

In Re: Modistone Ltd.

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Court : Mumbai

Decided On : Jul-25-2002

Reported in : 2003(2)ALLMR117; II(2003)BC411; (2003)1BOMLR3; 2003(1)MhLj98

Judge : F.I. Rebello, J.

Acts : Sick Industrial Companies (Special Provisions) Act, 1985 - Sections 16, 20, 20(1), 21 and 22; [Companies Act, 1956](#) - Sections 433, 439 and 466

Appeal No. : Company Petition No. 166 of 2002 in B.I.F.R. Case No. 32 of 1998

Appellant : In Re: Modistone Ltd.

Judgement :

F.I. Rebello, J.

1. The Register of the Board for Industrial and Financial Reconstruction addressed a letter dated 11-5-2001 to the Registrar of this Court. In that letter, it is set out that in case No. 32 of 1998, the applicant company being M/s. Modistone Ltd. an enquiry was conducted under Section 16 of the Sick Industrial Companies (Special Provisions) Act, 1985 in accordance with the procedure laid down in the said Act. The Bench of B.I.F.R. has recorded an opinion under Section 20(1) of the Act that it is just and equitable that M/s. Modistone Ltd. should be wound up and has directed the registrar to forward the aforesaid opinion of the Board to this Court

(wrongly named as High Court of Maharashtra) for further action under law. On receipt of the papers, matter was placed before the learned Company Judge who by his order of 24-1-2002 directed the petition to be registered as winding up petition. The petition was also accepted. The order of the learned Judge discloses that an appeal had been preferred by the employees union to A.A.I.F.R. which was dismissed on 8-8-2001. There is no challenge to that order.

2. The petition has now come up for admission before this court. There were also other petitions for winding up of the company pending before this court. It was urged at the bar that once the order has been passed by B.I.F.R. there is no further question of passing any further orders or advertising the company petition. It is contended that the Sick Industrial Companies (Special Provisions) Act, 1985 is a Special Act. Once an Authority under the Special Act has come to the conclusion that the company cannot be rehabilitated and passed an order under Section 20 of the Act, there is nothing further left for the company court but to proceed to wind up the company and then to pass further consequential orders in terms of the provisions of the Companies Act.

For that purpose, it will be necessary to refer to the provisions of the Section 20 of the Act which is set out below :

'20. Winding up of sick industrial company - (1) Where the Board, after making inquiry under Section 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 networth 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.'

It will also be necessary to reproduce the provisions of Section 433 of the Company Act. The purpose is to find out whether once an authority under Sick Industrial Companies (Special Provisions) Act has come to the conclusion that the company cannot be rehabilitated. What is the order to be passed by the company court :

'433. A company may be wound up by the Court:--

(a) if the company has, by special resolution, resolved that the company be wound up by the Court;

(b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;

(c) if the company, does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(d) if the number of members is reduced, in the case of a public company below seven, and in the case of a private company, below two;

(e) if the company is unable to pay its debts;

(f) if the Court is of opinion that it is just and equitable that the company should be wound up.'

3. Before I advert further to the facts and issues, gainful reference may, be made to the judgment of the Apex Court in the case of Allahabad Bank v. Canara Bank AIR 2000 SC 1535. The issue involved was again the jurisdiction of the Tribunal functioning under the provisions of the Recovery of Debts due to Banks and Financial Institutions Act. In that case Allahabad Bank had obtained a money decree against the debtor company under the Recovery of Debts due to Banks and Financial Institutions Act. The Canara Bank a secured creditor who claim was pending before the same Tribunal at Delhi. The learned company Judge under Sections 537, 446 and 442 of the Companies Act stayed the said proceedings taken out by the Allahabad Bank before the Recovery Officer under RDB Act. The application for winding up of defendant company was pending in the Delhi High Court. No winding up order has been passed nor provisional liquidator appointed. It was contended that the Bank is obliged to seek leave of the company court and the company court can stay the proceedings under Sections 442, 537 for the ultimate purpose of deciding the priorities in the event of a winding up order or other order appointing a provisional liquidator being passed under Section 446(1) of the [Companies Act, 1956](#). The Judgment was reserved by the Apex Court when

in the meantime, an amendment made to the Act with effect from 17-1-2000. The Allahabad Bank filed proceedings for recovery of amounts before Debt Recovery Tribunal Recovery. Case was filed before the Recovery Officer. The Debtor company filed an appeal, there was no stay. In the meantime, Canara Bank also filed an application before Debt Recovery Tribunal, Delhi for a decree under RDB Act. That was pending. The Canara Bank filed interlocutory proceedings before the Recovery Officer seeking pro rata distribution of sale proceeds from auctions of the debtor company's property. This was resisted by the Appellant Bank. The applications were dismissed. The property of the debtor company was sold. This was confirmed by the Recovery Officer. Another property was also sold but the Recovery Officer declined to confirm that sale and directed fresh auction. The appellant bank filed W.P. under Articles 226 and 227. On 9-3-1999 the learned company Judge passed an order referred to earlier. There are some subsequent events which need not deter us.

It was argued, however, that RDB Act is a special statute which provides for the entire procedure of filing an application for adjudication and recovery and as such taken out of the purview of the Companies Act including Sections 442, 537 and 446 of the said Act and that the proceedings under the RDB Act cannot be said to be binding on the company court and it should be transferred to the company court. Section 34(1) has its overriding provisions of the Act. The sale as provided under Section 34(2). The proceedings saves only six statutes from the degree passed by the Tribunal. The Companies Act is not one of them. Even otherwise, it was contended that Section 446 was not applicable as there was no order nor order appointing provisional liquidator. The argument was also advanced on the ordinance which in the meantime had come into force. After considering section, the Apex Court held in Paragraph 19 that the jurisdiction of the Tribunal with regard to adjudication is exclusive. The RDB Act requires Tribunal alone to decide the application for Recovery of Debts Due to Banks and Financial Institutions. Once the Tribunal passed an order that the debt is due, Tribunal has to issue necessary certificate under Section 19(22) of the Recovery Officer for recovery of the debts specified in the certificate. Then the next question was whether the Act over rides provision of Sections 442, 537 and 447 of the Companies Act. The court after considering the matter then held that the provisions of the RDB Act and

special provisions contained therein and the purpose of the Act is something more important than the purpose of Sections 442, 446 and 537 of the Companies Act. The court then proceeded to examine whether the RDB Act is special Act and whether the Companies Act is general Act as held by some High Courts, The Court after examining the order in Para 49 observed that at the stage of adjudication under Section 17 and execution of the certificate under Section 25 etc., the provisions of the RDB Act, 1993 confer exclusive jurisdiction in the Tribunal and the Recovery Officer in respect of debts payable to Banks and financial institutions and there can be no interference of the Company Court under Section 442 read with Section 537 or under Section 446 of the [Companies Act, 1956](#). In the matter of priorities the court held that the question of priorities among the Banks and Financial Institutions and other creditors can be decided only by the Tribunal under the RDB Act and in accordance with Section 19(19) read with Section 529A of the Companies Act and in no other manner. The provisions of the RDB Act, 1993 are to the above extent inconsistent with the provisions of the [Companies Act, 1956](#) and the latter Act has to yield to the provisions of the former. This position holds good during the pendency of the winding up against the debtor-company and also after a winding up order is passed. No leave of the Company Court is necessary for initiating or continuing the proceedings under the RDB Act, 1993.

A Division Bench of Delhi High Court in *Ratlam Ispat Ltd. v. Greaves Feseco Ltd.* [1991] 72 Com Cas. 548 after considering the provisions of Section 20 of the SIC(SP) Act and Section 446 of the Companies Act, observed that once the court comes to the conclusion under Section 20 that the company has to be wound up, then it has to forward the same to the concerned High Court. On receipt of information, the court is required to proceed under Sub-section 2 of Section 20. Sub-section 2 of Section 20 referred to earlier would show that the High Court shall order winding up of the sick industrial company on the basis of the opinion of the Board and the High Court is required to proceed with the winding up in accordance with the provisions of the Companies Act. He then observed that once company is wound up under Section 20 of SICSP Act, the company Judge has to proceed as if that company has been wound up as per Section 20 of the Act.

4. We may now examine some provisions of the Act to find out whether SICSP act is special Act considering Section 446 considering Companies Act. Under Section 32 of the SICSP Act, rules or schemes made thereunder have effect notwithstanding anything inconsistent therewith contained in any other law except two Acts as stated therein or in the memorandum of articles of the Association of the Industrial company or in any other instrument having effect by virtue of any law other than this Act. Amalgamation is provided for also. As the preamble of the Act shows is an Act to make in public interest, special provisions with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined and for matters connected therewith or incidental thereto.

For that purpose, Act has provided for the establishment of the Board as also constituted appellate authority. The power of the court in appellate authority has been set out along with its constitution. The proceedings before them are deemed to be special proceedings for the purpose set out under Section 14. What is important is Chapter 3 which has reference to the Board for enquiry under Section 16. The power to make suitable orders, preparation and sanction of schemes, rehabilitation by giving financial assistance arrangement for continuing operations etc., during enquiry, and lastly Section 20 which has been reproduced earlier. Section 21 would show that after the board conducts an enquiry under Section 16 and after consideration of all the relevant facts and circumstances, the Board is of the opinion that the sick industrial company is not likely to make good losses within a reasonable time. The authorities specially set up applies mind to the record and comes to the conclusion that it is just and equitable that the company be wound up. Sub-section (2) sets out that 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.

Under Section 433 of the Companies Act and more specifically (F) the company may be wound up by the court if the court is of the opinion that it is just and

equitable that the company should be wound up. Section 439 is the provision as to applications for winding up. Section 442 is for commencement of winding up by the Court. Section 443 is powers of the court hearing petition and Section 444 provides the effect of winding up. Cumulative reading of these sections with Section 22 would show that when the opinion is forwarded by the Court under Section 20, there is nothing further left in the company court to form an opinion. All that happens is that on the order of winding up being passed, Section 447 operates and then the court will proceed with winding up of the sick company including by exercising powers under Section 448 onwards.

It is therefore, clear that once the Board forms an opinion, there is no further discretion left in the High Court in so far as winding up of the company on the ground that it is just and equitable. Opinion formed will be binding on the court which has only to formally proceed to pass an order of winding up. To that extent, SICSP Act is Special Act and Companies Act would be general Act. Provisions of Section 20(2) will be binding on the company court. Once that be the case, all procedural formalities including advertising and hearing are dispensed with and the company court is to proceed on the material as already considered by the Board and as reflected in its final decision.

In my opinion, therefore, once the Board recommends and sends its opinion to the High Court under Section 20(1), the High Court in terms of Section 22 is obliged to pass an order of winding up of the company without following the procedure laid down under the Companies Act. The court therefore, has to follow procedure under the Companies Act for giving effect to the order of winding up. In the instant case therefore, company stands wound up based on the report of the court dated 25-4-2001.

5. Official liquidator of this court is appointed as official liquidator in winding up. Order accordingly.

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