

A MORGAN SECURITIES AND CREDIT PVT. LTD.

v  
MODI RUBBER LTD.

DECEMBER 14, 2006

B [S.B. SINHA AND P.K. BALASUBRAMANYAN, JJ.]

*Company Law:*

C *Sick Industrial Companies (Special Provisions) Act, 1985: Section 22(3).*

D *Suspension of legal proceedings, contracts etc.—Arbitration and Conciliation Act and SICA—Interrelation between—Predominance of the former over the latter—Inter Corporate Deposit—Default in payment of—An arbitration award was made in favour of a creditor for a certain sum- The creditor also filed an application before the High Court for winding up of the debtor-company, which was allowed- The High Court restrained the debtor-company from dealing with its assets without the permission of the Court—The debtor-company made a reference under S. 15 of SICA to the Board for Industrial and Financial Reconstruction—The Division Bench of the High Court set aside the order of winding up and directed to keep the winding up proceedings in abeyance till the disposal of the appeal under SICA—The debtor-company filed an application before the Board under S. 19-A read with S. 22(3) of SICA for permission to dispose of its shares, which was dismissed—A writ petition filed against the aforesaid order before another High Court was allowed—Pursuant to or in furtherance of the said judgment of that High Court, the shares had been sold and the sale proceeds had been deposited with the Board—Validity of—Held: During the pendency of an inquiry before the Board, the debtor-company could sell its shares -It, however, could not do so because of the restraint order passed against it—It was, therefore, not permissible for the High Court to direct sale of the shares despite refusal on the part of the Board to do so—The Board has the power to suspend the operation of an award if any occasion arises therefor—Arbitration and Conciliation Act, 1996, Ss. 5 & 36.*

H **The appellant advanced a certain sum by way of an Inter Corporate Deposit to the respondent-company. The respondent-company defaulted in the**

payment thereof. An arbitration award was made in favour of the appellant for a certain sum under the Arbitration and Conciliation Act, 1996. The appellant also filed an application before the High Court for winding up of the respondent-company, which was allowed. The High Court restrained the respondent-company from dealing with its assets without the permission of the Court. The respondent, in the meanwhile, made a reference under Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) to the Board for Industrial and Financial Reconstruction (Board).

An appeal against the order of winding up was preferred by the respondent before the Division Bench of the High Court. The Court set aside the order of winding up and directed to keep the winding up proceedings in abeyance till the disposal of the appeal under SICA. The respondent filed an application before the Board under Section 19-A read with Section 22(3) of SICA for permission to dispose of its shares, which was dismissed.

A writ petition filed against the aforesaid order before another High Court was allowed. Pursuant to or in furtherance of the said judgment of that High Court, the shares had been sold and the sale proceeds had been deposited with the Board. Hence the appeal.

The following question arose before the Court:-

Whether the provisions of the Arbitration and Conciliation Act, 1996 would prevail over the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985?

Dismissing the appeals, the Court

**HELD:** (Per Sinha, J.) 1. The Arbitration and Conciliation Act, 1996 is a complete Code by itself. It lays down the machinery for making an arbitral award enforceable. In terms of section 36 of the 1996 Act, an award becomes enforceable as if it were a decree where the time for making the application for setting it aside under Section 34 has expired, for such application having been made, has been refused. [1036-F]

*McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 6 SCALE 220, referred to.

2. It is not in dispute that during the pendency of an inquiry before the Board for Industrial and Financial Reconstruction (Board), the respondent

A could sell its shares. It, however, could not do so because of the restraint order passed against it. It was, therefore, not permissible for the High Court to direct sale of the shares despite refusal on the part of the Board to do so. The Board exercises statutory functions. It is a *quasi judicial* authority. It exercises various powers under the Code of Civil Procedure. For the purpose of the 1996 Act it is a judicial authority. [1036-G-H; 1037-A]

B

3. A power to pass an interim order, however, and that to directing disposal of the assets, must be found out in the scheme of the statute itself. Although the courts of limited jurisdiction may also possess by necessary implication incidental power so as to enable it to direct preservation of property during the pendency of a proceeding before it, it is doubtful whether such incidental power can be exercised for sale of the assets of the company.

C

[1037-B]

4. When a reference is made before the Board, certain consequences ensue. The proceedings for the winding up of a company or for execution of distress or the like against the property of the company or for the appointment of a receiver would not continue. Even, no suit for recovery of money or for the enforcement of any security or of any guarantee shall lie or be proceeded with further, save and except with the consent of the Board or the appellate authority. [1037-C]

D

5. Section 22-A of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), however, permits the Board to pass certain conditional orders. Upon receipt of a reference, the Board has no other option but to make an inquiry; of course, therefor the reference is to be registered, upon scrutiny thereof. The imperative character of an inquiry at the hands of the Board is inherent in the scheme of the Act. The legislative intention therefor is clear and explicit. The consequences flowing from registration of a reference necessarily would mean initiation of an inquiry which would include investigation into facts, causes and effects thereof. [1037-D-G]

E

F

6. Section 19-A of SICA as inserted in the year 1994, although may be held to be clarificatory in nature, however, confers a special power to pass an order envisaged thereunder. Section 19-A does not empower the Board to direct sale of the assets at the stage of enquiry. Section 22(1) and 22(3) again would, however, be applicable where an inquiry under Section 16 is pending. Whereas under Section 22(1) no specific order is required to be passed by the Board; it is necessary, in respect of the matters enumerated under Section 229(1) thereof. [1037-H; 1038-A-B]

G

H

7. Although for the aforementioned purpose, it may not be imperative that such an order be passed only in terms of a scheme but it is true that an application of mind on the part of the Board in relation thereto is necessary. A

8.1. It is difficult to accept the submission of the appellant that Section 22(3) of SICA deals only with the contractual obligations. The expression "award", standing orders or other instrument" does not refer only to contractual obligations which are bindings on the company, but also liabilities thereunder. [1038-C] B

8.2. The expression "award" has a distinct connotation. It envisages a binding decision of a judicial or a quasi judicial authority. It may be an arbitral award. It may also be an award under Section 10-A of the Industrial Disputes Act, 1947, or one made by the Labour Court or an Industrial Tribunal. An award of a quasi judicial authority may provide for a binding decision on the company. [1038-D-E] C

9.1. An award is, thus, to be treated to be a decree even without intervention of the court only for the purpose of its enforceability. [1039-E] D

9.2. An order can be passed by the Board for suspending the operation of the award if any occasion arises therefor. [1039-F]

*Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Ltd.*, [2000] 5 SCC 514, referred to. E

10. However, Section 22(1) would be attracted only when an award becomes a decree and, thus, enforceable in a court of law, albeit in the event a proceeding is initiated therefor. In this case, an objection to the award has been filed. It is, therefore, yet to become a decree. [1039-H; 1040-A] F

11. When an order is passed by the Board in exercise of its jurisdiction under Section 22(3) directing the parties not to continue the proceeding, an award or decree is not set aside thereby. They are merely kept in abeyance so as to enable the Board to pass an appropriate order, *inter alia*, for revival of a sick company for the purpose of giving effect other purport and object for which the laws relating to corporate insolvency have been enacted. G

[1041-A-B]

*Morgan Stanley Mutual Fund v. Kartick Das*, [1994] 4 SCC 225, *M/s. Transmission Corporation of A.P. Ltd. v. M/s. Lanco Kondapalli Power Ltd.*, [2006] 1 SCC 540, *Ramdev Food Products Pvt. Ltd. v. Arvindbhai Rambhai*, H

- A (2006) 8 SCALE 63 and *M. Gurudas v. Rasaranjan*, (2006) 9 SCALE 275, referred to.

*Spelling and Lewis: "A Treatise on the Law Governing Injunctions"* p. 10, referred to.

- B 12. The expression 'judicial authority' must be interpreted having regard to the purport and object for which the 1996 Act was enacted. Judging the contention of the Board and having regard to the width of its jurisdiction, the Board is a judicial authority within the meaning of Section 5 of the Act. [1044-D]

- C *Fair Air Engineers Pvt. Ltd. v. N.K. Modi*, [1996] SCC 385 and *Canara Bank. v. Nuclear Power Corporation of India Ltd.*, [1995] Supp. 3 SCC 81, relied on.

- D *SBP & Co. v. Patel Engineering Ltd.*, [2005] 8 SCC 618, *Konkan Railway Corporation Ltd. v. Mehul Construction Co.* (2000) 7 SCC 201, *Konkan Railway Corporation v. Rani Construction Pvt. Ltd.*, [2002] 2 SCC 388, *Management Committee of Montfort Senior Secondary School v. Vijay Kumar*, [2005] 7 SCC 472, *P. Anand Gajapati Raju v. P.V.G. Raju*, [2000] 4 SCC 539 and *The Bharat Bank Ltd. v. Employees of the Bharat Bank Ltd.*, [1950] SCR 459, referred to.

- E 3. Both the 1996 and the SICA Acts contain non-obstante clauses. Ordinary rule of construction is that where there are two non-obstante clauses, the latter shall prevail. But it is equally well-settled that ultimate conclusion would depend upon the limited context of the statute. [1044-E]

- F *Allahabad Bank v. Canara Bank*, [2000] 4 SCC 406 and *Maruti Udyog Ltd. v. Ram Lal*, [2005] 2 SCC 638, relied on.

*Shri Sarwan Singh v. Shri Kasturi Lal*, [1977] 1 SCC 750 and *NGEF Ltd. v. Chandra Developers, (P) Ltd.*, [2005] 8 SCC 219, referred to.

- G 14.1. Section 5 of the 1996 Act also provides for a non-obstante clause. It has, however, a limited application aiming at the extent of judicial intervention. Its application would be attracted only when an order under Section 22(3) is required to be passed. If the said provision is to be given effect to, the Board would not intervene in the matter of the implementation of the award. It would merely suspend the operation of it. It may even pass an
- H order suspending the liabilities or obligations of the industrial company under

the award. Even otherwise in the fact of the present case it stands suspended. A  
[1046-F-G]

14.2. The Board, however, has not passed an order under Section 22(3) of SICA. The court, therefore, must proceed with the objection filed by the respondent under Section 34 of the 1996 Act. However, if the objection filed by the respondent is rejected, the question of its enforceability would come into being. Once the arbitral award having the force of a decree is put into execution, Section 22(1) of SICA would come on its way from being enforced. B  
The appellant's contention that having regard to the provisions of Section 5 of the 1996 Act, the Board would have no Jurisdiction, therefore, does not seem to have any force. [1046-H; 1047-A-B]

15. Section 22(3) of SICA provides for a specific power in the Board. C  
The said provision contemplates a larger public interest. In the event an arbitral award is held to be outside the purview of Section 22(3) thereof, it may be difficult to frame a scheme or in a given case implement the same under SICA. SICA provides for a time-frame for all the stages for the proceedings. Proviso appended thereto assumes significance in this behalf. D  
[1047-C]

16. The Parliament presumed that the suspension of an award shall not be for a long period. In a given case, a party to an award may face some hardships owing to its suspension; but in such an event, it would always be open to it to bring the same to the notice of the Board. The Board under Section 22(3) of SICA may pass such an order or may not do so. If an order is passed by the Board, an appeal lies there against. The provisions of SICA, it will bear repetition to state, have been made to seek to achieve a higher goal and, thus, the provision of SICA would be applicable, despite Section 5 of the 1996 Act. [1047-D-E] E

*Kailash Nath Agarwal v. Pradeshiya Industrial & Investment Corporation of U.P. Ltd.*, [2003] 4 SCC 305 and *Burn Standard Co. Ltd. v. McDermott International Inc.* (decided by Calcutta High Court on 11.06.1997, referred to. F

*Saurabh Kalani v. Tata Engineering Ltd.*, (2003) 3 Arb. LR 345 (Bom), G  
approved.

(Per Balasubramanyan, J. (concurring):

1. While purporting to exercise jurisdiction in a writ petition challenging an order of the Board for Industrial and Financial Reconstruction H

**A** (B.F.I.R.) which was approached by the respondent, the Division Bench of the High Court has chosen to brush aside the valid orders passed by the Company Court in Allahabad, the order to maintain status quo passed by the Appellate Authority for Industrial and Financial Reconstruction (A.A.I.F.R.) and by various Debts Recovery Tribunals and has permitted the asset of the respondent to be sold as proposed by the respondent. It must be noted that the orders were made by the competent tribunals or court and that those orders were binding on the respondent, the writ petitioner in the High Court. If on its understanding of Section 22(3) of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), the High Court was of the view that the orders of restraint did not bar the BIFR from considering the prayer of the respondent, **C** there was still the order of AAIFR to maintain status quo regarding the assets of the respondent-Company. Surely, that was an order under SICA. No reason is given by the High Court to hold that the order of AAIFR is also not binding on BIFR or that BIFR could not ignore it. The High Court should have dealt with the question properly with reference to the nature of the relevant orders and the context in which they were made and if it was still of the view that the power vested in BIFR under Section 22(3) of SICA enabled it to override all those orders, it should have normally remitted the application made by the respondent to BIFR so as to enable it to take a decision on the prayer of the respondent in the context of the proceedings pending before BIFR and all elements relevant for the purpose of such a decision. The High Court has also not considered how far it will be appropriate to permit the sale of the assets of a Company which is before the BIFR for a scheme of revival.

**2. Occasions are not infrequent when not so scrupulous debtors approach BIFR to stall the proceedings and to keep their creditors at bay. The delay before the BIFR is sought to be taken advantage of. The Parliament has apparently taken note of this and has repealed SICA by the Sick Industrial Companies (Special Provisions) Repeal Act, 2003. The vacuum, thus created has been filled by an amendment to the Companies Act, 1956. But, so far, the provisions of the Amending Act and the Companies Act introduced, have not been brought into force. It appears to be time to consider whether these enactments should not be notified. [1049-B-C]**

**CIVIL APPELLATE JURISDICTION:** Civil Appeal No. 2572 of 2006.

From the Final Judgment and Order dated 8.6.2005 of the High Court of Delhi at New Delhi in Writ Petition (C) No. 10284 of 2005.

**H** C.A. Sundram, Sushil Kumar Jain, A.P. Dhamija, H.D. Thanvi, Ram

Niwas, Santanam Snaminathan and Rohini Musa for the Appellant. A

Neeraj Sharma, V. Sheshagari, Roopali Singh, Rahul Prasanna Dave,  
Suruchi Aggarwal and A. Yushyakumar for the Respondent

The Judgment of the Court was delivered by

S.B. SINHA, J. Introduction : B

The principal question involved in this appeal arising out of a judgment and order dated 08.06.2005 passed by the High Court of Delhi in Writ Petition (Civil) No.10284 of 2005 revolves round a dispute as to whether the provisions of the Arbitration and Conciliation Act, 1996 (for short, 'the 1996 Act') would prevail over the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short, 'SICA'). C

*Background Facts :*

A sum of Rs.5,00,00,000 (Rupees five crores) by way of an Inter Corporate Deposit (ICD) was advanced by Appellant to Respondent Company. It committed a default in the payment thereof. The agreement contained an arbitration clause which was invoked. The learned Arbitrator made an award on or about 06.05.2004 in favour of the appellant for a sum of Rs.6,72,63,015, directing : D E

"I, therefore, in the circumstances, make the following Award :

- (i) The claimant is entitled to receive from the respondents and the respondents are jointly and severally liable to pay Rs.6,72,63,015/- up to the date of reference; F
- (ii) The claimant will also be entitled to interest at the contractual rate of 21% p.a. from the date of reference i.e. 15.4.2002 till the date of Award and thereafter i.e. from the date of Award till the date of payment with simple interest @ 18% p.a. However, if the entire amount is paid within three months from the date of the Award, the rate of interest from the date of Award till the date of payment shall stand reduced to 12% p.a. G
- (iii) The claimant will also be entitled to costs of arbitration which are fixed at Rs. 2,00,000/-. H

In the course of the proceedings I had passed two interim orders



A restraining the respondent No.1 from transferring or alienating their fixed as well as movable assets. Both those orders shall continue to operate till the full payment of the amount awarded under this Award.”

B Appellant also filed an application before the High Court of Allahabad for winding up of the respondent Company. The said application was admitted and an order of winding up was passed on 12.03.2004.

C Apart from the Arbitrator, the Allahabad High Court also by order dated 13.08.2001 passed in C.P. No.92 of 2000 and 13.03.2002 in C.P. No.1 of 2002 restrained the Respondent Company from dealing with or in any way encumbering its assets without the permission of the court. In a proceeding before the AAIFR, that Authority had also passed an order of restraint against the respondent company. The respondent in the meanwhile made a reference under Section 15 of SICA to the Board for Industrial and Financial Reconstruction (for short, ‘the Board’). An appeal against the order of winding up was preferred by the respondent before the Division Bench of the High Court. The High Court set aside the said order of winding up by an order dated 20.05.2004 and directed to keep the winding up proceedings in abeyance till the disposal of the said appeal under SICA. An application for recalling of the said order is said to be pending before the said Court.

E Before the Board, an application was filed by the Respondent purported to be under Section 19A read with Section 22(3) of SICA praying for permission to dispose of the shares it held in M/s Ambuja Cement Eastern Ltd. in pursuance of a public offer made by M/s Holcim Cements India Pvt. Ltd. to purchase 5.92% of the shares of M/s Ambuja Cement Eastern Ltd. The Respondent Company held 23,10,000 equity shares of the said company constituting about 1.02% of its total share capital at Rs.70/- per share. In the said application a disclosure was made as regards the restraint order passed by the Allahabad High Court. The said application was dismissed by the Board by an order dated 04.06.2005, holding :

G “...The injunction orders against sale of company’s assets from various Courts/Tribunals do not fall within the scheme of things envisaged u/s 22, 26, & 32. In fact, Section 22A itself empowers the Board to give directions not to dispose of assets. We do appreciate the circumstances regarding the offer for ACEL shares but in view of the orders of the various Courts/Tribunals restraining the company from disposing of its assets including AAIFR’s order dated 13.5.2005 to

H

maintain status quo, the Board finds it difficult to agree to the proposal to sell the shares as prayed by MRL.” A

Questioning the legality of the said order, a writ petition, which was marked as Writ Petition (Civil) No.10284 of 2005, was filed by the Respondent before the Delhi High Court. By reason of the impugned judgment, a Division Bench of the High Court allowed the said writ petition. B

It is not in dispute that pursuant to or in furtherance of the said judgment of the High Court, the shares had been sold and the sale proceeds had been deposited with the Board.

*Submissions:* C

Mr. C.A. Sundaram, the learned Senior Counsel appearing on behalf of the Appellant, inter alia, submitted that the provisions of SICA could not have been taken recourse to as no scheme had been framed and, thus, the High Court committed a serious error in passing the impugned judgment relying, inter alia, on or on the basis of Section 22(3) of SICA. D

Section 5 of the 1996 Act having an overriding effect, the counsel urged, even the Board could not have interfered with the award. Contrasting the provision of sub-section (1) of Section 22 with sub-section (3) thereof, it was contended that the award under the 1996 Act did not fall within the ambit thereof, in view of the fact that in terms of Section 36 thereof it becomes a decree. E

Mr. Neeraj Sharma, the learned counsel appearing on behalf of the Respondent, on the other hand, submitted that the Board being not a judicial authority, Section 5 of the 1996 Act will have no application. On a conspectus of the provisions of SICA, counsel contended, that the Board had the requisite jurisdiction to pass an appropriate order directing sale of the property even at the stage of inquiry. For the aforementioned purpose, Mr. Sharma argued, all the provisions inserted by reason of Act 12 of 1994 of SICA Amendment Act, 1993, namely, Section 19A, Section 22A and Section 22(1) as amended, must receive a harmonious construction. Counsel urged that the interim award having merged with the final award and furthermore in view of the fact that the award was yet to become a decree of the court, the question of its having become enforceable in law did not and could not arise. F G

*SICA :* H

A SICA was enacted in order to afford maximum protection of employment, optimize the use of financial resources, salvaging the assets of production, realizing the amounts due to the Banks and to replace the existing time consuming and inadequate machinery by efficient machinery for expeditious determination and 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 measure so determined and for matters connected therewith or incidental thereto.

C It contains special provision. The said Act was enacted for giving effect to the policy of the State for securing principles specified in Article 39 of the Constitution of India.

D 'Sick industrial company' has been defined in Section 2(o) to mean "an industrial company which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth.

E Chapter III of SICA provides for references, inquiries and schemes. Section 15 empowers the Board of Directors of a company to make a reference to the Board for determination of the measures which shall be adopted with respect to the company. The Board on receipt of such an application may make an inquiry into the working of the sick industrial company in exercise of its power conferred under Section 16 thereof, for determining whether the company has become a sick industrial company or not. For the said purpose it may require an operating agency to inquire into and to make a report to it. F The Board or the operating agency, as the case may be, is required to complete the enquiry as expeditiously as possible and an endeavour is to be made, to do so within sixty days from the commencement thereof. The Board may during the pendency of the said inquiry appoint Special Directors. Section 17 empowers the Board to make suitable orders on the completion of inquiry if it is found to be practicable for a sick industrial company to make its net worth exceed the accumulated losses within a reasonable time. G The Board is also required to make an order in writing and subject to such restrictions or conditions as may be specified therein, give such company as it may deem fit to make its net worth exceed the accumulated losses. However, in the event it comes to the conclusion that it is not practicable for the sick industrial company to make its net worth exceed the accumulated losses within a H reasonable time, it may by an order in writing direct any operating agency

specified in the order to prepare, having regard to such guidelines as may be specified, a scheme in relation to such company. A

Section 18 empowers the Board to prepare and sanction a scheme in terms whereof it is permissible for the operating agency, inter alia, to prepare a scheme to direct sale or lease of a part or whole of any industrial undertaking of the sick industrial company. Section 19 provides for rehabilitation by giving financial assistance where the scheme relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial company. Section 19A of SICA reads as under : B

“19A. Arrangement for continuing operations, etc. during inquiry.- C  
(1) At any time before completion of the inquiry under Section 16, the sick industrial company or the Central Government or the Reserve Bank or a State Government or a public financial institution or a State level institution or a scheduled bank or any other institution, bank or authority providing or intending to provide any financial assistance by way of loans or advances or guarantees or reliefs or concessions to the sick industrial company may make an application to the Board - D

- (a) agreeing to an arrangement for continuing the operations of the sick industrial company; or E
- (b) suggesting a scheme for the financial reconstruction of the sick industrial company.
- (2) \*\*\*            \*\*\*            \*\*\*”

Section 20 provides for winding up of sick industrial company; sub-section (4) whereof reads as under : F

“(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)”. G

Sub-sections (1) and (3) of Section 22 which are relevant for our purpose read as under : H

“22. Suspension of legal proceedings, contracts, etc- (1) Where in

A respect of an industrial company, an inquiry 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 where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.”

D xxx      xxx    xxx

E (3) Where an inquiry under section 16 is pending or any scheme referred to in section 17 is under preparation or during the period of consideration of any scheme under section 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlement, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adoptions and in such manner as may be specified by the Board.

G Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate.”

H Sub-section (5) of Section 22 mandates that in computing the period of limitation for the enforcement of any right, privilege, obligation or liability,

the period during which it or the remedy for the enforcement thereof remains suspended under the said Section shall be excluded. A

Section 22A reads as under :

“22A. Directions not to dispose of assets.- The Board may, if it is of opinion that any direction is necessary in the interest of the sick industrial company or creditors or shareholders or in the public interest, by order in writing direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets B

(a) during the period of preparation or consideration of the scheme under section 18; and C

(b) during the period beginning with the recording of opinion by the Board for winding up of the company under sub-section (1) of section 20 and up to commencement of the proceedings relating to the winding up before the concerned High Court.” D

Section 32 provides for a non-obstante clause.

The Board in exercise of its rule making power made regulations, known as ‘Board for Industrial and Financial Reconstruction Regulations, 1987’. Chapters IV to Chapter VIII thereof provide for various measures which are required to be taken by the Board during the inquiry or thereafter. E

*1996 Act :*

The 1996 Act was enacted to consolidate and amend the law relating to domestic, international and commercial arbitration and enforcement of the arbitral awards. F

1996 Act is in four parts. Part I provides for the matter relating to domestic arbitration; whereas Part II refers to enforcement of certain foreign awards. Part III provides for conciliation; whereas Part IV provides for supplementary provisions. We are concerned with the provisions contained in Part I of the Act. Chapter I, which begins with the interpretation clause, provides for the general provisions. Section 2(c) defines “arbitration award” to include an interim award. Section 5 provides for a non-obstante clause in the matters governed by Part I stating that no judicial authority shall intervene except where so provided for therein. Section 16 provides for the power of arbitral tribunal to rule on its own jurisdiction. G H

A Chapter VII provides for recourses available against the arbitral awards. Section 34 of the Act provides that the Court may be approached against an arbitral award by way of an application for setting aside the same in terms of sub-section (2) or sub-section (3) thereunder. Section 36 provides for enforcement of award in the following terms:

B “36. *Enforcement.* - Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.”

C In *Mcdermot International Inc. v. Burn Standard Co. Ltd.* (2006) 6 SCALE 220, this Court noticing the changes made in the 1996 Act *vis-à-vis* the 1940 Act, observed :

D “The 1996 Act makes a radical departure from the 1940 Act. It has embodied the relevant rules of the modern law but does not contain all the provisions thereof. The 1996 Act, however, is not as extensive as the English Arbitration Act.

E Different statutes operated in the field in respect of a domestic award and a foreign award prior to coming into force of the 1996 Act, namely, the 1940 Act, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. All the aforementioned statutes have been repealed by the 1996 Act and make provisions in two different parts, namely, matters relating to domestic award and foreign award respectively.”

F The 1996 Act is a complete Code by itself. It lays down the machinery for making an arbitral award enforceable. In terms of Section 36 of the 1996 Act, an award becomes enforceable as if it were a decree; where the time for making the application for setting it aside under Section 34 has expired, or such application having been made, has been refused.

G *Analysis of the Statutory Provisions:*

H It is not in dispute that during the pendency of an inquiry before the Board, the respondent could sell its shares. It, however, could not, do so because of the restraint order passed against it. Was it, therefore, permissible for the High Court to direct sale of the shares despite refusal on the part of the Board so to do, is the question. The Board exercises statutory functions.

It is a quasi judicial authority. It exercises various powers under the Code of Civil Procedure. For the purpose of the 1996 Act it is a judicial authority. **A**

A power to pass an interim order, however, and that too directing disposal of the assets must be found out in the scheme of the statute itself. Although the courts of limited jurisdiction may also possess by necessary implication incidental power so as to enable it to direct preservation of property during the pendency of a proceeding before it, it is doubtful whether such incidental power can be exercised for sale of the assets of the company. **B**

When a reference is made before the Board, certain consequences ensue, the proceedings for the winding up of a company or for execution of distress or the like against the property of the company or for the appointment of a receiver would not continue. Even, no suit for recovery of money or for the enforcement of any security or of any guarantee shall lie or be proceeded with further, save and except with the consent of the Board or the appellate authority. **C**

Section 22A, however, permits the Board to pass certain conditional orders. Upon receipt of a reference, the Board has no other option but to make an inquiry, of course, therefor the reference is to be registered, upon scrutiny thereof. The imperative character of an inquiry at the hands of the Board is inherent in the scheme of the Act. The legislative intention therefor is clear and explicit. The consequences flowing from registration of a reference necessarily would mean initiation of an inquiry which would include investigation into facts, causes and effects thereof. Act No. 12 of 1994 amending SICA also specified the main features of the amendments to be as under : **D**

- “(a) jurisdictional amendments which redefine the category of the companies coming within the purview of the Act, and the options which are available for revival, rehabilitation or winding up of sick industries companies; **F**
- (b) amendments to enhance the effectiveness of Board; **G**
- (c) amendments which seek to remove certain ambiguities and strengthen internal coherence of the Act by redefining certain provisions which are clarificatory in nature.”

Section 19A of SICA as inserted in the year 1994, although may be held to be clarificatory in nature, however, confers a special power to pass **H**



A an order envisaged thereunder. Section 19A does not empower the Board to direct sale of the assets at the stage of enquiry. Section 22(1) and 22(3) again would, however, be applicable where an inquiry under Section 16 is pending. Whereas under sub-section (1) of Section 22 no specific order is required to be passed by the Board; it is necessary, in respect of the matters enumerated under sub-section (3) of Section 22 thereof.

B

Although for the aforementioned purpose, it may not be imperative that such an order be passed only in terms of a scheme, as was submitted by Mr. Sundaram, but it is true that application of mind on the part of the Board in relation thereto is necessary.

C

It is difficult to accept the submission of the learned Senior Counsel that sub-section (3) of Section 22 of SICA deals only with contractual obligations. The expression "award, standing orders or other instruments" in our considered view does not refer only to a contractual obligation which is binding on the company, but also liabilities thereunder.

D

The expression "award" has a distinct connotation. It envisages a binding decision of a judicial or a quasi judicial authority. It may be an arbitral award. It may also be an award under Section 10A of the Industrial Disputes Act, 1947, or one made by the Labour Court or an Industrial Tribunal. An award of a quasi judicial or judicial authority may provide for a binding

E

decision on the company.

Meaning of the term "award" in our opinion cannot be restricted to a contractual obligation inasmuch as by its very nature a third party intervention, for resolution of disputes between the parties where company is a party, is envisaged. Even a 'settlement' arrived at by and between the parties thereto would be binding, inter alia, in terms of the provisions of Section 18 of the Industrial Disputes Act, 1947.

F

Submission of Mr. Sundaram that sub-section (3) of Section 22 would be attracted only in a case where a scheme has been made, in our opinion, does not stand a close scrutiny. Sub-section (3) of Section 22 contemplates four different regimes : (i) where an inquiry under Section 16 is pending; or (ii) where any scheme referred to in Section 17 is under preparation; or (iii) during the period of consideration of any scheme under Section 18; or (iv) where any such scheme is sanctioned thereunder.

G

H The expression "for due implementation of the scheme" would refer

only to the scheme which has been sanctioned under Section 18 and not any stage prior thereto. If the submission of Mr. Sundaram is accepted, the other provisions contained in sub-section (3) of Section 22 cannot be given effect to, as a result whereof the same would become otiose. A

What, however can be directed to be suspended were the matters which were existing immediately before the date of such order. B

Rule of ejusdem generis for construing the words "agreement, settlement standing order or other instruments" is also not applicable in the instant case.

An award under the 1996 Act indisputably stand on a different footing vis-a-vis an award made under the Arbitration Act, 1940. Whereas under the 1940 Act, an award was required to be made a rule of the court to make it enforceable; the 1996 Act, however, raises a legal fiction. When an award is made, an application under Section 34 is required to be filed questioning the validity thereof. Once such an application is filed, it remains under suspension in the sense that it would not be enforceable. Only upon expiry of the period specified in Section 34 to challenge an award or when such objection is refused, the same would become enforceable. Section 36 merely specifies as to how such an award can be enforced by laying down that it can be enforced as if it were a decree. C D

The legal fiction created under Section 36 has, therefore, a limited application. An award is, thus, to be treated to be a decree even without intervention of the court only for the purpose of its enforceability. E

Thus, an order can be passed by the Board for suspending the operation of the award if any occasion arises therefor. F

In *Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Ltd.*, [2000] 5 SCC 514, it was held that the word 'deemed' used in the section would thus mean, "supposed", "considered", "construed", "thought", "taken to be" or "presumed".

The question, however, will moreover have to be considered in the light of Section 5 of the 1996 Act, which would depend on the meaning of the words "judicial authority" occurring therein. G

However, sub-section (1) of Section 22 would be attracted only when an award becomes a decree and, thus, enforceable in a court of law, albeit in H

A the event a proceeding is initiated therefor. In this case, an objection to the award has been filed. It is, therefore, yet to become a decree.

While exercising its power under sub-section (3) of Section 22, the Board cannot ignore an order passed by a superior court. It may be bound by the doctrine of judicial discipline.

B

Sub-section (1) of Section 22 itself provides for a non-obstante clause. It not only refers to the provisions of the Companies Act or the Memorandum or Articles of Association of an industrial company or any other instrument in force under the said Act, but also of other laws.

C

SICA furthermore was enacted to give effect to a larger public interest so as to secure the principles specified in Article 39 of the Constitution of India. Sub-section (1) of Section 22 must be construed having regard to the aforementioned principles in mind. It seeks to restrain the Court from entertaining and/or proceeding with any court proceeding if the it is before it.

D

The provisions contained in sub-section (1) of Section 22, however, appear to be clear and unambiguous. Sub-section (3) of Section 22, on the other hand, does not speak of automatic suspension of the proceedings or bar the jurisdiction of the Court in entertaining any application. The provision

E

empowers the Board to make a declaration in terms whereof, inter alia, operation of a settlement or award, not only where the industrial company is a party, but also where the same would be applicable thereto, would remain suspended. It envisages suspension of not only operation of any contract of assurances of property, agreement, settlement, award, standing orders, etc.,

F

but also rights, privileges, obligations and liabilities accruing or arising thereunder. The result of such declaration is not far to seek. Such declaration, however, either for suspension or operation of the contract or award, etc. for the rights, privileges, obligations and liabilities or all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder is to be made specifically. The Board may choose to make either of the declarations,

G

as provided for thereunder. The period for such suspension, however, is controlled by the proviso appended thereto.

A statutory distinction has, thus, been made by the Legislature as regard suspension of a proceeding, on the one hand, and initiation and/or continuance thereof, on the other. Whereas in the former case the statutory impact would

H

be automatic, in the latter the court is required to apply its mind having

regard to facts and circumstances of each case. When an order is passed by the Board in exercise of its jurisdiction under sub-section (3) of Section 22 directing the parties not to continue the proceeding, an award or decree is not set aside thereby. They are merely kept in abeyance so as to enable the Board to pass an appropriate order, inter alia, for revival of a sick company for the purpose of giving effect to the purport and object for which the laws relating to corporate insolvency have been enacted.

While it has to be acknowledged that that the Board has a duty to afford maximum protection to employment, optimize the use of financial resources, salvaging the assets of production, realizing the amounts due to the Banks and to replace the existing time consuming and inadequate machinery by efficient machinery for expeditious determination by a body of experts and, thus, to a limited extent making it entitled to safeguard the economy of the country and protect viable sick units, it, however, must act within the four-corners of the statute. The Board, however, while passing an interim order has to keep in mind not only the governing principles relating to grant of injunction as envisaged in *Morgan Stanley Mutual Fund etc. v. Kartick Das etc.*, [1994] 4 SCC 225, but also the principles of judicial amity or comity. [See '*A Treatise on the Law Governing Injunctions*' by Spelling and Lewis' page 10 - See also *M/s Transmission Corporation of A.P. Ltd. & Ors. v. M/s Lanco Kondapalli Power Pvt. Ltd.*, [2006] 1 SCC 540, *Ramdev Food Products Pvt. Ltd. v. Arvindbhai Rambhai & Ors.*, (2006) 8 SCALE 631 and *M. Gurudas & Ors. v. Rasaranjan & Ors.*, (2006) 9 SCALE 275]

#### *Judicial Authority :*

The 1996 Act does not define the term 'Judicial Authority'. What is defined in Section 2(e) thereof is 'Court'. In its ordinary parlance 'judicial authority' would comprehend a court defined under the Act but also courts which would either be a civil court or other authorities which perform judicial functions or quasi judicial functions.

In *SBP & Co. v. Patel Engineering Ltd. and Anr.*, [2005] 8 SCC 618, a Seven Judge Bench of this Court although did not have the occasion to deal with the question directly; but while overruling the decisions in *Konkan Railway Corporation Ltd. and Ors. v. Mehul Construction Co.*, [2000] 7 SCC 201 and *Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd.*, [2002] 2 SC 388 opined :

A “A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (see *Fair Air Engineers (P) Ltd. v. N.K. Modi*). When the defendant to an action before a

B judicial authority raises the plea that there is an arbitration agreement and the subject-matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the

C dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration”

D In *Management Committee of Montfort Senior Secondary School v. Vijay Kumar and Ors.*, [2005] 7 SCC 472 a question arose as to whether a Tribunal under the Delhi School Education Act, 1973, is a judicial authority. It was held that a School Tribunal is a judicial Authority, as it act judicially and exercise a judicial power.

E The question again came up for consideration indirectly in *P. Anand Gajapathi Raju and Ors. v. P.V.G Raju, (Dead) and Ors.*, [2000] 4 SCC 539 wherein it was held:

“5. The conditions which are required to be satisfied under sub-sections (1) and (2) of Section 8 before the court can exercise its powers are:

- F
- (1) there is an arbitration agreement;
  - (2) a party to the agreement brings an action in the court against the other party;
- G
- (3) subject-matter of the action is the same as the subject-matter of the arbitration agreement;
  - (4) the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.

H

This last provision creates a right in the person bringing the action to have the dispute adjudicated by the court, once the other party has submitted his first statement of defence. But if the party, who wants the matter to be referred to arbitration applies to the court after submission of his statement and the party who has brought the action does not object, as is the case before us, there is no bar on the court referring the parties to arbitration."

In *Fair Air Engineers Pvt. Ltd. and Anr. v. N.K. Modi*, [1996] 6 SCC 385, it was held that the District Forum, National Commission and the State Commission under the Consumer Protection Act are included in the term 'judicial authority' for the purpose of Section 34 of the Arbitration Act, 1940.

In *Canara Bank v. Nuclear Power Corporation of India Ltd. and Ors.*, [1995] Supp. 3 SCC page 81, it was held :

"8. Sub-section (1) of Section 9-A empowers the Special Court to exercise the jurisdiction, powers and authority exercisable by a civil court. It so empowers the Special Court in relation to any matter or claim, inter alia, that arises out of transactions in securities entered into between the stated dates in which a notified person is involved. The words "civil court" are used in the context of the jurisdiction, powers and authority that the Special Court may exercise. The Special Court is empowered to exercise such jurisdiction, powers or authority in relation to the matters or claims therein specified. These matters or claims include those arising out of transactions in securities entered into between the stated dates in which a notified person is involved. Sub-section (2) of Section 9-A deals with the transfer of certain suits, claims or other legal proceedings (other than an appeal) to the Special Court. Every suit, claim or other legal proceeding pending before any court the cause of action whereof is such that, had it arisen after the commencement of the Amendment Ordinance, the suit, claim or other legal proceeding would have had to be filed before the Special Court, stands transferred to the Special Court. Every suit, claim or other legal proceeding pending before any court the cause of action whereof arises out of transactions in securities entered into between the stated dates in which a notified person is involved would, therefore, if it is pending before any court on the date on which the Amendment Ordinance came into force, stand transferred to the Special Court. By

- A reason of sub-section (3) of Section 9-A, on and after the commencement of the Amendment Ordinance, no court other than the Special Court may exercise any jurisdiction, powers or authority in relation to any matter or claim referred to in sub-section (1), that is to say, in relation to any matter or claim, inter alia, arising out of transactions in securities entered into between the stated dates in which a notified person is involved.”

- B We are, however, not oblivious of a decision of this Court in *The Bharat Bank Ltd., Delhi v. Employees of the Bharat Bank Ltd., Delhi* [1950] SCR 459 wherein an Industrial Tribunal functioning under the Industrial Disputes Act was held to be not a Judicial Tribunal, stating that although it has all the trappings of a court but is not a court.

- C The expression ‘judicial authority’ must, therefore, be interpreted having regard to the purport and object for which the 1996 Act was enacted. Judging the contention of the Board and having regard to the width of its jurisdiction, we are of the opinion that the Board is a judicial authority within the meaning of Section 5 of the Act.

*Non Obstante Clause :*

- E Both the Acts contain non-obstante clauses. Ordinary rule of construction is that where there are two non-obstante clauses, the latter shall prevail. But it is equally well-settled that ultimate conclusion would depend upon the limited context of the statute. [See *Allahabad Bank v. Canara Bank and Anr.*, [2000] 4 SCC 406 para 34].

- F In *Maruti Udyog Ltd. v. Ram Lal and Ors.*, [2005] 2 SCC 638, it was observed :

- G “39. The interpretation of Section 25-J of the 1947 Act as propounded by Mr Das also cannot also be accepted inasmuch as in terms thereof only the provisions of the said chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law including the Standing Orders made under the Industrial Employment (Standing Orders) Act, but it will have no application in a case where something different is envisaged in terms of the statutory scheme. A beneficial statute, as is well known, may receive liberal construction but the same cannot be extended beyond the statutory scheme”

H

In *Shri Sarwan Singh and Anr. v. Shri Kasturi Lal*, [1977] 1 SCC 750, A  
this Court opined :

“...When two or more laws operate in the same field and each contains a non-obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional B  
protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration”

The endeavour of the court would, however, always be to adopt a rule of harmonious construction. C

In *NGEF Ltd. v. Chandra Developers (P) Ltd. and Anr.*, [2005] 8 SCC 219, interpreting sub-section (4) of Section 20 of SICA, it was held : D

“41. It is difficult to accept the submission of the learned counsel appearing on behalf of the respondents that both the Company Court and BIFR exercise concurrent jurisdiction. If such a construction is upheld, there shall be chaos and confusion. A company declared to be sick in terms of the provisions of SICA, continues to be sick unless it is directed to be wound up. Till the company remains a sick company having regard to the provisions of sub-section (4) of Section 20, BIFR alone shall have jurisdiction as regards sale of its assets till an order of winding up is passed by a Company Court.” E

It was further held :

“49. Section 32 of SICA contains a non obstante clause stating that provisions thereof shall prevail notwithstanding anything inconsistent with the provisions of the said Act and of any rules or schemes made thereunder contained in any other law for the time being in force. It would bear repetition to state that in the ordinary course although the Company Judge may have the jurisdiction to pass an interim order in exercise of its inherent jurisdiction or otherwise directing execution of a deed of sale in favour of an applicant by the Company sought to be wound up, but keeping in view the express provisions contained in sub-section (4) of Section 20 of SICA such a power, in our opinion, in the Company Judge is not available. (See BPL Ltd.) F  
G

50. We may, however, observe that the opinion of the Division H



A Bench in *BPL Ltd.* to the effect that the winding-up proceeding in relation to a matter arising out of the recommendations of BIFR shall commence only on passing of an order of winding up of the Company may not be correct. It may be true that no formal application is required to be filed for initiating a proceeding under Section 433 of the Companies Act as the recommendations therefor are made by BIFR or AAIFR, as the case may be, and, thus, the date on which such recommendations are made, the Company Judge applies its mind to initiate a proceeding relying on or on the basis thereof, the proceeding for winding up would be deemed to have been started; but there cannot be any doubt whatsoever that having regard to the phraseology used in Section 20 of SICA that BIFR is the authority *proprio vigore* which continues to remain as custodian of the assets of the Company till a winding-up order is passed by the High Court.”

In *ICICI Bank Ltd. v. Sidco Leathers Ltd. and Ors.*, [2006] 5 SCALE 27 the law is stated in the following terms :

D “The non-obstante nature of a provision although may be of wide amplitude, the interpretative process thereof must be kept confined to the legislative policy. Only because the dues of the workmen and the debt due to the secured creditors are treated *pari passu* with each other, the same by itself, in our considered view, would not lead to the conclusion that the concept of inter se priorities amongst the secured creditors had thereby been intended to be given a total go-by.

E A non-obstante clause must be given effect to, to the extent the Parliament intended and not beyond the same.”

F Section 5 of the 1996 Act also provides for a non-obstante clause. It has, however, a limited application aiming at the extent of judicial intervention. Its application would be attracted only when an order under sub-section (3) of Section 22 is required to be passed. If the said provision is to be given effect to, the Board would not intervene in the matter of the implementation of the award. It would merely suspend the operation of it. It may even pass an order suspending the liabilities or obligations of the industrial company under the award. Even otherwise in the fact of the present case it stands suspended.

H The Board however, has not passed an order under sub-section (3) of

Section 22 of SICA. The court, therefore, must proceed with the objection filed by the Respondent under Section 34 of the 1996 Act. However, if the objection filed by the Respondent is rejected, the question of its enforceability would come into being. Once the arbitral award having the force of a decree is put into execution, sub-section (1) of Section 22 of SICA would come on its way from being enforced. The contention raised by Mr. Sundaram that having regard to the provisions of Section 5 of the 1996 Act, the Board would have no jurisdiction, therefore, does not seem to have any force. A B

Sub-section (3) of Sections 22 SICA provides for a specific power in the Board. The said provision contemplates a larger public interest. In the event an arbitral award is held to be outside the purview of sub-section (3) of Section 22 thereof, it may be difficult to frame a scheme or in a given case implement the same under SICA. SICA provides for a time-frame for all the stages of proceedings. Proviso appended thereto assumes significance in this behalf. C

The Parliament presumed that the suspension of an award shall not be for a long period. In a given case, a party to an award may face some hardships owing to its suspension; but in such an event, it would always be open to it to bring the same to the notice of the Board. The Board under sub-section (3) of Section 22 of SICA may pass such an order or may not do so. If an order is passed by the Board, an appeal lies thereagainst. The provisions of SICA, it will bear repetition to state, have been made to seek to achieve a higher goal and, thus, the provisions of SICA would be applicable, despite Section 5 of the 1996 Act. D E

In *Kailash Nath Agarwal and Ors. v. Pradeshiya Industrial & Investment Corporation of U.P. Ltd. and Anr.*, [2003] 4 SCC 305, it was held : F

“...The object for enacting SICA and for introducing the 1994 Amendment was to facilitate the rehabilitation or the winding up of sick industrial companies. It is not the stated object of the Act to protect any other person or body”

In *Burn Standard Co. Ltd. v. Mc.Dermott International Inc. & Ors.*, disposed of on 11.06.1997, a Division Bench of the Calcutta High Court opined that the arbitration proceedings may continue during the pendency of an inquiry pursuant to a reference made under SICA. G

Yet again in *Saurabh Kalani v. Tata Finance Ltd. and Anr.*, (2003) 3 H

A Arb. LR 345 (Bombay), the Bombay High Court took the same view.

*Conclusion :*

B In this case, the shares have been sold. The sale proceeds have been deposited before the Board. It is, thus, futile to interfere with the impugned order at this stage. However, we thought it necessary to lay down the law for future guidance of the Board while deciding a similar case.

For the reasons aforementioned, we do not intend to interfere with the impugned judgment of the High Court. It is dismissed accordingly having become infructuous. No costs.

C  
D **P.K. BALASUBRAMANYAN, J.** 1. While, I agree with the conclusion of my learned Brother on the interplay of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as 'SICA') and the Arbitration and Conciliation Act, 1996 on the question of law formulated while issuing notice on the Petition for Special Leave to Appeal to this Court, and his final order, I think it necessary to express my reservation on the propriety of the order passed by the Division Bench of the High Court on the facts and in the circumstances of the case. While purporting to exercise jurisdiction in a writ petition challenging an order of the Board for Industrial and Financial Reconstruction (hereinafter referred to as, 'B.I.F.R.') which  
E was approached by the respondent, the Division Bench of the High Court has chosen to brush aside valid orders passed by the Company Court in Allahabad, the order to maintain status quo passed by the Appellate Authority for Industrial and Financial Reconstruction (A.A.I.F.R.) and by various Debts Recovery Tribunals and has permitted the asset of the respondent to be sold as proposed by the respondent. It must be noted that the orders were made by the  
F competent tribunals or court and that those orders were binding on the respondent, the writ petitioner in the High Court. If on its understanding of Section 22(3) of SICA, the High Court was of the view that the orders of restraint did not bar the BIFR from considering the prayer of the respondent, there was still the order of A.A.I.F.R. to maintain status quo regarding the  
G assets of the respondent-Company. Surely, that was an order under the SICA. No reason is given by the High Court to hold that the order of A.A.I.F.R. is also not binding on B.I.F.R. or that B.I.F.R. could ignore it. According to me, the High Court should have dealt with the question properly with reference to the nature of the relevant orders and the context in which they were made and if it was still of the view that the power vested in  
H B.I.F.R. under Section 22(3) of SICA enabled it to override all those orders,

it should have normally remitted the application made by the respondent to B.I.F.R. so as to enable it to take a decision on the prayer of the respondent in the context of the proceedings pending before B.I.F.R. and all elements relevant for the purpose of such a decision. The High Court has also not considered how far it will be appropriate to permit the sale of the assets of a Company which is before B.I.F.R. for a scheme of revival.

2. Occasions are not infrequent when not so scrupulous debtors approach B.I.F.R. to stall the proceedings and to keep their creditors at bay. The delay before the B.I.F.R. is sought to be taken advantage of. The Parliament has apparently taken note of this and has repealed SICA by the Sick Industrial Companies (Special Provisions) Repeal Act, 2003. The vacuum, thus created has been filled by an amendment to the Companies Act. But, so far, the provisions of the Amending Act and the Companies Act introduced, have not been brought into force. It appears to be time to consider whether these enactments should not be notified.

V.S.S

Appeal dismissed.