**Modi Rubber Limited a Company Incorporated under the Companies Act, 1956 Vs. Madura Coats Limited a Company Incorporated under the Companies Act, 1956 and Official Liquidator attached to Hon'ble Allahabad High Court**

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**Court** : Allahabad

**Decided On :** May-20-2004

**Reported in** : [2006]130CompCas32(All)

**Judge** : M. Katju and ;K.N. Ojha, JJ.

**Acts** : Sick Industrial Companies (Special Provisions) Act, 1985 - Sections 15, 16, 16(1), 17, 18, 19, 20(1), 22, 22(1) and 25; Companies Act - Sections 481

**Appeal No.** : Special Appeal No. 420 of 2004

**Appellant** : Modi Rubber Limited a Company Incorporated under the Companies Act, 1956

**Respondent** : Madura Coats Limited a Company Incorporated under the Companies Act, 1956 and Official Liquidator at

**Advocate for Def.** : Ajay Bhanot, Adv.

**Advocate for Pet/Ap.** : V.B. Singh and ;Uday Pratap Singh, Advs.

**Disposition** : Appeal allowed

**Judgement** :

**M. Katju, J.**

1. This special appeal has been filed against the impugned order of the learned Single Judge dated 12.3.2004 in Company Petition No. 1 of 2002 Modi Rubber Limited v. Madura Coats Limited. An impleadment application has been filed on behalf of Phillips Carbon Black Limited which we have allowed.

2. We have heard the learned counsel for the parties and have perused the record.

3. The facts of the case are given in some detail in the impugned order dated 12 3.2004 It appears that a bunch of creditors' petitions were filed in this Court praying for winding up of M/s Modi Rubber Limited on the ground that the said company is unable to pay its huge debts. On 13.3.2002 the Court passed an order giving its prima facie finding that the respondent company was unable to pay its debts and injuncted the respondent company from dealing with or encumbering any of its assets without seeking prior permission of the Court. Thereafter by order dated 17.5.2002 it was held by the Court that there was a liability of Rs. 3,22,91,636/- admitted by M/s Modi Rubber Limited. On 21.5.2002 the Court again recorded a finding that the company was unable to pay its debts. Hence the petition was admitted and a direction was given to issue an advertisement under Rule 24 of the Rules.

4. On 9.7.2002 while granting the said company liberty to furnish a payment schedule for repayment of its admitted dues to its creditors the Court recorded a finding that the application of the company did not make a complete and truthful disclosure of the financial arrangements proposed with the banks and financial institutions, and hence two weeks' time was granted to make complete and truthful disclosure of the financial status of the company as it obtained on 30.6.2002 alongwith the proposals submitted to the financial institutions. This disclosure was not made and hence on 23.7.2002 one week further time was granted to the

company as a last opportunity to comply with the order dated 9.7.2002 with the rider that if the order was not complied with the prayer for appointment of a provisional liquidator would be considered.

5. Again on 4.3.2003 adjournment was sought by the company with the request that its arrangement with Appolo Tyres Limited could not be finalized because of the death of Sri Raunak Singh, the Managing Director of Appolo Tyres Limited. It was also stated that apart from negotiations with Appolo Tyres Limited negotiations were going on with some German company also.

6. While observing that this was a dilatory tactics on frivolous excuses this Court again granted a last opportunity and fixed the case for 10.3.2003. Again on 11.3.2003 the case was adjourned to 3.4.2003 requiring the company to place on record the progress in the negotiations. Thereafter several dates were fixed but till the date of the order there was no complete proposal or arrangement suggested by M/s Modi Rubber Limited.

7. On 12.3.2004 learned counsel for M/s Modi Rubber Limited again sought an adjournment on the ground that an agreement is likely to be signed between M/s Modi Rubber Limited and Appolo Tyres Limited. Hence it was prayed that the Court should postpone and defer the winding up petitions of several creditors of M/s Modi Rubber Limited which had been pending for the past more than two years for decision.

8. By the impugned order the learned Single Judge recorded a finding that the company is unable to pay its debts. The Court's reason for postponement of these proceedings earlier was due to a faint hope that by the process of negotiations some buyer of M/s Modi Rubber Limited may come forward who may revive the company thereby saving the jobs of the workers. This hope was belied repeatedly and nothing concrete appeared during the period of two years. Affidavits of financial institutions like IFCI, IDBI, UTI, Insurance Companies, etc. have been filed which did not bring out anything of substance and did not hold out any fruitful prospect. During the arguments before the learned Single Judge, learned counsel for M/s Modi Rubber Limited submitted that Appolo Tyre 'Limited had framed some scheme in which the claims of the creditors would be satisfied. However, it was

pointed out by Sri Ajay Bhanot, Advocate representing the creditors in the leading company petition, namely, Madura Coats Limited that the proposal given by Appolo Tyre Limited was only that the creditors of the company should accept 25% of their dues in full and final satisfaction of their claim. Sri Bhanot stated that this proposal was ridiculous and deserves to be rejected outright.

9. The learned Single Judge by the impugned order held that the adjournment sought by the Modi Rubber Limited was nothing but dilatory tactics on frivolous excuses and hence he refused to adjourn the case. The learned Single Judge held that there was no doubt that M/s Modi Rubber Limited was unable to pay its debts as had been observed in the earlier orders also. The debts were huge and the financial condition of the company was not sound. Hence he was of the opinion that it was just and equitable that Modi Rubber Limited be wound up. He directed accordingly. He also directed that the official liquidator was appointed as liquidator of the company and he will proceed to take charge of the assets of the company and submit his report alongwith the inventory within six weeks.

10. Sri Vijai Bahadur Singh, learned counsel for the appellant has submitted that on 6.12.2003 the Board of Director of M/s Modi Rubber Limited passed a resolution to file a reference to the Board of Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985. Accordingly reference application under the aforesaid Act was sent to the BIFR by M/s Modi Rubber Limited through letter dated 3.2.2004 which was received by the BIFR on 4.2.2004 and the reference was registered as case No. 344 of 2004 on 17.3.2004.

11. Sri V.B. Singh has relied on the judgment of the Supreme Court in Real Value Appliances Ltd. v. Canara Bank and Ors. : [1998]3SCR170 . In that decision it was held that the enquiry under Section 16(1) of the Sick Industrial Companies Act must be treated as having commenced as some as the registration of the reference is completed after scrutiny, and from that time action against the Company's assets must remain stayed in view of Section 22 of the Act till the final decision is taken by the BIFR.

12. Sri V.B. Singh submitted that since the reference application of Modi Rubber Limited was received by the BIFR on 4.2.2004 it must be deemed that it was

registered on 4.2.2004 and hence the impugned order which was passed subsequently on 12.3.2004 was illegal as it violated Section 22 of the Sick Industrial Companies Act.

13. We do not agree. It may be that the reference application of M/s Modi Rubber Limited was received on 4.2.2004 but it was registered only on 17.3.2004. The decision of the Supreme Court in Real Value Appliances Ltd v. Canara Bank (Supra) does not say that the enquiry under Section 16(1) must be treated as having commenced as soon as the reference application is received by the BIFR. It states that the enquiry under Section 16(1) shall be treated as having commenced as soon as registration of the reference is completed after scrutiny. The words 'as soon as the registration of the reference is completed after scrutiny' clearly imply that the registration can only be done after scrutiny. Mere receipt of the reference application by the BIFR on a particular date does not mean that the registration shall be deemed to have been done on that particular date. After receiving the reference application the BIFR has to do its scrutiny and then only register the reference. In the present case the reference was registered only on 17.3.2004 and not on 4.3.2004. Hence we cannot accept this submission of Sri V.B. Singh.

14. In fact this was not even a plea taken up before the learned Single Judge when he passed the impugned order dated 12.3.2004. There is no mention of the Sick Industrial Companies Act in the impugned order dated 12.3.2004. Thus M/s Modi Rubber Limited was itself conscious of the fact that there was no enquiry under Section 16 of the Sick Industrial Companies Act pending when the order dated 12.3.2004 was passed . Hence it did not take plea of the prohibition of Section 22 before the learned Single Judge. Now in special appeal this new plea is sought to be taken by M/s Modi Rubber Limited, and we have to consider whether the plea can be taken now.

15. Under Section 22 of the Sick Industrial Companies Act proceedings for winding up shall be suspended if an enquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration or a sanctioned scheme is under implementation or when an appeal under Section 25 is pending.

In our opinion none of these conditions were satisfied when the impugned order dated 12.3.2004 was passed.

16. It was not brought to the knowledge of the learned Single Judge that any reference application had been sent by M/s Modi Rubber Limited to the BIFR. However this averment has come in paragraph 22 of the affidavit filed by the appellant alongwith the stay application in this appeal. In this paragraph it is mentioned that the company filed a reference application before the BIFR under Section 15 of the Act and the said reference application dated 3.2.2004 was received by the BIFR on 4.2.2004 and has been registered as case No. 153 of 2004. Copy of the Form A and confirmation of Registration dated 17.3.2004 has been filed as Annexure 20 to the affidavit filed alongwith the stay application in this appeal.

17. Thus it is true that the reference was registered subsequent to the impugned order dated 12 3.2004. However, that order has been challenged before us in this appeal.

18. It is well settled that an appeal is a continuation of the original proceedings vide Shyam Sundar Lal v. Shagun Chand : AIR1967 All214 ., Putta Kannayya v. Venkat Narasayya AIR 1918 Mad. 998 F.B., Atchayya v. Venkata. AIR 1915 Mad 1223 F.B., Damodar Mukherjee v. Bonwarilal : AIR1960 Cal469 , M.M. Quasim v. Manohar Lal : [1981]3SCR367 , etc. Since the order of the registration of the reference was passed on 17.3.2004, it has been passed during the pendency of this appeal, and since an appeal is a continuation of the original proceeding, we are of the opinion that the appellant will get benefit of Section 22 of the Sick Industrial Companies Act, 1985. As held by the Supreme Court in Bai Dosabu v. Mathurdas : [1980]3SCR762 , the appellate Court can take into consideration events and changes in the law occurring during the pendency of the appeal (see also Vibhuti Singh v. Damari Lal : AIR1978 All370 , Themmalapuram Bus Transport v. R.T.O., AIR 1967 Ker. 285, M.M. Quasim v. Mahohar Lal : [1981]3SCR367 , etc.

19. On similar facts in Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Ltd. : (2000)5SCC515 the Supreme Court took a similar view as we are taking. In that

decision the learned Single Judge of the High Court passed a winding up order dated 5.9.1997. Against that order an appeal was filed before the Division Bench of that Court and during the pendency of that appeal a reference application under 15 of the Sick Industrial Companies Act was filed before the BIFR. The Supreme Court held after interpreting the provisions of the Act that the appellant is entitled to the benefit of Section 22.

20. The Supreme Court in that decision also held that the order for winding up under the Companies Act is not the culmination of the winding up proceedings pending before the Company Judge. The ultimate order passed on such petition is the order of dissolution of the company under Section 481 of the Companies Act. In paragraph 10 of the said judgment in Rishabh Agro Industries Ltd. (Supra) the Supreme Court also repelled the contention that after the order of winding up and appointment of the Liquidator, the Board of Directors had no jurisdiction to move the BIFR or to take any other steps. The Supreme Court observed:

' It is contended that after the order of the winding up and appointment of the Liquidator, the Board of Directors had no jurisdiction to move BIFR by passing a resolution. Such a submission cannot be accepted. In a winding up petition the Liquidator is appointed to protect the assets of a company for the benefit of its creditors, secured and unsecured and others. It is not the function of the Official Liquidator to start the process of rehabilitation of the company as is aimed at under the Act. Despite appointment of the Official Liquidator, the Board of Directors continue to hold all residuary powers for the benefit of the company which includes the power to take steps for its rehabilitation.'

21. In view of the above observation of the Supreme Court we find no merit in the submission of the learned counsel for the respondents that after passing of the impugned order the Board of Directors has no right to file this appeal. Although in the above quoted observation the Supreme Court has held that the Board of Directors of the Company can, despite the winding up order, move the BIFR, in our opinion a logical inference can be drawn from the ratio of the above observation that it can also file an appeal against the winding up order.

22. It may be mentioned that under Section 17 of the Sick Industrial Companies Act 1985 the Court has to make an enquiry under Section 16 about the Company through an operating agency, and then decide whether it is practicable to make its net worth exceed the accumulated losses within a reasonable time, in which case an effort has to be made to revive the company. However, if the Board is of the opinion that it is not practicable to make its net worth exceed the accumulated losses within a reasonable time it may direct the operating agency to prepare a scheme providing for such measures as mentioned in Section 18 as may be specified in its order. Thereafter the operating agency has to prepare a scheme under Section 18 and efforts have to be made to try to revive the company. The scheme may provide for financial assistance under Section 19 by way of loans, advances, etc. from the Central Government, State Government, scheduled bank or other banks, financial institutions etc.

23. It is only when the Board after making the enquiries under Section 16 and considering all the relevant facts and circumstances and after giving opportunity of being heard to the concerned parties is of the 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 it should be be wound up, that the Board can record its finding and forward its opinion to the concerned High Court under Section 20(1).

24. Thus a perusal of the provisions of the Sick Industrial Companies Act 1985 shows that first a serious effort should be made to revive the company. On the other hand, in winding up proceedings under the Companies Act there is no such provision for making such effort The Sick Industrial Companies Act, 1985 is a special law and hence its provisions will prevail over the general provisions of the Companies Act.

25. Of course a suit may lie against the company after obtaining consent of the Board as provided for in Section 22(1) but otherwise the winding up of the proceeding have to remain stayed under Section 22(1) vide Patheja Brothers Forgings & Stamping v. ICICI Ltd, (2000)6 SCC 545. There is nothing on record to

show that the consent of the BIFR or the appellant authority has been taken under Section 22(1) in this connection for filing a suit against the Company.

26. Learned counsel for the respondent has relied on the decision of the Supreme Court in Sirmur Chemical and General Industries v. Union of India, 1962 (32) Company Cases 826 and General Indian Motor Works v. Their Employees : (1959)IILLJ373SC and the decision in Sri Tej Pratap Mills v. Granaries Ltd., 1961 (31) Company Cases 610 etc. and has contended on the strength of those decisions that this appeal by the company is not maintainable and in fact only the Official Liquidator could have filed the appeal. We do not agree. A careful perusal of the above decisions shows that these decisions were not delivered in the context of the Sick Industrial Companies Act, 1985. In fact the aforesaid Act was not even in existence when the aforesaid judgements were delivered. As mentioned in the decision of the Supreme Court in Rehab Agro Industries Limited (Supra) in the Companies Act there is no provision for rehabilitation and revival of sick industrial companies. All that the Official Liquidator can do under the Companies Act is to protect the assets of the company (after the order of winding up) for the benefit of its creditors secured and unsecured and others. On the other hand, under the Sick Industrial Companies Act first a serious attempt has to be made for revival of the sick industrial company, and only when it fails can winding up be ordered.

27. If it is held that only an Official Liquidator can file an appeal against the order of winding up then when a case under the Sick Industrial Companies Act is registered it may cause serious prejudice to the company. Obviously the Official Liquidator has no personal interest in attempting to revive and rehabilitate the sick company, and hence' he may not file an appeal at all. On the other hand, the Directors, share holders, etc. may have such interest. If the winding up proceedings continue despite the registration of a case under the Sick Industrial Companies Act then the proceedings for revival or rehabilitation of the sick company may become redundant and futile because in the meantime the Official Liquidator may sell away the assets of the company to satisfy the claims of the creditors. How can a company revive if its assets have been sold away? Hence the benefit of the Sick Industrial Companies Act will become illusory, futile and

otiose if pending proceedings under the act meantime the company is wound up.

28. Hence the decision in Sirmur Chemical and General Industries v. Union of India (Supra), General Indian Motor Works v. Their Employees (Supra), and Sri Tej Pratap Mills v. Granaries Ltd. (Supra) are in our opinion distinguishable. The facts of the case are covered by the decision of the Supreme Court in Rehab Agro Industries Ltd v. O.K. Capital Services Ltd (Supra).

29. Shri Ajay Bhanu, learned counsel for the respondent has submitted that the reference to the BIFR was made only to defeat the impugned winding up order. This precise argument was advanced before the Supreme Court in Rehab Agro Industries Ltd. v. O.K. Capital Services (Supra) and was repelled (vide para 6 of the said judgment). It was held by the Supreme Court that if a provision of law is misused and abused it is for the legislature to amend the law.

30. The appellant has filed a supplementary affidavit in this appeal stating that during the pendency of the winding up petition Apollo Tyres Ltd., which is a major tire producing company, had expressed genuine interest in taking over the Company, and this would enable about 3000 workers of the Company, who had lost their jobs in August 2001, to get re-employed, and thus they and their families consisting of 1500 persons would get back their bread and butter. It is also stated in this supplementary affidavit that the financial institutions which have 44.24% shares in the Company have not applied for winding up. The O.K. which has 16.85% share has categorically opposed the winding up petition.

31. It is not necessary for us to go into the correctness or otherwise of these facts because we are of the opinion that for the reasons given above, and particularly in view of the decision of the Supreme Court in the case of Rehab Agro Industries Ltd. (Supra), this appeal deserves to be allowed.

32. For the reasons given above this appeal is allowed and the impugned order of the learned Single Judge dated 12.3.2004 is quashed and it is directed that the proceedings before the learned Company Judge shall remain in abeyance till the disposal of the proceedings / appeal before the authorities under the Sick Industrial Companies Act.