THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 09.07.2010

\+ **WP(C) 7097/2008**

FINITE INFRATECH LTD ... Petitioner

– versus –

IFCI & ORS ... Respondents

Advocates who appeared in this case:-

For the Petitioner	:	Mr Amit Sibal with Mr Sachin Midha, Mr Jafar Alam, Mr Harsh Koushik, Ms Ring Choden Lepcha and Ms Kriti Kumar
For the Respondent No.1	:	Mr N. K. Kaul and Mr Parag Tripathi, Sr Advocates with Mr Suresh Dobhal, Mr Lokesh Bhola, Ms Ruchi Kohli and Ms Alpana
For the Respondent No.2	:	Mr Yashpal Rangi with Mr Manjit Singh
For the Respondent No.3	:	Mr A. S. Chandhiok, ASG with Mr Neeraj Chaudhari with Mr Khalid Arshad, Ms Vibha Dhawan, Ms Madhur Panjwani and Mr Gurpreet Singh

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MS JUSTICE VEENA BIRBAL

1. Whether Reporters of local papers may be allowed to see the judgment ? YES
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in Digest ? YES

BADAR DURREZ AHMED, J

1. "….From the heart of all matter
Comes the anguished cry –
'Wake, Wake, great Shiva,
Our body grows weary
Of its law-fixed path,
Give us new form
Sing our destruction,
That we gain new life.'

~Rabindranath Tagore.

This is how the great Tagore saw the invocation of Lord Shiva's attribute of simultaneously being a destroyer and a creator. The destruction of the body

to enable the heart or soul to gain a new life in a new form. Perhaps, this very principle of Hindu philosophy has been borrowed by western thinkers and, ultimately, by the economist Schumpeter in his concept of 'creative destruction' (see: 'creative destruction' in Economics: Nietzsche, Sombart, Schumpeter by Higo Reinert and Erik S. Reinert).

2. But, what has all this got to do with this case? This will become clear, shortly. This much is evident, conceptually speaking, that destruction need not be the end alone, it may also be the beginning of something new. Here we are concerned with the repeal of the Industrial Finance Corporation Act, 1948 and the consequential death of the Industrial Finance Corporation of India (hereinafter referred to as 'the Corporation'), which was established under it, as also the birth of the Industrial Finance Corporation of India Limited (hereinafter referred to as 'IFCI Limited'). The repeal was brought about by the Industrial Finance Corporation (Transfer of Undertaking and Repeal) Act, 1993. But, did the repeal also, simultaneously, establish or constitute IFCI Limited as a new form, a new 'life' of the dead Corporation?

3. This question arises in the backdrop of another question, as to whether IFCI Limited (respondent No. 1) is a "financial institution" within the meaning of Section 2(1)(m) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'said Act')? And, this issue arises in view of the prayer sought by the petitioner for quashing the notification No. SO 98(E) dated 15.02.1995, which has been issued under Section 4A(2) of the

Companies Act, 1956 notifying IFCI Limited as a public financial institution. If the plea taken by the petitioner that it is not a financial institution within the meaning of Section 2(1)(m) of the said Act is accepted, then the proceedings initiated by IFCI Limited under the said Act against the property of the petitioner in respect of which a mortgage has been created, would be set at naught. This would be so because, then, IFCI Limited would not fall within the meaning of the expression "financial institution" as defined in Section 2(1)(m) of the said Act and, therefore, it would not be entitled to avail the benefits available to a financial institution under the said Act. On the other hand, if the contention of the respondents is accepted that IFCI Limited is such a financial institution then IFCI would be entitled to take and continue proceedings under the said Act.

4. As pointed out above, the aforesaid issue arises in the backdrop of the repeal of the Industrial Finance Corporation Act, 1948 by virtue of the Industrial Finance Corporation (Transfer of Undertaking and Repeal) Act, 1993. The Corporation was established under Section 3(1) of the Industrial Finance Corporation Act, 1948. Subsequent to the repeal of the Industrial Finance Corporation Act, 1948, the undertaking of the Corporation stood transferred to and vested in IFCI Limited which was formed and registered subsequently under the Companies Act, 1956.

5. The Corporation had sanctioned a term loan of an amount not exceeding Rs 400 lacs to the petitioner on 26.08.1991. The loan agreement between the parties was executed on 03.02.1992 and, in order to secure the

said loan, an equitable mortgage was created on 20.02.1992 in respect of plot Nos. 15-17, HUDA Industrial Area, Rewari, Haryana together with all buildings and structures standing thereon. Thereafter, as pointed out above, the Industrial Finance Corporation (Transfer of Undertaking and Repeal) Act, 1993 (hereinafter referred to as 'the Repeal Act') was enacted. Subsequently, IFCI Limited was formed and registered under the Companies Act, 1956 and on and from 01.07.1993, which was the appointed date under the Repeal Act, the undertaking of the Corporation stood transferred and vested in IFCI Limited. Since the petitioner, for some reason, had defaulted in repayment of the loan, IFCI Limited, on 05.10.1998 recalled the loan and demanded a sum of Rs 2,16,93,294/-. Thereafter, IFCI Limited filed OA No.122/1999 before the Debts Recovery Tribunal invoking the provisions of the Recovery of Debts Due to Banks and Financial Institution Act, 1993 (hereinafter referred to as 'the DRT Act') for recovery of Rs 2,46,72,428/-. Pursuant thereto, settlement talks were initiated by the petitioner with IFCI Limited. According to the petitioner, while the settlement talks were in progress, IFCI Limited also took action under Section 13(2) of the said Act in respect of the said mortgage by issuing a notice dated 13.02.2008 in which a demand of Rs 18,21,38,833/- plus future interest with effect from 15.01.2008, was made. The petitioner filed objections to the proposed action but those objections were rejected by IFCI Limited. Consequently, on 05.05.2008 IFCI Limited took physical possession of the said mortgaged property.

6. Being aggrieved by the said action of IFCI Limited, the petitioner filed an application under Section 17 of the said Act before the Debts Recovery Tribunal. However, as the petitioner did not get any relief before the Debts Recovery Tribunal, it filed an appeal under Section 18 before the Debts Recovery Appellate Tribunal and, *inter alia*, took the plea that IFCI Limited was not a financial institution under Section 2(1)(m) of the said Act and, therefore, the proceedings under the said Act pursuant to the issuance of the notice under Section 13(2) thereof were wholly without jurisdiction. In the meanwhile, IFCI Limited had issued a public notice of sale of movable and immovable assets of the petitioner and the date of auction was set at 28.07.2008. However, that auction failed but, as there was imminent danger of a further auction being conducted, the petitioner approached this Court by way of this writ petition seeking, *inter alia*, the quashing of proceedings under the said Act as also the quashing of the notification dated 15.02.1995 whereby IFCI Limited was notified as a public financial institution. A declaration has also been sought in this writ petition that IFCI Limited is not a financial institution under Section 2(1)(m) of the said Act and consequently cannot be regarded as a secured creditor within the meaning of Section 2(1)(zd). We would also like to point out that during the course of proceedings before this Court, a Division Bench of this Court, by an order dated 15.01.2009 directed that the proceedings before the DRT and the DRAT may continue, subject to final orders of this Court.

7. To appreciate the rival contentions of the parties, it would be necessary to first examine the statutory provisions. Section 13(1) of the said Act stipulates that notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882, any "security interest" created in favour of any "secured creditor" may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of the said Act and thus Section 13(1) gives the right to a secured creditor to enforce a security interest without the intervention of the court or tribunal but in accordance with the provisions of the said Act. The expression "security interest" is defined in Section 2(1)(zf) and means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31 of the said Act. It is clear that the mortgage created by the petitioner in favour of IFCI Limited would be covered under the expression "security interest", provided IFCI Limited is regarded as a "secured creditor". The expression "secured creditor" has been defined in Section 2(1)(zd) in the following manner:-

> "2(1)(zd) "secured creditor" means any bank or financial institution or any consortium or group of banks or financial institutions and includes –
>
> (i) debenture trustee appointed by any bank or financial institution; or
>
> (ii) securitisation company or reconstruction company; or
>
> (iii) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance;"

This requires us to explore the meaning of the expression "financial institution" which has been defined in Section 2(1)(m). In the present case we are only concerned with clause (i) of Section 2(1)(m) which defines "financial institution" to mean "a public financial institution within the meaning of section 4A of the Companies Act, 1956 (1 of 1956);".

8. We now move on to Section 4A of the Companies Act which specifies "public financial institutions" in the following terms:-

> "4A. Public financial institutions. – (1) Each of the financial institutions specified in this sub-section shall be regarded, for the purposes of this Act, as a public financial institution, namely:-
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> (i) the Industrial Credit and Investment Corporation of India Limited, a company formed and registered under the Indian Companies Act 1913 (7 of 1913);
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> (ii) the Industrial Finance Corporation of India, established under section 3 of the Industrial Finance Corporation Act, 1948 (7 of 1948);
>
> (iii) the Industrial Development Bank of India, established under section 3 of the Industrial Development Bank of India Act, 1964 (18 of 1964);
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> (iv) the Life Insurance Corporation of India, established under section 3 of the Life Insurance Corporation Act, 1956 (31 of 1956);
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> (v) the Unit Trust of India, established under section 3 of the Unit Trust of India Act, 1963 (52 of 1963);
>
> (vi) the Infrastructure Development Finance Company Limited, a company formed and registered under this Act.
>
> (vii) the securitisation company or reconstruction company which has obtained a certificate of registration under sub-section (4) of section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

(2) Subject to the provisions of sub-section (1) the Central Government may, by notification in the Official Gazette, specify such other institution as it may think fit to be a public financial institution:

Provided that no institution shall be so specified unless –

(i) it has been established or constituted by or under any Central Act, or

(ii) not less than fifty-one per cent of the paid-up share capital of such institution is held or controlled by the Central Government."

From a reading of Section 4A of the Companies Act, 1956, it is apparent that it is in two parts. The first part falls under sub-section (1) and the second, under sub-section (2). Under the first part, the public financial institutions are specified by name. Under the second part, a provision has been made for other institutions to be notified in the official gazette as public financial institutions if the Central Government so thinks fit. The proviso to sub-section (2) of Section 4A of the Companies Act, 1956 is of vital importance for a decision in this case. It lays down two conditions which have to be satisfied before the Central Government can notify an institution to be a public financial institution. The first condition is that the institution should have been established or constituted by or under any Central Act. The second condition is that not less than 51% of the paid up share capital of such an institution must be held or controlled by the Central Government. Another important feature of sub-section (2) of Section 4A of the Companies Act, 1956 is that it begins with the words – "subject to the provisions of sub-section (1)". It is pertinent to note that in the specified public financial institutions mentioned under sub-section (1), the Industrial

Finance Corporation of India established under Section 3 of the Industrial Finance Corporation Act, 1948 has been specifically mentioned in clause (ii) thereof. Thus, if the Repeal Act had not been enacted, the Corporation would have continued to exist and by virtue of Section 4-A (1) of the Companies Act, 1956 it would have to be regarded as a public financial institution. But, the Industrial Finance Corporation of India no longer exists because of the Repeal Act and its entire undertaking has been transferred to and vested in IFCI Limited, which is not a specified public financial institution under sub-section (1) of Section 4A of the Companies Act, 1956. Therefore, the entire controversy in this case centres on the interpretation to be given to the words and expressions used in sub-section (2) of Section 4A of the Companies Act, 1956.

7. By virtue of notification No. SO 98(E) file No. 3/33/94-CL.V dated 05.02.1995, the Central Government, in exercise of powers conferred under Section 4A(2) of the Companies Act, 1956 specified IFCI Limited, formed and registered under the Companies Act, 1956, to be a financial institution and amended the original notification of the Government of India, Ministry of Law, Justice and Company Affairs bearing No. S.O.1329 dated 8th May, 1978 by inserting the following entry after entry (15):-

> "(16) Industrial Finance Corporation of India Ltd., formed and registered under the Companies Act, 1956 (1 of 1956)".

8. The submission of Mr Amit Sibal, the learned counsel appearing on behalf of the petitioner, was that this notification was bad in law and was beyond the powers given to the Central Government under Section 4A(2) of

the Companies Act, 1956 because, according to him, IFCI Limited was neither established by nor constituted under any Central Act. He also contended that the stipulation as regards the Central Government holding or controlling not less than 51% of the paid up share capital of IFCI Limited is no longer satisfied and, therefore, the notification requires to be quashed. According to Mr Sibal once the notification goes, IFCI Limited cannot be regarded as a public financial institution and, consequently, it would not fall within the expression "financial institution" as appearing in Section 2(1)(m) of the said Act. The result of this would be that IFCI Limited would not be entitled in law to take recourse to the provisions of the said Act.

9. It was contended by Mr Sibal that the word "established" in Section 4A (2) of the Companies Act is used in the sense of bringing into existence or creating. An indication that this is the manner, in which it has been used, according to Mr Sibal, is given by the use of the very same word "established" in clauses (ii), (iii), (iv) and (v) of sub-section (1) of Section 4A of the Companies Act. He submitted that the manner in which the word "established" has been used in sub-section (1) clearly shows that the institution must be created by or brought into existence by the statute itself. He submitted that the word "established" does not have the same meaning as "formed and registered" under the Companies Act. This would be evident from the fact that the expressions "formed and registered" and the word "established" have been used differently in the very same sub-section (1) of Section 4A of the Companies Act. Thus, the Legislature consciously

used the word "established" when it wanted to do so and consciously used the words "formed and registered" when it wanted to convey a different meaning.

10. Mr Sibal then referred to the provisions of the Industrial Finance Corporation Act, 1948 and in particular to the Preamble and Section 3 thereof where the intention of Parliament was clearly to "establish" the Industrial Finance Corporation of India. The expression used in Section 3(1) of the Industrial Finance Corporation Act, 1948 was to the following effect:-

> "a corporation to be called the Industrial Finance Corporation of India shall be established for the purposes of this Act."

He submitted that the Industrial Finance Corporation of India was clearly a corporation which was established under the Industrial Finance Corporation Act, 1948. It was governed by the said statute and not by the Companies Act. It had no separate Memorandum or Articles of Association and everything concerning the Corporation was incorporated and provided in the said Act itself.

11. Mr Sibal then referred to the Repeal Act of 1993. Reading the Statement of Objects and Reasons behind the introduction of the Repeal Act, Mr Sibal submitted that it was due to the continued decline in the availability of concessional funds from the Government and the Reserve Bank of India over the years as also the changes in the past several months (prior to the introduction of the Repeal Act) in the financial sector that it had become obligatory for the Industrial Finance Corporation of India to raise resources largely from the market. However, the Industrial Finance

Corporation Act, 1948 permitted accessibility to the market only when it was backed by a Government guarantee. As a result, the Corporation was prevented from raising resources on competitive terms. It was also stated in the Statement of Objects and Reasons that the Industrial Finance Corporation Act, 1948 provided a very dominant role to its major shareholder, namely, the Industrial Development Bank of India in the functioning of the Corporation. This situation was considered to be anomalous as the two institutions, that is, the Industrial Finance Corporation of India and the Industrial Development Bank of India, were competitors.

12. The Statement of Objects and Reasons further indicates that to deal with these problems and in particular, to ensure greater flexibility and consequent ability of the Corporation to respond to the needs of the fast changing financial system, it was thought necessary "*to establish a new company under the Companies Act, 1956, to which the entire undertaking, business and functions of IFCI as well as the assets and liabilities and the staff of IFCI will be transferred on such day as will be notified by the Central Government.*" It was further provided in the said Statement of Objects and Reasons that the conversion of the Corporation (IFCI) into a company would also enable it to re-shape its business strategies, provide greater autonomy, recourse to the capital market for raising resources, facilitate expansion of its equity base in future, and create a more levelled playing field across broadly similar financial institutions. In sum and substance, it was submitted by Mr Sibal that the old corporation was extinguished and a new company (IFCI Limited) was to be formed and

registered under the Companies Act, 1956. It is not as if by virtue of the Repeal Act, the new company – IFCI Limited, was brought into existence or created but it was yet to be formed and registered under the Companies Act, 1956 as would be clear from the definition of the word "company" given in Section 2(b) of the Repeal Act wherein the word "company" has been defined to mean the Industrial Finance Corporation of India Limited (IFCI Limited) "to be formed and registered under the Companies Act, 1956". Mr Sibal sought to distinguish the manner in which the company has been defined in Section 2(b) with the manner in which the word "corporation" has been defined in Section 2(c) as meaning the Industrial Finance Corporation of India "established" under sub-section (1) of Section 3 of Industrial Finance Corporation Act, 1948. It is on the basis of this distinction, that Mr Sibal submitted that IFCI Limited was not established under the Repeal Act.

13. Continuing with his submission, Mr Sibal contended that Section 3 of the Repeal Act merely transferred the undertaking of the Corporation to the company. Section 4 of the Repeal Act dealt with the general effect of vesting of undertaking in the company. Referring to Section 5 of the Repeal Act, he submitted that by virtue thereof, with effect from the appointed day (01.07.1993), all fiscal and other concessions, licences, benefits, privileges and exemptions granted to the Corporation in connection with the affairs and business of the Corporation under any law for the time being in force, were deemed to have been granted to the company. He submitted that on that date, the said Act was not in force and, therefore, it could not even be

contended that since IFCI was a public financial corporation specifically mentioned in Section 4A(1) of the Companies Act, by virtue of Section 5 of the Repeal Act, the benefits, privileges etc., which were available to it, would continue to be granted to IFCI Limited also.

14. He submitted that the manner in which the management and affairs of IFCI Limited was to be conducted was not provided in the Repeal Act and that would be the subject matter of the Memorandum and Articles of Association of IFCI Limited. He further submitted that by virtue of Section 8 of the Repeal Act, options were given to the officers or employees of the Corporation to continue or not to continue to be such officers/ employees of the company (IFCI Limited). According to Mr Sibal, this in itself indicated that the very nature of the Corporation was changed from government to private. Referring to Section 11 of the Repeal Act, Mr Sibal submitted that by virtue of that provision, the Industrial Finance Corporation Act, 1948 stood repealed with effect from the appointed day, that is, 01.07.1993, and from that day onwards, the Corporation ceased to exist and the new company, that is, IFCI Limited did not have the character of a public financial institution.

15. Mr Sibal also referred to a similar statute being the UTI (Transfer of Undertaking and Repeal) Act, 2002 whereby the Unit Trust of India Act, 1963 was repealed. However, according to Mr Sibal, the UTI Repeal Act did not contemplate a complete privatization and, therefore, a specific provision was made for substitution of the specified company or administrator in place of the Unit Trust of India wherever necessary in every

Act, rule, regulation or notification. Section 18 of the UTI Repeal Act reads as under:-

> "18. In every Act, rule, regulation or notification in force on the appointed day, for the words "Unit Trust of India", wherever they occur, the words, brackets and figures "specified company referred to in the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002" or "Administrator of ,the specified undertaking of the Unit Trust of India referred to in the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002", as the case may be, shall be substituted."

He submitted that by virtue of the said Section 18, the specified company and the administrator of the specified undertaking of the Unit Trust of India stood substituted in place of the words "Unit Trust of India" wherever they occur in every Act etc. The result being that the reference to the Unit Trust of India established under Section 3 of the Unit Trust of India Act, 1963 in Clause (v) of Section 4A(1) of the Companies Act, 1956 would be a reference to the specified company or the administrator, as the case may be, referred to in the UTI Repeal Act of 2002. Thus, by virtue of the said Section 18, though the Unit Trust of India ceased to exist, its components, which were the specified company and the administrator, were both specifically incorporated in Section 4A(1)(v) of the Companies Act, 1956 and were, therefore, to be regarded as public financial institutions. He submitted that this is also the ratio of the Supreme Court decision in the case of ***Southern Petrochemical Industries Corporation Limited v. Administrator of Specified Undertaking of Unit Trust of India & Ors : (2007) 2 SCC 282*** (I). Mr Sibal submitted that a provision like the said Section 18 is conspicuous by its absence in the Repeal Act of 1993.

Therefore, it was his contention that the legislative intent was clear that IFCI Limited was not to be regarded as a public financial institution because if it were so, Parliament could have very easily included a provision similar to the said Section 18 of the UTI Repeal Act.

16. It was next contended by Mr Sibal with reference to 'Gower and Davies' Principles of Modern Company Law, Seventh Edition, that the constitution of a company bears reference to two documents, that is, the Memorandum of Association and the Articles of Association. According to the said work, the Memorandum of Association must contain a specified minimum content and normally contains little more than the required subject matter. The content of the articles is very much under the control of those who establish the company, that is, the incorporators and subsequently of the members of the company. Consequently, the articles tend to be elaborate and relate to the internal affairs of the company. A reference was also made by Mr Sibal to Sections 33 to 36 of the Companies Act and it was contended that IFCI Limited was established not by the Repeal Act of 1993 but by the formation and registration of the company under the Companies Act. The company's constitution as it were, was governed by the Memorandum and Articles of Association and not by any statutory provision.

17. Lastly, Mr Sibal submitted that the second condition specified in the proviso to Section 4A(2) of the Companies Act is also not satisfied in

the present case inasmuch as the Central Government does not now own or control at least 51% of the paid up share capital. It was submitted that as on 31.03.2008, the Central Government did not own or control any part of the paid up share capital of IFCI Limited. Though, in 1995, when the notification dated 15.02.1995 was issued, the position was different. At that point of time, the Central government did not own any shares in IFCI Limited but the combined share holding of IDBI, LIC, GIC, UTI, SBI and other public sector banks and subsidiaries was 53.98% and thereby the Central Government could have been said to control 53.98% of the paid up share capital of IFCI Limited. But, according to Mr Sibal, the contention of owning or controlling at least 51% of the shareholding was not just a one-time requirement. It was necessary at the time of issuance of the notification and it was also necessary that the same stipulation would continue throughout the existence of the said notification. According to him, if ownership and control of the Central Government fell below 51%, then IFCI Limited would lose its public element and thereby lose its status of being a public financial institution. He submitted that this requirement was not merely a condition precedent but also a condition which subsisted thereafter. For all these reasons, Mr Sibal submitted that the notification was beyond the scope and powers of Section 4A and, therefore, IFCI Limited cannot be regarded as a public financial institution and by virtue of the entire train of provisions, IFCI Limited would not be entitled to take recourse to the provisions of the said Act.

18. Mr Neeraj Kishan Kaul, the learned senior counsel appearing on behalf of IFCI Limited, drew our attention once again to the Statement of Objects and Reasons behind the Repeal Act of 1993. He stated that the raising of funds was becoming a problem because under the Industrial Finance Corporation Act, 1948 all such transactions would have to be backed by government guarantee. Furthermore, IDBI, which was a competitor of the Corporation, was a major shareholder in the Corporation and this had led to an anomalous situation. It is in this backdrop that the decision was taken to form a new company in order to get rid of these shackles and the object was not disinvestment on the part of the government or privatization. It was only a new '*avatar*' of the Corporation. Mr Kaul submitted that a similar situation had arisen in the case of the repeal of the Unit Trust of India Act, 1963 which was considered by the Supreme Court in ***Southern Petrochemical*** (I) *(supra)*. He submitted that while the learned counsel for the petitioner had placed much reliance on the absence of a provision similar to Section 18 of the UTI Repeal Act, the special provision was only by way of facilitation and was a mere rule of convenience. Even if Section 18 had not been there, the result would have been the same. Mr Kaul submitted that the creation of IFCI Limited was contemplated under the Repeal Act of 1993 and not under the Companies Act. Referring to the provisions of Repeal Act of 1993, he submitted that there was a vesting of the entire undertaking and a complete transfer thereof from the Corporation to IFCI Limited. He compared the provisions of UTI Repeal Act of 1993 and submitted that even in the former Act, there was a reference to the

specified company to be formed and registered under the Companies Act, 1956 as would be apparent from the definition of specified company under Section 2(h) of the UTI Repeal Act. The Supreme Court construing similar provisions, held the specified company as also the administrator as defined under the UTI Repeal Act to fall within the scope and ambit of the expression "public financial institutions". According to Mr Kaul, similar is the case in the present petition. Mr Kaul placed reliance on ***Gammon India Limited v. Special Chief Secretary & Ors: (2006) 3 SCC 354*** to submit that the Repeal Act of 1993 was not just a repeal but also a simultaneous re-enactment. Referring to paragraph 73 of the said decision, Mr Kaul submitted that whenever there is a repeal of an enactment and simultaneous re-enactment, the re-enactment is to be considered as re-affirmation of the old law and provisions of the repealed Act which are thus re-enacted continue in force uninterruptedly unless, the re-enacted enactment manifests an intention incompatible with or contrary to the provisions of the repealed Act. He submitted that the mere registration of a company under the Companies Act does not mean that it was not established by or constituted under the Repeal Act of 1993. The intention was one of continuity. He further submitted that all the conditions stipulated in Section 4A(2) of the Companies Act stand fulfilled. IFCI Limited was established by and constituted under the Repeal Act of 1993 which was a Central Act. Thereafter, the notification was issued by the Central Government in 1995 specifying IFCI Limited as a public financial institution. On the date of the notification, the Central Government owned or controlled more than 51% of

the paid up share capital of IFCI Limited. He submitted that though the shareholding has gone below 51% subsequently, the date of reckoning would be 15.02.1995, that is, the date of the notification. A reference in this regard was made to paragraph 100 of ***Southern Petrochemical Industries Co. Ltd v. Electricity Inspector & ETIO and Ors : (2007) 5 SCC 447*** [hereinafter referred to as Southern Petrochemical (II)]. The said passage reads as under:-

> "We are also unable to agree with Mr. Andhyarujina that exemption from tax is a mere concession defeasible by Government and does not confer any accrued right to the recipient. Right of exemption with a valid notification issued gives rise to an accrued right. It is a vested right. Such right had been granted to them permanently. 'Permanence' would mean unless altered by statute. Thus, when a right is accrued or vested, the same can be taken away only by reason of a statute and not otherwise. Thus, a notification which was duly issued would continue to govern unless the same is repealed."

According to Mr Kaul, IFCI Limited had its origin in the Repeal Act of 1993 which was a Central Act. In that Act, it was specifically provided for the establishment and consequential formation and registration of IFCI Limited under the Companies Act, 1956. The Act also provided for a complete transfer of rights, liabilities, privileges and concessions which had been granted earlier to the Corporation to IFCI Limited. Mr Kaul, therefore, in view of the aforesaid submissions contended that IFCI Limited would have to be regarded as a public financial institution under Section 4A(2) of the Companies Act and consequently as a financial institution within the meaning of Section 2(1)(m) of the said Act. Thus, IFCI Limited would be

entitled to institute and continue any action under the provisions of the said Act. He submitted that the writ petition ought to be dismissed.

19. The resolution of this case, as would be apparent from the foregoing discussion, would depend entirely on the interpretation of the provisions of Section 4A of the Companies Act, 1956 and particularly the construction to be given to the provisions of sub-section (2) thereof. In this context, it will have to be determined as to what is meant by the expression "established or constituted by or under any Central Act". It would also have to be determined as to whether the condition of the Central Government holding or controlling not less than 51% of the paid up share capital of the institution in question was only a trigger condition or a condition precedent and not one which was required to be fulfilled at all times. In this context, it will also have to be determined as to whether the validity of the notification dated 15.02.1995 would have to be tested having regard to the date on which it was made or the existence of the conditions would have to be considered at future points of time also. It would also be required of us to examine the Supreme Court decision in ***Southern Petrochemical*** (I) *(supra)* and to see as to whether any parallel can be drawn from that decision with regard to the UTI Repeal Act while considering the present case whereby the Industrial Finance Corporation Act, 1948 has been repealed and a new company, namely, IFCI Limited has come into existence.

20. We shall examine the last point first. In ***Southern Petrochemical*** (I) *(supra)* the issue arose as to whether the specified company and the administrator within the meaning of the UTI Repeal Act, could be regarded as public financial institutions falling under Section 4A(1) of the Companies Act, 1956 in place of the Unit Trust of India, which had been established under Section 3 of the Unit Trust of India Act, 1963. The Supreme Court came to the conclusion that by virtue of Section 18 of the UTI Repeal Act, in every Act, rule, regulation or notification in force, the words "Unit Trust of India" wherever they occurred would be substituted by "specified company referred to in the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002" or "Administrator of the specified undertaking of the Unit Trust of India referred to in the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002", as the case may be. In other words, it was held that by virtue of Section 18, clause (v) of Section 4A(1) of the Companies Act, 1956 would, in effect, be read as:-

> "specified company referred to in the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002" or "Administrator of the specified undertaking of the Unit Trust of India referred to in the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002"

In place of:-

> "the Unit Trust of India, established under Section 3 of the Unit Trust of India Act, 1963 (52 of 1963);"

Consequently, because of the provisions of Section 18 of the UTI Repeal Act, the specified company and/ or the administrator were incorporated in clause (v) of Section 4A(1) of the Companies Act, as public financial institutions. It is clear that the Supreme Court decision in ***Southern***

Petrochemical (I) *(supra)* was not at all concerned with the provisions of sub-section (2) of Section 4A. It was only concerned with the provisions of Section 4A(1) which dealt with those public financial institutions which had been specifically named in Section 4A(1) of the Companies Act, 1956 itself. Therefore, no assistance can be taken from the decision in ***Southern Petrochemical*** (I) *(supra)* insofar as the present controversy is concerned. We are concerned with the provisions of Section 4A (2) thereof since there is no provision similar to Section 18 of the UTI Repeal Act in the Repeal Act of 1993. The reference to Industrial Finance Corporation of India in clause (ii) of Section 4A(1) of the Companies Act, 1956, has not been substituted to indicate a reference to IFCI Limited.

21. Let us now consider the second condition stipulated in the proviso to Section 4A(2) of the Companies Act that no institution in which the Central Government holds or controls less than 51% of the paid up share capital of such institution, can be specified as a public financial institution. There is no doubt and it is an admitted position that as on the date on which the notification was issued, this condition stood satisfied. The Central Government did hold or control more than 51% of the paid up share capital of IFCI Limited. It has already been mentioned above that as on 15.02.1995, though the Central Government by itself did not hold any shares in IFCI Limited, it controlled 53.98% of the paid up share capital though institutions such as IDBI, LIC, GIC, UTI, SBI and other public sector banks and subsidiaries. It is also true that on the date on which the

notice under Section 13(2) of the said Act was issued and on subsequent dates, the Central Government neither held nor controlled more than 51% of the paid up share capital of IFCI Limited. This means that the said condition does not continue to be satisfied, though on the date on which the notification was issued, the condition with regard to ownership and control of shareholding was satisfied. An argument was made by Mr Sibal that the said condition with regard to shareholding was not only a condition precedent but also a condition subsequent and subsisting. His contention was that the moment this condition was not no longer satisfied, IFCI Limited would lose its status as a public financial institution. On first impression, this may be an attractive argument. But, if it were to be accepted, it would perhaps lead to a chaotic situation. An example would illustrate. Suppose at one point of time the Central Government had 55% shareholding in such an institution. Suppose further that ten days later, the Central Government sold of 10% of its holding and another ten days later, the Central Government restored its shareholding to 55%. In such a situation, if the argument of the learned counsel for the petitioner was to be accepted, the notification would be valid till such time the Central Government held 55% shares, then, ten days later it would become invalid because the shareholding dropped to 45% and again a further ten days on, the notification would again become valid because the Central Government would then hold 55% shares in the said institution. Such a fluctuation or flip-flop in the status of the institution is certainly not contemplated by the provisions of Section 4A(2) apart from the fact that it would lead to a very

chaotic situation. Therefore, we are in agreement with the submission made by the learned counsel for the respondents that the validity of the notification from the standpoint of shareholding would have to be examined as on the date on which the notification under Section 4A(2) of the Companies Act is issued. The condition with regard to the government owning or controlling not less than 51% of the paid up share capital of an institution is, in our view, merely a condition precedent for the purposes of examining the status of the institution as a public financial institution and for the purposes of determining the validity of the notification under Section 4A(2) of the Companies Act, 1956. It is open to the Central Government, at any subsequent point of time to 'de-notify' an institution as a 'public financial institution' if it deems fit.

22. We can also take support from ***Southern Petrochemical*** (II) *(supra)* wherein the Supreme Court, as pointed out above, in the context of an exemption notification, observed that a notification which was duly issued would continue to govern unless the same is repealed.

23. We are now left to consider the first condition stipulated in the proviso to Section 4A(2) of the Companies Act, 1956. We would have to examine the meaning of the expression "established or constituted by or under any Central Act". In the present case, the reference to the Central Act is that to the Repeal Act of 1993. The question is whether IFCI Limited could be said to have been established or constituted by or under the Repeal Act of 1993. It is clear that in the Repeal Act of 1993 while there is

reference to the company to be formed, IFCI Limited was to be formed and registered under the Companies Act, 1956. In that sense, IFCI Limited was not formed or registered by or under the Repeal Act of 1993. The expression "established or constituted by or under", in our view, would have to be construed as "established by" or "established under" or "constituted by" or "constituted under". This is so because the expression "by or under" is common to both the words "establish" and "constitute". We are emphasizing this because the words "by" and "under" have different connotations. The word "under" is wider in its sweep than the word "by". This is clear from the Supreme Court decision in the case of ***R.C. Mitter & Sons v. CIT*: AIR 1959 SC 868.** In that case, the Supreme Court was construing the effect and scope of the words "constituted under an instrument of partnership" as appearing in Section 26-A of the Income Tax Act, 1922. The Calcutta High Court had come to the conclusion that the word "constituted" meant created and that the preposition "under" used in the aforesaid expression was inappropriate and the Court read the said word as "by". The Supreme Court observed that the High Court had fallen into error in re-constructing the expression to read "constituted by an instrument of partnership" in place of the expression "constituted under an instrument of partnership" as appearing in the statute book. The Supreme Court observed that the High Court had fallen into error in re-constructing the provisions of the statute instead of construing them and that the word "by" could be substituted for the word "under" in the said Section 26-A only if the words, as they stood in the Section, were not capable of making sense

and it would, thus, have been necessary to amend the wording of the section. The Supreme Court then examined the issue as to whether the words "constituted under an instrument of partnership" had some meaning which could be attributed to them harmoniously with the rest of the relevant provisions. In this context, the Supreme Court observed that a partnership could be created or set up by a contract in writing, setting out all the terms and conditions of the partnership, but there may also be many cases where a partnership has been brought into existence by an oral agreement between the parties on certain terms and conditions which may subsequently be reduced to writing which would answer the description of an instrument of partnership. Such an instrument, would, naturally, record all the terms and conditions of the contract between the parties which, at the initial stages, had not been reduced to writing. The Supreme Court observed as under:-

> "In such a case, though the partnership had been brought into existence by an oral agreement amongst the partners, if the terms and conditions of the partnership have been reduced to the form of a document, it would be right to say that the partnership has been constituted under that instrument."

The Supreme Court went on to say:-

> "The word "constituted" does not necessarily mean "created" or "set up", though it may mean that also. It also includes the idea of clothing the agreement in a legal form. In the *Oxford English Dictionary*, Vol. II, at pp. 875 and 876, the word "constitute" is said to mean, inter alia, "to set up, establish, found (an institution, etc.)" and also "to give legal or official form or shape to (an assembly, etc.)". Thus, the word in this wider significance would include both the idea of creating or establishing and the idea of giving a legal form to, a partnership. The Bench of the Calcutta High Court in the case of *R. C. Mitter & Sons v. CIT* under examination now, was not, therefore, right in restricting the word "constitute" to mean

> only "to create", when clearly it could also mean putting a thing in a legal shape."

The Supreme Court, thereafter, concluded that the words "constituted under an instrument of partnership" include not only firms which have been created by an instrument of partnership but also those which may have been created by word of mouth but have been subsequently clothed in legal form by reducing the terms and conditions of the partnership to writing. Drawing a parallel from the said decision, we fell that the expression constituted under any Central Act as appearing in Section 4A(2) of the Companies Act, 1956 would have reference to institutions which have been conceived or contemplated under a Central Act but have been subsequently clothed in legal form by registration under the Companies Act as in the case of IFCI Limited. In the present case we have no difficulty with regard to the use of the expression "by or under" inasmuch as both the words "by" and "under" have been used in the provision. The indication is very clear that the institution could have been constituted by the Central Act or under a Central Act, the latter expression being of a wider amplitude. We are also of the view that the word "constituted" does not necessarily mean "created" and, as pointed out in ***R.C. Mitter & Sons*** *(supra)*, the word "constituted" could also refer to "give legal or official form or shape to". Thus, an institution constituted by or under any Central Act could have reference to a company which, though formed and registered subsequently under the Companies Act, was conceived and contemplated under a Central Act such as the Repeal Act of 1993.

24. A similar logic would apply to the word "established". For, even the word "establish" does not necessarily mean to "create". As pointed out in ***S. Azeez Basha v. Union of India*: AIR 1968 SC 662**, after reference to several dictionaries, the word "establish" has a number of meanings and one of them includes creation also. The dictionary meanings of the word "establish" are as under:-

> The word "establish'' according to the ***Oxford English Dictionary*** means, amongst other things, to 'institute or ordain permanently by enactment or agreement, give legal form and recognition to, secure or settle, set up on a permanent or secure basis, bring into being, found, make stable or firm, strengthen, ratify, confirm, restore, place in a secure position, initiate, secure acceptance of, place beyond dispute, ascertain, prove'.
>
> The word "establish'' according to ***Black's Law Dictionary*** means, amongst other things, 'to settle, make or fix firmly, to enact permanently, to make or form, to bring about or into existence, to prove, to convince'.
>
> The word "establish'' according to ***Webster's Dictionary*** means, amongst other things, 'set up or found, to make stable or firm, to settle, to confirm, to appoint or constitute for permanence, as officers, laws, regulations, etc., to enact, to ordain, to originate and secure the permanent existence of, to found, to institute, to create and regulate, to secure public recognition in favour of, to prove and cause to accepted as true'.
>
> The word "establish'' according to ***Words and Phrases*** means, amongst other things to prescribe, to make stable or firm, to found, to set up, to fix firmly, to maintain, to prove, to found, create, originate or institute, to regulate.

25. From the above, it is clear that the word "establish" could have a narrow meaning as implying "created by" or under a specific provision of a statute or it could have a wider meaning similar to the meaning we have ascribed to the expression "constituted under". This is apparent from the fact that even 'to originate' is regarded as 'to establish'. Furthermore, the

use of the expression 'by or under' as also the supplemental word 'constituted' makes the legislative intent of employing the wider meaning very clear.

26. Till now we have proceeded on the basis that the two conditions mentioned in the proviso to Section 4A(2) of the Companies Act, 1956 have to be satisfied together. But, in reality the two conditions are separated by the disjunctive word 'or'. The proviso stipulates that no institution shall be specified to be a public financial institution unless (i) it has been established or constituted by or under any Central Act, or (ii) not less than fifty-one percent of the paid-up share capital of such institution is held or controlled by the Central Government. It is a well settled principle of interpretation of statutes that the word 'or' must be considered in its normal disjunctive sense unless such a construction produces an unintelligible or absurd result, in which case it may be read as "and", if it subserves the object of the provision (See: ***State of Bombay v. RMD Chamarbaugwala:*** ***AIR 1957 SC 699***; ***Mazagon Dock v. CIT:*** ***AIR 1958 SC 861***; and ***Prof. Yashpal v. State of Chhattisgarh:*** ***(2005) 5 SCC 420***). When we read the word 'or' in its plain and normal sense in the said proviso, there is no resultants absurdity. In other words, either of the two conditions are required to be fulfilled, though, it may happen that in some cases both conditions are satisfied. In other words, an institution which has been established or constituted by or under any Central Act need not also satisfy the other condition with regard to its paid-up share capital (and vice versa) for it to qualify as an institution

which the Central Government may specify to be a public financial institution.

27. In the present case, both the conditions stand satisfied. But, even if one of the conditions had been fulfilled, IFCI limited could still have been specified as a public financial institution under Section 4A(2) of the Companies Act, 1956. Therefore, the validity of the said notification dated 15.02.1995 is beyond reproach.

28. The result of the foregoing discussion is that IFCI Limited would have to be regarded as a public financial institution under Section 4A of the Companies Act. As a consequence, it would be a financial institution under Section 2(1)(m) and, therefore, IFCI Limited would be entitled to take recourse to the provisions of the said Act in order to enforce a "security interest" created in its favour.

The writ petition is dismissed. However, the parties are left to bear their respective costs.

BADAR DURREZ AHMED, J

VEENA BIRBAL, J

JULY 09, 2010
SR