NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 193 of 2023

[Arising out of Orders dated 17.01.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Cuttack Bench, Cuttack), in TP No. 99/CTB/2019 (Formerly C.P. (IB) No.342/KB/2017)]

IN THE MATTER OF:

Paradeep Phosphates (PPL) ...**Appellant**

Versus

State of Orissa & Anr. ...**Respondents**

Present:

For Appellant : Mr. Krishnendu Dutta, Sr. Advocate with Ms. Varsha Banerjee and Ms. Udita Singh, Advocates.

For Respondents : Mr. Shashank Bajpai, Spl. Counsel with Ms. Aashna Mehra, Mr. Akshit Saxena, Mr. Vatsal Tripathi and Mr. Govind Singh Chauhan, Advocates.

J U D G M E N T

ASHOK BHUSHAN, J.

This appeal has been filed by the appellant challenging the order dated 17.01.2023 passed by the adjudicating authority (National Company Law Tribunal, Cuttack Bench, Cuttack) in TP No. 99/CTB/2019 (Formerly C.P. No.342/KB/2017 on file of NCLT/Kolkata). The petition filed by the appellant has been rejected by the NCLT, aggrieved by the order, this appeal has been filed.

2. Brief background facts of the case giving rise to this appeal need to be noticed:

i. The appellant is a Public Limited Company engaged in the business of manufacture and sale of fertilizers and other related products. The net worth of the appellant company turned negative in the financial year ending on 30.09.2002.

ii. The appellant filed a reference under provision of Sick Industrial Company, Special Provisions Act, 1985 (hereinafter referred to as **"SICA"**), which was registered as Case No. 238/2003. Appellant was declared a SIC Industrial Company by Board for Industrial and Financial Reconstruction (**"BIFR"**) by order dated 20.07.2005. Draft Rehabilitation Scheme (**"DRS"**) was prepared and circulated to all parties including Government of Orissa.

iii. BIFR heard the objection of DRS on 15.05.2008. In the said hearing, representative of Government of Orissa submitted that there is no policy to provide any relief to SIC Industrial Company. BIFR thereafter heard the matter on 02.09.2008 and sanctioned the scheme. Paragraph 20 of the scheme which dealt with reliefs and concessions envisaged exemption from VAT/Sale Tax and Entry Tax.

iv. Appellant sent a representation to the Government of Orissa for grant of exemption as per the approved scheme 02.09.2008. The net worth of appellant turned positive on 31.03.2011. Appellant filed MA 442/2011 before the BIFR praying for direction to the state to provide benefit of exemption. Appellant also sought de-registration from the purview of SICA. MA 442/2011 was disposed of by the BIFR on

02.08.2011 de-registering the company as SIC Industrial undertaking. Appellant was assessed under Orissa Entry Tax and filed a Writ Petition in Orissa High Court on 27858/2013, which Writ Petition was disposed of on 15.01.2014 by the High Court, accepting the prayers of appellant to consider the representation filed by the appellant.

v. The order dated 15.01.2014 was challenged by the appellant before the Hon'ble Supreme Court, where Hon'ble Supreme Court disposed of the appeal on 17.02.2014 directing the appellant to deposit 50% of the tax demanded along with interest. In pursuance of the direction of the High Court dated 15.01.2014, the State of Orissa passed an order rejecting the application of the appellant seeking exemption from tax.

vi. Appellant thereafter filed an MA No.285/2014 before the BIFR seeking direction against the state for implementation of the provisions of the sanctioned scheme. Notice of assessment was issued to the appellant. Appellant again filed Writ Petition No.20338/2014 before the High Court for quashing the order rejecting the representation.

vii. On 01.12.2016 Insolvency and Bankruptcy Code, 2016 (for short the **"Code"** or the **"IBC"**) came into force and the provisions of SICA were also repealed.

viii. Appellant filed a C.P. No.342/2017 before the NCLT Kolkata Bench on 08.05.2017 seeking declaration that approved scheme of BIFR be declared as an approved resolution scheme under Section 31 of the IBC. State of Orissa filed an objection to the application. The said C.P.

No.342/2017 was subsequently transferred to the Cuttack Bench, which was registered as C.P. No. 99/CTB/2019.

ix. The Writ Petition 20338/2014 pending in High Court was disposed of on 07.12.2021 by the High Court observing that NCLT to decide the pending application in accordance with the law. Appellant also challenged the order of the High Court dated 07.12.2021 before the Hon'ble Supreme Court, which SLP was dismissed on 23.09.2022. The C.P. 342/2014 was objected by the State of Orissa by filing objection. Adjudicating authority heard the parties and by the impugned order dated 17.01.2023 rejected the C.P.342/2017, aggrieved by which order, this appeal has been filed.

x. Adjudicating authority in the impugned order has framed 3 points for determination which are as follows:

> *"The points for determination are:*
>
> *1) Whether the petitioner is entitled for tax exemption even after the disposal of M.A.No.442 of 2011 on 16.08.2011?*
>
> *2) Whether the Scheme SS-08 sanctioned by BIFR without the consents of the respondents is binding upon the respondents?*
>
> *3) Whether the petitioner is entitled for tax exemption under the scheme SS-08 when it collected the Taxes?*

xi. On Point No. 1, adjudicating authority held that appellant has no right to prefer the petition after the disposal of MA 442/2011 on 16.08.2011. On Point No. 2 it was held that during hearing before the BIFR on 15.05.2008, the representative of the Government of Orissa submitted that Government of Orissa has no policy to provide any relief to sick

companies. It was held that any scheme sanctioned without the consent of the entities will not be binding. The point was answered against the appellant. Point No. 3 was also decided against the appellant. Adjudicating authority while considering the Point No. 3 referred to Notification dated 24.05.2017 issued by the Central Government and held that appellant did not prefer an appeal against the order of BIFR within the time allowed. Notification dated 24.05.2017 does not revive the already time barred right to file an appeal. After answering the 3 points of determination, the application filed by the appellant was dismissed.

xii. Aggrieved by the said order, this appeal has been filed.

3. We have heard learned Sr. counsel Mr. Krishnendu Dutta appearing for the appellant as well as learned counsel Mr. Sushant Bajpai, Spl. counsel with Ms. Aashna Mehra appearing for the State of Orissa.

4. Learned counsel for the appellant submits that adjudicating authority committed error in rejecting the company petition filed by the appellant which was filed for enforcement of the Sanctioned Scheme SS-08. Under Clause 20 of the scheme, scheme granted relief and concessions, relating to exemption of VAT Sale Tax and Entry Tax. Learned counsel submitted that issue of Sales Tax, Vat Tax has stand settled and only issue surviving is the issue of exemption in the Entry Tax. It is submitted that scheme was never objected by representative of the Orissa Government. In the hearing dated 15.05.2009 although representative of the Government of Orissa submitted that there is

no policy of granting exemption to Sick Industries but that proceeding cannot be treated to any objection or refusal of consent to the scheme. There being no written objection communicated to the scheme it shall be deemed to be approved by virtue of Section 19 of the SICA Act, 1985. It is submitted that scheme was binding on the state and state was obliged. Scheme was sanctioned for period of 7 years from 2007-14. The fact that appellant was de-registered as SIC Industries on 16.08.2011 by order of BIFR does not affect the entitlement of the appellant to get the benefit of scheme till 2014. Objection of the respondent that claim of the appellant is barred by limitation is incorrect. Appellant has been consistently approaching the concerned department for due implementation of the scheme, since 2008. The objection of the respondent that for availing the benefit of Section 5 of SIC Industrial Companies (Special Provisions) Repeal Act, 2003, there must be continuing scheme is without any basis. The de-registration of the company from purview of SICA shall not result in non-implementation of the terms of the sanctioned scheme. Clause 20(i)(b) of SS-08 is clear and unequivocal.

5. Learned counsel for the State of Orissa refuting the submissions of the counsel for the appellant has referred to in his reply filed in the appeal where various objections have been raised to the company petition filed by the appellant. It is submitted that MA No. 442/2011 having been disposed of by BIFR on 16.08.2011 de-registering the appellant from SIC Industries and not granting any prayer made by the appellant for directing State Government to grant exemption, the said order has become final. No appeal was filed against the order dated 16.08.2011 by the appellant. Its right to claim any direction

against the state stood closed and become final. C.P.342/2017 filed by the appellant before NCLT was not maintainable. The sanctioned scheme having lapsed since 2011, the said sanctioned scheme cannot be treated to be approved resolution plan under IBC. The company petition before the NCLT was not maintainable. The appellant by virtue of Notification dated 24.05.2017 claimed to enforce the alleged rights under sanctioned scheme which is not implementable. Very foundation of the C.P.342/2017 was baseless. NCLT had no jurisdiction to entertain the application. Adjudicating authority has rightly dismissed the application. State of Orissa had never given its consent to the relief and concessions as prayed rather representative of the State of Orissa had appeared before the BIFR in the proceeding dated 15.05.2008 and had submitted that state has no policy to provide any relief to SIC Industrial Company. It is pleaded that state having never consented to the scheme, it was unenforceable under Section 19 by virtue of Section 19 of the SICA Act. Scheme had already lapsed and cannot be enforced at the time when C.P.342/2017 was filed. Pre-requisite for availing benefit of Section 5 of SICA Repeal Act requires a sanctioned scheme which must be continuing and in effect from the date of dissolution of BIFR, scheme having approved from 7 years from 2007-14 and further by virtue of order passed by BIFR on 16.08.2011 in MA No. 442/2011, appellant being de-registered as SIC Industrial Company, scheme was not continuing thereafter. Sanctioned scheme ceased to be in effect from 16.08.2011, hence there was no occasion to file any company petition before the NCLT by the adjudicating authority.

6. We have considered the submissions of the counsel for the parties and perused the records.

7. From the submission of the counsel for the parties, following questions arise for consideration:

I. Whether the appellant was entitled to claim tax exemption even after disposal of MA No.442/2011 on 16.08.2011?

II. Whether Sanctioned Scheme SS-08 sanctioned by BIFR on 02.09.2009 shall be deemed to be consented by the State of Orissa within meaning of Section 19(2) of the SICA?

III. Whether the appellant has made out a case before the NCLT for issuing any direction for granting the exemption from payment of Entry Tax till the year 2014 as per sanctioned scheme dated 02.09.2008?

Question No. (I):

8. The facts as noticed above indicate that the appellant was registered as a SIC Industrial unit by order dated 20.07.2005 in Case No.238/2003, DRS was prepared and circulated and ultimately approved by BIFR on 02.09.2008. Clause 20 of the scheme provided as follows:

> *"20. Relief and concessions from various other agencies concerned in addition to the above, the scheme envisages the following reliefs and concessions from various other concerned agencies i.e. Central Government and State Governments' and Statutory Authorities as given below:*
>
> *(ii) From the State Govt. of Orissa Sales Tax*

(c) To exempt the company from payment of VAT / Sales Tax payable for a period of seven years from the cut-off date.

(d) To exempt the company from payment of entry tax on company's raw material imports."

9. After approval of the scheme, the net worth of the company turned positive on 31.03.2011 and it filed MA No.442/2011 seeking de-registration from the purview of the SICA. In the MA No.442/2011, appellant has made various prayers. The prayers made by the appellant in MA NO.442/2011 has been noticed by the BIFR in its proceeding dated 16.08.2011. Copy of the proceeding dated 16.08.2011 of the BIFR is filed as Annexure A-7 to the appeal. The prayer made in MA No.442/2011 are noticed in paragraph 12 of the proceedings which are as follows:

"a. Deregister the case of the applicant company.

b. Issue direction to the State Govt. of Orrisa for implementation of un-implemented provisions of the sanctioned scheme (SS-08) by the concerned agencies.

c. Issue direction to working capital consortium bankers for release of the first charge given by the company on its fixed assets as per para 19(iii) of the sanctioned scheme (SS-08).

d. Pass such order or any other order as may be deemed appropriate in view of the facts and the circumstances of the case."

10. The prayers made by the appellant before the BIFR were not only de-registration of the company but also a direction to the State Government of Orissa for implementation of unimplemented provisions of the sanctioned scheme, which was prayer (b). The BIFR heard the parties and discharged the company from purview of SICA. Directions were issued. The proceeding noticed that net worth of the company has turned positive and the scheme

has been substantially implemented by the company and it may be discharged from the BIFR. In paragraph 13.4 directions were issued. Paragraph 13.4 is as follows:

> *"13.4 The Bench, on consideration of the submissions made, materials on record, notes that the prescribed provisions of SS-08 have been fully implemented by the company and also as the company M/s Paradeep Phosphates Ltd. (PPL) has ceased to be a 'sick industrial undertaking' within the meaning of section 3(1)(d) of the Act. The Bench hereby discharges the company M/s Paradeep Phosphates Ltd. (PPL) from the purview of SICA/BIFR and issues the following further directions:*
>
> > *a) SBI is relieved from the responsibility of MA.*
> >
> > *b) The 'Special Director' appointed by the BIFR on the company's 'Board of Directors' (BoD), if any, would stand discharged with immediate effect.*
> >
> > *c) The company would complete the necessary formalities with the concerned 'Registrar of Companies' (ROC), as may be required.*
> >
> > *d) The Miscellaneous Application No. 442/2011 in case No. 238/2003 M/s Paradeep Phosphates Ltd is disposed-off accordingly."*

11. MA No.442/2011 was disposed of accordingly. The order dated 16.08.2011 clearly indicate that only prayer granted was to de-register the appellant from SIC Industrial Company. Other prayers of the appellant seeking a direction for implementation of unimplemented provisions of the sanctioned scheme were not considered and granted.

12. Appellant did not file any appeal against the order dated 16.08.2011 within 180 days which is period for limitation for filing an appeal. The order dated 16.08.2011 passed by the BIFR became final against the appellant having not been appealed, BIFR itself having not granted the relief claimed by

the appellant in MA No.442/2011 to issue any direction to the State of Orissa to implement unimplemented provisions of the sanctioned scheme, it was not opened for the appellant to initiate various proceedings and contend that the scheme should be implemented. In any view of the matter, the scheme was sanctioned from 2007-14. 7 years period also came to an end in 2014. Appellant also filed subsequently MA No.285/2014 before the BIFR praying for further directions which remain pending and no order has been passed. BIFR having not granted any relief to the appellant, we are of the view that the order dated 16.08.2011 became final and Question No. (I) is answered as follows:

(I) The appellant was not entitled to claim tax exemption after disposal of MA 442/2011 on 16.08.2011.

<u>Question No. (II):</u>

13. Revised DRS was circulated on 03.03.2008, which has been noticed by the BIFR in its proceeding dated 03.03.2008. Sections 19(1), 19(2) & 19(3) of the SICA on which reliance has been placed by the appellant provides as follows:

> ***"19. Rehabilitation by giving financial assistance.—****(1) Where the scheme relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial company, the scheme may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution or any institution or other authority (any Government, bank, institution or other authority required by a scheme to provide for such financial assistance being*

hereafter in this section referred to as the person required by the scheme to provide financial assistance) to the sick industrial company.

(2) Every scheme referred to in sub-section (1) shall be circulated to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation 1[or within such further period, not exceeding sixty days, as may be allowed by the Board, and if no consent is received within such period or further period, it shall be deemed that consent has been given].

(3) Where in respect of any scheme the consent referred to in sub-section (2) is given by every person required by the scheme to provide financial assistance, the Board may, as soon as may be, sanction the scheme and on and from the date of such sanction the scheme shall be binding on all concerned.

> *[(3A) On the sanction of the scheme under sub-section (3), the financial institutions and the banks required to provide financial assistance shall designate by mutual agreement a financial institution and a bank from amongst themselves which shall be responsible to disburse financial assistance by way of loans or advances or guarantees or reliefs or concessions or sacrifices agreed to be provided or granted under the scheme on behalf of all financial institutions and banks concerned.*
>
> *(3B) The financial institution and the bank designated under sub-section (3A) shall forthwith proceed to release the financial assistance to the sick industrial company in fulfilment of the requirement in this regard.]"*

14. The objections on the DRS came for consideration before the BIFR on 15.05.2008. The proceeding that BIFR dated 15.05.2008 has been brought on the record and for objections on DRS, the hearing was fixed for 15.05.2008. In paragraph 7 of the proceeding, following has been noticed.

"7. Based on the revival scheme submitted by SBI (OA), the Board prepared a Draft Rehabilitation Scheme (DRS) for the revival of the company which was

circulated to all concerned for consent as required u/s 19(2) read with Section 19(1) of SICA. As per the DRS net worth is expected to become positive by the end of FY 2008-09 and the accumulated losses would be wiped out in the FY 2015-16, denoting that the scheme is financially viable. Short particulars of the said scheme were directed to be published in two local dailies, inviting objections/suggestions with regard to the DRS and the Board fixed a hearing on 15.5.2008 to hear objections/suggestions."

15. Paragraph 8 of the proceeding dealt with the hearing on 15.05.2008. In Paragraph 8.2, the submission of the representative of the Government of Orissa has been noticed in following words:

"8.2 The representative of the GOO submitted that the GOO has no policy to provide any relief to sick companies."

16. Subsequently, the scheme came for consideration on 02.09.2008 and was approved by the BIFR. At the time of hearing on 02.09.2008, advocate representing the Orissa Commercial Tax Department brought into the notice of the BIFR the dues of Sales Tax and Orissa Entry Tax against the company. Paragraph 11.7 of the proceedings are as follows:

"11.7 The Id advocate representing Orissa Commercial Tax Department, submitted that dues of Rs 1,02,346.00 on account of Orissa Sales Tax, Rs 6,91,298.00 on account of Central Sales Tax and and Rs 2,76,63,284.00 on account of Orissa Entry Tax were outstanding against the company. At this juncture, the FCA representing the company submitted that these were disputed claims and were sub-judice. He finally submitted that the company would abide by the judgment of courts on the final outcome."

17. Sanctioned Scheme SS-08 noticed all relevant details and Clause 20 deals with reliefs and concessions. Clause 20(i) which was relief from State Government of Orissa is as follows:

"(i) From the State Government of Orissa

<u>Sales Tax:</u>

(a) To exempt the Company from payment of VAT/Sales Tax payable for a period of seven years from the cut-off-date.

(b) To exempt the Company from payment of entry tax on Company's raw material imports."

18. The submission which has been much pressed by the counsel for the appellant is that consent within meaning of Section 19(2) was never denied by State of Orissa and in view of the fact that consent was not received within period of 60 days it shall be deemed that the consent has been given.

19. Section 19(2) of the SICA provides for circulation of rehabilitation scheme to every person required by the scheme to provide financial assistance for its consent. We have noticed above that revised DRS was circulated on 03.03.2008 and hearing on the objections on the DRS was fixed by the BIFR on 15.05.2008. When the hearing was fixed for 15.05.2008 on the objection, it is clear that by the said period the consent could have been given to the scheme by those who are required to provide financial assistance. Hearing took place on 15.05.2008 before the BIFR and we have already noticed that representative of the State of Orissa made a statement that the Government of Orissa has no policy to provide any relief to SIC Industrial Company which is noticed in paragraph 8.2 as extracted above. 15.05.2008 was the date for hearing the objection on the DRS and when the state representative placed before the BIFR that Government of Orissa has no policy to provide any relief to SIC Industrial Company, we are not persuaded to accept the submission of

the appellant that the said statement cannot be treated to be denial of the consent.

20. Learned counsel for the appellant has placed much reliance on Section 19(2) of the SICA to contend that since no consent was received within a period of 60 days or further period, it shall be deemed that the consent has been given. The question of deemed consent arise when there is no communication from the state regarding consent. In the proceeding which were proceeding for hearing objection on the revised DRS on behalf of State of Orissa categorically stated that there is no policy of giving any relief to the SIC Industrial Company by the Government of Orissa. The above submission was clear denial of consent from the State of Orissa. The submission of the appellant of deemed consent as contemplated in Section 19(2) of the SICA shall not come into play in facts of the present case, since present is not a case where within the period prescribed no consent was communicated rather present is a case where on hearing an objection on DRS which was heard on 15.05.2008 by BIFR as noted above the representative of the Orissa Government communicated that there is no policy of giving relief to the SIC Industrial Company, thus it was a clear case of communication that State of Orissa is not consenting to grant exemption from Entry Tax, we are not persuaded to accept the submission of the counsel for the appellant that in facts of the situation of the present case, consent of the State of Orissa shall be deemed to have been given. Section 19(3) further provides that when consent of sub-Section (2) is given every person required such sanctioned scheme is binding on any such person. The hearing the State of Orissa rather

communication that there is no policy of giving any benefit to the SIC Industrial Company consent was denied and there is no applicability of deeming fixation as contemplated by the learned counsel for the appellant. We thus hold that there was no deemed consent by the State of Orissa under Section 19(2) and submission of the appellant that there shall be deemed consent of the State of Orissa and it is bound to implement Clause 20 cannot be accepted.

21. Learned counsel for the appellant has placed reliance on the judgment of the High Court of Delhi in ***'Damodar Valley Corporation' Vs. 'Appellate Authority for Industrial and Financial Reconstruction & Ors.',*** reported in **[2009 SCC OnLine DEL 1843].** Learned counsel for the appellant submits that in the above case, Damodar Valley Corporation failed to file its objection within the time allowed in the DRS, hence it shall be deemed to have given consent. In paragraph 8 of the judgment, following was laid down:

> ***"8.*** *It has been observed in the impugned order that the DRS was sent by the BIFR to the petitioner on March 23, 2007 and same was received by it on April 6, 2007. The petitioner failed to file objections to the DRS within the stipulated period of 60 days from the receipt thereof, i.e., by June 6, 2007. The petitioner did not apply for extension of time though it could have applied for further time not exceeding 60 days before the expiry of the stipulated period of 60 days from the date of circulation of the DRS. The petitioner had failed to place on record any document or application/communication to show that it had made a request for extension of time prior to the hearing conducted by the BIFR on July 4, 2007, when the impugned order was passed. Thus, according to section 19(2) of the SICA it will be deemed that the consent had been given by the petitioner. Since section 19(2) of the SICA was a deeming provision it was immaterial for the BIFR to record any finding in the*

> *impugned order regarding "deemed consent". Certain reliefs and concessions were proposed vide clauses (ii), (iv)(v) and (vi) of paragraph 9.3 of DRS qua the petitioner and the same were deleted by the BIFR even without filing any objections/suggestions by the petitioner. Direction regarding restoration of power supply was imperative to enable rehabilitation of respondent No. 3 company. Respondent No. 3 company was bound by the sanctioned scheme with regard to the payments of dues of the petitioner and the petitioner was at liberty to bring to the notice of the BIFR any failure on the part of respondent No. 3 company in case schedule was not adhered to. In the light of the above observations AAIFR dismissed the appeal."*

22. From the facts of the above case, it is clear that in the DRS, 60 days' time was allowed to file the extension that is by 06.06.2007. Damodar Valley Corporation neither applied for objection nor failed to place any document or application/communication to show that it was with respect to extension of time till 04.07.2007 when impugned order was passed. In the above circumstances, High Court held that under Section 19(2) of the SICA Act it shall be deemed to have given consent. When we come back to the facts of the present case, DRS was circulated on 03.03.2008 and 15.05.2008 was fixed by BIFR itself for hearing objection on the DRS on 15.05.2008 representative of the state appeared and made submission that there is no policy of the state to grant any relief to SIC Industries, any concessions to the SIC Industries, thus present is the case where the view of the State of Orissa was duly communicated within time allowed, hence there is no occasion for deemed consent in the facts of the present case. Thus, the judgment of ***'Damodar Valley Corporation'*** **(supra)** does not help the appellant in the facts of the present case.

23. Another judgment relied by the counsel for the appellant is ***'Union of India' Vs. 'Cimco Ltd. & Ors.'*** reported in **[2014 SCC OnLine DEL 909].** Delhi High Court came to consider provisions of Section 19 of the SICA in the above case. In the above case, DRS was circulated to the Railways but no objection was filed and it was after the scheme was sanctioned and circulated certain objection was raised in paragraphs 9 to 11, Delhi High Court made following observations:

> ***"9.*** *Five questions arise in this case : first, whether the BIFR may—by sanctioned scheme of rehabilitation under the SICA—only bind those entities referred to in section 18(8) ; secondly, whether clause 11.6 binds the Railways under section 19 of the SICA ; thirdly, whether clause 11.6 is binding in its own terms or whether it only recommends certain action ; fourthly, whether CBL can benefit from the concessions granted by clause 11.6 even if the BIFR has declared that company is no longer sick, and is in fact, returning positive figures ; and finally, whether the deviation from the 2005 GFR Rules envisaged by clause 11.6 renders it void.*
>
> ***10.*** *As regards the first two questions, the court notes that the provisions of sections 18 and 19 are complementary, and dealing with different spheres of action. Section 18(8) states that the scheme sanctioned by the BIFR will be binding on the sick company, its creditors, employees, guarantors, etc. Indeed, these are the only entities which the BIFR can unilaterally bind. The scope of application of section 19, however, is different. In the words of the section, as regards "the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution or any institution or other authority", the BIFR does not have the authority to bind these entities by its orders and thus modify the obligations and rights owed between the sick company and these entities. However, the scheme for rehabilitation may—in the interests of ensuring that the sick company returns to a profitable state as soon as possible— envisage "financial assistance by way of loans, advances or guarantees or relief's or*

> *concessions or sacrifices from" any of the above entities. These provisions in the DRS will not be binding on these entities, unless their consent is obtained. Thus, these entities—the Railways in this case—may determine whether the concessions envisaged in the DRS will be provided by them and either to consent or reject the provision. If the entity rejects the provision, unlike in the case of the entities covered under section 18(8), they will not be bound by the scheme sanctioned subsequently. This is made clear by clause 2 of section 19, which states that the DRS is to be circulated in order to obtain consent. Once consent is obtained, however, the provision becomes binding for the period of the sanctioned scheme.*
>
> *Crucially, in this regard, section 19(2) categorically provides that "if no consent is received within such period or further period, it shall be deemed that consent has been given".*
>
> ***11.** In this case, as the AAIFR has noted in the impugned order—at paragraph 3—that it is undisputed that the DRS was circulated to the Railways, for the purpose of obtaining consent and inviting suggestions/objections. No objections were filed by the Railways. It states today—for the first time since the scheme was sanctioned by the BIFR on March 11, 2010—that the scheme was circulated to the Secretary, Ministry of Railways and then redirected to the Stores Directorate of the Ministry later (which is the concerned Department, it is claimed), by which stage "hardly any time was left for filing of objection". The Railways raises this plea after almost three years of the presentation of the claim by CBL to the BIFR. No such stand was taken before, and in any event, no request for extension of time, let alone an objection taken at any stage of these proceedings before the BIFR, AAIFR, this court or the Supreme Court in the various rounds of litigation witnessed in this matter. Thus, in terms of section 19(2), deemed consent of the Railways to clause 11.6 of the sanctioned scheme was taken, and it is accordingly binding on it.”*

24. When we look into the facts of the above case, it is clear that the DRS was circulated which envisaged certain concession by Ministry of Railways. Clauses of scheme was not adhered to, aggrieved by which action by the

Railway, MA was filed by SIC Industrial Company before the BIFR seeking compliance of the scheme. BIFR decided against the Railway which appealed before Appellate Authority for Industrial and Financial Reconstruction (**"AAIFR"**). AAIFR dismissed the stay application which was challenged before the Delhi High Court as well as unsuccessfully before the Hon'ble Supreme Court. Subsequently, the appeal was dismissed on 07.05.2023 which was challenged in the Writ Petition before the High Court dated 14.09.2014 was delivered. The above judgment also clearly noticed that DRS was circulated to the Railways which did not file any objection which has been noticed in paragraph 11 of the judgment. In the above context Delhi High Court held that under Section 19(2) scheme is binding on the Railway. The above judgment is thus also clearly distinguishable in the facts of the present case. We answer Question No. (II) in following manner:

(II) Sanctioned scheme SS-08 sanctioned by BIFR on 02.09.2009 shall not be deemed to be consented under Section 19(2) of the SICA 1985.

<u>Question No. (III)</u>

25. We having already held that to the sanctioned scheme no consent was given by State of Orissa to Clause 20 of the sanctioned scheme no grounds were made out to issue any direction to State of Orissa to grant the exemption from payment of Entry Tax till 2014.

26. Learned counsel for the appellant relying on the judgment of the Orissa High Court dated 07.12.2021 in Writ Petition No. 20338/2014 submitted that High Court has specifically directed that the dispute involved in the present

case be adjudicated by the NCLT, which order has also been upheld by the Hon'ble Supreme Court vide order dated 23.09.2022, hence objections as to the maintainability was no longer opene to the respondent and deserve to be rejected. The order of the High Court which has been relied by the appellant has been filed along with the appeal as Annexure A-25, in which order the High Court has noticed the proceedings before the BIFR. In paragraphs 7 to 9 of the order of the High Court, following has been directed:

> *"7. The Court is informed that on 31st August, 2021, the NCLT had passed an order to the effect that in view of the pendency of the present writ petition, it would prefer awaiting the outcome of the present petition before passing further orders in the said application.*
>
> *8. Another development which appears to have taken place is that since the year 2011 the net-worth of PPL turned positive and it asked that it be discharged from the purview of the Scheme. This is reflected in an order dated 6th September, 2011 passed by the BIFR. In para 13.4 of the said order dated 6th September, 2011, the BIFR noted that the PPL had ceased to be a sick industrial undertaking within the meaning of Section 3(1)(o) of the SICA and discharged the PPL from the purview of Scheme under the SICA. The BIFR issued further directions including discharging the Special Director appointed by the BIFR on PPL's Board of Directors.*
>
> *9. Since this Court had already taken a view in the order dated 15th January, 2014 that PPL should go before the BIFR for all incidental or ancillary reliefs it was seeking in respect of the Scheme from which it stands discharged by virtue of the above order dated 6 September, 2011, the Court considers it appropriate to reiterate that observation and direct that the NCLT before whom the application filed by PPL on 18th June, 2014 is currently pending, should proceed with the hearing of the said application in accordance with law. The Court therefore refrains from issuing any direction or making any observation on the plea urged by PPI, in the present petition and leaves it open to the PPL to urge all the pleas raised here vis-à-vis the sanctioned*

> *Scheme passed in BIFR Case No.238 of 2003 before the NCLT. Likewise, the contention of the Opposite Parties vis-à-vis such plea of the PPL. is also left to be urged before the NCLT in accordance with law."*

27. The above order only indicates that NCLT is to decide the application **in accordance with law.** High Court has not decided any issue finally in its judgment dated 07.12.2021, but after noticing the sequence of the event has directed the NCLT to decide in accordance with law, thus, submission of the appellant cannot be accepted that judgment of the High Court dated 07.12.2021 is a decision which decides any issue including the maintainability of the application before the NCLT. When the NCLT was to decide in accordance with law, it was free to take decision in accordance with law.

28. At this stage, we need to notice one more aspect of the matter as has been noticed by the adjudicating authority also in the impugned order. Reliance was placed by the appellant on Central Government Notification dated 24.05.2017, after IBC was enforced, the provisions of SICA Act, 1985 was repealed. Reliance has been placed on Notification dated 24.05.2017, by which Notification, 2 provisos were added which has been noticed in paragraph 9 of the impugned order which are as follows:

> *"9…"Provided also that any scheme sanctioned under sub section (4) or any scheme under implementation under sub section (12) of section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall be deemed to be an approved resolution plan under subsection (1) of section 31 of the Insolvency and Bankruptcy Code, 2016 and the same shall be dealt with, in accordance with the provisions of Part II of the said Code:*

> *Provided also that in case, the statutory period within which an appeal was allowed under the Sick Industrial Companies (Special Provisions) Act, 1985 against an order of the Board had not expired as on the date of notification of this Act, an appeal against any such deemed approved resolution plan may be preferred by any person before National Company Law Appellate Tribunal within ninety days from the date of publication of this order."*

29. The Notification dated 24.05.2017 came for consideration before this Tribunal in **[Comp. App. (AT) (Ins.) No. 160/2017]**, ***'Pr. Directorate General of Income Tax (Admn. & TPS)' Vs. M/s. Spartax Ceramix India Ltd. & Anr.',*** where this Tribunal took the view that Notification dated 24.05.2017 was in excess of authority of Central Government to issue order under Section 242 of the IBC. This Tribunal held that Appellate Tribunal cannot, pursuant to impugned Notification 24.05.2017 entertain an appeal. The order passed by this Tribunal was challenged before the Hon'ble Supreme Court in ***'M/s. Spartax Ceramics India Ltd.' Vs. 'Union of India & Ors.'*** by filing **[Civil Appeal No.7291-7292/2018],** which appeal was disposed of by the Hon'ble Supreme Court on 25.10.2018. The order of the Hon'ble Supreme Court passed on 25.10.2018 is as follows:

> ***"1)*** *Delay condoned.*
>
> ***2)*** *Having heard learned counsel in all the three appeals before us for some time, and having gone through the judgment dated 28.05.2018 passed by the the National Company Law Appellate Tribunal (NCLAT), we are of the view that the judgment of the NCLAT holding that the appeal filed by the Central Government in that case not maintainable in view of the fact that the Notification dated 24.05.2017 travels beyond the scope of the removal of difficulties provision is correct. We are of the view that, having held that the appeal is not maintainable, the appellate Tribunal should not have adjudicated upon either the limitation*

aspect of the case or the merits of the particular Scheme before it. Therefore, while upholding the judgment passed by the appellate Tribunal on the ground that the appeal itself was not maintainable, we set aside the judgment insofar as it purports to deal with the limitation aspect of the case and the merits including the declaration of the Scheme as being illegal.

3) *Insofar as Civil Appeal No. 8247 of 2018 and Civil Appeal D. No. 33241/2018 are concerned, it is clear that on the facts in these cases, originally, the appellants had approached the High Court of Delhi in writ petitions. The High Court of Delhi, by judgment dated 22.02.2018 (as modified by order dated 17.04.2018) and 14.09.2017, respectively, ordered the parties to avail of the alternative remedy of filing an appeal before the NCLAT in view of the Notification dated 24.05.2017 which was done by the appellants in these appeals.*

4) *As the impugned judgment dated 28.05.2018 has set aside this Notification, and which has been upheld by us, the NCLAT, in both these cases, has dismissed the two appeals so filed, following the main judgment of 28.05.2018. This being the case, we revive the two writ petitions that had been before the High Court of Delhi in both the appeals before us with liberty to the appellants to amend the aforesaid writ petitions within a period of four weeks from today.*

5) *We request the High Court of Delhi to take up the writ petitions at the earliest. It is made clear that pleadings may be completed in both the writ petitions expeditiously, and all points available in fact and law to all parties shall be kept open.*

6) *With these observations, the appeals are disposed of.*

7) *Pending applications shall stand disposed of."*

30. This Tribunal in **[Comp. App. (AT) (Ins.) No. 312/2022]**, ***'Pramod Kumar Pathak' Vs. 'ARFAT Petrochemicals Private Limited'*** decided on 12.12.2022 has noted the order of the Hon'ble Supreme Court in ***'M/s. Sparktax Ceramics India Ltd.'*** **(supra)** and has observed that Notification dated 24.05.2017 is not a valid Notification and there is no occasion to accept

the submission that approved DRS is a resolution plan giving any foundation to file an application under Sections 33 & 34 of the IBC. After noticing the judgment of the Hon'ble Supreme Court, in paragraphs 13 & 19, this Tribunal has observed as follows:

> *"13. We are not in agreement with the submission of learned Counsel for the Appellant with regard to Notification dated 24.05.2017 that the judgment of the Hon'ble Supreme Court can be treated as only an obitor. The Hon'ble Supreme Court has clearly approved the view of the Appellate Tribunal that Notification dated 24.05.2017 travels beyond the scope of removal of difficulties provisions, which is law declared by the Hon'ble Supreme Court and is binding on all under Article 141 of the Constitution of India. The judgment of the Adjudicating Authority impugned in the present Appeal follows the judgment of the Hon'ble Supreme Court in* ***M/s Spartek Ceramics India Ltd. vs. Union of India & Ors.*** *When the Notification dated 24.05.2017, is not a valid Notification, there is no occasion to accept the submission that approved Rehabilitation Scheme dated 07.01.2005, which is foundation of the Application filed by the Appellant under Sections 33 read with Section 34 can be treated as a Resolution Plan within the meaning of IB Code. The very foundation of the Application filed by the Appellant under Sections 33 and 34 having been knocked out, the Application was rightly rejected by the Adjudicating Authority.*
>
> *19. We are of the view that judgment of the Hon'ble Supreme Court in* ***M/s Spartek Ceramics India Ltd.*** *is a law declared by the Hon'ble Supreme Court, where Hon'ble Supreme Court has specifically approved the view of this Appellate Tribunal that Notification dated 24.05.2017 travels beyond the scope of removal of difficulties provisions. We have already extracted the provisions of Section 242 of the IB Code in preceding paragraphs of this judgment, where as per sub-section (1) of Section 242, Central Government is empowered to issue an order, if any difficulty arises in giving effect to provisions of this Code. The power under Section 242 is thus confine to the powers of Central Government in removing difficulties arising in giving effect to the provisions of the IB Code. The powers*

cannot be exercised by Central Government to remove any difficulty regarding review or monitoring of scheme sanctioned under Sick Industrial Companies (Special Provisions) Act, 1985 and the repeal of Sick Industrial Companies (Special Provisions) Act, 1985, which is the specific reason mentioned in the Notification dated 24.05.2017, noticing the difficulties, which has arisen for which the order has been issued. It is useful to note following part of the Notification, which deals with difficulties, which has arisen:

"And, whereas, difficulties have arisen regarding review or monitoring of the schemes sanctioned under subsection (4) or any scheme under implementation under sub-section (12) of section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) in view of the repeal of the Sick Industrial Companies (Special Provisions) Act, 1985, substitution of clause (b) of section 4 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 and omission of sections 253 to 269 of the Companies Act, 2013;"

31. The above is another reason to hold that application filed by the appellant before the NCLT being C.P. 342/2017 was not maintainable, however as noted above, we have also held on merits that paragraph 20 of the scheme as approved on 02.09.2008 was not binding on the State of Orissa and State of Orissa was not obliged to grant exemption from payment of Entry Tax as prayed by the appellant. The above findings are sufficient to answer the question. We answer Question No. III in following manner:

(III) Appellant did not make out any case before NCLT in C.P.342/2017 for issuing any direction for granting exemption from payment of Entry Tax till 2014 as per sanctioned scheme 02.09.2008.

32. We are of the view that adjudicating authority after considering all relevant aspect of the matter has rightly rejected C.P.342/KB/2017 filed by

the appellant. For the reasons as noticed above, appellant is not entitled for any relief in this appeal. There is no merit in the appeal. Appeal is dismissed.

Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

18th May, 2026

himanshu