

TATA MOTORS LTD.

v.

PHARMACEUTICAL PRODUCTS OF INDIA LTD. & ANR.

(Civil Appeal No. 3640 of 2008)

MAY 16, 2008

**[S.B. SINHA, LOKESHWAR SINGH PANTA AND  
MARKANDEY KATJU, JJ]**

*Companies Act, 1956; s. 391/Sick Industrial Companies  
(Special Provisions) Act, 1984; Ss. 15-20, 26 and 32:*

*Liability of sick Company to pay to secured and unsecured creditors – Interpretation of provisions of 1956 Act and 1984 Act – Reference by sick company to Board for Industrial and Financial Reconstruction – Board while recommending for winding up of the company appointed an operating agency – Appellate Authority staying operation of the order of Board – Framing of schemes by operating agency for settling dues of selective creditors excluding the appellant-company and other creditors – Approval of – Company Judge approving the Scheme – Letters Patent Appeal dismissed by High Court – Correctness of – Held: Incorrect – Provisions under Special Act override the provisions of a general Act – S.26 of SICA bars the jurisdiction of Civil Courts in respect of any matter, the Board or AAIFR is empowered to determine – Thus, jurisdiction of the High Court in a case of this nature is limited – Order of the Board not appeared to be fair and reasonable to meet the requirements of law – Hence, not only the impugned judgment but also the order of the Board as also the Appellate Authority cannot be sustained and set aside – Matter remitted to the Board for consideration afresh in accordance with the provisions of SICA – Interpretation of Statutes.*

**Respondent No.1, a company took loan from another company, the predecessor-in-interest of the appellant. Respondent No. 1, being unable to pay the dues to appel-**

A lant and other secured and unsecured creditors made a reference before the Board for Industrial and Financial Reconstruction. The Board appointed Industrial Development Bank of India (IDBI) as an operating agency and recommended winding up of the respondent-company.

B An appeal was preferred thereagainst by the appellant-creditor before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR). The Appellate authority stayed the operation of the order of the Board. Before the Appellate authority two separate Schemes were

C framed, one of them related to an arrangement between respondent No. 1 and one M/s. Wanbury Ltd. for settling of dues. Respondent No. 1, however, filed an application before the High Court in terms of Section 391 of the Companies Act, during the pendency of the appeal, a Scheme

D was presented before the Company Judge purported to be settling of dues of about 80 percent of the creditors. Allegedly, even at that stage, it was not disclosed before the Company Court that unsecured creditors listed in the Scheme were only a selected few creditors, as a result whereof a large number of creditors had been excluded.

E Before the Company Judge, the appellant filed an application for intervention objecting the scheme on certain grounds. Rejecting objections, the scheme was approved by the High Court. Letters Patent Appeal preferred thereagainst by the appellant was dismissed by the High Court.

F Hence, the present appeal.

Appellant contended that SICA being a special statute, the provision thereof shall prevail over the provisions of the 1956 Act; that the High Court committed a manifest error in entertaining the respondent's application for merger under Sections 391 to 394 of the Act, although the matter was pending before the AAIFR; that the High Court failed to notice the binding precedent of this Court in *NGEF Ltd. vs. Chandra Developers (P) Ltd.* (2005) 8 SCC 219 wherein it has clearly been held by this Court that

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SICA will prevail over the 1956 Act; that Section 26 of the SICA bars the jurisdiction of the company Judge; and that the Division Bench of the High Court has failed to consider that the Company Judge had no jurisdiction to entertain such a proceeding.

Respondent No. 1 submitted that the operation of the order of BIFR having been stayed, the Company Petition was maintainable; that Section 19 of SICA will have no application as it speaks of financial assistance by the persons specified therein; that Section 22 of SICA must be read in the context of Section 19 thereof; that Section 26 or any other provision of SICA do not oust the jurisdiction of the Company Court; that SICA would prevail over 1956 Act only if the provisions of the latter are inconsistent with the provisions of SICA and not otherwise; and that the Scheme in question being subject to approval by BIFR and that BIFR by reason of its order dated 1<sup>st</sup> May, 2007 had granted approval thereof, the legal requirements must be held to have been complied with.

Allowing the appeal, the Court

HELD: 1.1 The provisions of a special Act override the provisions of a general Act. A later of it will override an earlier Act. The Companies Act, 1956 is a general Act. It consolidates and restates the law relating to companies and certain other associations. It is prior in point of time to Sick Industrial Companies (Special Provisions) Act, 1984. Wherever any inconstancy is seen in the provisions of the two Acts, SICA would prevail. (Para – 19) [285-E-F]

1.2 SICA is a special statute. It is a self contained Code. The jurisdiction of the Company Judge in a case where reference had been made to BIFR would be subject to the provisions of SICA. (Para – 20) [285-G]

1.3 SICA was enacted to secure the principles specified in Article 39 of the Constitution of India. It seeks to

A give effect to the larger public interest. It should be given primacy because of its higher public purpose. Section 26 of SICA bars the jurisdiction of the Civil Courts. (Para – 22) [291-F-G]

B *NGEF Ltd. vs. Chandra Developers (P) Ltd. (2005) 8 SCC 219* and *Bombay Dyeing & Manufacturing Co. Ltd. vs. Bombay Environmental Action Group (2006) 3 SCC 434* – referred to.

C 1.4 What scheme should be prepared by the operating agency for revival and rehabilitation of the sick industrial company is within the domain of BIFR. Section 26 of SICA not only covers orders passed under SICA but also any matter which BIFR is empowered to determine. (Para – 22) [291-H; 292-A]

D 1.5 The jurisdiction of civil court is barred in respect of any matter for which the appellate authority or the Board is empowered. The High Court may not be a civil court but its jurisdiction in a case of this nature is limited. (Para – 23) [291-A-B]

E *Jyoti Bhushan Gupta vs. Banaras Bank Ltd. (1962) Supp 1 SCR 73* and *Damji Valli Shah vs. Life Insurance Corporation of India (1965) 2 SCR 665* – referred to.

F 2.1 The jurisdiction of the Company Court is now vested in the Tribunal. Therefore, it will be difficult to hold, in view of a changed situation, that Section 26 of SICA ousts the jurisdiction of the Company Court in totality. (Para – 26) [294-D]

G 2.2 It is not possible to harmonize the provisions of Sections 391 to 394 of the 1956 Act with the provisions of SICA. In the facts and circumstances of the case, the judgment of the High Court cannot be sustained. (Para – 26) [295-C,B]

H 3.1 The Scheme provides for not only entering into an arrangement as regards repayment of debts to secured creditors and unsecured creditors but also provides

for a merger, subject of course, to an appropriate order being passed by BIFR. The question is as to whether such a Scheme could be placed for approval before BIFR. This Court is of the view that it could not be. Before BIFR could approve a scheme, the same must be drawn in terms of the provisions of the Act and not de hors the same. It is required to apply its own mind. The operating agency is supposed to make a scheme. The operating agency before the AAIFR took one stand and before this Court it has taken another. According to it, it was not involved in the preparation of the Scheme. It had no occasion to apply its own mind. Furthermore, after the Single Judge passed its order, AAIFR disposed of the appeal only in terms of the order of the High Court directing BIFR to consider the scheme vetted by the operating agency within a period of three months from the date of this order and take necessary further steps for the revival of the appellant company in accordance with law. The order of BIFR also clearly shows that it has granted its approval in view of the observations made by the appellate authority. It might have done so keeping in view the doctrine of judicial discipline in mind. (Paras – 28 and 29) [295-E-H; 296-A-C]

3.2 The order of BIFR is not an outcome of any pre-application of mind. There is no finding that it has taken into consideration all the relevant facts. There is nothing to show that such an order is fair or reasonable or meets the requirements of law. Hence, this Court is of the opinion that not only the judgment of the High Court but also the orders of BIFR as also the AAIFR should be set aside and the matter should be remitted to the BIFR so as to enable it to proceed in accordance with the provisions of SICA afresh. (Paras – 30 and 31) [296-D-E]

4. It is a fit case where this Court should exercise its jurisdiction under Section 142 of the Constitution of India to meet the object for which the Act has been enacted. (Para – 27) [295-D]

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3640  
of 2008

B From the Judgment and Order dated 16.10.2006 of the  
High Court of Judicature at Bombay in Appeal No. 725 of 2006  
in Company Petition No. 470 of 2005 connected with Com-  
pany Application No. 282 of 2005

C R.F. Nariman, C.A. Sundaram, Abhishek, M. Singhavi,  
Shyam Divan, Birendra Saraf, Amar Dave, Nandini Gore, Sonia  
Nigam, S. Jayaram, Rohni Musa, Sudanshu Batra, Abhishek  
Gupta, Pramit Saxena, Amit Yadav, S.V. Deshpande, S.M.  
Jadhav, P.K. Manohar, Arvind Kumar Gupta and Bipin Bihari  
Singh for the Appearing Parties.

The Judgment of the Court was delivered by

D **S.B. SINHA, J.** 1. Leave granted

*Introduction*

E 2. Interpretation/application of the provisions of the Sick  
Industrial Companies (Special provisions) Act, 1984 (SICA) vis-  
à-vis the Companies Act, 1956 (1956 Act) is in question in this  
appeal which arises out of a judgment and order dated 16<sup>th</sup>  
October, 2006 passed by a Division Bench of the High Court of  
Judicature at Bombay in Appeal No.725 of 2006 arising out of  
a judgment and order dated 13<sup>th</sup> February, 2006 passed by a  
learned Single Judge of the Bombay High Court approving a  
F Scheme filed by the respondent herein in Company Petition  
No.470 of 2005 which was under Section 391 of the 1956 Act.

*Background Facts:*

G 3. First respondent is a company registered and incorpo-  
rated under the 1956 Act. It took loan from Tata Finance Ltd,  
predecessor-in-interest of the appellant on interest @ 18% per  
annum. Disputes and differences arose between the parties,  
which were referred to arbitral tribunal. An award was passed  
on 30<sup>th</sup> July, 2002 in the Arbitration proceedings for a sum of  
H Rs.1,51,36,795/- together with interest @ 18% per annum till

payment and/or realization. It is stated that the total amount due to the appellant from the respondent would be near about 5.7 crores of rupees. There were other secured and unsecured creditors also.

*Proceedings under SICA*

4. Respondent being unable to pay the dues made a reference in terms of Section 15 of SICA before the Board for Industrial and Financial Reconstruction (BIFR). The BIFR appointed Industrial Development Bank of India (IDBI) as an operating agency. It purported to have considered various schemes. However, as Unit Trust of India (UTI) raised an objection for giving up any of its dues and there were six secured creditors and large number of unsecured creditors, BIFR on or about 27<sup>th</sup> October, 2004 passed an order recommending winding up of the respondent. An appeal was preferred thereagainst before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR).

5. The AAIFR granted stay of operation of the order of BIFR dated 27<sup>th</sup> October, 2004 by an order dated 13<sup>th</sup> September, 2005. Before the AAIFR two separate Schemes were framed, one of them related to an arrangement between the respondent and M/s. Wanbury Ltd. It agreed to settle the outstanding dues of the creditors of PPIL. But before doing so, it thought it fit to settle all the large creditors being Financial Institutions and Banks. The scheme envisaged payment to a class of creditors.

It was also envisaged:

“ In addition, two immovable properties of the company (which were its primary and main assets) were to be sold and the unsecured creditors were to be paid a proportion of the sale proceeds. The balance of the sale proceeds were to be paid over to the secured creditors.

Upon payment of the cash consideration, Wanbury was to get complete control over the Respondent including all its

A assets subject to the approval of the merger before the appropriate forum.

The scheme was to become effective upon approval of overall settlement including an order for merger or any other mode of acquisition of assets of PPIL by Wanbury or such scheme of PPIL by BIFR/AAIFR.”

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Appellant was kept outside the said Scheme. The scheme involved some selective secured creditors and some selective unsecured creditors.

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*Company Court Proceedings*

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6. Respondent, however, filed an application before the High Court of Judicature at Bombay purported to be in terms of Section 391 of the 1956 Act during the pendency of the said appeal on or about 29<sup>th</sup> April, 2005. A Scheme was presented before the Company Judge purported to be involving about 80 percent of the creditors, most of them being banks, financial institutions. Allegedly, even at that stage, it was not disclosed before the Company Court that unsecured creditors listed in the Scheme were only a selected few creditors, as a result whereof a large number of creditors had been excluded.

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7. Before the Company Judge, the appellant filed an application for intervention. It filed an objection to the said Scheme primarily on the grounds:-

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“That the revival/rehabilitation of the company was under consideration of a specialized body formed under the Sick Industries Act which is a special legislation and would prevail over the provisions of the Companies Act.

G

That the non-obstante clause contained in the Sick Industries Act will have the effect of overriding and excluding the provisions of the Companies more so where there is an overlapping between the two Act.

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That considering the scheme of the Sick Industries Act, the revival/restructuring of the company cannot be considered

by two separate forums separately.

A

That the scheme involved financial reconstruction, sale of assets of the company and merger/take over by Wanbury. These issues expressly fall within the domain of the BIFR under Section 18 of the Sick Industries Act.

B

That a scheme could not be presented only in respect of selected unsecured creditors to the exclusion of the other similarly placed unsecured creditors such as the Petitioners.

That the entire scheme was nothing but a fraud which was being played whereby the company and its assets were being transferred to Wanbury which was associated with the company itself.”

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UTI also filed an objection.

D

8. The said contentions of the appellant, however, were rejected by a learned Single Judge of the High Court by his order dated 13<sup>th</sup> April, 2006 and the Scheme was approved.

*Order of the AAIFR*

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9. In view of the aforementioned order of the High Court, AAIFR also on or about 1<sup>st</sup> June, 2006 approved the said Scheme opining :-

“5. Learned counsel for the Appellant Company states that the scheme of Compromise and Arrangement approve by the Bombay High Court have been incorporated in the scheme of revival cum merger submitted to IDBI (Operating Agency) in pursuance of direction given by us on 9.11.2005.

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6. In view of IDBI's recommendation of the revival cum merger proposal submitted by PPIL, which is in accordance with Bombay High Court's order dated 13.2.2006, we set aside the impugned order dated 27.10.2004 and direct BIFR to consider the scheme vetted by the OA within a period of three months from the date of

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A this order and take necessary further steps for the revival  
of the appellant company in accordance with law.”

B 10. An intra court appeal was preferred thereagainst by  
the appellant on or about 3<sup>rd</sup> August, 2006. By reason of the  
impugned judgment the said Letters Patent Appeal has been  
dismissed, stating:-

C “2. The Appellant claims to be an unsecured creditor to  
the extent of Rs.1.51 crores as set out in the award dated  
30.7.2002 with further interest at the rate of 18% per annum.  
It is not in dispute that the Scheme of Arrangement  
approved by the learned Company Judge between  
Pharmaceutical Products of India Ltd. and its unsecured  
creditors and Wanbury does not affect the rights of the  
D appellant as the appellant, though an unsecured creditor,  
is not specified in Schedule-I, appended to the Scheme.  
In this backdrop, the impugned order cannot be faulted.  
However, it is clarified that whatever objections the  
appellant may have against the revival scheme pending  
before the BIFR, pursuant to the order dated 1.6.2006  
passed by the AAIFR, they may place their objections  
E before the BIFR and obviously upon such objections being  
placed the BIFR shall consider the revival scheme of the  
respondent-Company on its own merits, keeping in view  
all relevant fact and circumstances, including the objections  
of the appellant.”

F *Subsequent Events*

G 11. We may also take note of some subsequent events. In  
view of the order of AAIFR dated 1<sup>st</sup> June, 2006, BIFR issued  
notice on 1<sup>st</sup> February, 2007 to consider the Scheme-cum-  
merger with M/s. Wanbury Ltd. propounded by the respondent  
company returnable on 29<sup>th</sup> March, 2007. On the said date, all  
the interested parties including the appellant were heard. By an  
order dated 1<sup>st</sup> May, 2007, BIFR is said to have sanctioned the  
Scheme-cum-merger of M/s. Wanbury Ltd. with the respondent:

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12. We may also place on record that inter alia on the premise that the said Scheme of merger was approved in gross violation of this Court's order dated 15<sup>th</sup> December, 2006, a contempt petition was filed. We are not concerned with the said Contempt Petition herein.

*Contentions*

13. Mr. R.F. Nariman, learned Senior Counsel appearing on behalf of the appellant, in support of this appeal would submit :-

1. SICA being a special statute, the provision thereof shall prevail over the provisions of the 1956 Act.
2. The High Court committed a manifest error in entertaining the respondent's application for merger under Sections 391 to 394 of the Act, although the matter was pending before the AAIFR.
3. The High Court failed to notice the binding precedent of this Court in *NGEF Ltd. vs. Chandra Developers (P) Ltd.* : (2005) 8 SCC 219 wherein it has clearly been held that SICA will prevail over the 1956 Act.
4. The Division Bench of the High Court has failed to consider that the Company Judge had no jurisdiction to entertain any proceeding.
5. Section 26 of the SICA bars the jurisdiction of the Company Judge.

14. Mr. C.A. Sundaram, learned senior counsel appearing on behalf of the respondent, on the other hand would urge :-

1. The operation of the order of BIFR having been stayed, the Company Petition was maintainable at the instance of the respondent.
2. Section 19 of SICA will have no application as it speaks of financial assistance by the persons specified therein.

- A 3. Section 22 of SICA must be read in the context of Section 19 thereof.
4. Section 26 or any other provision of SICA do not oust the jurisdiction of the Company Court.
- B 5. SICA as interpreted by this Court in NGEF Ltd. (supra) would prevail over 1956 Act only if the provisions of the latter are inconsistent with the provisions of SICA and not otherwise.
- C 6. The Scheme in question being subject to approval by BIFR and that BIFR by a reason of its order dated 1<sup>st</sup> May, 2007 had granted approval thereof, the legal requirements must be held to have been complied with.

D *STATUTORY PROVISIONS*

*SICA*

E 15. SICA was enacted to make, in the 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.

F 16. Section 15 of SICA provides for making reference by the Board of Directors of the Company on becoming an industrial company, a sick industrial company, to the Board for determination of the measures to be adopted with respect to the company. Section 16 provides for making inquiry into the working of sick industrial company by the Board after receiving reference. Section 17 provides for powers of Board to make suitable order on the completion of inquiry. Sub-section (3) thereof reads as under:-

G 17. (3) *Powers of Board to make suitable order on the*

*completion of inquiry.*

(3) If the Board decides under sub-section (1) that it is not practicable for a sick industrial company to make its net worth exceed the accumulated losses within a reasonable time and that it is necessary or expedient in the public interest to adopt all or any of the measures specified in section 18 in relation to the said company it may, as soon as may be, by order in writing, direct any operating agency specified in the order to prepare, having regard to such guidelines as may be specified in the order, a scheme providing for such measures in relation to such company."

17. Section 18 provides for preparation and sanction of Scheme. Sections 18(1)(c), 18(3) and 18(6A) read as under :-

"Section 18 - Preparation and sanction of Schemes

(1) Where an order is made under sub-section (3) of section 17 in relation to any sick industrial company, the operating agency specified in the order shall prepare, as expeditiously as possible and ordinarily within a period of ninety days from the date of such order, a scheme with respect to such company providing for any one or more of the following measures, namely:—

(c) the amalgamation of—

(i) the sick industrial company with any other company, or

(ii) any other company with the sick industrial company;

(hereafter in this section, in the case of sub-clause (i), the other company, and in the case of sub-clause (ii), the sick industrial company, referred to as "transferee company");

(3) (a) The Scheme prepared by the operating agency shall be examined by the Board and a copy of the scheme with modification, if any, made by the Board shall be sent, in draft, to the sick industrial company and the operating agency and in the case of amalgamation, also to any other

A company concerned, and the Board shall publish or cause to be published the draft scheme in brief in such daily newspapers as the Board may consider necessary, for suggestions and objections, if any, within such period as the Board may specify.

B (b) The Board may make such modifications, if any, in the draft scheme as it may consider necessary in the light of the suggestions and objections received from the sick industrial company and the operating agency and also from the transferee industrial company and any other company concerned in the amalgamation and from any shareholder or any creditors or employees of such companies:

D Provided that where the scheme relates to amalgamation the said scheme shall be laid before the company other than the sick industrial company in the general meeting for the approval of the scheme by its shareholders and no such scheme shall be proceeded with unless it has been approved, with or without modification, by a special resolution passed by the shareholders of the company other than the sick industrial company.

F (6A) Where a sanctioned scheme provides for the transfer of any property or liability of the sick industrial company in favour of any other company or person or where such scheme provides for the transfer of any property or liability of any other company or person in favour of the sick industrial company, then, by virtue of, and to the extent provided in, the scheme, on and from the date of coming into operation of the sanctioned scheme or any provision thereof, the property shall be transferred to, and vest in, and the liability shall become the liability of, such other company or person or, as the case may be, the sick industrial company."

H 18. Section 19 provides for rehabilitation by giving financial assistance; sub-sections (1), (2) and (4) whereof reads as

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under :-

"Section 19 - Rehabilitation by giving financial assistance.  
-(1) Where the scheme relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial company, the scheme may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution or any institution or other authority (any Government, bank, institution or other authority required by a scheme to provide for such financial assistance being hereafter in this section referred to as the person required by the scheme to provide financial assistance) to the sick industrial company.

(2) Every scheme referred to in sub-section (1) shall be circulated to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation or within such further period, not exceeding sixty days, as may be allowed by the Board, and if no consent is received within such period or further period, it shall be deemed that consent has been given.

(4) Where in respect of any scheme consent under sub-section (2) is not given by any person required by the scheme to provide financial assistance, the Board may adopt such other measures, including the winding up of the sick industrial company, as it may deem fit."

Sections 20, 26 and 32 of SICA read as under :-

"Section 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

A industrial company is not likely to make its net worth exceed  
the accumulated losses within a reasonable time while  
meeting all its financial obligations and that the company  
as a result thereof is not likely to become viable in future  
and that it is just and equitable that the company should  
B be wound up, it may record and forward its opinion to the  
concerned High Court.

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

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

(4) Notwithstanding anything contained in sub-section (2)  
or sub-section (3), the Board may cause to be sold the  
assets of the sick industrial company in such manner as  
it may deem fit and forward the sale proceeds to the High  
F Court for orders for distribution in accordance with the  
provisions of section 529A, and other provisions of the  
Companies Act, 1956 (1 of 1956).

Section 26 - Bar of jurisdiction. - No order passed or  
proposal made under this Act shall be appealable except  
G as provided therein and no civil court shall have jurisdiction  
in respect of any matter which the Appellate Authority or  
the Board is empowered by, or under, this Act to determine  
and no injunction shall be granted by any court or other  
authority in respect of any action taken or to be taken in  
H pursuance of any power conferred by or under this Act.

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

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

*The Companies Act, 1956*

Section 391 of the Companies Act, 1956 reads as under:

Section 391 - Power to compromise or make arrangements with creditors and members .- (1) Where a compromise or arrangement is proposed-

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them,

the Tribunal may, on the application of the company or of any creditor or member of the company or, in the case of

A a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be to be called, held and conducted in such manner as the Tribunal directs.

B (2) If a majority in number representing three-fourths in  
C value of the creditors, or class of creditors, or members,  
D or class of members as the case may be, present and  
voting either in person or, where proxies are allowed under  
the rules made under section 643, by proxy, at the meeting,  
agree to any compromise or arrangement, the compromise  
or arrangement shall, if sanctioned by the Tribunal, be  
binding on all the creditors, all the creditors of the class,  
all the members, or all the members of the class, as the  
case may be, and also on the company, or, in the case of  
a company which is being wound up, on the liquidator and  
contributories of the company:

Provided that no order sanctioning any compromise or  
arrangement shall be made by the Tribunal unless the  
Tribunal is satisfied that the company or any other person  
by whom an application has been made under sub-section  
(1) has disclosed to the court, by affidavit or otherwise, all  
material facts relating to the company, such as the latest  
financial position of the company, the latest auditor's report  
on the accounts of the company, the pendency of any  
investigation proceedings in relation to the company under  
sections 235 to 351, and the like.

(3) An order made by the Tribunal under sub-section (2)  
shall have no effect until a certified copy of the order has  
been filed with the Registrar.

(4) A copy of every such order shall be annexed to every  
copy of the memorandum of the company issued after the  
certified copy of the order has been filed as aforesaid, or  
in the case of a company not having a memorandum, to  
every copy so issued of the instrument constituting or

defining the constitution of the company.

A

(5) If default is made in complying with sub-section (4), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to one hundred rupees for each copy in respect of which default is made.

B

(6) The Tribunal may, at any time after an application has been made to it under this section stay the commencement or continuation of any suit or proceeding against the company on such terms as the Tribunal thinks fit, until the application is finally disposed of."

C

*Interpretation of the Statutory Provisions*

19. It was conceded by Mr. Sundaram SICA being a special law vis.-a-vis the 1956 Act, it shall prevail over the latter. The learned counsel, however, qualifies his submission by contending that SICA only excludes the provisions of the Companies Act when they are inconsistent with each other.

D

The provisions of a special Act will override the provisions of a general Act. A later of it will override an earlier Act. 1956 Act is a general Act. It consolidates and restates the law relating to companies and certain other associations. It is prior in point of time to SICA.

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Wherever any inconstancy is seen in the provisions of the two Acts, SICA would prevail. SICA furthermore is a complete code. It contains a non-obstante clause in Section 32.

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20. SICA is a special statute. It is a self contained Code. The jurisdiction of the Company Judge in a case where reference had been made to BIFR would be subject to the provisions of SICA.

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We may, at this stage, notice the effect of SICA vis-à-vis the other Acts, as has been noticed by this Court in some of its judgments

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A 21. In *NGEF Ltd. vs. Chandra Developers (P) Ltd.* : (2005) 8 SCC 219, in regard to the jurisdiction of the Company Court it was held :-

B “20. Mr K.K. Venugopal, the learned Senior Counsel, would submit that having regard to sub-section (2) of Section 536 of the Companies Act, the High Court has the jurisdiction to permit sale of assets of the Company even before passing of the winding-up order, in relation whereto Section 20(4) of SICA will have no application.

C 23. The provisions relating to winding up by the courts occur in Chapter II of the Companies Act, 1956. Section 433 of the Act enumerates the circumstances in which the company may be wound up by the court including the inability on the part of the company to pay its debts. Section 441 of the Act specifies as to when the proceeding for winding up of a company by the court shall commence at the time of the presentation of the petition for the winding up.

E In a case, however, where winding-up proceedings are initiated in terms of recommendations made by BIFR or AAIFR, as the case may be, no such petition is required to be presented. Section 443 lays down the power of a court on hearing petition; clause (d) of sub-section (1) whereof provides for a power to make an order for winding up of the company with or without costs or any other order that it thinks fit. Section 444 lays down the consequences of the winding-up order. In terms of Section 446 of the Act, in the event of passing of a winding-up order or appointment of liquidator as Provisional Liquidator, no suit or legal proceeding would commence or if pending at the date of the winding-up order, shall not be proceeded with against the company except by leave of the court and subject to such terms as the court may impose. Sub-section (2) of Section 446 provides for a non obstante clause, in terms whereof the Company Court shall have jurisdiction

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to entertain or dispose of any suit or proceedings specified therein. Section 451 lays down general provisions as to liquidators. Section 457 specifies the power of the liquidator which is required to be exercised with the sanction of the court. Sub-section (2) of Section 536 reads as under:

"536. *Avoidance of transfers, etc., after commencement of winding up.*—(1) \* \* \*

(2) In the case of a winding up by the Tribunal, any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall, unless the Tribunal otherwise orders, be void."

In regard to jurisdiction of the Company Court it was held:-

"39. The provisions of SICA contain non obstante clauses. It is a special statute. It is a complete code in itself. The jurisdiction of the Company Court in such matters would arise only when BIFR or AAIFR, as the case may be, has exercised its jurisdiction under Section 20 of SICA recommending winding up of the Company upon arriving at a finding that there does not exist any chance of revival of the Company."

It was furthermore held:

"40. Mr Venugopal has placed reliance upon a decision of a learned Single Judge of the Karnataka High Court in Karnataka State Industrial Investment and Development Corpn. Ltd. v. Intermodel Transport Technology Systems for the proposition that despite the fact BIFR retains jurisdiction to get the assets of a sick company sold in terms of sub-section (4) of Section 20 of SICA; still the leave of the Company Court, therefor would be required. The said decision, however, has been reversed by the Division Bench of the Karnataka High Court in BPL Ltd.

A v. Intermodal Transport Technology Systems (Karnataka) Ltd. holding that the Company Court has no such jurisdiction. We generally accept the views of the Division Bench.

B 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.

D 42. Apart from the fact that sub-section (4) of Section 20 contains a non obstante clause and, thus, it shall prevail over the provisions contained in sub-section (2). The said Act is also a latter statute.

E 43. The provisions of SICA would prevail over the provisions of the Companies Act. Section 20 of SICA relates to winding up of the sick industrial company. Before BIFR or AAIFR, as the case may be, makes a recommendation for winding up of the Company, an enquiry is made in terms of Section 16 thereof wherefor all relevant facts and circumstances are required to be taken into consideration. Before an opinion is arrived at in that behalf, the parties are given an opportunity of hearing. The satisfaction arrived at by BIFR that the Company is not likely to become viable in future and it is just and equitable that the Company should be wound up must be based on objective criteria. The High Court indisputably on receipt of such recommendation of BIFR would initiate a proceeding for winding up in terms of Section 433 of the Companies Act. Sub-section (2) of Section 536 ipso facto

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does not confer any jurisdiction upon the Company Court to direct sale of the assets of the sick company. It has to exercise its power thereunder subject to the provisions of the special statute governing the field. Despite the fact that the procedures laid down under the Companies Act would be applicable therefor but they must be read with sub-section (4) of Section 20 of SICA which contains a non obstante clause and in terms thereof, BIFR is authorised to sell the assets of the sick industrial company in such a manner as it may deem fit. By reason of the said provision, BIFR is also empowered to forward the sale proceeds to the High Court for orders for distribution in accordance with Section 529-A and other provisions of the Companies Act which in no uncertain terms would mean that the distribution of the sale proceeds would be for the purpose of meeting the claims of the creditors in the manner laid down therein. The intention of Parliament in enacting the said provision becomes clear as in terms of Section 22-A of SICA, BIFR is empowered to issue any direction in the interest of the sick industrial company or its creditors or shareholders and direct the sick industrial company not to dispose of its assets except with its assent. Section 32, as noticed hereinbefore, again contains a non obstante clause. The scheme suggests that BIFR retains control over the assets of the Company and in terms of the aforementioned provisions may either prevent any sale or permit any sale of the assets of the sick industrial company. Such a power in BIFR remains till a winding-up order is passed by the High Court and a stage arrives for the High Court for issuing orders for distribution of the sale proceeds.

**44.** SICA was furthermore enacted subsequent to the provisions of the Companies Act. It is not, thus, possible to accept the submission that the High Court exercises a concurrent jurisdiction."

It was ruled that the Company Court and the BIFR do not

A exercise concurrent jurisdiction, holding:-

B “45. It may be true that the High Court’s jurisdiction is that  
C of the Appellate Authority but keeping in view the  
D terminology contained in sub-section (4) of Section 20  
read with Section 32 of the Act, it leaves no manner of  
doubt that the provisions of SICA shall prevail over the  
provisions of the Companies Act. For the aforementioned  
purpose, it was not necessary for Parliament to mention  
specifically the provisions of sub-section (4) of Section 20  
that the same shall prevail over Section 536 of the  
Companies Act, as was suggested by the learned counsel  
appearing for the first respondent. The construction of the  
provisions of both the Acts, as suggested by the learned  
counsel, that both the provisions of sub-section (4) of  
Section 20 and Section 536 should be read conjointly so  
as to enable an applicant to obtain a sanction of both  
BIFR and the Company Court, thus, do not appeal to us.”

E The Court noticed the non obstante clause contained in  
clause (4) of Section 20 as also Section 32 of SICA to hold that  
the High Court does not exercise concurrent jurisdiction with  
BIFR. The fact that SICA was enacted in 1984 had also been  
taken into consideration.

The Court considered in details the exercise of the juris-  
diction of the Company Court vis-à-vis the BIFR to opine :-

F “69. BIFR admittedly had the power to sell the assets of  
the Company but the High Court until a winding-up order  
is issued does not have the same. BIFR in its order dated  
24-8-2002 might have made an observation to the effect  
that the Company may approach the High Court in case  
G it intended to dispose of its property by private negotiation  
but the same would not mean that BIFR could delegate its  
power in favour of the High Court. BIFR being a statutory  
authority, in the absence of any provision empowering it to  
delegate its power in favour of any other authority had no  
H jurisdiction to do so. “Delegatus non potest delegare” is

a well-known maxim which means unless expressly authorised a delegatee cannot sub-delegate its power. Moreover, the said observations of BIFR would only mean that the Company Court could exercise its power in accordance with law and not de hors it. If the Company Court had no jurisdiction to pass the impugned order, it could not derive any jurisdiction only because BIFR said so.”

(See also *Morgan Securities and Credit Pvt. Ltd. v. Modi Rubber Ltd.* [AIR 2007 SC 683]

22. The principle laid down therein has been reiterated in *Bombay Dyeing & Manufacturing Co. Ltd. vs. Bombay Environmental Action Group* : (2006) 3 SCC 434 stating :

“13. The 1993 Act was enacted to provide for and regulate the payment of interest on delayed payments to small-scale and ancillary industrial undertakings and for matters connected therewith.

14. The provisions of the 1993 Act, therefore, do not envisage a situation where an industrial company becomes sick and requires framing of a scheme for its revival.

15. It is no doubt true that an award in relation to a claim of a small-scale industry if made by the Council would be governed by the provisions of the Arbitration and Conciliation Act, 1996 (for short “the 1996 Act”).”

SICA furthermore was enacted to secure the principles specified in Article 39 of the Constitution of India. It seeks to give effect to the larger public interest. It should be given primacy because of its higher public purpose. Section 26 of SICA bars the jurisdiction of the Civil Courts.

What scheme should be prepared by the operating agency for revival and rehabilitation of the sick industrial company is within the domain of BIFR. Section 26 not only covers orders passed under SICA but also any matter which BIFR is empow-

A ered to determine.

23. The jurisdiction of civil court is, thus, barred in respect of any matter for which the appellate authority or the Board is empowered. The High Court may not be a civil court but its jurisdiction in a case of this nature is limited.

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24. Our attention has been drawn to the decision of this Court in *Jyoti Bhushan Gupta v. Banaras Bank Ltd*, [ (1962) Supp 1 SCR 73 ] where the question which arose for consideration was as to whether Article 183 of the Limitation Act shall have any application in regard to the applicability of the provisions of the Limitation Act, it was stated :-

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“By the Companies Act of 1913, the High Court was invested with jurisdiction to order payment of the amounts due by debtors of companies ordered to be wound up. This jurisdiction may be invoked as of right against all persons whose names are placed on the list of contributories. The jurisdiction is ordinary : it does not depend on any extraordinary action on the part of the High Court. The jurisdiction is also original in character because the petition for exercise of the jurisdiction is entertainable by the High Court as a court of first instance and not in exercise of its appellate jurisdiction. Again by s. 187 no special jurisdiction is conferred. The High Court adjudicates upon the liability of the debtor to pay debts due by him to the Company : the jurisdiction is therefore civil. Normally, a creditor has to file a suit to enforce liability for payment of a debt due to him from his debtor. The Legislature has by s. 187 of the Companies Act empowered the High Court in a summary proceeding to determine the liability and to pass an order for payment but on that account the real character of the jurisdiction exercised by the High Court is not altered. Nor is there any substance in the contention that the authority to order payment of a debt under s. 187 is merely a power of the High Court and not its jurisdiction. By s. 3 read with s. 187

of the Companies Act the High Court has jurisdiction to direct payment of the amount due by a contributory : and an order passed for payment manifestly is an order passed in exercise of the jurisdiction vested in the High Court by s. 3 read with s. 187 of the Companies Act. "

It was furthermore observed:-

"The jurisdiction to deal with the claims of companies ordered to be wound up is conferred by the Indian Companies Act and to that extent the Letters Patent are modified. There is, however, no difference in the character of the original civil jurisdiction which is conferred upon the High Court by Letters Patent and the jurisdiction conferred by special Acts. When in exercise of its authority conferred by a special statute the High Court in an application presented to it as a court of first instance declares liability to pay a debt, the jurisdiction exercised is original and civil and if the exercise of that jurisdiction does not depend upon any preliminary step invoking exercise of discretion of the High Court, the jurisdiction is ordinary."

25. In *Damji Valli Shah v. Life Insurance Corporation of India*, [(1965) 2 SCR 665 ], the question which arose for consideration was as to whether a similar provision made in the Life Insurance Corporation Act, 1956 shall bar the jurisdiction of the Company Court in terms of Section 446 (1) of the Companies Act. Referring to Section 41 of the Life Insurance Corporation Act, 1956 it was stated that the Tribunal constituted under the LIC Act will have exclusive jurisdiction. It was opined:-

"20. It is in view of the exclusive jurisdiction which sub-s. (2) of s. 446 of the Companies Act confers on the company Court to entertain or dispose of any suit or proceeding by or against a company or any claim made by or against it that the restriction referred to in sub-s. (1) has been imposed on the commencement of the proceedings or proceeding with such proceedings against a company after a winding-up order has been made. In view of s. 41

A of the LIC Act the company Court has no jurisdiction to entertain and adjudicate upon any matter which the Tribunal is empowered to decide or determine under that Act. It is not disputed that the Tribunal has jurisdiction under the Act to entertain and decide matters raised in the petition  
B filed by the Corporation under s. 15 of the LIC Act. It must follow that the consequential provisions of sub-s. (1) of s. 446 of the Companies Act will not operate on the proceedings which be pending before the Tribunal or which may be sought to be commenced before it."

C 26. What in this case, however, has been contended is that BIFR had no jurisdiction to make a scheme as envisaged under Section 391 of the Act. Even otherwise, 'civil court' has a definite connotation. The jurisdiction of the Company Court is now vested in the Tribunal. Therefore, it will be difficult to hold,  
D in view of a changed situation, that Section 26 ousts the jurisdiction of the Company Court in totality. The decision, however, also says that the special statute shall prevail over the general rule.

E Although it may not be very relevant, we may notice that this Court in *Dwarka Prasad Agarwal v. Ramesh Chander Agarwal*, [(2003) 6 SCC 220] opined as under :-

F "22. The dispute between the parties was eminently a civil dispute and not a dispute under the provisions of the Companies Act. Section 9 of the Code of Civil Procedure confers jurisdiction upon the civil courts to determine all disputes of civil nature unless the same is barred under a statute either expressly or by necessary implication. Bar of jurisdiction of a civil court is not to be readily inferred.  
G A provision seeking to bar jurisdiction of a civil court requires strict interpretation. The court, it is well settled, would normally lean in favour of construction, which would uphold retention of jurisdiction of the civil court. The burden of proof in this behalf shall be on the party who asserts that  
H the civil court's jurisdiction is ousted. (See Sahebgouda

v. Ogeppa) Even otherwise, the civil court's jurisdiction is not completely ousted under the Companies Act, 1956." A

We are, therefore, of the opinion that the judgment of the High Court cannot be sustained. We may furthermore notice that the decision of the learned single judge has been overruled by a Division Bench of the Bombay High Court in *Ashok Organics Industries Ltd. v. Dena Bank* (Company Petition No. 108 of 2006, disposed of on 25.1.2008). B

It is also not possible to harmonize the provisions of Sections 391 to 394 of the 1956 Act with the provisions of SICA. C

For the views we have taken, it is not necessary to consider the other contentions raised at the bar.

27. The question, however, is what relief should be granted in view of the subsequent events. Various intervention applications have been filed. We do not intend to make any observation in regard thereto. We are, however, of the opinion that it is a fit case where we should exercise our jurisdiction under Section 142 of the Constitution of India to meet the object for which the Act has been enacted. D

28. We have been taken through the Scheme. The Scheme provides for not only entering into an arrangement as regards repayment of debts to secured creditors and unsecured creditors but also provides for a merger, subject of course, to an appropriate order being passed by BIFR. The question is as to whether such a Scheme could be placed for approval before BIFR. We are of the view that it could not be. Before BIFR could approve a scheme, the same must be drawn in terms of the provisions of the Act and not de hors the scheme. It is required to apply its own mind. The operating agency is supposed to make a scheme. The operating agency before the AAIFR took one stand; before us it has taken another. According to it, it was not involved in the preparation of the Scheme. It had no occasion to apply its own mind. Furthermore, after the learned Single Judge passed its order, AAIFR disposed of the appeal only in E  
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A terms of the order of the High Court stating :-

“In view of IDBI’s recommendation of the revival cum merger proposal submitted by PPIL, which is in accordance with Bombay High Court’s order dated 13.2.2006, we set aside the impugned order dated 27.10.2004 and direct BIFR to consider the scheme vetted by the OA within a period of three months from the date of this order and take necessary further steps for the revival of the appellant company in accordance with law.”

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29. The order of BIFR dated 1<sup>st</sup> May, 2007 also clearly show that it has granted its approval in view of the observations made by the appellate authority. It might have done so keeping in view the doctrine of judicial discipline in mind.

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30. The order of BIFR is not an outcome of any pre-application of mind. There is no finding that it has taken into consideration all the relevant facts. There is nothing to show that such an order is fair or reasonable or meets the requirements of law.

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31. We are, therefore, of the opinion that not only the judgment of the High Court but also the orders of BIFR as also the AAIFR should be set aside and the matter should be remitted to the BIFR so as to enable it to proceed in accordance with the provisions of SICA afresh.

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32. The appeal is allowed with the aforementioned observations and directions. In the facts and circumstances of the case, there shall be no order as to costs.

Appeal Allowed.