REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1475 OF 2006

M/s. Madura Coats Limited ..... Appellant

VS

M/s. Modi Rubber Ltd. & Anr. .....Respondents

J U D G M E N T

Madan B. Lokur, J.

1. The appellant (Madura Coats) is aggrieved by the judgment and order dated 20th May, 2004 passed by the Division Bench of the Allahabad High Court in Special Appeal No. 420 of 2004. By the impugned judgment and order the Division Bench of the High Court allowed the Special Appeal of the respondent and stayed further proceedings before the Company Court consequent upon a winding up order passed against the respondent (Modi Rubber) till a final decision is taken on a reference made by Modi Rubber to the Board for Industrial and Financial

Reconstruction.

2. Company Petition No.1 of 2002 was filed by Madura Coats in the Allahabad High Court for winding up Modi Rubber on the allegation that Modi Rubber was unable to pay its huge undisputed debts. Notice was issued in the Company Petition to Modi Rubber who entered appearance but took several adjournments in the matter on one pretext or the other including furnishing the schedule for repayment of the admitted dues to the creditors, an arrangement being worked out with Apollo Tyres Ltd. and various other reasons.

3. Eventually, after two years of adjournments, the Company Court declined to grant any further adjournment to Modi Rubber. Accordingly, on a consideration of the material on record and after hearing learned counsel for the parties, the Company Court passed an order on 12th March, 2004 holding that Modi Rubber was unable to pay its undisputed debts and that it was just and equitable that the company be wound up. An Official Liquidator was appointed to take charge of the assets of the company and to submit a report along with the inventory.

4. Feeling aggrieved by the winding up order, Modi Rubber preferred an appeal before the Division Bench of the High Court which was allowed by the impugned judgment and order.

5. Before the Division Bench it was brought out for the first time that on 6th December, 2003 the Board of Directors of Modi Rubber had passed a resolution to file a reference before the Board of Industrial and Financial Reconstruction (for short 'the BIFR') under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short 'the SICA').

6. Pursuant to the aforesaid resolution, an application was made by Modi Rubber to the BIFR on 3rd February, 2004 which was received by the BIFR on 4th February, 2004. Thereafter, the application was scrutinized and on 17th March, 2004 the reference made by Modi Rubber was registered as Case No. 153 of 2004. It will be seen that while the application for making a reference was sent to the BIFR before the winding up order was passed by the Company Court, the reference was actually registered after the winding up order was passed by the Company Court.

7. On these broad facts, it was contended by Modi Rubber before the Division Bench that in view of the decision of this Court in ***Real Value Appliances Ltd. v. Canara Bank***[1] on filing an application before the BIFR, all proceedings in respect of the company ought to have been stayed in terms of Section 22 of the SICA. Consequently, even the Division Bench of the High Court could not have decided the appeal filed by Modi Rubber. This contention was rejected by the High Court and it was held that the crucial date for a stay of proceedings under Section 22 of the SICA is the date on which the reference is registered with the BIFR and not the date on which an application for reference is filed.

8. However, the High Court took into consideration the subsequent events namely the fact of registration of the reference and relying upon ***Rishabh Agro Industries Ltd. v. P.N.B. Capital Service Ltd.***[2] it was held that Modi Rubber was now entitled to the benefit of the provisions of Section 22 of the SICA. It was also held that a winding up order passed under the Companies Act, 1956 (for short 'the

[1] (1998) 5 SCC 554
[2] (2000) 5 SCC 515

Companies Act') is not the culmination of the proceedings pending before the Company Court. The final order to be passed in the winding up proceedings is an order of dissolution of the company under Section 481 of the Act.

9. Under the circumstances, the High Court set aside the winding up order passed by the Company Court and further directed that the proceedings before him shall remain in abeyance till the disposal of proceedings before the authorities under the SICA.

10. Leave to appeal against the judgment and order of the High Court was granted on 24th February, 2006 and the following order passed:

> "Leave granted.
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> Whether the Board of Industrial and Financial Reconstruction should entertain a reference made by a sick company in terms of Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985, ('SICA') after the company had already been directed to be wound up by a Company Judge in a matter which was pending before the Court for 2 years, vis-à-vis Section 22 of the Act is in question in this appeal, which arises out of the judgment and order dated 20.05.2004 passed by the Division Bench of the High Court of Judicature at Allahabad in Special Appeal No. 420/2004. Our attention has been drawn to a Division Bench decision of this Court in **Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Ltd., (2000) 5 SCC 515,** wherein this Court opined that the reference in terms of Section 15 of SICA can be made even after passing of the winding up order.

> The correctness of the ratio of the said decision has been questioned before us. We are inclined to think that there is merit in the challenge to the correctness of the view taken therein. We are also of the opinion that the proposition of law stated in the said decision of this Court may require reconsideration having regard to Section 20 of the Act and the object and scope of SICA vis-à-vis the provisions of the Companies Act. We are, therefore, of the opinion that the matter be referred to a larger Bench. Let the records of the case be placed before Hon'ble the Chief Justice of India for constitution of a larger Bench.
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> Hearing of the appeal is expedited. Liberty to mention."

It is under these circumstances that this appeal has been placed before us for consideration.

11. During the hearing of this appeal, further facts were placed before us. It was pointed out that the reference made by Modi Rubber to the BIFR was challenged by Madura Coats by filing Civil Misc. Writ Petition No. 17870 of 2004 in the Allahabad High Court. A view was taken by the High Court in its order dated 10th May, 2004 that the writ petition was premature and the maintainability of the reference could be raised by Madura Coats before the BIFR. Under the circumstances, the High Court did not consider it proper to entertain the writ petition which was accordingly dismissed.

12. Following upon the order passed by the High Court, Madura Coats moved an application before the BIFR on or about 12th January, 2006 in which it was prayed that Madura Coats be impleaded as a party in the proceedings and that its dues with interest thereon be included as a pressing creditor in the rehabilitation scheme. It is not clear whether any formal order was passed impleading Madura Coats in the proceedings before the BIFR, but in any event, it does appear from the record that Madura Coats participated in the proceedings before the BIFR.

13. We were told by learned counsel for Modi Rubber that before the BIFR a Draft Rehabilitation Scheme (DRS) for revival of the company was filed and advertised on 18th January, 2008. In connection with the DRS, the summary record of proceedings of the BIFR of 8th April, 2008 notes the presence of the advocate for Madura Coats in paragraph 7.20 and records the submission that Madura Coats does not agree for a settlement at 30% of the admitted amount as proposed. The BIFR also noted in paragraph 7.38.1 that objections to the DRS were raised by some employees, unsecured creditors and a few governments/government

agencies. It was also noted that unsecured creditors have to fall in line with the provisions of the rehabilitation scheme in the interest of revival of Modi Rubber.

14. Paragraph 7.38.1 of the summary record of proceedings read as follows:-

> "7.38.1 Objections were raised by some employees, unsecured creditors and a few Governments/Government agencies. It is very important that the interest of the employees is safeguarded and employment is protected while reviving the company. The terms for settlement of the dues of the workers should not be inferior to the terms offered for settlement of the dues of the secured creditors. Unsecured creditors have to fall in line with the provisions of the rehabilitation scheme in the interest of revival of the company in respect of Government/Government agencies who objected to the DRS, the words "to consider" have to be stipulated in the DRS. DB and Arsec (I) Ltd., the two secured creditors who raised objections have agreed to settle the matter with the company."

15. The BIFR finally issued certain directions, one of which was sanctioning the rehabilitation scheme under Section 19(3) and 19(4) of SICA for implementation by all concerned. As far as the unsecured creditors are concerned (and this includes Madura Coats), the rehabilitation scheme provided for acceptance of the outstanding dues as per one of the following three options:

> "a) To accept 30% of the principal outstanding as full and final payment. The payment shall be made within 3 months of the sanction of the scheme by the BIFR; or
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> b) To accept 40% of the principal outstanding as full the final payment. The payment shall be made in 3 equal annual installments from the cut off date (i.e. 31.03.2008). The first installment shall be payable within 3 months of the sanction of the scheme by the BIFR; or
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> c) To accept 50 % of the principal outstanding as full and final payment. The payment shall be made in one go at the end of 3rd year from the sanction of the Scheme by the BIFR."

We were told that Madura Coats did not challenge the rehabilitation scheme.

16. Under the circumstances, Modi Rubber addressed a letter to Madura Coats on 3rd September, 2008 informing the approval and sanction of the rehabilitation scheme by the BIFR and indicating the three options available to Madura Coats for clearing the outstanding dues. It seems that no reply was received by Modi Rubber to this communication. Accordingly, Modi Rubber sent another communication to Madura Coats on 12th August, 2011 reminding it to accept the settlement. In this communication, it was also mentioned that one raw material supplier had challenged the settlement terms by filing an appeal before the Appellate Authority for Industrial

and Financial Reconstruction but that it had lost in the appeal.

17. Learned counsel for Modi Rubber brought to our notice a few orders passed by the Company Court after the approval and sanction of the rehabilitation scheme. These orders which have been placed on record suggest that Modi Rubber was willing to pay the dues to Madura Coats in terms of the rehabilitation scheme and that the liability, according to Modi Rubber was Rs. 2.73 crores while according to Madura Coats the liability was more than Rs. 4.00 crores. By an order dated 16th November, 2011 Modi Rubber was directed by the Company Court to pay an amount of Rs. 1.50 crores to Madura Coats within one month. This payment of more than 50% of the dues was made to Madura Coats by a cheque on 15th December, 2011. We were told by learned counsel for Modi Rubber that the cheque was encashed by Madura Coats on 19th December, 2011.

18. The correctness of the impugned judgment and order will need to be tested on these facts and the law placed before us in connection with the reference made to

the larger Bench. On hearing learned counsel for the parties on these facts, we are of the opinion that different situations can arise in the interplay between the Companies Act and the SICA in the matter of winding up of a company and these situations have already been dealt with by this Court at one time or another.

19. One such situation is where winding up proceedings are pending and a reference is made to the BIFR. This situation occurred in ***Real Value*** where winding up proceedings were pending and the appointment of a provisional liquidator was under challenge. At that stage, steps were taken by ***Real Value*** for making a reference under Section 15 of the SICA to the BIFR. Under these circumstances, one of the questions agitated for consideration by this Court was whether on the registration of a reference, the Division Bench of the High Court could pass orders in an appeal against an interim order passed by the Company Court.

20. While referring to the provisions of the SICA, this Court concluded that once a reference is registered after scrutiny, it is mandatory for the BIFR to conduct an

enquiry. It was also held that the SICA is intended to revive and rehabilitate a sick industry before it can be wound up under the Companies Act. The legislative intention is to ensure that no proceedings against the assets of the company are taken before any decision is taken by the BIFR because if the assets are sold or the company is wound up, it may become difficult to later restore the *status quo ante*. It was held that it is for this reason that the enquiry under Section 16 of the SICA must be treated to have commenced as soon as the registration of the reference is completed after scrutiny and that action against the company's assets must remain stayed in view of Section 22 of the SICA till a final decision is taken by the BIFR. This is what this Court said in paragraph 23 of the Report:

> "It is argued that if the reference before the BIFR is only at the stage of registration under Section 15, then Section 22 is not attracted. This contention, in our opinion, has no merit. In our view, when Section 16(1) says that the BIFR can conduct the inquiry "in such manner as it may deem fit", the said words are intended only to convey that a wide discretion is vested in the BIFR in regard to the procedure it may follow for conducting an inquiry under Section 16(1) and nothing more. In fact, *once the reference is registered after scrutiny*, it is, in our view, mandatory for the BIFR to conduct an inquiry. If one looks at the format of the reference as prescribed in the Regulations, it will be clear that it contains more than fifty columns regarding extensive financial details of the Company's assets, liabilities, etc. Indeed, it will be practically impossible for the BIFR to reject a reference outright

> without calling for information/documents or without hearing the Company or other parties. Further, the Act is intended to revive and rehabilitate sick industries before they can be wound up under the Companies Act, 1956……. It is also the legislative intention to see that no proceedings against the assets are taken before any such decision is given by the BIFR for in case the Company's assets are sold, or the Company wound up it may indeed become difficult later to restore the status quo ante. Therefore, in our view, [the High Court of Allahabad, the High Court of Andhra Pradesh and the High Court of Himachal Pradesh] are right in rejecting such a contention and in holding that the inquiry must be treated as having commenced as soon as the registration of the reference is completed after scrutiny and that from that time, action against the Company's assets must remain stayed as stated in Section 22 till final decisions are taken by the BIFR."

21. This Court also referred to the Regulations framed under the SICA and in connection therewith it was held that after the amendment of Regulation 19 with effect from 24th March, 1994 once a reference is registered and it becomes mandatory to simultaneously call for information or documents from the informant and such a direction is given, then an enquiry under Section 16(1) of the SICA must, for the purposes of Section 22 thereof, be deemed to have commenced. This is what this Court held in paragraph 30 of the Report:

> "There can, therefore, be no difficulty in holding that after the amendment to Regulation 19 w.e.f. 24-3-1994, once the reference is registered and when once it is mandatory *simultaneously* to call for information/documents from the informant and such a direction is given, then inquiry under Section 16(1) must - for the

> purposes of Section 22 - be deemed to have commenced. Section 22 and the prohibitions contained in it shall immediately come into play."

22. Another facet of this situation is when proceedings are pending both before the BIFR and the Company Court but no order of winding up has been passed against the company. In such a situation (though we are not directly concerned with it) this Court took the view in ***Tata Motors Ltd v. Pharmaceutical Products of India Ltd***[3] that the provisions of SICA would prevail over the provisions of the Companies Act. In that case a scheme of rehabilitation of the company was prepared and presented before the High Court under Section 391 of the Companies Act while proceedings were pending before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) under the SICA. The High Court approved the scheme of compromise and arrangement and in view of the order of the High Court the AAIFR also approved the scheme. This Court relied upon ***NGEF Ltd. v. Chandra Developers (P) Ltd.***[4] to conclude that the Company Court and the BIFR do not exercise concurrent jurisdiction. "Till the company remains a sick

[3] (2008) 7 SCC 619
[4] (2005) 8 SCC 219

company having regard to the provisions of sub-section (4) of Section 20 [of the SICA], BIFR alone shall have jurisdiction as regards sale of its assets till an order of winding up is passed by a Company Court." Since the provisions of the SICA would prevail over the Companies Act, this Court held that the High Court could not have exercised jurisdiction and approved the scheme of compromise and arrangement prepared under Section 391 of the Companies Act.

23. Another situation is where a winding up order is passed by the Company Court but it is stayed in appeal. In ***Rishabh Agro*** the company was ordered to be wound up but this order was stayed by the Division Bench of the concerned High Court. Thereafter the company made a reference to the BIFR under Section 15 of the SICA.

24. Under these circumstances, one of the contentions urged by learned counsel for the respondents in that case was that an unscrupulous litigant, after suffering an order of winding up, could approach the BIFR and get the winding up proceedings stayed. This Court observed that such a grievance might be justified but if a provision of law is

misused and subjected to abuse of the process of law, it is for the Legislature to take appropriate steps.

25. With regard to the merits of the controversy before it, this Court took the view that it could not be said that the provisions of Section 22 of the SICA would not be attracted after an order of winding up is passed. While referring to this Section it was held that there was no doubt that the provision would be applicable even after the winding up order is passed and no proceedings even thereafter could be taken under the Act. It was noted that a winding up order passed under the Act is not the culmination of the proceedings before the Company Court but is in effect the commencement of the process which ultimately would result in the dissolution of the company in terms of Section 481 of the Act. This is what this Court had to say in paragraphs 9 and 11 of the Report:

> "9. It is true that for invoking the applicability of Section 22 it has to be established that an inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or sanctioned scheme is under implementation or an appeal under Section 25 to an industrial company is pending. But it cannot be said that despite the existence of any of the aforesaid exigencies the provision of Section 22 would not be attracted after the order of winding up of the company is passed. The words
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> > "no proceeding for winding up of the industrial company or for execution, distress or the like against

> any of the properties of the industrial company or for the appointment of receiver in respect thereof shall lie or *be proceeded with further*",
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> leave no doubt in our mind that the effect of the section would be applicable even after the winding-up order is passed as no proceeding even thereafter can *be proceeded with further* under the Companies Act. The High Court appears to have not taken note of the aforesaid words i.e. *to be proceeded with further*. As the impugned judgment is based upon wrong assumption of the provision of law and completely ignoring the vital words noticed hereinabove, the same cannot be sustained.
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> 10. xxxxx
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> 11. It may also be noticed that winding-up order passed under the Companies Act is not the culmination of the proceedings pending before the Company Judge but is in effect the commencement of the process. The ultimate order to be passed in such a petition is the dissolution of the Company in terms of Section 481 of the Companies Act."

26. In view of the above, this Court was of opinion that the interim order passed by the High Court after the reference was registered by the BIFR could not be sustained and deserved to be set aside.

27. From the above it is quite clear that different situations can arise in the process of winding up a company under the Companies Act but whatever be the situation, whenever a reference is made to the BIFR under Sections 15 and 16 of the SICA, the provisions of the SICA would come into play and they would prevail over the provisions of the Companies Act and proceedings under the Companies Act must give way to proceedings under the SICA.

28. In this state of the law, in so far as the present appeal is concerned, we do not find any error in the view taken by the High Court in concluding that the winding up proceedings before the Company Court cannot continue after a reference has been registered by the BIFR and an enquiry initiated under Section 16 of the SICA. The present appeal is squarely covered by the primacy given to the provisions of the SICA over the Companies Act as delineated in ***Real Value***, ***Rishabh Agro*** and ***Tata Motors***. Consequently, the High Court was right in concluding that the provisions of Section 22 of the SICA would come into play and that the Company Court could not proceed further in the matter pending a final decision in the reference under the SICA.

29. Quite apart from the above, we are also of opinion that in view of the subsequent developments and the fact that Madura Coats had participated before the BIFR and has taken its dues in terms of the rehabilitation scheme approved and sanctioned by the BIFR, nothing really survives for consideration in this appeal. Strictly speaking, we have merely undertaken an academic exercise pursuant

to a reference made to a larger Bench.

30. As far as the reference is concerned we are of the view that ***Real Value*** and ***Rishabh Agro*** do not require any reconsideration. ***Tata Motors*** was decided by a Bench of three Judges and we see no reason to differ from the view taken therein that the provisions of SICA prevail over the provisions of the Companies Act.

31. The appeal is without merit and is dismissed.

……..……..J

(Jagdish Singh Khehar)

……J

(Madan B. Lokur)

……J

(C. Nagappan)

New Delhi;

June 29, 2016