

(2006) 08 OHC CK 0035

In the Orissa High Court

Case No : Writ Petition (C) No. 8567 of 2006

Sri Bireswar Das Mohapatra and Another

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 17-08-2006

Acts Referred:

Companies Act, 1956 — Section 439, 442, 444, 446, 529A

Constitution of India, 1950 — Article 226, 227

Criminal Procedure Code, 1973 (CrPC) — Section 198(13)

Income Tax Act, 1961 — Section 72, 72A

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 18, 20, 34, 34(1)

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 20, 20(1), 20(2), 20(3)

Citation : (2006) 2 OLR 423

Hon'ble Judges : I. Mahanty, J;A.K. Ganguly, J

Bench : Division Bench

Advocate : Kaniska Rath, I.C. Dash, D. Nanda and C.M. Singh, for the Appellant; D.P. Sarangi, P. Prusty, C.R. Das and M. Sarangi, for the Respondent

Final Decision : Allowed

Judgement

A.K. Ganguly, J.—This writ petition has been filed by the guarantors to the loanee who obtained loan from the State Bank of India, Bhubaneswar, Industrial Estate Branch (hereinafter referred to as the "SBI"). The petitioners are also erstwhile Managing Director and Director of M/s. East End Engineers (P) Ltd., which is a Company under the Companies Act and the loanee from the Bank.

2. The material facts of the case are the said Company, namely, M/s. East End Engineers (P) Ltd. took loans from SBI after executing security documents and creating equitable mortgage of immovable property supported by the guarantee of the petitioners. In order to realise its loans, SBI filed on 28.7.1993 a suit in the Civil Court being TMS No. 207 of 1993. Thereafter the said company was declared sick and under the provisions of SICA the BIFR made a recommendation

u/s 20 of SICA for its winding up. On the basis of such recommendation by the BIFR, winding up proceeding commenced before the learned Company Judge of this Court. The final winding up order has not yet been passed. In the said winding up proceeding, the Official Liquidator and Registrar of Company have been noticed and one Mahendra Sarangi, posted as J.G.M. Recovery, Legal Affairs and Valuation, was appointed as the Officer of the Operating Agency in order to assist the Official Liquidator. Direction has also been given by the learned Company Judge on the Official Liquidator for taking steps for realization of the assets and that proceeds are to be deposited in the High Court for its distribution in accordance with the provisions of Section 529A and other provisions of the Companies Act. A copy of the said order is annexed to the writ petition. After constitution of the DRT, the suit filed by the SBI (TMS 207/1993) was transferred to DRT and proceedings have been taken before DRT.

3. Initially a writ petition, challenging DRT proceeding, was filed before this High Court. That writ petition was disposed of by a Division Bench of this Court by order dated 20.2.2004 directing the petitioner to raise the question of maintainability before the DRT and the DRT was directed to consider the same on its own merit and in accordance with law and then dispose of the same. Pursuant to the said order, the petitioner filed a preliminary objection taking therein a specific point that pursuant to the recommendation of BIFR u/s 20(2) of the SICA, a winding up proceeding was initiated before the Company Judge of this Court. The Bank, as secured creditors, participated in the said proceedings. Ultimately by order dated 27.3.1995 the learned Company Judge passed an order directing the initiation of a winding up proceeding and thereafter the Official Liquidator was appointed on 27.3.1995 for taking possession of the assets of the company and the said winding up proceeding is still continuing. It was submitted that the filing of the original suit by the Bank before the Civil Court was in contravention of Section 22 of SICA as such the proceeding before the DRT is not maintainable.

4. The DRT ultimately by its order dated 16.12.2004 in MA No. 202 of 2004 arising out of TC No. 140 of 2001 held that the preliminary objection will be decided in the main OA and not separately. Against the said order another writ petition was filed being Writ Petition No. 1373 of 2005 and ultimately the said writ petition was disposed of on 16.5.2006 by directing the DRT to decide the question of maintainability first before proceeding with the original application. Pursuant thereto, the DRT by its order dated 15.6.2006 dismissed the preliminary objection. Against that order this writ petition has been filed.

5. Assailing the order dated 15.6.2006, the learned Counsel on behalf of the petitioners urged that in the instant case winding up proceeding being Company Case No. 10 of 1994 has not been initiated under Sections 439/444 of Companies Act but this was done in view of the provision of Section 20 of SICA. The learned Counsel further submitted that Section 20(2) of SICA provides that High Court shall, on the basis of the opinion of the Board, order winding up of

the sick industrial company and may proceed or cause to proceed with the winding up of the sick industrial company in accordance with the provisions of the Companies Act, 1956. The learned Counsel also submitted that in the instant case in accordance with the provision of Section 20(2) of SICA, the Company Judge of the High Court has appointed an officer of the operating agency to assist the Official Liquidator in the winding up of the company.

6. Relying on the statutory provisions of SICA and the order of commencement of winding up by the learned Company Judge of the High Court, the learned Counsel has drawn the attention of this Court to the decision of the Apex Court in the case of NGEF Ltd. Vs. Chandra Developers Pvt. Ltd. and Another, .

7. In the said judgment the learned Judges of the Apex Court held that provisions of SICA would prevail over those of the Companies Act. It was also held that the provisions of SICA contain non obstante clauses and SICA is a special statute and a complete code in itself. The learned Judges also held that the procedure laid down under the Companies Act would be applicable in such winding up proceeding which is initiated on the recommendation of the BIFR or AAIFR, as the case may be, but such power of the Company Court is subject to Section 20 of SICA, Sub-section (4) of which contains a non obstante clause. In order to properly appreciate this point, this Court sets out hereinbelow the provision of Section 20 of SICA:

20. Winding up of sick industrial company - (1) Where the Board, after making inquiry u/s 16 and after consideration of all the relevant facts and circumstances and after giving an opportunity of being heard to all concerned parties, is of opinion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof is not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record and forward its opinion to the concerned High Court.

(2) The High Court shall, on the basis of the opinion of the Board, order winding up of the sick industrial company and may proceed and cause to proceed with the winding up of the sick industrial company in accordance with the provisions of the Companies Act, 1956 (1 of 1956).

(3) For the purpose of winding up of the sick industrial company, the High Court may appoint any officer of the operating agency, if the operating agency gives its consent, as the liquidator of the sick industrial company and the officer so appointed shall, for the purposes of the winding up of the sick industrial company, be deemed to be, and have all the powers of, the official liquidator under the Companies Act, 1956 (1 of 1956).

(4) Notwithstanding anything contained in Sub-section (2) or Sub-section (3), the Board may cause to be sold the assets of the sick industrial company in such manner as it may deem fit and forward the sale proceeds to the High Court for orders for distribution in accordance with the provisions of Section 529A, and

other provisions of the Companies Act, 1956 (1 of 1956).

8. It was urged once winding up proceeding commences, then having regard to the phraseology of Section 20 of SICA, BIFR is the authority which continues to remain the custodian of the assets of the company till a winding up order is passed by the High Court.

9. Section 32 of the SICA, which contains an overriding clause is relevant for deciding the controversy in this case. Section 32 of SICA runs as under:

32. Effect of the Act on other laws. - (1) The provisions of this Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976) for the time being in force 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 this Act.

(2) Where there has been under any scheme under this Act an amalgamation of a sick industrial company with another company, the provisions of Section 72A of the Income Tax Act, 1961 (43 of 1961), shall, subject to the modifications that the power of the Central Government under that section may be exercised by the Board without the Central Government under that section may be exercised by the Board without any recommendation by the specified authority referred to in that section, apply in relation to such amalgamation as they apply in relation to the amalgamation of a company owning an industrial undertaking with another company.

10. RDBI also contains an overriding clause, but the overriding clause in RDBI is subject to the provision of SICA. The overriding provision in Section 34 of the RDBI Act is as follows:

34. Act to have overriding effect. - (1) Save as provided under Sub-section (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therein contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act

(2) The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the Unit Trust of India Act, 1963 (52 of 1963), the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984), the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and the Small Industries Development Bank of India Act, 1989 (39 of 1989).

11. A perusal of Section 34 of RDBI makes it clear that the same is in addition to and not in derogation of the various Acts and one of them is SICA.

12. The learned Counsel for the Bank, on the other hand, raised the bar of

alternative remedy against entertaining this writ petition and also the locus of the writ petitioners. The learned Counsel submitted that the order which has been impugned in the writ petition is appealable u/s 20 of the RDBI and the petitioners should have filed the appeal instead of filing this writ petition. It is also stated that the writ petitioners participated in the proceeding in the DRT and the matter has been decided on merit. After being aggrieved by the said order, the petitioners cannot challenge the said order by filing this writ petition. In support of this contention reliance was placed on a few judgments.

13. The learned Counsel also argued the matter on merits by contending that the winding up proceedings are pending under Companies Act before this Hon'ble Court and the provisions of SICA cannot confer any authority on BIFR to control the proceedings under Companies Act. The learned Counsel further submitted that in the case of NGEF Ltd. (supra), the Supreme Court examined whether the Company Court can grant leave for sale of part of the properties of the company even before an order of winding up is passed or provisional liquidator is appointed and the Apex Court held that the Company Court has no such power to grant leave when no order of winding up is passed. The learned Counsel further submitted that in the instant case once the Company Court passed order for winding up on 27.3.1995 the sickness of the company comes to an end and the Company Court proceeding has to be carried on under the Companies Act. The present situation being like that, it was contended that SICA has no application whatsoever. The learned Counsel in that connection referred to the decision of the Supreme Court in the case of Allahabad Bank v. Canara Bank reported in AIR 2000 SC 1535 and held that DRT has exclusive jurisdiction to determine the debt and RDBI Act has overriding effect over the provisions of the Companies Act. Therefore, the proceedings filed by the Bank before the DRT are maintainable. The learned Counsel further submitted that the validity of the decision in the case of Allahabad Bank (supra) has not been diluted in so far as the proceeding before the DRT is concerned. It was also submitted that the Bank stands outside the winding up proceedings inasmuch as it filed the suit prior to the initiation of a winding up proceeding. As in the winding up proceedings the Bank was noticed it had appeared through its Advocate but it has not proceeded by filing its claim in the winding up proceeding. On the other hand the Bank is pursuing its remedy under the RDBI Act. The learned Counsel for the Bank argued that in the facts of the case the order of the DRT is valid and this Court should dismiss the writ petition and allow the proceeding of the DRT to continue.

These are the rival contentions of the parties.

14. The objection which has been raised by the learned Counsel for the Bank that the writ petitioners have no locus standi to file the petition is not well founded. The writ petitioners are guarantors and the equitable mortgage, which was created by the company, has been supported by the guarantee of the petitioners. The winding up proceeding which is pending before the Company Judge in this High Court is also in respect of the very same company in liquidation of which

the petitioners were Ex-Directors. It perhaps cannot be disputed that the liability of the guarantor being joint with the company, the bank has a right to proceed against the guarantor in order to recover its outstanding dues against the company. The guarantors are also parties to the proceeding, which has been filed by the Bank before the DRT. It is well settled that the guarantor's contract can be invoked by the bank if its claim against the principal debtor fails. In such a situation the guarantors have the locus to maintain the writ petition.

15. The questions, which have cropped up in this case cannot be answered by relying on the decision in the case of Allahabad Bank v. Canara Bank (supra). The learned Judges of the Supreme Court in Allahabad Bank considered the effect of RDBI Act on Companies Act and after such consideration held that the jurisdiction of DRT under RDBI Act is exclusive in respect of the recovery of debts by the bank and financial institution and that cannot be interfered by the Company Court u/s 442 read with Section 537 or u/s 446 of the Companies Act. In that context the learned Judges referred to Section 34(1) of RDBI Act and held that RDBI Act overrides other laws to the extent of inconsistency. It may be noted in this connection that in Allahabad Bank decision, the learned Judges had no occasion to deal with the impact of SICA on RDBI Act and the effect of Section 34(2) on RDBI Act.

16. Since the question of alternative remedy is raised in this matter, the same question may be dealt with also. In the case of Modern Syntax (I) Ltd. Vs. Debts Recovery Tribunal Jaipur and Others, a similar question of alternative remedy was raised. Chief Justice Dr. AR. Lakshmanan (as His Lordship then was) speaking for the Division Bench held where interpretation of intricate questions of law or an interpretation of provisions of Constitution are involved and the petition raises questions of jurisdiction of DRT, writ petition is directly maintainable before the High Court. The learned Chief Justice (as His Lordship then was) held that this question has been settled (by a catena of decisions of the Supreme Court) (See Paragraph 18 at 175 of the report).

17. The existence of an alternative remedy cannot and does not oust the jurisdiction of a writ Court. It operates as an automatic restraint on the exercise of discretion by the High Court. The existence of an alternative remedy only inhibits the exercise of discretion by the High Court, not its jurisdiction. Though certain exceptions have been carved out through judicial pronouncements, indicating where High Court can intervene despite the existence of an alternative remedy, but those are in the nature of guidelines for exercise of discretion by the High Court. They are, if I may say so, not exhaustive but are illustrative. In fact there is no straight jacket formula in this regard. Whether a High Court would exercise its discretion in the given facts of a case depends on its facts and the legal questions arising from those facts.

18. That is why even though Section 18 of RDBI Act creates a bar of jurisdiction on other Courts but it does not as obviously it cannot create any bar on the jurisdiction of the High Court under Articles 226 and 227 of the Constitution of

India in relation to matters u/s 17 of RDBI Act.

19. Reference in this connection may be made to the decision of the Supreme Court in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, . In paragraphs 20 and 21 of the judgment which is at page 27 of the report, the Supreme Court held when a specific challenge is raised to the jurisdiction of the statutory authority to entertain a matter and such authority decides that question, High Court has jurisdiction to ?examine the order and see whether jurisdictional issues are correctly decided. In such cases, High Court should not dismiss the writ petition without examining the correctness of the decision. In the instant case the jurisdiction of the DRT has been specifically questioned by the petitioners in view of the decision of the Supreme Court on its interpretation of various statutory provisions. The High Court by its order directed the DRT to decide those questions as preliminary issues relating to jurisdiction. Once that question has been decided by the DRT, as has been done in this case, it cannot be said that the High Court cannot examine the correctness of DRT's decision. In fact the impugned order has been passed under the direction of the High Court. The High Court's jurisdiction to give direction to the DRT has been accepted by the Bank. Then the Bank participated in the proceedings before the DRT to decide the question of its maintainability by the DRT. After doing that it cannot possibly be urged by the Bank that the High Court can now not examine the correctness of that decision even though there intricate questions of interpretation of statute relating to jurisdiction of DRT are involved.

20. Various judgments have been cited by the learned Counsel for the Bank in support of his arguments on alternative remedy. The first decision cited on this point was rendered in the case of State Bank of India v. Allied Chemical Laboratories and Anr. reported in 2005 (II) OLR 596. In that case pure questions of fact were involved and no question of jurisdiction was even raised. The High Court was not called upon to examine any decision of the DRT on any preliminary question involving conflict of jurisdiction created under various statutory provisions, as is the situation in the instant case. So the decision in the case of State Bank of India (supra) is clearly distinguishable.

21. The learned Counsel for the Bank relied on the decision of the Supreme Court in the case of Seth Chand Ratan Vs. Pandit Durga Prasad (D) by Lrs. and Others, in support of his argument on alternative remedy. But the facts in that case were quite different. There was a dispute over registration of the temple in question as a private trust. There was a reference by the Registrar to Civil Court and orders passed on such reference are appealable as decrees before Civil Court. Such appeals were filed and were dismissed. Thereafter filing of writ petition before the High Court over the same dispute is not proper. In that context, the Apex Court observed in paragraph 11, Page 2742 of the report as under"

If there are two modes of invoking the jurisdiction of the High Court and one of those modes has been chosen and exhausted it would not be a proper and sound

exercise of discretion to grant relief in the other set of proceedings in respect of the same order of the subordinate Court. The refusal to grant relief in such circumstances would be in consonance with the anxiety of the Court to prevent abuse of process as also to respect and accord finality to its own decisions.

It is clear from the facts discussed above that the ratio in Seth Chand Ratan has no application to this case.

22. The other decision cited on this point was rendered in the case of Mrs. Sanjana M. Wig Vs. Hindustan Petro Corporation Ltd., . That case stands on totally different facts. It was a case of termination of petroleum dealership agreement. The dealership also came to an end. So on those facts, a writ petition was not. considered entertainable. While saying so, the Apex Court held where a petition raises public law elements or raises questions arising out of public law functions, it is maintainable in the writ jurisdiction (see para 18). Going by this ratio, the present writ petition is maintainable.

23. A decision on the question of jurisdiction of DRT in the facts situation of the present case is not entirely free from difficulties specially when proceedings have been initiated under SICA and a winding up proceeding before the Company Judge of this Court has commenced on the recommendation of the BIFR.

24. The Division Bench Judgment of Madras High Court in the case of J.M. Malhotra and others Vs. Union of India and others, is pertinent. The Division Bench held that the opinions submitted by the BIFR from the basis for ordering winding up by the High Court. The Division Bench held that it may be open to the High Court to go into the correctness of the opinion submitted by BIFR and decide as to whether it should proceed with the winding up of the Sick Company in accordance with the provisions of the Company Act. So it cannot be said that it is obligatory on the High Court to order winding up of a sick industrial company once it receives an opinion from the BIFR. The said judgment of Division Bench was challenged before the Supreme Court and the Hon'ble Supreme Court by its judgment dated 7th April, 1995, reported in 1989 CompCas 609 SC , approved the judgment of the Division Bench. The Apex Court held that Sub-section (2) of Section 20 of SICA has to be construed to mean that the High Court in deciding the question of winding up of a company has to take into account the opinion of the Board forwarded to it under Sub-section (1) of Section 20. In doing so, the High Court will not abdicate its own function to determine the question of winding up. The Supreme Court held that if Sub-section (1) of Section 20 is so read in that case Sub-section (2) of Section 20 will not suffer any infirmity. By saying so the Supreme Court affirmed the view of the High Court.

25. In the instant case the High Court after applying its mind on the recommendation of BIFR has commenced a winding up proceeding and the details of which have already been stated above.

26. While dealing with the provisions of RDBI, the provisions of the Companies Act and State Financial Corporation Act a Three Judge Bench of the Supreme

Court in the case of Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another, have made some very pertinent observations. It appears that the matter was placed before the Three Judge Bench of the Supreme Court, as a Two Judge of the Supreme Court held that there is a conflict of opinion between the decision of the Supreme Court in the case of Allahabad Bank v. Canara Bank and Anr. reported in AIR 2000 SC 7535 and in the case of International Coach Builders Ltd. Vs. Karnataka State Financial Corpn., .

27. The Apex Court, in Rajasthan Financial Corporation (supra) in trying to resolve the said divergent views referred to various judgments of the Supreme Court and dealt with the case of Allahabad Bank (supra) in paragraph 14 of the judgment. In paragraph 14 the learned Judges held that in the case of Allahabad Bank (supra) the question of jurisdiction of DRT under RDBI Act and the Company Court under Company Act came up for consideration. Analyzing the judgment of the Supreme Court in the case of Allahabad Bank (supra), the Apex Court in the case of Rajasthan Financial Corporation (supra) came to the finding that the Court in the Allahabad Bank (supra) has not held that Section 529A of the Companies Act will have no application in a case where proceeding under the Recovery of Debt Act has been set in motion by the financial institution (see para 14 at page 761). Therefore, the learned Judges in paragraph 17 laid down the law by holding that once the winding up proceeding has commenced, as has been done in this case, and a liquidator is to be in charge of the assets of the company which is being wound up, the distribution of the proceeds of the sale of assets held at the instance of the financial institution under RDBI Act or State Financial Corporation Act (not applicable in this case) can only be in association with the Official Liquidator under the supervision of the Company Court. The Apex Court has gone into the extent of holding that the right of a financial institution or of the recovery tribunal to sell the assets cannot be taken away but the same stands restricted by the requirement of the Official Liquidator being associated with it and thus the Company Court has the right to ensure that the distribution of the assets in terms of Section 529A of the Companies Act takes place (See para 17 at page 726 of the report).

28. The learned judges in paragraph 18 at page 763 of the report have summarized the principle. The relevant portions whereof are set out below:

18 (i) A Debt Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation, through its Recovery Officer but only after notice to the Official Liquidator or the liquidator appointed by the Company Court and after hearing him.

xxx xxx xxx xxx (iv) In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the SFC Act are not set in motion, the concerned creditor is to approach the company Court for appropriate directions regarding the realization of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the

company-in-liquidation.

29. Now if we turn our attention to the two overriding clauses in SICA and RDBI Act, both of which have been set out above, this Court thinks that both the clauses require close examination. If both the overriding clauses are compared it will be seen that Section 32 of SICA is only subject to Foreign Exchange Regulation Act, Urban Land Ceiling Act and Section 72(a) of the Income Tax Act subject to amalgamation of sick industrial company with another company. Save and except that, the provisions of SICA have been given an overriding effect over any other law. In so far as Section 34 of RDBI Act is concerned, Section 34(1) is subject to Section 34(2) and Section 34(2) makes it clear that provision of RDBI Act shall be in addition to and not in derogation of various Acts and one of them is SICA.

30. It is, therefore, clear from a conjoint reading of Section 34 (1) and 34 (2) of RDBI Act that while framing the provisions of RDBI Act, a later law, the Parliament was conscious of the existence of SICA and did not want to give the provision of RDBI Act an overriding effect on the provision of SICA. The reasons for which are not far to seek.

31. SICA was enacted in 1985 with the purpose of utilizing productive industrial assets and affording protection of employment and optimising the use of the funds of the banks and financial institutions. For doing the same it was considered imperative to revive and rehabilitate the potentially viable sick industrial companies as quickly as possible. Thus the twin objects behind enacting SICA was to salvage the productive assets and realize the amounts due to the banks and financial institutions to the extent possible from the non-viable sick industrial companies through liquidation of those companies (see the Statement of Objects and Reasons of SICA). RDBI Act, a later law in point of time, was enacted in 1993 for the purpose of setting up special Tribunals with special powers of adjudication and speedy recovery of debts due to the banks and financial institutions. That is why in the later Act, i.e. RDBI Act, the overriding clause has been enacted subject to the provisions of SICA inasmuch as Parliament knew that SICA as an existing law, is operating in a field which has something in common with the area of operation of RDBI Act. Both these Acts are special statutes. Even then, the overriding clause in RDBI Act has been intentionally framed in such a manner as to avoid any conflict in the area of operation between these two Acts. The scheme of these two statutes, I think, are not mutually exclusive. So an interpretation of one which reduces the other to a "useless lumber" or a "dead letter" is to be avoided. In the later Act, that is in Section 34(2) of RDBI Act, the intention is manifest that both SICA and RDBI are to be harmoniously construed.

32. In this context the expression "in addition to and not in derogation of" occurring in Section 34(2) of RDBI assumes considerable relevance. In Black's Law Dictionary, Seventh Edition, the word "derogation" has been explained as "partial repeal or abrogation of a law by a later Act that limits its scope or

impairs its utility and force.

33. In Wharton's Law Lexicon the word "derogation" has been explained as follows:

Derogation, the act of weakening or restraining a former law or contract. It is an established rule that a man may not derogate from his own grant.

34. Same is the elucidation of the word "derogation" in Words and Phrases Volume 2 and it defines "derogation" as under:

The partial repeal or abolishing of a law, as by a subsequent Act which limits its scope or impairs its utility and force; as distinguished from "abrogation", which means the entire repeal and annulment of a law.

35. In view of the common area of operation between these two Acts, RDBI Act has not been enacted in derogation of SICA. That is why in the overriding clause in Section 34(2) of RDBI Act, the expression "in addition to and not in derogation of" has been used with reference to SICA. The expression "in addition to and not in derogation of" has come up for judicial determination before different Courts. Some of them may be noticed.

36. In the case of Yelland and Ors. v. Powell Duffryn Associated Olleries Limited reported in 1941 (I) KB 519 the Court of Appeal held that "not in derogation of" will have the same meaning "as in addition to" even though it may be tautology. Lord Justice Mac KINNON at page 525 of the Report opined "The truth is, as far as I can see, that "and not in derogation of" means nothing more than "shall be in addition to". The learned Judge held that the said expression was an "unnecessary tautology" but no other meaning can be given to that expression. Lord Justice LUXMOORE and Lord Justice DU PARCO also concurred with His Lordship's views.

37. The same expression also came up for consideration before the Apex Court in the case of P.C. Joshi and Another Vs. The State of Uttar Pradesh, . Similar expression "in addition to not in derogation of " occurred in Sub-section (13) of Section 198 of the Criminal Procedure Code. The learned Judges held that the said expression has come by way of ex abundanti cautela. The learned Judges held that expressions "in addition to" and "not in derogation of" mean the same thing. (See para - 7, Page 390 of the report).

38. From the aforesaid discussion it is clear that Section 34(2) of RDBI even by way of tautology emphasizes that its provisions are in addition to those of SICA. So it would be wrong to interpret that the provisions of RDBI Act override SICA. The correct interpretation is that both the statutes must be allowed to operate in their own field even though there is a bit of overlapping between the two.

39. From such harmonious construction it follows that the proceedings in respect of the said Company which are pending before DRT under RDBI Act and the pending winding up proceeding of the same company in liquidation before the

High Court which commenced on the recommendation of BIFR u/s 20 of SICA are not totally separable from each other. One cannot proceed independently of the other in so far as the sale of assets of the company in liquidation and the realization of the dues of its creditors including those of the bank are concerned.

40. In this connection the ratio in the case of NGEF Ltd. (supra) is of considerable importance. In NGEF Ltd., the Apex Court, inter alia, held:

(A) The company which is declared sick in terms of the provision of SICA Act continues to remain so unless it is directed to be wound up.

(B) As long as the company remains a sick company, BIFR alone, having regard to the provision of Sub-section (4) of Section 20 of the SICA, shall have the jurisdiction as regards sale of its assets till an order of winding up is passed by a Company Court.

(C) The power of the High Court under Sub-section (2) of Section 536 of the Companies Act does not ipso facto confer any jurisdiction on the Company Court to direct sale of assets of a sick company. The said power has to be exercised subject to the provision of special statute i.e. SICA.

(D) The procedure under Companies Act must be read subject to Sub-section (4) of Section 20 of SICA which contains a non obstante clause and therefore BIFR is authorised to sell the assets of a sick company and in such a manner as it may deem fit.

(E) By reason of Sub-section (4) of Section 20 of SICA the BIFR is empowered to forward the sale proceeds to the High Court for distribution in accordance with Section 529A and other provisions of the Companies Act,

(F) Considering Section 22-A and Section 32 of SICA the Apex Court held that the statutory scheme of the SICA suggests that BIFR retains control over the assets of the company and in view of the aforesaid provisions "may either prevent any sale or permit any sale of the assets of the sick industrial company". The Court further held that "such a power in BIFR remains till a winding up order is passed by the High Court and a stage arrives for the High Court for issuing the order of distribution of the sale proceeds."

(G) In a winding up proceeding initiated on the recommendation of BIFR, the BIFR continues to remain the custodian of the assets of the company in liquidation, till a winding up order is passed by the High Court. The Apex Court held as above in view of the provisions of Section 20 of SICA.

41. Therefore DRT proceedings cannot, in view of the principle laid down in NGEF Ltd., proceed ignoring the winding up proceeding initiated on the recommendations of BIFR given u/s 20 of SICA.

42. The Apex Court's decision in NGEF Ltd. was cited before DRT but the DRT's perception of the ratio in NGEF Ltd. was not correct. Ignoring the ratio in NGEF Ltd., the DRT proceeded on the basis of the Apex Court's judgment in Allahabad

Bank (supra). But DRT did not appreciate that in Allahabad Bank (supra) the Apex Court did not have the occasion to consider the effect of a winding up proceeding initiated on the recommendation of BIFR and the effect of Section 20 of SICA on a winding up proceeding, vis-a-vis its effect on the DRT proceedings. The Apex Court in Allahabad Bank (supra) also did not have to consider the effect of SICA on DRT proceeding in view of Section 34(2) of RDBI Act. These intricate questions relating to jurisdiction should be left for the decision of the Writ Court and the alternative remedy is not efficacious in the facts of the case.

43. The order of the DRT dated 15.6.2006, therefore, cannot be sustained and the same is quashed. In view of the clear law laid down in NGEF Ltd. (supra) and also the clear finding in Rajasthan Financial Corporation (supra), set out above, the proceedings before DRT cannot be continued without notice to the Official Liquidator appointed in the winding up proceedings referred to above. In Rajasthan Financial Corporation (supra), it has been held that the Official Liquidator must be noticed and also be heard.

44. So in this case, the petitioners are directed to file a petition before the DRT to implead the Official Liquidator and also the J.G.M. Recovery, Legal Affairs and Valuation Officer who was appointed by the Company Judge to assist the Official Liquidator. Such petition be filed before the D.R.T. within two weeks from today by the petitioners. On such petition being filed, DRT will implead them and give the added parties an adequate opportunity of taking such defence or exceptions as are available to them in terms of the guidelines in NGEF Ltd. (supra) which, we hold, are attracted to the present case since a winding up proceeding in respect of the said company on the recommendation of BIFR is pending in High Court. The added parties must be heard in support of their case.

45. The DRT will decide whether, in view of the objections taken before it, the proceedings can continue despite the pendency of winding up proceedings before the High Court. In the peculiar facts of this case, the winding up proceeding, having been initiated on the basis of the recommendation of BIFR under SICA has a bearing on the proceedings before DRT.

In that view of the matter, we permit the Bank to pray for expeditious disposal of the winding up proceeding before the learned Company Judge.

This Writ petition is allowed to the extent indicated above. The order dated 15.6.2006 is set aside. There will be no order as to costs.

I. Mahanty, J.

46. I agree.