

# Dispute Resolution Hotline

January 05, 2015

## SUPREME COURT CLARIFIES: RECOVERY APPLICATION BY BANKS STAYED AGAINST SICK COMPANY

- A three judge bench of the Supreme Court holds that the immunity under Section 22 of Sick Industrial Companies (Special Provisions) Act, 1985 would also extend to a recovery application made under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993;
- Supreme Court states that the principle of giving effect to the intention of legislature is to be given precedence over the doctrine of *generalia specialibus non derogant*;
- Bank and Financial Institutions cannot proceed against a Sick Company.

### INTRODUCTION

The Supreme Court recently in *KSL and Industries Limited ("KSL") v. M/s Arihant Threads Limited ("Arihant") and Others*<sup>1</sup> has held that the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA") shall prevail over the provision for the recovery of debts in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDBFI"). It has been observed that the bar under Section 22 of the SICA is very much applicable to a recovery application filed under RDBFI.

### BACKGROUND

The appeal was placed before the three judge bench of the Supreme Court by way of reference made by a two judge bench of the Supreme Court speaking through C.K Thakker and Altamas Kabir JJ. In the two judge bench judgment under consideration, Justice Thakker had opined that in view of an overriding clause in Section 34 of RDBFI, the provisions of RDBFI is to be given priority and primacy over SICA as Section 34 has been inserted through a latter enactment. However, Justice Altamas Kabir observed that in view of a specific exception to Section 34 (1) carved out in Section 34 (2) which states that the provisions of RDBFI Act shall be in addition to and not in derogation of SICA, it is clear that the intention of legislature was that SICA would prevail over RDBFI.

### FACTUAL MATRIX

Arihant had set up an export oriented spinning unit for manufacturing cotton yarn in Amritsar District in the State of Punjab. It had taken a loan by way of foreign currency and a working capital to the tune of INR 93.1 million from Industrial Development Bank of India ("IDBI"). IDBI filed an application before the Debt Recovery Tribunal, Chandigarh ("DRT") for recovery of the debt when Arihant failed to repay loan installments. DRT ordered an ex-parte order in favour of IDBI directing a recovery of INR 252.6 million along with interest at the rate of 7.8 % per annum and in the event of failure on the part of Arihant to pay the aforementioned amount, IDBI was entitled to sell the mortgaged property of Arihant. Pursuant to the failure of Arihant to pay, the recovery officer fixed the reserve price of the mortgaged properties at INR 125 million and KSL was declared to be the highest bidder in the auction sale. Arihant filed an appeal before the DRT seeking to set aside the auction sale. DRT-I Delhi allowed the prayer of Arihant subject to Arihant making a payment of a certain amount.

Arihant *inter alia* filed an appeal before the Debt Recovery Appellate Tribunal, Delhi ("DRAT") against the order of the DRT-I Delhi. In the meanwhile, Arihant invoked the provisions of SICA and applied for a reference to the Board of Industrial and Finance Reconstruction ("BIFR"). Subsequent to which the DRAT confirmed the auction sale in favor of KSL. Arihant moved the Delhi High Court vide writ petitions against the order of the DRAT which was allowed by the Delhi High Court on the ground that in view of the express bar of Section 22 of SICA, the recovery proceedings cannot be pursued against Arihant and no order ought to have been passed by the DRAT. The High Court's Order was challenged in the Supreme Court by KSL.

### ISSUES

- Whether the bar under Section 22 of the SICA would be applicable in view of a non-obstante clause in Section 34 of the RDBFI?
- Whether the doctrine of *generalia specialibus non derogant* is to be made applicable while interpreting two special statutes containing non-obstante clauses?

### JUDGMENT AND JUDICIAL REASONING

The three judge bench of the Supreme Court speaking through S.A Bobde J has held that the provisions of Section 22 of SICA would prevail over the provision for the recovery of debts in the RDBFI and that the doctrine of *generalia specialibus non derogant* is not to be given a mechanical application; rather the interpretative rule of giving effect to the intention of the legislature is to be made applicable.

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The reasoning of the Supreme Court is stated as follows:

- SICA confers wide powers on the BIFR like providing for amalgamation of the sick industrial company with a transferee company, sale or lease a part of the industrial undertaking, the rationalization of managerial personnel, supervisory staff and workmen and other preventive and remedial measures<sup>2</sup> and hence Section 22 of SICA is to be given a purposive and wider interpretation in light of the purpose of its enactment being to be able to adopt timely preventive, ameliorative and remedial measures to rehabilitate sick industrial companies.<sup>3</sup>
- In view of the express mention of no proceedings for “execution, distress or the like against any of the properties of the industrial company” and “no suit for recovery of money or for enforcement of any security” in Section 22 of the SICA, it is clear that the legislative intent is to protect the properties of the sick industrial company from being proceeded against by its creditors or levy execution of distress against its creditors.<sup>4</sup>
- Section 34 (2) of the RDDBFI is in the nature of an exception to Section 34 (1) by virtue of a saving provision in Section 34 (1) and it provides that the provisions of RDDBFI and the rules made under it shall be in addition to and not ‘in derogation of’<sup>5</sup> SICA. Hence, one has to give effect to the intention of the legislature by interpreting Section 22 so as to preserve the power of the BIFR under SICA and save the proceedings from being overridden by a latter enactment.
- The Supreme Court relied upon the observations made in *LIC v. D.J Bahadur*<sup>6</sup> wherein it has been held that in determining whether a statute is a special or a general one, the focus must be on the principal subject-matter plus the perspective. For certain purposes, an act may be general and for certain other purposes it may be special. S.A Bobde J. observed that the purpose of SICA is to provide for ameliorative measures for reconstruction of sick companies whereas that of RDDBFI is to provide for speedy recovery of debts due to banks and financial institutions. However, with specific reference to the purpose of reconstruction of sick companies, SICA must be held to be special law.

## ANALYSIS

The three judge bench of the Supreme Court has applied the purposive rule of interpretation and has not gone by the general rule of interpretation that in case a non-obstante clause is present in two enactments, the later Act must prevail.<sup>7</sup> However, the implications of the judgment are that the second generation banking reforms brought about by enactment of RDDBFI in order to reduce the Non-Performing Assets could be derailed. A company which is unable to pay its debts may apply to BIFR for taking remedial measures and in that event the bar of Section 22 would apply resulting into suspension of recovery proceedings.

However, it will be interesting to see whether the bar of SICA would also extend to a proceeding under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (“**SARFAESI**”) particularly when there is no exception to the non- obstante clause in Section 35 of SARFAESI. In view of Section 37 of SARFAESI whereby it is stated that the provisions of SARFAESI would be in addition to and not in derogation of RDDBFI, the bar of Section 22 of SICA may also extend to a proceeding under SARFAESI following the reasoning adopted by the three judge bench of the Supreme Court.

– **Satish Padhi & Vyapak Desai**

You can direct your queries or comments to the authors

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<sup>1</sup> [2014] 123 CLA 198 (SC)

<sup>2</sup> See Section 18 of SICA

<sup>3</sup> See Statement of Objects and Reasons of SICA

<sup>4</sup> Supra note 1, para 29

<sup>5</sup> Black’s Law Dictionary has defined Derogation to mean partial repeal or abrogation of law by a latter act that limits its scope or impairs its utility and force. Ibid, para 37

<sup>6</sup> (1981) 1 SCC 315

<sup>7</sup> See Allahabad Bank v. Canara Bank, (2000) 4 SCC 406, Maharashtra Tubes Ltd v. State Industrial & Investment Corpn. Of Maharashtra Ltd, (1993) 2 SCC 144

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