

Reference to BIFR of sickness will halt proceedings before the DRT

In a jolt to banks looking at speedy recovery, a three Judge Bench of the Supreme Court, in a recent judgment dated October 27, 2014, in the case of **KSL & Industries Ltd., vs Arihant Threads Ltd., & Ors.**, held that in the event of an industrial company filing reference before the Board for Industrial and Financial Reconstruction (“BIFR”) under the Sick Industrial Companies (Special Provisions) Act, 1985 (“SICA”), then till the reference is pending or unless permitted by the BIFR, Banks cannot proceed with recovery proceedings including an Original Application before the DRT under the Recovery of Debts Due to Banks & Financial Institutions Act, 1993 (“RDDB Act”). The matter came to be referred to a three Judge Bench because of a difference of opinion on this point between two judges.

Section 22 of SICA only provides that no *proceedings* for execution, distress or the like against any of the properties of the industrial company and no *suit* for the recovery of money or for the enforcement of any security against the sick industrial company shall lie or be proceeded with further, except with the consent of the BIFR, pending a reference before the BIFR or AAIFR. Though in specific terms there is no reference made to an original application filed before the DRT under the RDDB Act for recovery of money, the Supreme Court held that a purposive interpretation would have to be adopted. It noted that when the RDDB Act came to be enacted in 1993 only after the SICA (in 1985) and therefore the absence of any specific reference to an Original Application/Recovery Proceeding filed before the DRT under the RDDB Act cannot be considered as having the effect of excluding it from within the scope of Section 22 of SICA. The Court held that in view of the Original Application under the RDDB Act ultimately leading to a recovery certificate being issued and proceedings for an attachment / sale in the course of execution of that recovery certificate taking place, proceedings before the DRT also ought to be covered under the provisions of Section 22 of SICA.

Emphasis was placed on the provisions of Section 34(2) of the RDDB Act which provides that the provisions of the RDDB Act or the Rules thereunder shall be in addition to, and not in derogation of the laws mentioned therein wherein a specific mention of SICA is made. The Supreme Court observed that the term “not in derogation” clearly expressed the intention of the Parliament not to detract from or abrogate the provisions of SICA in any way and in effect it meant that the Parliament intended that the proceedings under SICA were to go on and for that purpose further intended that all other proceedings against the sick industrial company and its assets and properties should be stayed pending the process of reconstruction.

The Supreme Court found no contrary intention in the RDDB Act to exclude a recovery/original application under the RDDB Act from the purview of Section 22 of the SICA and accordingly, opined that indeed there could be no reason for such exclusion since the purpose of the Section 22 in SICA is to protect the properties of a sick industrial company, so that they may be dealt with in the best possible way for the purpose of its revival by the BIFR.

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It may be difficult to find fault with the judgment itself, especially considering the object of SICA and the provisions of RDDB Act, which specifically state that they were in addition to the provisions of SICA and not in derogation thereof. The Court could also have sustained its reasoning by making a reference to the provisions of the (Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act")), where specific provisions have been made by which the secured creditors of a sick industrial Company representing not less than 3/4th in value of the amount outstanding against financial assistance disbursed, could always defeat any attempt by the sick industrial company to frustrate recovery by approaching BIFR, whereas such provisions are not available under the RDDB Act.

That SICA has been abused to evade recovery, delay and prolong proceedings for recovery is a view which has gained wide acceptance and has led the Government to consider repealing SICA. The Sick Industrial Companies (Special Provisions) Repeal Act, 2003 has not yet come into force and shall come into force upon formation of the National Company Law Tribunal (NCLT) under the Companies Act, 2013. Section 434(1)(d) of the Companies Act, 2013 provides that on such date as may be notified by the Central Government in this behalf, any appeal before AAIFR or reference pending before BIFR under SICA shall stand abated and the sick industrial company may make reference to NCLT under the Companies Act, 2013 within 180 days from the date of such abatement.

In view of such impending repeal and also in view of the provisions under the SARFAESI Act empowering Banks to defeat any attempt by the borrower to take undue shelter under SICA, perhaps Banks may not feel as affected by this judgment as they would otherwise have been. However, till SICA is repealed, this judgment would still enable some of the borrowers to delay and protract recovery proceedings initiated before the DRT under the RDDB Act by merely filing a reference to the BIFR, especially in those cases where Banks feel the need to approach the DRT rather than proceeding under the SARFAESI Act or where there is insufficient security for realisation of the entire debts by proceeding under the SARFAESI Act.

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