HIGH COURT OF GUJARAT

N K INDUSTRIES LIMITED
Versus
STATE BANK OF INDIA

Date of Decision: 07 November 2001

Citation: 2001 LawSuit(Guj) 754

Hon'ble Judges: C K Buch

Eq. Citations: 2002 1 GLH 773, 2002 1 GHJ 187

Case Type: Special Civil Application

Case No: 8689 of 2000

Subject: Company, Constitution, Direct Taxation, SICA

Acts Referred:
Constitution Of India Art 227, Art 226
Sick Industrial Companies (Special Provisions) Act, 1985 Sec 16, Sec 15(2), Sec 15(1)

Final Decision: Petition dismissed

Advocates: Nanavati Associates, Pranav G Desai, Sonia Hurra, Singhi And Buch Associates, B P Bhatt

Cases Referred in (+): 6

[1] The petitioner- M/s N.K.Industries Ltd. (hereinafter referred to as the "petitioner company", by invoking jurisdiction of this Court under Article 226 of the Constitution of India, has prayed for issuance of a writ of mandamus and/or appropriate writ, direction or order quashing and setting aside the impugned order dated 12.5.2000/23.5.2000 passed by the Appellate Authority for Industrial & Financial Reconstruction (hereinafter referred to as "AAIFR" or "Appellate Authority") allowing appeal No. 107/99 and reversing the order dated 9.7.1999 passed by the Board for Industrial & Financial Reconstruction (hereinafter referred to as "BIFR" or "Board"). Other consequential reliefs are also prayed by the petitioner company.

[2] The matter was listed on admission board on 20.8.2000 and the Court was pleased to issue notice to the other side. All respondents are served. As the learned counsel

appearing for other side have resisted this petition vehemently, with the consent of parties, matter is heard at length at the admission stage and is disposed of by this judgment.

[3] It would be just and proper to narrate facts, in brief, leading to present controversy between the parties. The petitioner company was incorporated on 19.8.1987 as a Private Limited Company and was thereafter converted into Public Limited Company. It is engaged in the business of manufacturing Castor Oil and its derivatives. It has set-up world's biggest Castor Oil Complex with crushing capacity of 400 TPD and solvent capacity of 400 TPD as well as creating capacities in derivatives-HCO, 12-HSA & Glycerine. Paid-up capital of the company as on 31.3.1998 was Rs.600.99 lacs and free reserves of Rs. 944.32 lacs. It is, however, contended that due to reasons beyond control, the petitioner company accumulated loss of Rs. 4540.60 lacs. The net worth of the petitioner company as on 31.3.1998 was minus Rs. 2995.29 lacs. The petitioner company, therefore, made reference before BIFR in terms of sec.15(1) and 15(2) of the Sick Industrial Companies (Special Provisions) Act,1985 (hereinafter referred to as "SICA") which came to be registered as Case No.35/99. After appreciating the say of the petitioner and appreciating documentary evidence produced before BIFR and statement of accounts, balance-sheet etc., BIFR, vide order dated 9.7.1999, declared the petitioner company as "sick unit" under sec.3(1)(o) of SICA. BIFR appointed Bank of Baroda as Operating Agency and gave certain directions which are reflected in the above-referred order passed by the BIFR. Feeling aggrieved and dissatisfied with the order dated 9.7.1999 passed by the BIFR, one of the secured creditors namely State Bank of India filed an appeal before the AAIFR - Appellate Authority which came to be registered as Appeal No.107/99. AAIFR allowed the appeal and set aside the order of BIFR and dismissed the reference made by the petitioner company vide its order dated 12.5.2000/23.5.2000 (Annex.D colly.), which is under challenge.

[4] Grounds for challenge are mainly enumerated in paras 10 to 18 of the petition. Learned senior counsel Mr. KS Nanavati for Nanavati & Nanavati Associates for the petitioner has argued at length practically on all grounds pleaded in the petition and has submitted that the order under challenge is unjust, improper, contrary to the scheme of SICA and Regulations framed thereunder and, therefore, the court should exercise its jurisdiction under Articles 226 and 227 by quashing and setting aside the order under challenge. By reading various observations (conclusion) made by BIFR in its order dated 9.7.1999, it is argued that appellate authority has completely ignored the aspects and evidence which weighed the BIFR while passing the impugned order. Acceptance of appeal under under erroneous approach has resulted into total miscarriage of justice. According to Mr. Nanavati, SICA has been enacted with a view to

secure timely detection of sick companies / industrial undertakings. Board of experts viz. BIFR is supposed to determine the preventive, ameliorative, remedial and other measures expeditiously. Enforcement of measures so determined at the earliest is also one of the object of SICA. BIFR had considered all the relevant aspects while scrutinising the reference made by the petitioner and had appointed a Nationalised Bank viz. Bank of Baroda - one of the secured creditors, as Operating Agency. Ignoring the paramount object of SICA, the appellate authority dismissed the reference at the stage of admission/entertainment under a misconception of the entire scheme and under erroneous approach. BIFR, while dealing with the reference under sec.15(1) of SICA duly registered under Regulation No.19 of BIFR Regulations, 1987 (hereinafter referred to as the "Regulations"), had initiated inquiry under sec.19 to ascertain the plea of the company and had concluded, in view of the provisions of sec.3(1)(0) of the Act, that the petitioner is the sick industrial company. At the time of reversing the order of BIFR, the appellate authority held that the promoters of the company resorted to dishonest and unfair practice for personal enrichment and sickness applied is not a genuine sickness. To appreciate the case of the petitioner, Mr. Nanavati has taken this Court through relevant paragraphs of the order under challenge and more particularly observations and averments made in paras-14(a), 14(c), 14(d), 19(d), para-24(b), 29(a), 29(d), 31(c), 31(e) and 35 of the order under challenge.

[5] (I) Mr. Nanavati has also taken this Court through the construction, objects and reasoning in the preamble and to various provisions of SICA. According to Mr. Nanavati, BIFR is conferred with statutory duty and function of investigating into the sickness of an industrial company and to take remedial measures for its revival provided that such an industrial company is held to be a "sick industrial company". Inquiry contemplated under sec.15 of the Act read with Regulations 21 to 25 of the Regulation is only for the purpose of determining the effect of sickness brought to the notice of BIFR under the Reference. Sec.16 to 18 of the Act provides for measures which BIFR has to take for revival and BIFR cannot refuse to perform its statutory duties and functions under the Act. The Board cannot refuse to act on the ground that either the management has been dishonest or has mismanaged affairs of the company or siphoned or misappropriated funds or has been guilty of making company sick or fabricating or falsifying the accounts. On receipt of Reference under sec.15(1) of the Act, sickness is required to be ascertained under an inquiry and the cause leading to such sickness is not relevant. BIFR must come to a positive conclusion whether or not the company in respect of which reference is registered, is a "sick industrial company" or not.

5.(Ii) Mr. Nanavati has pointed out that company is legally bound to make reference otherwise the company and defaulting directors in making reference

under sec.15(1) of the Act can be subjected to the criminal action by way of prosecution. It is pointed out that information as to sickness of industrial company has to be lodged before the BIFR by the Board of Directors of the Company by way of reference under sec.15 but scheme further provides that various bodies contemplated under sec.15(2) i.e. Central Government, Bank, Financial Institutions, Reserve Bank etc. also can make such reference. BIFR can also suo motu entertain reference in view of the provisions of Sec. 16(1). According to Mr. Nanavati, the word "may" used in sec.16(1) should not be interpreted as "must".

5.(Iii) In fact, if BIFR is satisfied with the audited accounts no further inquiry would become necessary and the board can declare the company as "sick". The question of making inquiry would arise where the Board finds that audited accounts are not dependable and an inquiry is necessary to determine whether the company is a sick industrial company or not. In case on hand, after inquiry, BIFR concluded in favour of the company and declared it as "sick industrial company". The petitioner company had never prayed for any protection and reference under sec.16(1) is not an application asking a helping hand from BIFR. It is simply a report informing BIFR as to the nature and stage of sickness. Mr. Nanavati has taken me through prescribed form viz. Form No.A & AA provided under Regulations and has pointed out that signatory of the reference made is designated as an informant. He is neither a complainant nor applicant. BIFR may refuse to entertain reference filed by the company if it comes to a conclusion that accounts are not dependable or same are manipulated, but in the case on hand, body of the experts namely BIFR has accepted the reference and has appointed operating regulating agency from one of the secured creditors namely Bank of Baroda. Finding recorded by the appellate authority is total misconception of law as if SICA is beneficial piece of legislation and the same is enacted to help each sick industrial company with helping hand

5.(Iv) According to Mr. Nanavati, there is a clear distinction between the company and its management and SICA provides for measures for change of management or transfer of the productive assets as a part of the scheme for revival of the company. He has hammered that section 24 provides for misfeasance proceedings. Under this, while implementing any scheme or proposals actions can be taken against any past or present director, manager, officer, employee or any person. While forming scheme for management of sick company, recovery can be ordered from such persons of the company's money or property. According to Mr. Nanavati, provisions of sec.24 are much wider than sec.542 and 543 of the Companies Act. So, considering all these aspects, BIFR has accepted the reference, registered it and appointed Operating Agency Bank of Baroda. There was no need to reverse the finding on assumptions, presumptions or surmises. The allegations which were

made during the course of arguments before the appellate authority by the learned counsel appearing for the appellant Bank seems to have succeeded only because they were able to prejudice the appellate authority as to the alleged misconduct on the part of management.

5.(V) The petitioner company is a public limited company and sickness of the company is more relevant in such cases and the alleged cause does not require to be magnified on extraneous consideration and the same should be left to BIFR during the proceedings under sections 16 & 17 onwards. According to Mr. Nanavati, patent error of law has been committed by the appellate authority. All the beneficial provisions meant for protecting the company from the effects of consequences of mismanagement of its affairs by its Board of Directors, for saving the productive assets from being vested, for saving the labour force of unemployment, and the funds of the financial institutions is being unrecoverable would be rendered wholly nugatory if it is held that BIFR or AAIFR can reject a reference without determining whether the company is a sick industrial company or not, only on the ground that the accounts of the company have been fabricated or manipulated by the Board of Directors or are not dependable. Relying on the scheme of Regulations 21 to 25 and partly on Regulations 24 and 25, it is submitted that Board is bound to hold further proceedings in accordance with the procedure prescribed in the regulations moment the Board is satisfied that the company has become sick. It is obligatory duty of the Board to come to the conclusion either positively or negatively and cannot refuse to determine the question as to the sickness or otherwise of the company.

5.(Vi) In the present case, the Board was satisfied and it was apparent on the face of the account, balance-sheet and, therefore, a reference was made before the BIFR. The appellate authority has not considered the most relevant part of section 22 which provides that protection is not available to a company before BIFR if the BIFR grants consent to proceed against the sick company. Such an order of consent or refusal is subject to an appeal under sec. 25 and can be challenged by a petition under Articles 226 and 227 of Constitution. Mr. Nanavaty has submitted that the judgments relied upon by the otherside are cited under misconception of law that SICA is a beneficial piece of legislation and its provisions cannot be invoked if the accounts are fabricated or manipulated by management. The findings of the BIFR were absolutely in accordance with law as on the date of the reference, the petitioner company had reported its sickness to the Board and at first hand satisfaction, the BIFR registered the reference and initiated actions further. The SICA is a self contained code with provisions for identification of a sick or

potentially sick company and it is to be determined whether the company in respect of which information is received under sec. 15 is sick or not.

5.(Vii) Relying upon the provisions of section 16 read with regulation 21 to 25 Mr. Nanavati has submitted that the finding of AAIFR should be held illegal and arbitrary and beyond reasonable interpretation. Mr. Nanavati has hammered that even when as to the reliability or trustworthiness of the management or account is raised (and are raised) and when it is agitated that management is guilty of misappropriation or diversion of fund or manipulating accounts, the BIFR and AAIFR must determine the question whether in fact, the company is sick or not by going behind the allegations and the acts by adopting various measures provided under the Act. It is argued that in an appeal under sec. 25 the AAIFR can itself undertake an enquiry or can remand the matter back to BIFR with a direction for further enquiry in the back ground of basic objects of the Act. It is also open for AAIFR to consider the objections and can ignore certain disputable entries recorded and can record that the net-worth of the company on the date of reference was still negative. In this case, AAIFR ought to have directed a special investigative audit as represented by the company or made an enquiry itself in respect of each objections raised by the otherside and after considering the special audit report or on the finding recorded at the end of enquiry, the AAIFR ought to have determined whether the net-worth of the company on the date of the reference made was negative. Rejection of reference on the ground that the accounts are not dependable and the management is guilty of misappropriation or diversion of funds or manipulation of accounts, is absolutely arbitrary and the same has given rise to the cause of the petition. Failure to exercise jurisdiction vested in it under sec. 25 read with other relevant provisions of the Act and the Regulations framed there under, is an independent ground to challenge the findings of AAIFR.

5(Viii) It is also submitted that the AAIFR has injudiciously and improperly considered various objections some of which were not raised before the AAIFR, and therefore, the same has resulted in breach of principles of natural justice. By reading para-30 and 31 of the judgment under challenge, Mr. Nanavati has submitted that AAIFR obviously has been influenced by the objections either not raised before the BIFR or even in the written submissions or in the petition of appeal before the AAIFR. This Court is supposed to take care in all cases where there is a failure of justice.

5.(Ix) I have considered the examples, for the purpose pointed out by Mr. Nanavati which are reflected in Annexure-I with the written submissions. The grievance of Mr. Nanavati is that the AAIFR having heavily relied upon the Auditor's report of the audited balance-sheet for the year 1997-98, has failed to consider all the remarks

relevant in determination of the net-worth of the company. Remark (vi) pointed out by Mr. Nanavati reads as under:

"(Vi) No provision is made for doubtful debts amounting to Rs. 3844 lacs and doubtful advances amounting to Rs. 646.56 lacs. Had the provision made, the loss would have been increased by that amount."

The AAIFR ought to have reconstructed the balance-sheet after giving effect to various remarks of the Auditor to ascertain whether the net-worth was negative. The finding of the AAIFR is apparently not based on any material of rationally probative value but the same is based on conjectures and surmises. In such cases, this Court should exercise its discretionary jurisdiction. At one stage of submission, Mr. Nanavati has submitted that in any case for the various illegalities, the failure or manipulation alleged to have been committed by the management of the company, a public limited company cannot be punished and the court should exercise its jurisdiction. Mr. Nanavati has placed reliance on the decision of the Apex Court reported in AIR 1984 SC p. 1182 in the case of I.T. Commissioner, Bombay vs. Mahendra & Mahendra Ltd. The Apex Court says:

"By now, the parameters of the Court's power of judicial review of administrative or executive action or decision and the grounds on which the Court can interfere with the same are well settled and it would be redundant to recapitulate the whole catena of decisions of this Court commencing from Barium Chemicals, 1966 Supp SCR 311 : (AIR 1967 SC 295) case on the point. Indisputably, it is a settled position that if the action or decision is perverse or is such that no reasonable body of persons, property informed, could come to, or has been arrived at by the authority misdirecting itself by adopting a wrong approach, or has been influenced by irrelevant or extraneous matters the Court would be justified in interfering with the same. This Court in one of its later decisions in Smt. Shalini Soni vs. Union of India, (1981) 1 SCR 962: (AIR 1981 SC 431), has observed thus: "It is an unwritten rule of the law, constitutional and administrative, that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote."

He has also placed reliance on the decision in the case of Oudh Sugar Mills Ltd. vs. Union of India, reported in 1978 ELT (J 172).

[6] The respondent no. 1- State Bank of India and respondents no. 4,6,7,9, 13 and 14 have strongly resisted this petition. The oral submissions made by learned Senior

Counsel Mr. SN Soparkar is adopted by the learned counsel appearing for other respondents.

6.(I) As the petitioner has submitted points of submissions in writing, the first respondent has also submitted his points of submissions in writing. Mr. Soparkar before arguing the matter on merits, raised preliminary objection and has submitted that this Court should not examine the decision of AAIFR unless it is found that the view taken by the lower authority is palpably unsustainable, totally unsupported by evidence or such that no reasonable man can ever take, this court should not upset the same. Writ jurisdiction of this Court is a supervisory jurisdiction and is not of an appellate court. The AAIFR has exercised its quasi judicial powers and the functions. AAIFR is a judicial functionary in a specialised field which would require a technical expertise and consideration of the various economical factors. So, considering the limited scope of jurisdiction, this Court should refuse to invoke jurisdiction under Articles 226 and 227 of the Constitution. For this purpose, Mr. Soparkar has placed reliance on the decision of Division Bench of this Court in Special Civil Application No. 6912 of 1996 (Date:8.11.1996) and other decisions delivered while dealing with the Company Petition No. 328 of 1997 dated 11.9.1998. When this matter was placed for further hearing after reopening of the vacation, the decision of this Court in Special Civil Application No. 5125 of 2000 (Group) dated 10.1.2001 is also cited. He mainly relies on para 14 to 18 of the Judgment (Coram: K.R. Vyas, J.). Mr. Soparkar has drawn the attention of this Court to a decision reported in AIR 1964, page 477 in the case of Syed Yakoob vs. K.S. Radhakrishnan & Ors. which clearly brings out the limited scope of jurisdiction of High Court while dealing with the decisions of a quasi-judicial functionary. While enlarging this argument, it is submitted by Mr. Soparkar that the issue brought before this Court by the petitioner should be examined from a very narrow angle if this Court finds that the lower authority i.e. AAIFR is wholly wrong and if the view taken by the AAIFR is neither unsustainable nor perverse, the petition should be dismissed. If this Court finds, on such scrutiny, that two views could be possible on the matter or where there is scope to take some other view than the finding of quasi-judicial authority should not be disturbed. Mr. Soparkar and Mr. Nanavati both the learned senior counsel for the parties have taken me through both the decisions of BIFR and AAIFR.

[7] (I) The SICA is enacted in the public interest for timely detection sick and/or patently sick company in Industrial undertakings. While interpreting the provisions or regulations framed thereunder, the Court should ensure that the same are not interpreted in the manner which may promote any illegality , mal- practice, fraud or dishonesty. Determining of sickness and causes of sickness is within the scheme of

SICA. Relying on the report of Committee appointed by the Reserve Bank of India, under the Chairmanship of one Shri P. Tiwari, Mr. Soparkar has pointed out various causes of sickness enumerated by the Committee. According to Mr. Soparkar this Court should take similar view which has been taken by the Delhi High Court in two different cases. Mr. Soparkar has placed reliance on the decision of the Delhi High Court reported in 1998(5) Company Law Journal, page 108 and in the case of Madhumilan Sintex Ltd. vs. AAIFR & Ors. (Civil) Writ No. 4702/1998 dated 21.4.1999. These judgments have strong persuasive value and it should be accepted by this Court because, as submitted by Mr. Soparkar, the said view is in furtherance of fairness and equity. Any other view may encourage psychology to commit fraud or may promote illegality and may tempt dishonest management. Mr. Soparkar has placed reliance on the observations of the Madhya Pradesh High Court's decision reported in 1999(4) Company Law Journal page 190 in the case of Kedia Distilleries Ltd. In the cited judgment, the High Court has quoted the observations of the Apex Court from a case reported in 1997 SCC 649 where the Apex Court has interpreted the purpose and scheme of SICA. I would like to quote the same which reads as under:

> "We are sure that section 22 was not meant to bring dishonesty nor can it be so operated so as to encourage unfair practice."

According to Mr. Soparkar the observation and the finding recorded by AAIFR if appreciated in light of this proposition and interpretation of relevant laws, than it would be clear that this writ petition needs to be dismissed in limine.

7.(Ii) Alternatively, Mr. Soparkar learned Senior Counsel for respondent no. 1 has replied all the main contentions. According to Mr. Soparkar, regulation 24 expressly provides that if after completing the enquiry or considering the report BIFR is satisfied that no case exists for coming to the conclusion that the industrial company has become a sick industrial company, it shall drop further proceedings in the reference. Therefore, detailed enquiry at the stage of registration is must. Relying on the provisions of section 17 of the Act read with regulation no. 26, it is submitted that BIFR has to pass suitable order, "on completion of inquiry and after being satisfied that the company has become sick industrial company." In the present case, the BIFR had appointed Operating Agency. The appointment of Operating Agency under sec. 16(3) or under regulation 21(b) is only for the purpose of assisting BIFR in holding inquiry on the limited scope as to whether or not company has become sick company for the purpose of being registered. Mr. Soparkar has submitted that sickness of a company is not to be judged only on the face of books of accounts or balance-sheet. It is submitted that in order to register reference before the BIFR, it is necessary that a company is sick, that means really sick. Once the AAIFR found that accounts were fabricated, the obvious conclusion is

that on these accounts it is not possible to reach to a conclusion that company is sick. Only if the BIFR or AAIFR come to the conclusion that the company is sick, it can register the reference. On scrutiny if it is found that the company is not sick, it cannot be said to be sick or incapable finding being reached as regards the sickness, than in that event, the reference cannot be registered. Provision of sec. 24, according to Mr. Soparkar is required to be made, so that if during the operation of the scheme, if any illegalities are found, BIFR is not rendered powerless to take appropriate action against the delinquent management. This enabling power given does not lead to a conclusion that a company, which cannot be regarded as sick company, is entitled to have its reference registered because on future date BIFR may have a chance to take appropriate action against the delinquent.

7.(Iii) Mr. Soparkar has taken me through the provisions of section 25 of the Act and has submitted that the AAIFR can reach to a finding contrary to the finding reached by the BIFR without appointing special investigative auditor or undertake any separate exercise for scrutinising the accounts. It is not necessary for AAIFR to remand the matter back to BIFR for having appointing Special Investigative Auditor. According to Mr. Soparkar the order passed by BIFR in the present case is of cryptic nature and almost without any reason. It was possible for AAIFR, by sending the matter back to BIFR directing him to pass reasoned order being Appellate Authority. But in the present case, considering the nature of submissions advanced before it, has passed an exhaustive order dealing with all the issues raised before it and has added its own logic based on reasons and it has come to the conclusion that the reference of the petitioner was required to be rejected. The order under challenge is well within the power. Before AAIFR, reports of three firms of Chartered Accountants were available and on appreciation, the AAIFR came to the conclusion that the accounts are fabricated. Once AAIFR reached that conclusion and when it was possible for AAIFR in reaching to that conclusion than there was no need to appoint special investigative auditor or to remand the matter.

7.(Iv) According to Mr. Soparkar there is no beach of principles of natural justice. In the whole body of the writ petition, this point has not been raised at all. The AAIFR has noted that all arguments canvassed against the petitioner. It was within the knowledge of the advocate of petitioner and all relevant submissions made by the learned counsel appearing for the petitioner has been considered. It is well settled that record of lower court cannot be challenged before superior court and the finding recorded by the lower court that argument was or was not raised cannot be called in question before the superior forum. Mr. Soparkar for this purpose has placed reliance on the decision of the Apex Court, reported in AIR 1982 SC p. 1249

in the case of State of Maharashtra vs. Ramdas Shrinivas Nayak where the Apex Court has deprecated the practice of such challenge. In response to the certificate dated 6.9.2000 produced by the petitioner along with the written submissions issued by the Chartered Accountants, Mr. Soparkar has submitted that this Court should not take even cognizance of such document. Even on the day on which the arguments were concluded, no such document was placed on record. This petition was argued at length for several days. The date of certificate is 5.9.2000, therefore, the same should not be referred. However, in the alternative, Mr. Soparkar has submitted that AAIFR has reached to the conclusion that the accounts are fabricated and, therefore, it cannot reach to the conclusion that petitioner is a sick company. The present exercise based on such fabricated accounts, is therefore, an exercise in futility. This calculation could have been produced before AAIFR and AAIFR would have dealt with the same in accordance with law. The petitioner on creation of new document on the basis of documents which are found to be false or unreliable by the AAIFR cannot agitate that this is a case worth allowing the petition. It is submitted that it is not within the jurisdiction of this court to entertain such a plea at all. Even if such a plea can be entertained on facts, no other conclusion is possible. Mr. Soparkar with a view to give strength to his submission and logic and with a view to support the reasons assigned by the AAIFR, has placed three hypothetical balance-sheets and has tried to demonstrate that a company which fraudulently and clandestinely removes the stock or a company which fraudulently or clandestinely takes cash from its debtors and does not reflect in the books of accounts may still claim sickness. I have appreciated three hypothetical balance-sheets with a view to appreciate the oral submissions advanced by respondents. Mr. Soparkar has hammered that this Court in its writ jurisdiction should not take a view which would encourage dishonesty, perpetuate fraud or pamper illegality. Mr. Soparkar has pointed out many illegalities and irregularities appreciated by the AAIFR i.e. (i) disappearance of goods worth Rs. 37.18 crores; (ii) decline in yield from 43% to 33% (from oil seeds); (iii) having consequences of suppression of profit of more than Rs. 12 crores; (iv) suppression of income which is detected by the Income Tax Department (reflected in the notice under sec. 143(2) of the Income Tax Acts, 1961 dated 27.6.2000); (v) siphoning away of funds for the benefits of sister concerns etc. For short, it is submitted by respondent that present proceedings are taken out by the petitioner with an obvious purpose to get protection of section 22 of the Act in view of the fact that large number of suits for crores of rupees are filed against the petitioner by the secured creditor including first respondent - State Bank of India which had been stayed because of the proceedings before the lower authorities. The petition should be dismissed with costs.

[8] Having considered the rival contentions and the case placed before this Court by the present petition, it would be proper to appreciate, firstly; the facts available on record and the relevant proposition of law which could be applied to the facts of this case, secondly, this Court also should make some observations as to the sustainability of such proceedings where the finding of quasi-judicial body has been challenged invoking jurisdiction of this Court under Article 226 and/or 227 of the Constitution. It is not a matter of dispute that a reference has been made by the Board before the BIFR under sec. 15 considering the financial health reflected in the balance-sheet for the year 1997-98. The petitioner-company was Private Limited company and after offering its share to public became a Public Limited Company. The petitioner, on account of alleged huge loss made a reference to BIFR and submitted documentary evidence as statement of accounts, balance-sheet etc. Vide order dated 9.7.1999 BIFR registering the reference of the petitioner-company declared the petitioner-company as sick unit and appointed Bank of Baroda as Operating Agency. BIFR after noting absence of representative of NPPL and officer of Bank of Baroda on the date of hearing, who was to remain present to clarify some details, it seems treating their resistance as very formal objection passed the order under challenge. The very order took respondent no. 1 State Bank of India before AAIFR as the Bank was aggrieved and dissatisfied with the finding recorded. The impugned order reads as under:

> "The Board heard the reference made by the company in terms of Section 15(i) of Sick Industrial Companies (Special Provisions) Act, 1985, (hereinafter called 'the Act') on 24.5.99. After hearing various submissions made and also considering the documents filed by the company, the Bench directed the representatives of Bank of Baroda, NPPL and the company to submit all the documentary evidence including court order, etc. duly certified positively within 3 days of hearing and reserved its order. The Board received the submissions made by the company i.e. N.K. Industries Ltd. on 27th May, 1999, whereas the Bank of Baroda (BOB) and NPPL did not submit any information despite directions. However, BOB subsequently had submitted their submissions while no information was received from NPPL. Even in the case of BOB though they indicated in their letter that one of their officers will further clarify details, nobody presented himself before the Bench to clarify any further issues as was indicated. After carefully considering the further submissions made as indicated above the Bench came to the following conclusion."
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> (Para-2 onwards are findings and directions).

[9] I am in agreement with the submissions of Mr. Soparkar that this order cannot be said to be a reasoned order, in view of the relevant provisions of the Act and regulations framed thereunder, and is a cryptic one. At the time of final hearing of the appeal, it was possible for AAIFR to remand the matter before BIFR directing the Board

to pass reasoned order after appreciating the details of accounts. It was open for AAIFR to offer an opportunity to the respondent of the appeal i.e. present petitioner-company and to decide whether the order of registration of reference and decision to declare the petitioner-company as sick industrial unit is legal and otherwise sustainable at law or not. It seems that the appellate authority-AAIFR after hearing the parties opted to decide the matter on merits and the judgment of AAIFR in the appeal preferred, the respondent no. 1 - State Bank of India is under challenge before this Court in this petition. The appellate authority as per settled legal proposition can re-write entire judgment on facts as well as on law. This exercise is necessary when appellate authority intends to reverse the finding. The shortcut of passing remand order has been deprecated by the Apex Court and various High Courts. It is on record that the matter was argued at length before the AAIFR for several days and it is not in dispute that reports of three firms of Chartered Accountants namely; (1) M/s. J. Jayraman & Co. (2) M/s. R.G. Shah & Co. and (3) M/s. Sunil Vakil and Associates were available to AAIFR. On the strength of the adverse remarks and strictures made by the Chartered Accountants, AAIFR has recorded a positive finding that the accounts are fabricated. Without mentioning the arguments of Mr. KS Nanavati learned Senior Counsel as the same are referred to hereinabove, it is clear that the finding recorded by AAIFR are not presumptions or resumptions. The element of recording of a decision on surmise is also missing. The finding recorded on the basis of facts brought to the notice of AAIFR are, thus, not on extraneous consideration. So, I do not accept that AAIFR ought to have remanded the matter back to BIFR for detailed inquiry by itself or by appointing special investigative auditor. Sub-section 2 of section 25 gives extremely wide powers to AAIFR. Ordinarily, the appellate authority has powers to confirm or set aside the order of the lower authority or forum but in the present case, the AAIFR was enjoying express powers all of "making such further inquiry as deemed fit" even while hearing appeal. When AAIFR was simultaneously enjoying the powers to modify or set aside the order or to remand the mater to BIFR for fresh consideration, AAIFR had opted to exercise all its powers and to appreciate the case put forward before it in detail. Therefore, it would not be proper to say that by not remanding the matter back to BIFR, AAIFR has committed any jurisdictional or procedural error. Appellate forum can re-write the judgment unless barred by specific provision.

[10] This Court is called upon to take the decision of a quasi judicial authority under judicial review. Before doing so this Court is obliged to consider with utmost care, the finding and conclusions recorded by such forum. I would like to quote some of the findings which are square reply to the question raised by the applicant and conclusions recorded by BIFR in para 2.1 to 2.6 of its order. AAIFR in its analysis and conclusion says:-

"Diversion of working capital finance for acquisition of capital assets or as loans and advances for purposes other than a company's operations, for which working capital finance has been made available by the banks, has certain inevitable consequences; liquidity crunch; depletion in the security of banks; borrowings from third parties at high rates of interest in order to meet the most urgent working capital needs; increasing irregularity in cash credit accounts with banks; consequent freezing of accounts by the banks; mounting interest charges; reduction in turn-over without corresponding reduction in fixed costs. These consequences inevitably lead to decline in profits or increase in the losses."....

.....Thus funds were diverted for purposes other than NKIL's operational requirements. Despite liquidity crunch, loans and advances increased from Rs. 19.16 cr (end of FY 97) to Rs. 29.02 cr (end of FY 98). This is clearly indicative of large scale diversion of funds.... .....We, therefore, do not accept Dr. A.M. Singhvi's argument and BIFR's conclusion based on BOB's statement that diversion of working capital finance did not have any impact on the profit & loss account of NKIL. BIFR/AAIFR cannot come to the rescue of companies/promoters/managements who divert working capital funds to purposes other than those for which such funds are meant.... (para-14) .....Mahendrakumar N. Patel/NPPIPL provided storage facilities to NKIL for its liquid cargo at Kandla. The transport, filling of tanks and delivery have been arranged by NKIL through its agents/surveyors... .....In para 2(iii) of their report on FY 98 accounts of NKIL, the statutory auditors have recorded that a shortage of 13,713 MT of finished FSG castor oil worth Rs. 37.08 cr (rounded off) was found on the basis of physical verification on stocks conducted by SGS in respect of finished goods storage at Kandla, and NKIL has raised debit note of the said amount on the tank owner NIPPIPL, that the said amount is included in sales and classified as doubtful debts.... .....The missing quantity of castor oil and the value thereof were included in sales by NKIL only after the shortage came to the notice of the bankers following physical verification of stocks. The fact that the amount of Rs. 38 cr. is shown as doubtful debtors of less than 6 months is indicative of future plans for writing off the said amount. The prime responsibility for this shortage rests with NKIL/management. Such a large quantify of FSG castor oil (about 1400 truck-tank loads) cannot disappear into thin air. This, in our view, is a case of clandestine sales and siphoning away of sales proceeds and an accounting manipulation after the shortage came to the notice of the creditors....SICA is not meant for rescuing companies/managements which make valuable assets disappear without corresponding value in cash being brought into the company's accounts.... (Para-19) .....At the consortium meeting on 14.10.98, the creditor banks had insisted that the promoters must bring back the advances of Rs. 19.15. cr given by NKIL to

KVP. The promoters did not make any mention of their intention to incorporated the income and expenses and the assets and liabilities of KVP into the accounts of NKIL. Between 14.10.98 and 6.11.98 (the date of balance sheet for FY 98), without the consent of and without any previous notice to the creditor banks, NKIL made changes in its accounts books by incorporating the assets and liabilities of KVP into NKIL's accounts effective from 1.4.97. Thereby, the debt of Rs. 19.15 cr. owned by KVP became the unsecured debtors of NKIL.... The take-over was patently malafide.... (para-24)

....."No satisfactory explanation is forthcoming regarding fall in yield of castor oil from 42% during last year to 33% during the current year."....

.....In its reply the memorandum of appeal, NKIL has stated-

"The quality of the castor seeds was poor due to rain and the yield was less. The fact is pointed out in the auditor's report. The yield has come down from 42% to 33% as there was a flood in Mehsana district during the year and therefore castor seeds and castor cakes were damaged badly..."

.....In the Director's Report, there is no mention of damage to castor seeds..... In any case, the rain/flood on 26-27 June, 1997 could not have led to 9% decline in oil yield for the whole year; at the most, it could make a nominal difference to oil yield from the stock actually lying in the open on those two days only..... NKIL has not complied with the requirements of the mandatory AS-5 in regard to the loss (if any) from damage by unprecedented rain/flood on! 26-27 June, 1997. We do not accept the explanations given in the Director's Report and in the reply to this appeal in so far as the decline in oil yield is concerned. This is a clear case of abuse of an extraordinary event occurring on 26-27 June 1997 to siphon away 9% oil yield for the whole year. Considering the raw material (castor seed) consumption of 520223 MT during FY 98 and assuming the value of castor oil @ Rs. 27,000/MT, the amount siphoned away works out to Rs. 12.64 cr. (Para-29)

[11] Para-31 of the order deals with other aspects of NKIL's account. Sub-para (e) of para-31 says:

"Item 26 of Form-A states that there are no sundry debtors amongst promoters and associates. Note 13 is schedule 19 to FY 98 accounts shows that amounts of Rs. 16.37 cr are advanced to companies under the same management. These are otherwise than for the business purposes of NKIL."

[12] Para-35 of the order is very important and records final conclusion at the end of deliberations. It says:-

"With the support of financial institutions and banks, NKIL had greatly expanded its business, acquired the status of a star trading house, own many awards, and became a major player in world trade in castor oil. It is pathetic that NKIL/promoters resorted to dishonest and unfair practices for personal enrichment. Our analysis shows that there has been large scale diversion/siphoning away of funds to relatives/individuals/sister concerns/group companies for purposes other than NKIL's business. Attempts have been made to cover up some of the clandestine operations by booking fictitious sales with doubtful receivables, showing unacceptably high decline in oil yield about which even the statutory auditors remained unsatisfied, and taking over the assets and liabilities of family firm which has been used over the years as the conduct for diversion of funds. The beneficent provisions of SICA are meant for industrial companies with bona fide sickness and not for economic offenders/managements who make companies sick by diverting and siphoning away their valuable assets and funds. NKIL's balance sheet is a fabricated one and does not reflect its true and fair financial position. The balance sheet for FY 98 and any subsequent balance sheet derived from it cannot be relied upon for entertaining a reference under SICA. NKIL claimed sickness by manipulating its accounts after diversion and siphoning away of funds. No useful purpose would be served by continuing the proceedings under SICA by way of SIA and action u/s. 24 of SICA. Parties are free to approach the competent civil/criminal courts for redressal of their grievances. The appeal is allowed. The impugned order is set aside. The reference made by NKIL u/s. 15 of SICA stands dismissed."

[13] Above discussion and finding shows proper application of mind with an expert eye. It is not a matter of dispute that the AAIFR was assisted, during the course of hearing, by able counsel appearing for the Financial Institutions and Banks, and it would not be legal even to infer that the Appellate Body was influenced by the objections whether not raised before BIFR or even in written submissions or in the petition of appeal before AAIFR. I have carefully considered the finding recorded in para-30 and 31 referred to hereinabove. It seems that during the course of oral arguments by the parties appearing before the AAIFR had submitted various points of view and the facts and as AAIFR having powers to appreciate the details put before it in reference to sub-section 2 of section 25 has recorded its findings.

[14] The order under challenge, of course is, an order reversing the first order which favours present petitioner. When an order of BIFR is reversed by the appellate authority than one can legitimately argue that this Court should be liberal in invoking the jurisdiction under Article 226 of Constitution as there is absence of provisions of an appeal against the order under challenge. But mere absence of provisions of appeal or

revision against the order of the statutory tribunal or quasi judicial functionary would not enlarge the scope of interference under Article 226/227 of Constitution with the order of such Tribunal or authority. When such decision is brought before the High Court for judicial review adding element of a prayer under equity, before rejection of such a prayer, this Court should consider the decision under challenge with detail which would look justice. But while exercising jurisdiction under Article 226 this Court cannot re-appreciate the facts or evidence de novo brought before it. In the present case, the reference made by the petitioner-company under sec. 15 of the Act ought not to have been accepted merely on perusal of balance-sheet of relevant year. Unless it is found that the company has become sick the reference is not required to be registered. It would not be legal to say that once the company approaches BIFR showing its sickness prima-facie the BIFR has no jurisdiction to reject the reference. The inquiry into the causes of sickness is not irrelevant.

[15] One of the main limb of the argument of the petitioner is not acceptable in view of the scheme of the Act and the Regulations framed thereunder. Section-16 of the Act obliges BIFR to make certain inquiries under which it can be determined whether a particular company reportedly seek is really a sick industrial company or not. Difference between pretendence of a sickness and genuine sickness needs some inquiry and if required, further investigation. This exercise could be made by the BIFR itself or through any operating agency. It is even open for the BIFR to have the assistance of experts. In the present case, as AAIFR had found that these inquiries were not made at the stage of registration and before appointing operating agency for the purpose of preparation of scheme of revival, the order of registration has been challenged. So, at the time of appreciating the say of the appellant, the AAIFR had tried to scan the case of the petitioner as well as the resisting Banks and the Financial Institutions within the frame work of the regulations and the scheme of the Act. The conclusion which could have been recorded by the BIFR in view of the Regulation 24 that no case exists for coming to the conclusion that the industrial company has become sick industrial company, on appreciation of facts available on record the appellate authority has recorded that finding. It would not be legal to say that it was not open for the appellate authority to record such finding and it is a privilege of the BIFR only. It would also not be proper or legal to say that when a statutory authority namely BIFR had recorded the conclusion accepting the reference made by the petitioner company, the appellate authority could have directed the very statutory authority, on certain directions to re-appreciate entire set of facts. As argued word "may" in section 16(1) of SICA cannot be read as "must". Such interpretation unless, in reference to context is necessary or otherwise warranted should not be made. The appellate authority can avoid duplication. It is not established satisfactorily that the petitioners were taken to surprise and without offering any reasonable opportunity

legitimate and correct finding has been reversed on extraneous consideration. It is not a matter of dispute that detailed inquiry at the stage of registration is one of the basic requirement. Section 17 of SICA read with Regulation 26, if considered, BIFR on completion of inquiry has to pass orders on facts. The appellate authority in the present case has found that appointment of operating agency for the purpose of preparing rehabilitation scheme was not warranted. The appointment of operating agency under sec. 16(3) or under Regulation 20(b) is only for the purpose of assisting the BIFR in holding inquiry on the limited scope as to whether or not company has become sick company for the purpose of being registered. The summary of recommendations made by Tiwari Committee was placed before this COurt by the learned counsel appearing for the State Bank of India and on perusal of entire Chapter-XI, it is clear that the BIFR and/or AAIFR can positively go into the causes of sickness because a purposeful monitoring system of a sick industrial unit under finance cannot be worked out or viability on a commercial basis which is one of the main criteria for such undertakings could not be assessed properly. The impugned order under challenge also takes care of this independent side of dispute.

[16] The petitioner after oral submissions, while submitting written submissions has produced some additional documents, including the certificate of Chartered Accountant dated 6.9.2000 and certain calculation also placed before the Court whereby the petitioner has tried to demonstrate that it is a sick company. I am doubtful whether this Court can take cognizance of such documents as this Court has no jurisdiction to re-appreciate the facts or scan the decision as if this Court is an appellate authority scrutinising de novo the order of inferior court. It is rightly pointed out by Mr. Soparkar that though this matter was argued for several days, the certificate which was with petitioner on 5.9.2000 was not placed on record. The conclusion of AAIFR that the accounts are fabricated or the totality of facts show that it would be difficult to reach to a specific conclusion that the company is sick than this Court cannot reverse the finding on the strength of a certificate dated 6.9.2000. Unless this Court finds that the conclusion recorded by AAIFR that the accounts were fabricated is perverse or apparently incorrect findings or the same is devoid of authority or jurisdiction, the order under challenge should not be interfered with. The wide powers of this Court under Article 226 of the Constitution should be sparingly exercised when a reasoned order of a statutory quasi judicial tribunal is brought before this Court for review. It was open for the petitioner to plead the case of his sickness before the appellate authority. The AAIFR in that case would have dealt with the same in accordance with the facts and law. On stray documents acquired by the petitioner at any later stage of the decision of the AAIFR this Court should not turn down the order under challenge. Such approach would be too liberal and contrary to the settled proposition of law. Writ jurisdiction of this Court is a discretionary jurisdiction and while exercising such

jurisdiction, this Court should not take such a view which would encourage any type of, direct or indirect, malpractice, fraud, misrepresentation or pamper illegality. The decision of the High Court of Madhya Pradesh in the case of Kedia Distilleries Ltd. reported in 1999(4) Comp. Law Journal p. 190 shows that consent of BAIFR/AAIFR involves exercise of sound discretion. It is observed that no hard and fast rule or formula could be prescribed or suggested for exercise of such discretion. Nor could it be insisted or urged that their consent ought to have been based on examination of the merit of company's reference for sickness or governed by principles for grant of injunction in civil matters. Some observations in the very judgment is relevant for the purpose. I would like to quote the same as it also deals with purpose of enactment of SICA. It says:-

> "As already notice, the SICA was enacted to provide opportunity to sick industrial companies to revive and be rehabilitated or wind up. Its purpose was not to enable unscrupulous companies to feign and manipulate sickness and to make a buck out of it. Section 22(1) was only a tool to achieve this object. Its terms were, therefore, to be interpreted reasonably and in that spirit and perspective. Otherwise, it would breed dishonesty encourage unfair practices and shady dealings and defeat the very purpose for which the statute was enacted. There is no dearth of instances where unscrupulous companies had misused this provision by manipulating sickness to ward off legitimate claims of creditors. Therefore, it requires both caution and circumspection to extend protection of section 22(1)to such companies. This contention was also expressed by Jeevan Reddy, J., in Commercial Tax Officer v. Corromandal Pharmaceuticals (1997)2 Comp LJ 164 (SC): 1997 SCC 649 in the following words [para 14 at page 173 of Comp LJ]:
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> "The object of the Act is undoubtedly laudatory but it must also provide for appropriate measures against persons responsible where it is found that sickness is caused by factors other than circumstances beyond the control of the management. It is also a well-known fact that the proceedings before the Board of Industrial and Financial Reconstruction take a long time to conclude and all the while the protective umbrella of section 22 is held over the company which has reported sick. We have come across cases where unfair advantage is sought to be taken of the provisions of section 22 by certain industrial companies - and the wide language employed in the section is providing them a cover. We are sure section 22 was not meant to breed dishonesty nor can it be so operated as to encourage unfair practices. The ultimate prejudice to public monies should not be overlooked in the process of promoting industrial progress. We are quite sure that the Government is fully alive to the situation and are equally certain that they must be thinking of necessary modifications in the Act."

[17] In the case of Vijay Agarwal and Anr. reported in (2000)2 Comp LJ 156 the AAIFR has observed that the protection and beneficial provisions of SICA cannot be extended to industrial companies and managements which indulge in shady and dishonest deals, causing serious prejudice to interests of companies as well as their creditors with the sole purpose of showing negative net worth. This finding was recorded on examination of facts. I agree with this decision though is not binding nor can be referred to as guideline, but it is important to note that the order under challenge is consistent. The consistency in the decision of one court or the statutory Tribunal if is in accordance with law should be appreciated and while disturbing such consistency this Court should go very slow. In the case of Development Credit Bank Ltd. reported in (2000)2 Comp LJ p. 159 the very principle has been reiterated by AAIFR. The decision of the Division Bench of Delhi High Court in the case of Madhumilan Syntex Ltd. (supra), by referring one observation of the decision of AAIFR has held that "as there is nothing wrong in the decision making process, we do not find any ground having been made out to interfere with the impugned order of the AAIFR, which in our opinion has been passed by it considering the merits of the cases of the parties and on the basis of the material, which formed part of the record of the BIFR." I have considered the ratio of the decision relied upon by the learned counsel appearing for the parties and according to me, the principle propounded by the Delhi High Court in case of J. Alexander & Ors. reported in (1998)5 Comp LJ p. 408 should be accepted, where deliberate motivated change in account was attempted. I agree that the decision has persuasive value but the ratio in view of the set of facts available on record, if is applicable in view of the facts of the present case, it can be applied in special reference to para-8 and 9 of the decision.

[18] As a result, the findings recorded by AAIFR are found absolutely in accordance with facts and after affording all reasonable opportunities to the parties appearing in the appellate proceedings. No error has been committed by AAIFR in holding that the NKIL/Promotors resorted to dishonest and unfair practice for personal enrichment and this is a case of large scale of diversion/siphoning away the funds to relatives, individual, sister concern/group companies for the purpose other than in NKIL's business. Therefore, this petition is dismissed. No order as to costs.