the sick industrial company or, as the case may be, in the transferee industrial company and where any shareholder claims payment in cash and not allotment of shares, or where it is not possible to allot shares to any shareholder the payment of cash to those shareholders in full satisfaction of their claims-

(i) in respect of their interest in shares in the sick industrial company before its reconstruction or amalgamation; or

(ii) where such interest has been reduced under Clause (f) in respect of their interest in shares as so reduced;

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

(i) sale of the industrial undertaking of the sick industrial company free from all encumbrances and all liabilities of the company or other such encumbrances and liabilities as may be specified, to any person, including a cooperative society formed by the employees of such undertaking and fixing of reserve price for such sale;

(j) lease to the industrial undertaking of the sick industrial company to any person, including a cooperative society formed by the employees of such undertaking;

(k) method of sale of the assets of the industrial undertaking of the sick industrial company such as by public auction or by inviting tenders or in any other manner as may be specified and for the manner of publicity therefore;

(l) transfer or issue of the shares in the sick industrial company at the face value or at the intrinsic value which may be at discount value or such other value as may be specified to any industrial company or any person including the executives and employees of the sick industrial company;

(m) such incidental, consequential and supplemental matters as may be necessary to secure that the reconstruction or amalgamation or other measures mentioned in the scheme are fully and effectively carried out.

(3)(a) A copy of the scheme prepared by the Board shall be sent, in draft, to the sick industrial company and the operating agency and in the case of amalgamation, also to the transferee industrial company and other industrial company concerned in the amalgamation for suggestions and objections, if any, within such period as the Board may specify"

(c) The Board may make such modifications, if any, in the draft scheme as it may

consider necessary in the light of the suggestions and objections received from the sick industrial company and the operating agency and also from the transferee industrial company and any other industrial company concerned in the amalgamation and from any shareholder or any creditors or employees of such industrial companies:

Provided that where the scheme relates to amalgamation of the sick industrial company the said scheme shall be laid before the transferee industrial company in the general meeting for the approval of the scheme by its shareholders and no such scheme shall be proceeded with unless it has been approved, with or without modification, by a special resolution passed by the shareholders of the transferee industrial company.

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

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

(5) The Board may on the recommendations of the operating agency or otherwise, review any sanctioned scheme and make such modifications as it may deem fit or may by order in writing direct any operating agency specified in the order, having regard to such guidelines as may be specified in order, to prepare a fresh scheme providing for such measures as the operating agency may consider necessary.

(6) When a fresh scheme is prepared under Sub-section (5), the provisions of Sub-sections (3) and (4) shall apply in relation thereto as they apply to in relation to a scheme prepared under Sub-section (1).

(7) The sanction accorded by the Board under Sub-section (4) shall be conclusive evidence that all the requirements of this scheme relating to the reconstruction or amalgamation, or any other measure specified therein have been complied with and a copy of the sanctioned scheme certified in writing by an officer of the Board to be a true copy thereof, shall, in all legal proceedings (whether in appeal or otherwise) be admitted as evidence.

(8) On and from the date of the coming into operation of the sanctioned scheme or any provision thereof, the scheme or such provision shall be binding on the sick industrial company, or, as the case may be, on the transferee industrial company and also on the shareholders of both the companies.

(9) If any difficulty arises in giving effect to the provisions of the sanctioned scheme, the Board may, on the recommendation of the operating agency, by order do anything, not inconsistent with such provisions, which appears to it to be necessary or expedient for the purpose of removing the difficulty.

(10) The Board may, if it deems necessary or expedient so to do, by order in

writing, direct any operating agency specified in the order to implement a sanctioned scheme with such terms and conditions and in relation to such sick industrial company as may be specified in the order.

(11) Where the whole of the undertaking of the sick industrial company is sold under a sanctioned scheme, the Board may distribute the sale proceeds to the parties entitled thereto in accordance with the provisions of Section 529-A and other provisions of the Companies Act, 1956.

Strong emphasis was laid on Section 15 of the SICA, which is reproduced below:

Section 15: Reference to Board: (1) Where any industrial company has become sick industrial company, the Board of Directors of the company shall within sixty days from the date of finalization 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.

Provided that if the Board of Directors had sufficient reasons even before such finalization to form the opinion that the company had become a sick industrial company, the Board of Directors shall, within sixty days after it has formed such opinion, make a reference to the Board for the determination of the measure which shall be adopted with respect to the company;

Provided further that no reference shall be made to the Board for Industrial and Financial Reconstruction after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 where financial assets have been acquired by any securitisation company or reconstruction company under Sub-section (1) of Section of that Act.

Provided also that on or after the commencement of the Act where a reference is pending before the BIFR, such reference shall abate if the secured creditors, representing not less than three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under Sub-section (4) of Section 13 of that Act.

(2) Without prejudice to the provisions of Sub-section (1), the Central Government or the Reserve Bank or a State Government or a public financial institution or a State level institution or a scheduled bank may, if it has sufficient reasons to believe that any industrial company has become, for the purposes of this Act, a sick industrial company, make a reference in respect of such company to the Board for determination of the measures which may be adopted with respect to such company;

Provided that a reference shall not be made under this Sub-section in respect of any industrial company by-

(c) the Government of any State unless all or any of the industrial undertakings

belonging to such company are situated in such State; a public financial institution or a State level institution or a scheduled bank unless it has, by reason of any financial assistance or obligation rendered by it, or undertaken by it, with respect to such company, an interest in such company.

18. Section 16 of the SICA deals with Inquiry into Working of Sick Industrial Companies, which reads as under:

(1) The Board may make such inquiry as it may deem fit for determining whether any industrial company has become a sick industrial company-

(a) upon receipt of a reference with respect to such company u/s 15; or

(b) upon information received with respect to such company or upon its own knowledge as to the financial condition of the company.

(2) The Board may, if it deems necessary or expedient so to do for the expeditious disposal of an inquiry under Sub-section (1), require by order any operating agency to enquire into and make a report with respect to such matters as may be specified in the order.

(3) The Board or as the case may be, the operating agency shall complete its inquiry as expeditiously as possible and endeavour shall be made to complete the inquiry within sixty days from the commencement of the inquiry.

(4) Where the Board deems it fit to make an inquiry or to cause an inquiry to be made into any industrial company under Sub-section (1) or, as the case may be, under Sub-section (2), it shall appoint one or more persons to be a special Director or special Directors of the company for safeguarding the financial and other interests of the company.

(5) The appointment of a special Director referred to in Sub-section (4) shall be valid and effective notwithstanding anything to the contrary contained in the Companies Act, 1956, or in any other law for the time being in force or in the memorandum and articles of association or any other instrument relating to the industrial company, and any provision, regarding share qualification, age limit, number of directorships, removal from office of directors and such like conditions contained in any such law or instrument aforesaid, shall not apply to any Director appointed by the Board.

(6) Any special Director appointed under Sub-section (4) shall-

(a) hold office during the pleasure of the Board and may be removed or substituted by any person by order in writing by the Board;

(b) not incur any obligation or liability by reason only of his being a Director or for anything done or omitted to be done in good faith in the discharge of his duties as a Director or anything in relation thereto;

(c) not be liable to retirement by rotation and shall not be taken into account for computing the number of Directors liable to such retirement.

Section 2 of SICA reads as under:

Effect of the Act on other Laws:

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

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

(3) Nothing in the Monopolies and Restrictive Trade Practice Act, 1969 shall apply in relation to

(a) the modernization or expansion of a sick industrial company, or

(b) the amalgamation or merger of a sick industrial company with another company as a result of a scheme sanctioned in accordance with the provisions of this Act.

19. Further, reliance was placed on Sub-section (3) of Section 22 of the SICA "where an inquiry u/s 16 is pending or any scheme referred to u/s 17 is under preparation or during the period of consideration of any scheme u/s 18 of 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 sick 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".

20. The other relevant portions of Section 22 of the SICA also had been relied upon. Further, emphasis was made on the language employed in Section 15 of the SICA and in the light of the Sections 2, 15, 16, 17, 18 and 22 of the SICA, elaborate submissions were made by the respective Counsel representing the parties.

21. It may be appropriate to have a look at certain portions of the order made by the BIFR. The relevant portions on which the emphasis had been laid are to the following effect:

The Bench noted that IDBI vide their letter dated 19.2.2007 had submitted that they had issued a notice to the company under the Act for recovery of their dues.

The representative of the company submitted that the company was incorporated in 1997 to commercialize the newly developed processed technology for manufacture of Magnesium Aluminates Spinel (MAS) developed by the International Advanced Research Centre for Power Metallurgy and New Materials (ARC-I), Hyderabad, a Government of India Research Laboratory under the Ministry of Science and Technology. Due to increase in the price of alumina by almost 70% and high fuel cost, the cost of production went up and the company suffered huge losses. State Bank of Indore also stopped the operation of working capital limits since January, 2005. Therefore, the company filed the reference with the Board.

He further submitted that the promoter subsequently developed a new product Micronized Reactive Spinel in April, 2005 and the product had been doing well. During 2006-07, the company earned operating profit of Rs. 12.00 lakhs before interest. He further submitted that the company had no statutory liability. He submitted copy of letter dated 14.7.2006 written by Steel Authority of India to the company appreciating the usefulness of the product developed by the company. He further submitted that they had met the IDBI officials also regarding settlement of their dues. He requested the Bench that the company may be declared sick and an operating agency may be appointed to prepare a viability study report and draft rehabilitation scheme for the company.

Having considered the facts on record and the submissions made at today's hearing, the Bench observed that there was no valid objection to the company's sickness from the parties present today. The company fulfilled various criteria for sickness under the Act. The Bench was satisfied that the company had become a sick industrial company in terms of Section 3(1)(o) of the Act and declared it to be so. The representative of the company indicated that it would not be possible for them to work out a scheme u/s 17(2) of the Act on their own. 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 IDBI as the operating agency (OA) with directions to prepare a revival scheme for the company, if feasible. The OA was directed to submit its report and reasoned recommendations - along with the draft of a viable and fully tied up rehabilitation scheme, if it emerges - within 16 weeks from today. The OA was directed to keep in view the provisions of Section 18 of the Act and the enclosed guidelines while carrying out this exercise. The company was directed not to dispose of, except with the consent of the Board, any of its assets as per Section 22A of the Act. The cut off date (COD) for the scheme shall be taken as 30.6.2007.

22. In the light of the stand taken in the counter affidavit filed by the respondents and also the order made by BIFR, certain submissions were made that all these objections which have been raised before this Court could have

been canvassed before the BIFR as well. It is needless to say that the scope and ambit relating to the powers of the BIFR to deal with these questions is limited. It cannot be said that merely because such objections had not been raised before BIFR the writ petitioner cannot approach this Court by filing the present writ petition. However, elaborate submissions were made relating to the non-obtaining of the consent from the other secured creditors at the appropriate time and the consent which had been obtained subsequent thereto from the other secured creditors incidentally the want of power to delegate also had been made a ground of attack. Though these submissions made by the learned Counsel representing the writ petitioner prima facie appear to be attractive, on a careful analysis of the scope and ambit of the provisions referred to supra and the facts referred to supra, this Court is of the considered opinion that merely because an order was made by the BIFR it does not derive any benefit to the writ petitioner when the secured creditor proceeded in accordance with the provisions of the Act. Apart from this aspect of the matter, as can be seen from the steps to be taken, the writ petitioner at the appropriate stage is having an effective alternative remedy by way of appeal and it is not as though all these serious objections which are being referred to before the writ Court cannot be raised in the appeal as grounds of attack. In the light of the same, this Court is giving liberty to the writ petitioner to raise all these objections at the appropriate stage before the appropriate Tribunal invoking appropriate remedy. Except making these observations at this stage, no positive direction as such can be given.

With the above observations, the writ petition is disposed of. No order as to costs.