

# THE LOSS OF INDUSTRIAL CHARACTER UNDER THE SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985: ADDRESSING THE JURISDICTIONAL CONUNDRUM

*Harshad Pathak\**

*The jurisdiction of the Board for Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985 rests on the twin pillars of 'industrial character' and 'sickness' of a company making the reference. While much of the judicial deliberation till date has been focussed on aspects concerning the sickness of a company, Indian courts are now being increasingly asked to determine the effect of a sick company's subsequent loss of industrial character. Through this paper, I critically examine whether the loss of industrial character of a sick company subsequent to the registration of its reference before the Board for Industrial and Financial Reconstruction ousts it from the purview of the Sick Industrial Companies (Special Provisions) Act, 1985 so as to deprive the Board for Industrial and Financial Reconstruction of its jurisdiction over the said company.*

## I. INTRODUCTION

“Just like birth and growth, sickness and death is an inevitable aspect of trade and industry. An industry flourishing today may face closure tomorrow while an industry languishing today may turn the corner and grow rapidly tomorrow. This is unavoidable in any economy.”<sup>1</sup>

Unavoidable as it may be, the instability in the prospects of any economic entity does not deter the state from adopting appropriate measures to protect its industries. As pointed out by the Committee on Industrial Sickness and Corporate Restructuring, headed by Shri Omkar Goswami ('Goswami Committee') in 1993, when asked to devise appropriate solutions to meet the challenges of industrial sickness in India, the success of India's economic

---

\* The author is an India qualified lawyer, currently pursuing the Geneva LL.M. in International Dispute Settlement (MIDS) 2016-17 as a J.N. Tata Scholar. He is an alumnus of the National Law University – Delhi, India, and may be contacted at harshad.pathak@mids.ch. The author wishes to extend his gratitude to all members of the editorial team of NUJS Law Review for their comments on the initial drafts of the paper.

<sup>1</sup> P.S. KAICKER, TAXMANN'S SICK INDUSTRIAL COMPANIES 1.1 (2004).

reforms depends upon a sustained growth in its industrial output and investment.<sup>2</sup> The health of the industrial sector, after all, is the spine of every stable and progressive economy, which implies that a state has a vested interest in preserving the health of its industrial sector.

In 1981 perturbed by the growing sickness in India's industrial sector, the Reserve Bank of India ('RBI') constituted a committee under the chairmanship of Shri T. Tiwari ('the Committee'), the then Chairman of the Industrial Reconstruction Corporation of India Limited, to look into the causes of industrial sickness, and suggest appropriate remedial measures.<sup>3</sup> As per the terms of reference formulated by the RBI, the Committee was tasked to recommend policy and legislative changes to ensure that industrial units operate viably.<sup>4</sup> While the Committee invariably identified several causes of industrial sickness, it specifically acknowledged the glaring inadequacy of available statutory remedies under multiple laws, and recommended the enactment of a comprehensive special legislation designed to deal with the problems of sick units.<sup>5</sup> Further, the Committee also recommended that a quasi-judicial body, having the same powers as a civil court, may be set up under a special legislation to deal expeditiously and exclusively with the matters relating to the rehabilitation of sick industrial units.<sup>6</sup>

Accepting the aforementioned recommendations,<sup>7</sup> the Parliament enacted the Sick Industrial Companies (Special Provisions) Act, 1985 ('SICA'),<sup>8</sup> which established the Board for Industrial and Financial Reconstruction ('BIFR'). The objective of the BIFR was to exercise the jurisdiction and powers, and discharge the functions and duties conferred or imposed upon it under the SICA.<sup>9</sup> Therefore, the SICA was enacted to make in public interest, special provisions for securing a timely detection of sick or potentially sick companies owning industrial undertakings, ensuring speedy determination by the BIFR of preventive, ameliorative, remedial and other measures to be taken with respect to such companies, and then overseeing the expeditious enforcement of the measures so determined.<sup>10</sup> Interestingly, the achievement of the above-stated objectives revolves around the establishment of the BIFR. On the one hand, the SICA obligates the board of directors of an industrial company to *suo motu*

<sup>2</sup> OMKAR GOSWAMI COMMITTEE, *Report of The Committee on Industrial Sickness and Corporate Restructuring*, ¶1.1 (July 13, 1993) ('Goswami Committee Report').

<sup>3</sup> S.A. NAIK, *THE LAW OF SICK INDUSTRIAL COMPANIES & BIFR* 35 (2011).

<sup>4</sup> KAICKER, *supra* note 1, 1.4.

<sup>5</sup> TIWARI COMMITTEE, *Interim Report on the Issue of Special Legislation*, 10.1 (1981).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* ("[...] draw up a special legislation which will enable speedy and effective action to be taken for rehabilitation of the sick units. Such a legislation can create a specialised body exclusively devoted to revival of sick units, which step would ensure unified approach and speedy and time-bound decisions.")

<sup>8</sup> The Sick Industrial Companies (Special Provisions) Act, 1985.

<sup>9</sup> *Id.*, §4(1).

<sup>10</sup> *Id.*, Long Title.

report its sickness to the BIFR within a prescribed period of time.<sup>11</sup> On the other hand, it empowers the BIFR to conduct an inquiry into the working of any sick industrial company so reported<sup>12</sup> and pass suitable orders on the completion of the inquiry.<sup>13</sup> Thus, considering the centrality of the BIFR to the object that is sought to be attained by the SICA, determining the scope and ambit of the BIFR's jurisdiction is understandably important.

The jurisdiction exercised by the BIFR as per the provisions of the SICA rests on the twin pillars of 'industrial character' and 'sickness' of the company that made the reference. Thus, any alteration of either jurisdictional fact has the potential to deprive the BIFR of its jurisdiction. While much of the discussion in this regard has centred around the 'sickness' of the company in terms of §3(1)(o) of the SICA,<sup>14</sup> the Supreme Court of India is yet to consider the consequences that may entail if a 'sick industrial company' registered before the BIFR loses its industrial character during the pendency of the proceedings under the SICA. The conspicuous silence of the SICA on this aspect has created a fertile ground for judicial impetus to thrive, albeit often at the expense of the element of clarity and judicial consistency. For instance, the Appellate Authority for Industrial and Financial Reconstruction ('AAIFR') established under SICA has itself adopted contradicting positions on this aspect. While in *G.D. Rathi Steel v. BIFR*,<sup>15</sup> the AAIFR refuted the possibility of de-registering a sick company for a subsequent loss of its industrial character, the AAIFR arrived at a completely opposite conclusion in *Vegepro Foods & Feeds Ltd. v. BIFR* ('Vegepro').<sup>16</sup> It is this precise controversy that I intend to address herein by alluding, *inter alia*, to the aforementioned decisions; albeit in relation to the instances where no rehabilitation scheme has been sanctioned by the BIFR under §18(4) read with §18(8) and §32(1) of the SICA.

In this paper, I examine the effect of a subsequent loss of 'industrial character' on the jurisdiction exercised by the BIFR under the provisions contained in the SICA. Specifically, I seek to determine whether the loss of any sick company's 'industrial character' subsequent to the registration of its reference before the BIFR ousts it from the purview of the SICA, thereby depriving the BIFR of the jurisdiction that it earlier exercised over the said company.

In Part II of this paper, I begin by briefly analysing the scope of application of the SICA, which is followed by an assessment of the concept of 'industrial character' under the SICA in Part III. Thereafter, in Part IV, I

---

<sup>11</sup> *Id.*, §15.

<sup>12</sup> *Id.*, §16.

<sup>13</sup> *Id.*, §17.

<sup>14</sup> *Id.*, §3(1)(o).

<sup>15</sup> *G.D. Rathi Steel v. BIFR*, Appeal No. 85 of 2008 (AAIFR) (Unreported).

<sup>16</sup> *Vegepro Foods & Feeds Ltd. v. BIFR*, Appeal No. 301 of 2010 (AAIFR) (Unreported) (the validity of the order in question is under challenge before the AAIFR in a batch of petitions, led by T.S. Sanil v. BIFR, Appeal No. 238 of 2009).

address the competence of a judicial authority to revisit or redetermine the existence of a jurisdictional fact at a subsequent stage of a proceeding. On such basis, in Part V, I proceed to review the effect of a company's subsequent loss of 'industrial character' on the jurisdiction of the BIFR, before summarising my conclusions in Part VI.

## II. SCOPE AND APPLICATION OF THE SICA

As stated above, the jurisdiction exercised by the BIFR in terms of the SICA rests on the twin pillars of 'industrial character' and 'sickness' of the company that made the reference before it. While §3(1)(o) of the SICA mentions that any company, which at the end of any financial year, has accumulated losses equal to or exceeding its entire net worth is deemed to be sick,<sup>17</sup> the criterion of 'industrial character' emanates from §1(4) of the SICA. §1(4) of the SICA does not use the expression 'industrial character'. However, it prescribes that the SICA shall apply to all scheduled industries other than the scheduled industry relating to ships and other vessels drawn by power.<sup>18</sup> The expression 'scheduled industry' herein refers to the industries that are specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 ('IDRA').<sup>19</sup>

A conjoined reading of the above provisions clarifies the scope of application of the SICA. With the exception of the industries relating to ships and other vessels drawn by power, when an 'industrial company' relating to an industry specified in the First Schedule to the IDRA becomes 'sick', its board of directors have to, within sixty days from the date of finalisation of its audited accounts, make a reference to the BIFR for the determination of the measures to be adopted.<sup>20</sup> On receipt of such reference, as required by §16 of the SICA, the BIFR makes an inquiry as to whether the company before it is a 'sick industrial company'.<sup>21</sup> To put it differently, the BIFR makes a dual inquiry as to whether the said company possesses an industrial character, and whether it has become 'sick'. If it determines that the company is indeed an industrial company suffering from sickness, then it has sufficient discretion to pass suitable orders for the purpose of rehabilitation.<sup>22</sup>

However, if the BIFR comes to the conclusion that the company making the reference is not a 'sick industrial company', then it is bound to close the reference for want of jurisdiction.<sup>23</sup> As echoed by the AAIFR in *Labh Construction Industries Ltd. v. BIFR*,<sup>24</sup> if on a rigorous scrutiny and an

<sup>17</sup> *Supra* note 8, §3(1)(o).

<sup>18</sup> *Id.*, §1(4).

<sup>19</sup> *Id.*, §3(1)(n).

<sup>20</sup> *Id.*, §15(1).

<sup>21</sup> *Id.*, §16.

<sup>22</sup> *Id.*, §17.

<sup>23</sup> The BIFR Regulations, 1987, Reg. 24.

<sup>24</sup> *Labh Construction Industries Ltd. v. BIFR*, Appeal No. 213 of 2008 (AAIFR) (Unreported).

independent inquiry, it is found that the company does not qualify for consideration under the SICA, then the BIFR has the right to pass a reasoned order bringing out why the company's reference is non-maintainable.<sup>25</sup> The implication being that wherever the BIFR considers that the company before it constitutes an industrial company, then it lacks jurisdiction, notwithstanding the extent of the said company's financial sickness. The same is in conformity with the object of the SICA, which is to address the peril of industrial sickness, as opposed to each individual instance of mere financial sickness.<sup>26</sup> Curiously, the SICA nowhere appears to address a situation concerning a sick company's loss of industrial character subsequent to the registration of its reference before the BIFR.

The aim of the SICA is to facilitate the rehabilitation of sick industrial units through adopting any of the measures in terms of §17, §18, §19 and §19A of the enactment. In suitable cases, the BIFR has the power to appoint and direct an 'operating agency' to prepare a scheme, proposing measures to make the net worth of the company exceed its accumulated losses.<sup>27</sup> As illustrated under §18(1) of the SICA, these may include, *inter alia*, taking over the management of the sick industrial company, its amalgamation with another company, the sale/ lease of any of its industrial undertakings, etc.<sup>28</sup> Once a draft scheme is prepared by the operating agency, the BIFR is required to examine the same and invite suggestions and objections not only from the 'sick industrial company' that made the reference, but also from any other interested persons such as the company with which an amalgamation is proposed, creditors of the sick industrial company, etc.<sup>29</sup>

Upon completion of the said process, the BIFR is required to sanction the scheme for the revival of the sick industrial company before it, which shall come into force on such date as may be specified by it.<sup>30</sup> On and from the date of coming into effect, the sanctioned scheme shall be binding on the sick industrial company in question, any other company involved in the implementation of the scheme, and on the shareholders, creditors, guarantors and employees of the said companies.<sup>31</sup> In fact, as per §32 of the SICA, such sanctioned scheme shall have effect, notwithstanding anything inconsistent therewith contained in any other law (barring the statutory enactments specifically exempted in the said provision), or in the memorandum or articles of association of an industrial company, or in any other instrument having effect by virtue of any law other than the SICA.<sup>32</sup>

---

<sup>25</sup> *Id.*, ¶6.

<sup>26</sup> *See generally supra* note 16.

<sup>27</sup> *Supra* note 8, §17(3).

<sup>28</sup> *Id.*, §18(1).

<sup>29</sup> *Id.*, §18(3).

<sup>30</sup> *Id.*, §18(4).

<sup>31</sup> *Id.*, §18(8).

<sup>32</sup> *Id.*, §32(1).

Throughout the above-explained mechanism provided for the rehabilitation of a ‘sick industrial company’ under the SICA, what remains crucial is that the SICA neither obligates any non-industrial company to make a reference to the BIFR nor does it empower the BIFR to pass any orders in relation to non-industrial companies. In other words, the jurisdiction of the BIFR is confined to an industrial company either facing, or already plagued with, sickness. The concept of an industrial company, or the industrial character of a company under the provisions of the SICA, is discussed in detail in the next Part. However, at this juncture, it will be sufficient to state that the various definitions contained in the SICA indicate that the SICA assumes the ‘industrial character’ of any company to be a static concept, which is incapable of changing over time. It appears to overlook that a ‘sick industrial company’ already registered before the BIFR may subsequently lose its industrial character during the pendency of such proceedings.

To illustrate, as a natural consequence of lack of capital, a sick company that is registered before the BIFR is often constrained to close down one or more of its undertakings, or lay off a part or whole of its workforce. On many occasions, the BIFR itself permits such a sick company to sell some of its assets like industrial machinery as part of a sanctioned scheme, with the money received in consideration to be utilised for the settlement of existing debts. Each such development, however, has the potential to lead to a cessation of the said company’s industrial character in terms of the parameters provided under the SICA and the IDRA. In such circumstances, the issue as to whether the BIFR has the power, or a duty, to discharge a sick company registered before it for a subsequent loss of its industrial character is a troubling question, with far-reaching ramifications.

Unfortunately, not only does the SICA fail to provide a clear answer to this question, even the scheme of the SICA does little to clarify if the existence of ‘industrial character’ is to be determined by the BIFR only at the threshold or must it subsist throughout the proceedings. This lack of clarity has now resulted in a series of conflicting judicial decisions as arrayed above. As such, I view the notion of ‘industrial character’ under the SICA as a fine starting point to commence a discussion on the effect of a registered sick company’s subsequent loss of industrial character on the jurisdiction exercised by the BIFR.

### III. ‘INDUSTRIAL CHARACTER’ UNDER THE SICA

As iterated above, the jurisdiction exercised by the BIFR under the SICA is confined to the regulation of ‘sick industrial companies’. However, in order to understand the true import of this expression, one needs to navigate

through an intertwined web of definitions contained in the SICA and the IDRA. To begin with, §3(1)(o) of the SICA defines a ‘sick industrial company’ to mean “[...] an industrial company (being a company registered for not less than five years), which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth.”<sup>33</sup>

Evidently, for any company to constitute a sick industrial company, it must be an industrial company in the first place. In this regard, what constitutes an ‘industrial company’ is understood from §3(1)(e) of the SICA, which simply defines it to mean “a company which owns one or more industrial undertakings”.<sup>34</sup> The definition of an ‘industrial undertaking’ in turn emanates from §3(1)(f) of the SICA, which defines it as under:

“industrial undertaking” means any undertaking pertaining to a scheduled industry carried on in one or more factories by any company but does not include

- (i) an ancillary industrial undertaking as defined in clause (aa) of Section 3 of the Industries (Development and Regulation) Act, 1951; and
- (ii) a small scale industrial undertaking as defined in clause (j) of the aforesaid Section 3.”<sup>35</sup>

Interestingly, though §3(1)(f) of the SICA uses the term ‘factory’, the same has not been defined either in the SICA or in the Companies Act, 1956. To remedy such a situation, §3(2) of the SICA provides that the words and expressions used but not defined either in the SICA or in the Companies Act, 1956 shall have the meaning as assigned to them in the IDRA.<sup>36</sup> As such, it will not be out of place to make reference to §3(bb)(c) of the IDRA, which defines the term ‘factory’ as follows:

“ ‘factory’ means any premises, including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on –

- (i) with the aid of power, provided that fifty or more workers are working or were working thereon on any day of the preceding twelve months; or

---

<sup>33</sup> *Id.*, §3(1)(o).

<sup>34</sup> *Id.*, §3(1)(e).

<sup>35</sup> *Id.*, §3(1)(f).

<sup>36</sup> *Id.*, §3(2)(b).

- (ii) without the aid of power, provided that on hundred or more workers are working or were working thereon on any day of the preceding twelve months and provided further that in no part of such premises any manufacturing process is being carried on with the aid of power.<sup>37</sup>

A careful perusal of the aforementioned definitions paints a more holistic picture of what constitutes an ‘industrial company’. Subject to the exceptions carved out under §3(1)(f) of the SICA, an industrial company is a company which owns one or more undertaking pertaining to a scheduled industry, with the scheduled industry carried on in one or more of its factories. If the company satisfies this dual criterion, then it is deemed to possess an industrial character in terms of the SICA. As a corollary, the expression ‘subsequent loss of industrial character’ denotes an ensuring circumstance where an erstwhile industrial company no longer owns any undertaking in which a scheduled industry is ‘carried on’. As illustrated in Part II, this may occur on account of a closure of its factories, or a lawful sale of the machinery apparatus or any other reason that may lead to the cessation of industry.

In addition to defining the contours of what constitutes an ‘industrial character’ under the SICA, the aforementioned exercise allows me to elucidate upon two further aspects that are fundamental to the present inquiry.

*First*, juxtaposing the definitions contained in the SICA and the IDRA reveals that mere ownership of a factory is not sufficient for an undertaking to be regarded as an ‘industrial undertaking’ under the SICA. It is equally imperative that the scheduled industry is also ‘carried on’ in the factory owned by the said undertaking. Particularly, the use of the expression ‘carried on’ in §3(1)(f) of the SICA suggests that where any factory/industrial undertaking does not ‘carry on’ the scheduled industry at any given point of time, then the company owning the said factory/undertaking cannot be classified as an ‘industrial company’.

At this juncture, it becomes important to distinguish an industrial company from its factories/industrial undertakings, for it is the former that receives emphasis under the SICA. To illustrate, a sick industrial company, being an entity established under the applicable Companies Act of India, may have multiple industrial divisions that function independently. However, once the reference made by the company is registered before the BIFR, the BIFR is entrusted with the responsibility of reviving the sick company that made the initial reference, and not simply focus on reviving only one or more of its separate industrial divisions.<sup>38</sup>

<sup>37</sup> The Industries (Development and Regulation) Act, 1951, §3(bb)(c).

<sup>38</sup> *Alind Workers Congress v. United Shippers Ltd.*, 2008 SCC OnLine AP 470 : (2009) 147 Comp Cas 559.



Interestingly, a situation similar to the above illustration had arisen in *Alind Workers Congress v. United Shippers Ltd.*,<sup>39</sup> where the sick industrial company in question had three industrial divisions in Hyderabad, with several other divisions in other parts of India. In such circumstances, the BIFR had sanctioned three separate rehabilitation schemes, and had directed two such divisions located in Hyderabad to be spun off into two separate companies with segregated assets and liabilities. Assessing the correctness of such an approach, a Division Bench of the High Court of Andhra Pradesh had explained that the SICA places emphasis only on the sick companies that own industrial undertakings, and not on the industrial undertakings *per se* to divorce them from the sick company to which they belong. This is because the SICA makes a clear distinction between an ‘industrial undertaking’ and a ‘factory’, and it is only an undertaking belonging to a scheduled industry, carried on in one or more factories by a company which is defined to be an ‘industrial undertaking’.<sup>40</sup> On such basis, the High Court of Andhra Pradesh found the sanction of three independent schemes for three separate industrial divisions, instead of one comprehensive scheme for reviving the sick company in question, to violate the provisions of the SICA. The said decision goes on to affirm that the underlying objective of the SICA is to take suitable preventive, ameliorative, remedial and other measures with respect to sick companies,<sup>41</sup> and not necessarily their undertakings.<sup>42</sup> As such, the concerns of an industrial undertaking are not of independent concern to the BIFR, and are only relevant so far as they relate to the sickness of the company that made the reference in the first place.

*Second*, it also becomes clear that the very existence of ‘industrial character’, being one of the jurisdictional facts, is a *sine qua non* for the BIFR to exercise its jurisdiction over a sick company.<sup>43</sup> In fact, elaborating upon the said aspect, the High Court of Bombay in *Apple Finance Ltd. v. Mantri Housing and Constructions Ltd.* (‘Apple Finance’)<sup>44</sup> had observed:

“The jurisdictional facts, existence of which is necessary for the purpose of conferment of jurisdiction on BIFR can be stated as follows:

- (i) The applicant who makes an application under Section 15 must be a “Company” as defined under Section 3 of the Companies Act [...]

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*, ¶34.

<sup>41</sup> *Id.*

<sup>42</sup> *Upper India Couper Paper Mills Co. Ltd. v. AAIFR*, 1991 SCC OnLine Del 657 : AIR 1992 Del 207.

<sup>43</sup> *See Apple Finance Ltd. v. Mantri Housing and Constructions Ltd.*, 2002 SCC OnLine Bom 97 : (2002) 112 Comp Cas 480; *See also K.S.V. Shanmugam v. Maharashtra State Coop. Cotton Growers Mktg. Federation Ltd.*, 1989 SCC OnLine Kar 227 : (1991) 70 Comp Cas 440.

<sup>44</sup> *Id.*

- (ii) The applicant Company must be an “Industrial Company”, owning one or more industrial undertaking [...]
- (iii) The applicant, being an Industrial Company, must be engaged in an industry which is a scheduled industry specified in First Schedule of the IDR Act and must not be (a) ancillary industrial undertaking (b) a small scale industry undertaking [...]
- (iv) The applicant “Industrial Company” must be registered for not less than 5 years prior to making of an application [...]<sup>45</sup>

Therefore, as a corollary to the above, wherever a sick company is found to not possess an industrial character, the BIFR has no jurisdiction over such a company under the SICA. As iterated above, the same is consistent with the object of the SICA, which only seeks to address the concerns associated with industrial sickness, as opposed to mere financial sickness.

#### IV. POWER TO REVISIT JURISDICTIONAL FACTS

Before adverting to the issue concerning the consequences of a subsequent loss of industrial character, it is essential to first ascertain the competence of the BIFR to re-assess the said jurisdictional fact at a subsequent stage. In other words, once the BIFR has determined a company to be a sick industrial company, one must establish if it has the power to revisit the same jurisdictional fact at a later point of time. This involves addressing a fundamental query as to whether the existence of any jurisdictional fact is determined finally at the threshold of any legal proceeding, or can this aspect be revisited at any subsequent stage of the proceeding. Here, by jurisdictional facts, I refer to the essential facts upon which the jurisdiction of a court, a tribunal or an authority depends inasmuch as if the jurisdictional fact exists, then the court, tribunal or authority has the jurisdiction to decide other issues, but not otherwise.<sup>46</sup>

It is well-accepted that the BIFR is akin to a tribunal exercising a quasi-judicial function.<sup>47</sup> Indeed, §13(3) of the SICA provides that the BIFR and the AAIFR shall, for the purposes of any inquiry or for any other purpose under the SICA, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying suits in respect of a variety of procedural

<sup>45</sup> *Id.*, ¶14-15.

<sup>46</sup> *See* Carona Ltd. v. Parvathy Swaminathan & Sons, (2007) 8 SCC 559, ¶21.

<sup>47</sup> NAIK, *supra* note 3, 87.

matters.<sup>48</sup> §26 of the SICA further provides that no civil court shall have jurisdiction in respect of any matter which the BIFR or the AAIFR are empowered to determine.<sup>49</sup> Therefore, to answer the question of the BIFR's competence to re-assess the existence of a jurisdictional fact, it is prudent to derive guidance from judicial decisions focusing on identical concerns, albeit in the context of the powers of a civil court or a special tribunal. After all, if one judicial authority or court is considered to possess an inherent power to redetermine the existence of a jurisdictional fact, then the same would also extend to the BIFR by analogy.

One of the first notable instances where a general rule regarding the re-assessment of jurisdictional facts was laid down by the Supreme Court of India was in *Carona Ltd. v. Parvathy Swaminathan & Sons*.<sup>50</sup> Therein, speaking in the context of rent control legislations, the Supreme Court of India had observed that:

“[...] The basic rule is that the rights of the parties should be determined on the basis of the date of institution of the suit [...] [and that] no relief will normally be denied to the plaintiff by reason of any subsequent event if at the date of the institution of the suit, he has a substantive right to claim such relief.<sup>51</sup>”

As such, it is no longer doubted that the jurisdiction once vested cannot be divested, unless the legislature has expressly or by necessary intent stated so.<sup>52</sup> In other words, once a court determines that it has the jurisdiction to entertain a civil action on the date of its institution, then the same will subsist unless expressly taken away by law. This conforms to the principle that the rights of litigants are governed by the law in force on the day the action was first instituted.

However, the aforementioned rule is not without its share of exceptions. In 1975 a three-judge Bench of the Supreme Court of India, in *Pasupuleti Venkateswarlu v. Motor & General Traders*.<sup>53</sup> was asked to assess the impact of subsequent factual developments on the maintainability of the eviction proceedings initiated by the landlord under the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960. Acknowledging the scope of the above general rule, the Supreme Court of India had nonetheless clarified that “procedure is the handmaid, and not the mistress of justice.”<sup>54</sup> Accordingly, un-

<sup>48</sup> *Supra* note 8, §13(3).

<sup>49</sup> *Id.*, §26.

<sup>50</sup> *Supra* note 46.

<sup>51</sup> *Id.*, ¶32,38.

<sup>52</sup> *Gopalakrishnan Nair v. Padmavathy Amma*, 1970 KLJ 1015, ¶4.

<sup>53</sup> *Pasupuleti Venkateswarlu v. Motor & General Traders*, (1975) 1 SCC 770.

<sup>54</sup> *Id.*, ¶5.

der the garb of procedural certainty, a court must not overlook the subsequent developments that impact the very foundation on which the reliefs have been prayed for. In fact, the Supreme Court of India stressed that at times, the principles of equity and justice may mandate that the rules of procedure be construed in a flexible manner, without compromising on fair play. It noted that there is no limitation on the power of even an appellate court to take cognisance of subsequent developments that are diligently brought to its attention, as failing to do so may subvert the larger interests of justice.<sup>55</sup>

The underlying rationale behind the above pronouncement had been elucidated by the erstwhile Federal Court of India in *Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri*,<sup>56</sup> by placing reliance on the decision rendered by the Supreme Court of the United States of America ('SCOTUS') in *Patterson v. State of Alabama*.<sup>57</sup> Therein, the SCOTUS had affirmed that in the exercise of an appellate jurisdiction, it had the power to not only to correct errors in the judgment under review, but also to make such disposition of the case as justice requires. Crucially, it had opined that in determining what justice required, the court was bound to consider any change, either in fact or in law, which had supervened since the judgment was entered.<sup>58</sup>

The certainty of this position was again affirmed by the Supreme Court of India three decades later in *Om Prakash Gupta v. Ranbir B. Goyal*.<sup>59</sup> Therein, the Supreme Court of India had laid down a three-fold criterion to determine the circumstances in which a court of law must exercise its power to take note of subsequent events, and mould the reliefs accordingly. As per the court, this power is to be exercised only if each of the following conditions is satisfied:

“(i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; [and] (iii) that such subsequent event is brought to the notice of the Court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise.”<sup>60</sup>

---

<sup>55</sup> *Id.*

<sup>56</sup> *Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri*, 1940 SCC OnLine FC 10 : AIR 1941 FC 5.

<sup>57</sup> *Patterson v. State of Alabama*, 1935 SCC OnLine US SC 65 : 79 L Ed 1082 : 294 US 600 (1935).

<sup>58</sup> *Supra* note 53, ¶6.

<sup>59</sup> *Om Prakash Gupta v. Ranbir B. Goyal*, (2002) 2 SCC 256.

<sup>60</sup> *Id.*, ¶11-12.

Admittedly, one may draw a fine distinction between the powers of a court to take note of subsequent developments to mould the reliefs claimed, and its competence to revisit the existence of jurisdictional facts on such basis. It may be argued that the above principle only speaks of instances where the court may grant a relief not originally prayed for by a party, and not completely deny jurisdiction. However, subject to the peculiarities of a dispute, the said principle has been consistently followed by Indian courts to not only modify the substantive relief claimed by a litigant at a subsequent stage of proceeding, but also to revisit the existence of a jurisdictional fact. To put it differently, under appropriate circumstances, Indian courts have not hesitated in taking judicial notice of subsequent factual developments that had a bearing on their jurisdiction,<sup>61</sup> or rendered the dispute infructuous.<sup>62</sup> In this regard, two judgments merit particular attention.

*First*, in *S. Narendra Kumar & Co. v. Apricot Foods (P) Ltd.*,<sup>63</sup> the plaintiff had filed a suit for infringement, while admitting that the goods of the defendant were being sold outside the territory of Mumbai, where the court in question was situated. However, after the filing of the suit, the plaintiff discovered that the defendant's goods were now also being sold in the city of Mumbai. As such, the plaintiff sought the leave of the court to bring such subsequent fact on record to repel the objection taken by the defendant to the court's territorial jurisdiction. However, despite acknowledging that the proposed amendment would indeed have the effect of legitimising a civil suit, which appeared to be originally "incompetent and defective",<sup>64</sup> the High Court permitted the plaintiff to amend its plaint since the subsequent developments in question were crucial to the aspect of the jurisdiction of the concerned court.

*Second*, and on a similar note, in *Shipping Corpn. of India Ltd. v. Machado Bros.*,<sup>65</sup> the Supreme Court of India was faced with a peculiar situation. Therein, during the pendency of two connected suits in relation to an agency agreement, the appellant had issued a fresh notice of termination of agency. The said notice was then challenged by the respondent in a third suit involving the same subject matter. In such circumstances, the appellant sought a dismissal of the first suit on the ground that it had become infructuous in light of the fresh notice of termination, and the subsequent development of instituting a third suit involving the same subject matter. In other words, it was the appellant's contention that during the pendency of the first suit, certain subsequent events had taken place, which had made the first suit infructuous. Agreeing with this contention, the Supreme Court of India reasoned that if, by

---

<sup>61</sup> See *S. Narendra Kumar & Co. v. Apricot Foods (P) Ltd.*, 2013 SCC OnLine Bom 667 : (2014) 7 Bom CR 623.

<sup>62</sup> See *Shipping Corpn. of India Ltd. v. Machado Bros.*, (2004) 11 SCC 168.

<sup>63</sup> *Supra* note 61.

<sup>64</sup> *Id.*, ¶2.

<sup>65</sup> *Supra* note 62.

certain subsequent events, the original proceedings become infructuous, then it is the court's duty to take such action as is necessary in the interest of justice, and dispose of the infructuous litigation.<sup>66</sup>

In light of the above, there is not much room to doubt the powers of any judicial authority, and by extension the BIFR,<sup>67</sup> to take notice of subsequent factual developments that have a bearing on its jurisdiction. Admittedly, there have been occasions where the AAIFR has refuted the arrayed possibility stating that once a company has been declared sick, it was not proper for the BIFR to discharge it from the purview of the SICA due to a subsequent loss of its industrial character, as doing so would be tantamount to the BIFR reviewing its own order.<sup>68</sup> The rationale was that the power to review the substance of an order is not an inherent power, and must be conferred by law – either specifically or by necessary implication.<sup>69</sup> In other words, since the SICA does not empower the BIFR to review its order on the grounds of any subsequent loss of industrial character of a sick company, the same is not permissible. However, notwithstanding the fallacy of equating reconsideration of a jurisdictional fact in light of a subsequent event or developments with the notion of reviewing an earlier order, such concerns now stand quelled by the Supreme Court of India's decision in *Ghanshyam Sarda v. Shiv Shankar Trading Co.* ('Ghanshyam Sarda'),<sup>70</sup> albeit in the context of revisiting the issue of sickness, and not industrial character, of the company making the reference. Therein, the Supreme Court of India held that the cases where the present existence of a jurisdictional fact is questioned, without doubting the original invocation of jurisdiction at an initial stage, stand on a different footing. In such cases, when the financial affairs of a sick company fell under the supervisory control of the BIFR, then the power to decide whether it has since then lost the jurisdiction or not, also lies in its exclusive domain.<sup>71</sup>

Undoubtedly, sickness and industrial character of a company are the two essential jurisdictional facts on the basis of which the BIFR assumes jurisdiction. Thus, where the BIFR is considered competent to re-assess one aspect concerning the financial health of the company, it is also likely to have the power to revisit the other aspect of industrial character. As such, it is now accepted that the courts have an inherent power to take into account supervening circumstances, and pass orders to both modify the relief originally prayed for, and even decline jurisdiction so as to do full justice between the parties.

---

<sup>66</sup> *Id.*, ¶25.

<sup>67</sup> *Ghanshyam Sarda v. Shiv Shankar Trading Co.*, (2015) 1 SCC 298.

<sup>68</sup> *Supra* note 15.

<sup>69</sup> *See Patel Narshi Thakershi v. Pradyuman Singhji Arjunsinghji*, (1971) 3 SCC 844 : AIR 1970 SC 1273; *See generally* Harshad Pathak, *On the Maintainability of Review against a Section II Order*, 4.2 IND. J. OF ARB. LAW 87 (2016) (for a discussion on the notion of substantive and procedural review in Indian law).

<sup>70</sup> *Supra* note 67.

<sup>71</sup> *Id.*, ¶28.

The application of this principle is considered to extend to the BIFR as well.<sup>72</sup> However, whether the BIFR ought to exercise this power to discharge a sick company for a subsequent loss of its industrial character is a far more convoluted question.

## V. EFFECT OF SUBSEQUENT LOSS OF INDUSTRIAL CHARACTER

For a sick company to fall within the ambit of the SICA, and thus within the BIFR's jurisdiction, it must possess an industrial character. As explained above, a subsequent loss of industrial character denotes an ensuing circumstance where an erstwhile industrial company no longer owns any undertaking in which a scheduled industry is 'carried on'. It is in such cases that one must determine the precise effect of this subsequent loss on the jurisdiction exercised by the BIFR under the provisions of the SICA.

On the one hand, one may argue that since the existence of industrial character is a *sine qua non* for the BIFR to exercise jurisdiction, a subsequent alteration to the same deprives the BIFR of its jurisdiction under the SICA, and constrains it to de-register the company before it. On the other hand, however, it is also conceivable that the SICA does not envisage a subsequent loss of industrial character as a ground for deregistration inasmuch as the cessation of a scheduled industry is often a direct consequence of the sickness of the company. Accordingly, in order to determine the precise impact of a subsequent loss of industrial character, it is crucial to scrutinise the particulars of each line of argument.

### A. THE ARGUMENT FOR DEREGISTRATION

The argument in favour of deregistration of a sick company on account of a subsequent loss of industrial character is premised on the understanding that the existence of an industrial character is central to the BIFR's jurisdiction under the SICA. In the absence of the same, the BIFR is not considered competent to regulate the conduct of business of any non-industrial company. The same is in harmony with the object with which the RBI had constituted the Committee in 1981, which is to address the concern of industrial sickness by making requisite recommendations as to the changes for ensuring that the industrial units operate viably. The judicial decisions in favour of such approach are plenty.

In 1991 the High Court of Karnataka in *K.S.V. Shanmugam v. Maharashtra State Coop. Cotton Growers Mktg. Federation Ltd.*<sup>73</sup> was required

<sup>72</sup> NAIK, *supra* note 3, 125.

<sup>73</sup> *Supra* note 43, ¶7.

to determine if §22 of the SICA, which provides for the suspension of legal proceedings pending an inquiry into the working of sick industrial companies, would operate where a competent court has already passed an order for winding up the sick company in question. Answering the question in the negative, the High Court of Karnataka emphasised on the importance of jurisdictional facts before noting that where any reference is made by a body of persons claiming to be the board of directors after the passing of an order of winding up of that company, then the said board of directors does not exist in the eyes of law so as to be considered competent to make a reference.<sup>74</sup> However, in addition to the same, the High Court of Karnataka also opined on the aspect of industrial character by noting as under:

“[...] the manner in which an industrial company has been defined clearly makes the legislative intent unambiguous [...] industrial undertakings must be carrying on an activity of manufacturing specified in the schedule and if, for any reason, it has ceased to manufacture or is not carrying on the scheduled industry, then it cannot be held to be an industrial undertaking [...]”<sup>75</sup>

Similarly, the High Court of Bombay in *Apple Finance*<sup>76</sup> was tasked with ascertaining whether it was bound by a registration order alleged to have been passed by the BIFR without any jurisdiction for lack of industrial character. Before answering the question in the negative, the High Court of Bombay examined the various factors that would deprive the BIFR of its inherent jurisdiction to register a reference. After ascertaining that the company in question did not retain an industrial character for at least five years on the date of reference, the High Court of Bombay concluded that in terms of §3(1) of the SICA, the respondent company was not an ‘industrial company’, which is a *sine qua non* for the exercise of jurisdiction by the BIFR. On such basis, it concluded that since this jurisdictional fact was absent, the BIFR lacked the jurisdiction to register a reference, or hold an inquiry under the provisions of the SICA.<sup>77</sup>

Admittedly, even though the above decisions affirm that the BIFR’s jurisdiction over a company is contingent upon it possessing an industrial character, neither decision actually dealt with issues arising from a subsequent loss of such character. In both instances, the company making the reference was found to not constitute an industrial company on the date of making the reference, as opposed to at a later point of time. However, if one considers that the BIFR is competent to decide whether it has lost its jurisdiction

---

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *See supra* note 43.

<sup>77</sup> *Id.*, ¶23.



even after accepting the reference,<sup>78</sup> both decisions lend sufficient credence to the argument in favour of deregistration of a company for a subsequent loss of industrial character.

Indeed, there exist accounts of a case under the SICA where after the registration of a case by the BIFR, but before the matter actually came up for hearing, it was discovered that a State Financial Corporation had already sold away the industrial unit in question to realise its dues. A certain commentator notes that in these circumstances, since the company could no longer satisfy the criterion of an 'industrial company' as laid down under §3(1)(e) of the SICA, the BIFR was constrained to drop proceedings in the case.<sup>79</sup> While the reference to the said decision is only anecdotal, a more clinching example of this approach is found in the decision rendered by the AAIFR in *Vegepro*<sup>80</sup> where it assessed the jurisdiction of the BIFR over a sick company whose industrial undertakings had permanently closed down since the registration of reference. After affirming that the BIFR indeed had the power to reconsider its jurisdiction in light of subsequent developments, the authority noted that where an industrial undertaking had permanently closed down, it no longer constituted an industrial company in terms of the SICA. Under these circumstances, the BIFR no longer retained jurisdiction over such a company, and it was liable to be discharged.<sup>81</sup>

The reasoning adopted by the AAIFR in *Vegepro* was identical to the one adopted by the Supreme Court of India in *Yash Deep Trexim (P) Ltd. v. Namokar Vinimay (P) Ltd.* ('Yash Deep'),<sup>82</sup> albeit in the context of the jurisdictional fact of 'sickness' of a company. Acknowledging that the industrial company before it had regained its financial health prior to the implementation of the rehabilitation scheme, the Supreme Court of India had opined that the object and scheme of the SICA, and the consensus of contesting parties with regard to the financial health of the company that had made the original reference, led to the essential conclusion that the said company no longer fell within the ambit of the expression 'sick industrial company'. Accordingly, the Supreme Court of India noted that since the rehabilitation package worked out by the BIFR was yet to be implemented, the SICA had ceased to apply to the company; rendering other questions raised to be academic and redundant.<sup>83</sup>

Viewed from this perspective, it may stand to reason that if the BIFR is bound to discharge a company that can no longer be classified as 'sick', a subsequent loss of industrial character by such company ought to

---

<sup>78</sup> *Supra* note 67, ¶28.

<sup>79</sup> KAICKER, *supra* note 1, 1.63.

<sup>80</sup> *Supra* note 16.

<sup>81</sup> *Id.*, ¶6-8.

<sup>82</sup> *Yash Deep Trexim (P) Ltd. v. Namokar Vinimay (P) Ltd.*, (2014) 1 SCC 545.

<sup>83</sup> *Id.*, ¶8-9.

invite similar treatment. After all, both ‘industrial character’ and ‘sickness’ of a company are the twin pillars on which the jurisdiction of the BIFR rests. As enticing as it may be, however, there exist significant considerations that leave ample room to devise a counter-argument to this assertion, which forms the subject matter of the next sub-part.

## B. THE ARGUMENT AGAINST DEREGISTRATION

The argument in favour of deregistration of a company for a loss of its industrial character suffers from its own inadequacies. Overlooking the object and purpose of the SICA, it places excess emphasis on a literal understanding of the statutory text in a manner that overlooks the potential for abuse, and is thus, rightly chastised. In particular, the argument can be doubted on the following three grounds, which also constitute the edifice on which the argument against deregistration is premised.

### 1. Object and Purpose of the SICA

The argument in favour of deregistration is largely inconsistent with the scheme of the SICA, which is discernible from a conjoined reading of the provisions contained therein, and in the BIFR Regulations, 1987 (‘BIFR Regulations’). On receipt of a reference by a company, §16 of the SICA enables the BIFR to make or cause such inquiry as it deems fit into the sickness of a company<sup>84</sup> so as to decide whether a case has been made out for making any further inquiry.<sup>85</sup> Thereafter, while the powers of the BIFR to pass appropriate orders are prescribed in the SICA, the procedure to be followed after completion of such inquiry emanates from the BIFR Regulations. In this regard, Regulation 24 provides that after the completion of its inquiry, where the 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.<sup>86</sup> However, as per Regulations 25 and 26, where the BIFR is satisfied that the industrial company has indeed become sick, it shall hold further proceedings in accordance with the procedure prescribed in the BIFR Regulations,<sup>87</sup> and after giving the sick industrial company or the informant as the case may be a reasonable opportunity to make submissions, pass such orders as deemed fit.<sup>88</sup>

Interestingly, §17 of the SICA allows the BIFR to allow the present management of the sick industrial company to increase its net worth within a

---

<sup>84</sup> *Supra* note 8, §16.

<sup>85</sup> NAIK, *supra* note 3, 131.

<sup>86</sup> *Supra* note 23.

<sup>87</sup> *Id.*, Reg. 25.

<sup>88</sup> *Id.*, Reg. 26.

reasonable time,<sup>89</sup> or if the same is not practicable, appoint and direct an operating agency to prepare a scheme<sup>90</sup> for the revival of the company or for its proper management.<sup>91</sup> Additionally, in terms of §20 of the SICA, where the BIFR is of the opinion that the sick industrial company in question is not likely to become viable in the future, it may forward to the concerned High Court its opinion that it is just and equitable for the company to be wound up.<sup>92</sup> The same is in conformity with one of the key objects of the enactment, which is to salvage the productive assets of a sick company, and realise the amounts that are due to banks and financial institutions; to the extent it is possible.<sup>93</sup>

Evidently, while Regulation 24 enables the BIFR to drop a reference in case a company does not constitute a sick industrial company, neither the SICA nor the BIFR Regulations empower the BIFR to do so after a reference has been registered. In other words, the scheme of the SICA does not envisage the possibility of deregistration of a company on account of subsequent developments like the loss of the company's industrial character. It follows that once a company is recognised by the BIFR to be a sick industrial company, then the SICA envisages only two routes of escaping the jurisdiction of the BIFR, i.e. either the company is revived for having made itself financially viable and operational, or recommended to be wound up. This conclusion was duly affirmed by the High Court of Karnataka in *Sudarsan Clay & Ceramics Ltd. v. AAIFR* ('Sudarsan Clay'),<sup>94</sup> and lends support to the idea that jurisdictional facts like the industrial character of a company must be determined at the threshold, i.e. at the time of registration of the reference. Beyond this stage, the concept of deregistration of a sick industrial company is alien to the scheme of the SICA.

Admittedly, the Supreme Court of India in *Ghanshyam Sarada* had held that the BIFR has the exclusive jurisdiction to deal with submissions stressing that a company, by reason of certain developments, has revived itself since the stage of registration, and thus, no scheme for revival needs to be undertaken.<sup>95</sup> Similarly, in *Yash Deep*,<sup>96</sup> the Supreme Court of India had remarked that if a company no longer falls within the ambit of a 'sick industrial company' defined under §3(o) of the SICA, then the SICA ceases to apply to it.<sup>97</sup> Indeed, on numerous occasions where a sick company was found to have made its net worth positive during pendency of its reference, it was held that the reference

---

<sup>89</sup> *Supra* note 8, §17(2).

<sup>90</sup> *Id.*, §18.

<sup>91</sup> *Id.*, §17(3).

<sup>92</sup> *Id.*, §20.

<sup>93</sup> *Statement of Object & Reasons of The Sick Industrial Companies (Special Provisions) Bill, 1985*, 165 of 1985.

<sup>94</sup> *Sudarsan Clay & Ceramics Ltd. v. AAIFR*, WP (C) No. 14887 of 2013 (Ker) (Unreported).

<sup>95</sup> *Supra* note 67, ¶27.

<sup>96</sup> *Supra* note 82, ¶8-9.

<sup>97</sup> *Id.*

under §15 of the SICA stood closed.<sup>98</sup> Therefore, where a sick company improves its net worth in circumstances indicating long-term viability, then the BIFR may treat the reference as closed as long as no party is prejudicially affected thereby. Such persons may include creditors of the company who insist on the BIFR's supervision due to a lack of trust in the company's management, or even certain directors of the company in their individual capacity if they perceive that despite an increase in net worth, the management is not acting in the company's best interests. Notwithstanding the plurality of such situations, one may draw a parallel and assert that despite the absence of any express provision, the SICA does recognise the notion of deregistration of a company on account of a subsequent alteration of the jurisdictional facts. However, there is a fine line of distinction to be drawn here.

The object behind the establishment of the BIFR, consisting of experts in various fields, is primarily to “determine the incidence of sickness in industrial companies, and devise suitable remedial measures through appropriate schemes or other proposals.”<sup>99</sup> As the statement of objects and reasons reveals, the purpose underlying both the SICA as well as the anxiety of the legislature was to, *inter alia*, provide for preventive and remedial measures essential for reviving the sick or potentially sick companies, and for ensuring their expeditious enforcement.<sup>100</sup> Thus, what the SICA purports to achieve is allowing a sick industrial company to be rehabilitated to ensure that its continued operation remains financially viable.<sup>101</sup> This can be achieved either through the implementation of a sanctioned scheme, or as provided for under §17(1) of the SICA, through the initiatives of the company itself. Accordingly, if the measures formulated by the BIFR, or those adopted by the present management of the sick industrial company on its own accord, make the company's operations viable again, then the jurisdiction of the BIFR over the company comes to an end even in the absence of a specific provision to this effect. The reason being that in such a situation, the object of the SICA and the purpose behind the registration of the reference made by such a company stands achieved. However, this explanation does not apply when deregistration is sought not due to an improvement in a company's financial health, but solely on account of a subsequent loss of its industrial character. In any circumstance, it is to be kept in mind that the SICA does not require a sick company to make a formal application or request to the BIFR praying for a withdrawal of jurisdiction once it stands revived, and when that stage is reached, the BIFR is itself expected to withdraw its jurisdiction.<sup>102</sup>

---

<sup>98</sup> See *Shree Digvijay Cements Co. Ltd., In re*, Appeal No. 69 of 1991 (AAIFR) (Unreported).

<sup>99</sup> *Supra* note 93.

<sup>100</sup> *Navnit R. Kamani v. R.R. Kamani*, (1988) 4 SCC 387 : AIR 1989 SC 9, 137.

<sup>101</sup> *Supra* note 94, ¶37; See also *Testeels Ltd. v. Radhaben Ranchhodlal Charitable Trust*, 1988 SCC OnLine Guj 32 : (1989) 66 Comp Cas 555.

<sup>102</sup> *NAIK, supra* note 3, 167.

## 2. Loss of Industrial Character as a Consequence of Sickness

While arguing in favour of the deregistration of a sick company on account of a subsequent loss of its industrial character, one tends to overlook that such a loss is often a direct consequence of the sickness that constrained the company to approach the BIFR in the first place. For instance, as illustrated above in Part II of this paper, a sick industrial company may be compelled to shut down its undertakings or alienate its assets and machineries to repay a part of its debt. Likewise, owing to a lack of financial investment or increasing pressure from creditors, an already sick company may be forced to drop its workforce below the threshold of fifty workers as is stipulated under §3(d) of the IDRA. In such cases, to assert that instead of attempting to rid the company of the complained sickness through a rehabilitation scheme, the BIFR must refuse to exercise jurisdiction is visibly counter-intuitive.

The above-stated inconsistency becomes all the more glaring if one considers the scheme of the SICA. As iterated above, the SICA empowers the BIFR to either allow a sick company to attempt to increase its net worth within a reasonable time,<sup>103</sup> or appoint and direct an operating agency to prepare a scheme for the revival of the company or for its proper management.<sup>104</sup> The same is supplemented by the protection from all legal proceedings and contractual liabilities in terms of §22(1) of the SICA.<sup>105</sup> Therefore, adopting an interpretation that precludes the BIFR from adopting any of these measures, and fulfil the object of the SICA, solely on the grounds that the complained sickness has significantly affected a company's industrial productivity would be the zenith of irony. To put it differently, industrial sickness often arises out of a bad financial structure or chronically inefficient use of factors of production, or poor market positioning.<sup>106</sup> To remedy such instances, it becomes imperative to interpret the provisions of the SICA in a manner that allows the BIFR a reasonable opportunity to address such operational and managerial concerns, instead of appropriating the consequential effects of the complained sickness to deprive the BIFR of its purposive jurisdiction.

A similar opinion was endorsed by the High Court of Karnataka in *Sudarsan Clay*<sup>107</sup> while assessing the correctness of an order passed by the BIFR to deregister a sick company for no longer being an industrial company. After noticing the grounds for deregistration of the company post the sanction of a revival scheme, the High Court of Karnataka held that once a company is determined to be sick, "necessarily there would be instances where, by reason only of abject cash crunch, the industrial activity comes to a total stand still.

---

<sup>103</sup> *Supra* note 8, §17(2).

<sup>104</sup> *Id.*, §17(3).

<sup>105</sup> *Id.*, §22(1).

<sup>106</sup> Goswami Committee Report, *supra* note 2, ¶2.1.1.

<sup>107</sup> *Supra* note 94.

However, that alone cannot lead to the Company being removed from the scope and ambit of SICA.<sup>108</sup> Instead, the High Court of Karnataka asserted that the BIFR must attempt to remedy such incidences of sickness through the preparation and implementation of a sanctioned scheme so as to attract further infusion of funds. On such basis, the High Court of Karnataka refuted the possibility of any deregistration on account of a subsequent loss of industrial character, and affirmed that the proceedings under the SICA can only result in the company being revived, or recommended to be wound up.<sup>109</sup>

The above decision resonates with the approach adopted by a Division Bench of the High Court of Delhi in *Sarin International Ltd. v. AAIFR*,<sup>110</sup> when asked to address a similar concern. Therein, the sick company claimed to no longer be an industrial company in terms of the SICA and the IDRA as it only had seven workers on that particular date. It argued that the BIFR and the AAIFR, therefore, did not have jurisdiction to recommend its winding up. However, taking note of the purpose behind enacting the SICA, the High Court of Delhi concluded that the AAIFR was well justified in rejecting such an argument on the ground that at the time of making the reference, if the number of workers were fifty or more, the reference could not be subsequently struck off.<sup>111</sup> The High Court of Delhi buttressed its decision with considerations of equity by noting that even in such situations, the right of workers' wages continue, and their dues have to be settled either by negotiations or by revival or if neither modes are successful, then by winding up of the company.<sup>112</sup>

Thus, a thoughtful consideration of the object of the SICA, coupled with a holistic understanding of the financial implications of sickness, seems to preclude the possibility of deregistering a company for a consequential loss of its industrial character. After all, one must not lose sight of the object and purpose of the SICA, and why it was enacted in the first place.<sup>113</sup>

### 3. Potential for Abuse

It is accepted that the interpretation of statutory text must profit from an element of foresight inasmuch as it must not be blind to a visible risk of misuse by certain unscrupulous litigants. In the absence of the same, a theoretically sound interpretation may end up obstructing the benefits that the statute seeks to impart. In the context of the SICA, this implies that preference for a literal interpretation of the statutory text must be assessed against the

---

<sup>108</sup> *Id.*, ¶27.

<sup>109</sup> *Id.*

<sup>110</sup> *Sarin International (P) Ltd. v. AAIFR*, 1996 SCC OnLine Del 574 : (1997) 89 Comp Cas 842.

<sup>111</sup> *Id.*, ¶9.

<sup>112</sup> *Id.*

<sup>113</sup> *See supra* note 8, Long Title.

opportunities it affords to the sick companies to circumvent the enactment after enjoying the protection it affords to them against their creditors.

At this juncture, it is apposite to make reference to §22 of the SICA, which provides for the suspension of legal proceedings, contracts, etc. In the first instance, §22(1) of the SICA provides that where in respect of an industrial company, an inquiry under §16 of the SICA is pending, or if any scheme is under preparation or consideration or implementation, then no proceedings for, *inter alia*, the winding up of the company, the execution of an order against the properties of the company, or for the recovery of money or enforcement of any security against the company shall lie or be proceeded with except with the consent of the BIFR or the AAIFR as the case may be.<sup>114</sup> Crucially, this embargo has an overriding effect over anything contained in any other law, including the Companies Act, 1956, or in the memorandum or articles of association of the sick industrial company in question.<sup>115</sup>

Similarly, in each of the above circumstances, §22(3) of the SICA allows the BIFR to declare, *inter alia*, that the operation of any contracts, settlements, awards, standing orders, etc. which may apply to the sick industrial company shall either remain suspended, or be enforceable with such adoptions and in such manner as may be specified by it.<sup>116</sup>

The rampant abuse of such an extensive protection afforded by §22 of the SICA is well documented. For instance, in the recent decision of *Alcatel-Lucent India Ltd. v. Usha India Ltd.*,<sup>117</sup> a Division Bench of the High Court of Delhi had lamented the respondent company's misuse of the machinery provided under the SICA by making repeated references to the BIFR year after year so as to benefit from the suspension of legal proceedings granted under §22(1) of the SICA. Expressing its discontent with the state of affairs, the High Court of Delhi had noted that when mere submission of a reference under §15 of the SICA triggers the protection afforded by §22 of the SICA, appropriate steps needs to be taken to ensure that the provision is not misused. The High Court of Delhi premised its honest observations on the acknowledgment that "over a period there has been rampant abuse of this provision [and the] experience of the working of the SICA has been far from satisfactory [...] it lent itself to gross misuse of some of its provisions, particularly Section 22 [...]"<sup>118</sup>

If one considers the import and operation of §22 of the SICA, it becomes amply clear that permitting the deregistration of a sick company

---

<sup>114</sup> *Id.*, §22(1).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*, §22(3).

<sup>117</sup> *Alcatel-Lucent India Ltd. v. Usha India Ltd.*, 2012 SCC OnLine Del 3260 : (2012) 174 Comp Cas 1.

<sup>118</sup> *Id.*, ¶20-22.

on the grounds of a subsequent loss of its industrial character merely carves another route for the companies to mischievously evade the supervision of the BIFR. To put it differently, a sick industrial company would be able to fend off its creditors by seeking refuge under the SICA, whereafter it may walk away from the BIFR's jurisdiction at will by simply ceasing the scheduled industry carried on in its factories.

This particular concern was specifically noted by the High Court of Karnataka in *Sudarsan Clay*<sup>119</sup> when it reviewed the many concessionary benefits enjoyed by a sick company under the SICA, and the remedial purpose behind the same. The High Court of Karnataka strongly doubted the efficacy of deregistering a sick company for a subsequent loss of its industrial character, after it had benefited from the concessions granted by financial institutions, as well as the State and Union Revenue Departments. In this light, the High Court of Karnataka affirmed that “discharging the Company gives freedom to the Directors; being the share holders, to merely walk away with the Company; after having put to jeopardy and peril, the revenues due to the Government, as also amounts due [...] to the financial institutions.”<sup>120</sup> Therefore, the High Court of Karnataka concluded that allowing a sick company to be discharged from the SICA due to a subsequent loss of its industrial character would be an abuse of the procedure under the SICA; implying that the various concessionary benefits granted by the state and financial institutions were misapplied.<sup>121</sup>

The High Court of Calcutta alluded to this concern in *Uniglobal Papers (P) Ltd. v. AAIFR*<sup>122</sup> as well while questioning the BIFR's wisdom in discharging a sick company from the purview of the SICA because it had sold its assets, including its factory, prior to the imposition of any prohibitory restraint. In particular, the High Court of Calcutta opined that as long as the scheme is in consideration before the BIFR, the same should not be frustrated by the impediments created by third parties, and at times, by the management of a sick company.<sup>123</sup>

However, no observation aptly reflects the extent to which the SICA has been abused to further vested individual interests than the one uttered by the Goswami Committee in 1993 in its report by noting that “There are sick companies, sick banks, ailing financial institutions, and unpaid workers. But there are hardly any sick promoters. There lies the heart of the matter.”<sup>124</sup>

---

<sup>119</sup> *Supra* note 94.

<sup>120</sup> *Id.*, ¶59.

<sup>121</sup> *Id.*, ¶67.

<sup>122</sup> *Uniglobal Papers (P) Ltd. v. AAIFR*, 2013 SCC OnLine Cal 17970 : (2014) 2 CHN 630.

<sup>123</sup> *Id.*, ¶35.

<sup>124</sup> *See* Goswami Committee Report, *supra* note 2.



The above considerations elucidate that allowing a sick company to be discharged solely on account of a subsequent loss of its industrial character would permit it to defeat the BIFR's jurisdiction by taking undue advantage of its own wrong. As noted by a commentator, it would allow unscrupulous management of a company to stave off the regulatory provisions of the SICA by simply ceasing its manufacturing activity for a while.<sup>125</sup> This certainly could not have been the legislative intent behind the enactment. This obstacle is in addition to the self-imposed hurdle emanating from the BIFR's lackadaisical functioning, which was succinctly articulated by the Goswami Committee in 1993. In its report, the Goswami Committee had expressed its displeasure towards the role performed by the BIFR by remarking that it was at a cross-road – “between being an organization that facilitates innovative, fast-track restructuring, and one that gets overwhelmed by bureaucratic apathy, by mandatory references, and interminable procedural loops.”<sup>126</sup> In fact, the Goswami Committee went on to suggest that in case there is no radical departure from such self-defeating practices, the BIFR may even go on to lose its remaining credibility in the eyes of banks, financial institutions, labour, and even the companies that it seeks to rehabilitate.<sup>127</sup>

Therefore, prudence dictates that one must resort to an interpretation that is both consistent with the object of the SICA, and also limits the potential for abuse. In the instant case, that would mean acknowledging that once the BIFR determines a company to be a ‘sick industrial company’ under the SICA and registers its reference, then such a company cannot be deregistered for a subsequent loss of its industrial character.

## VI. CONCLUSION

It is an accepted principle of statutory interpretation that if two interpretations of a provision are possible, one of which furthers the object and purpose of a statute while the other of which obstructs it, then it is the former that must be preferred and given effect to.<sup>128</sup>

In context of the present inquiry, a thorough consideration of the scheme of the SICA indicates that permitting a sick company to be discharged for a subsequent loss of its industrial character would run contrary to the object of the SICA. *Per contra*, it will be far more prudent to acknowledge that the logical conclusion of any proceedings before the BIFR in terms of the SICA is either a revival of a sick company, or a recommendation that it must be wound up. To introduce the possibility of a discharge at a later stage by way of inference not only lacks a justifiable basis but is also likely to create further opportunities

---

<sup>125</sup> NAIK, *supra* note 3, 62.

<sup>126</sup> Goswami Committee Report, *supra* note 2, ¶3.2.2.

<sup>127</sup> *Id.*

<sup>128</sup> *Supra* note 43, ¶20.

of rampant abuse. Accordingly, the text of the enactment read in context of its remedial and ameliorative nature, leads to one inescapable conclusion. While the BIFR may cease its jurisdiction if a sick company subsequently regains its financial health, no similar conclusion must be drawn in case of a subsequent loss of industrial character. The same is consistent with the object of the SICA inasmuch as no sick company would be deprived of the benefits of the SICA, as well as the supervision of the BIFR, for suffering from the consequences of the sickness that brought it to these doors in the first place.