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**(2014) 01 GAU CK 0053**  
**In the Gauhati High Court**

**Case No :** F.A.O. No. 10 of 2010 and W.P. (C) Nos. 4303 and 6286 of 2013

Ghanshyam Sarda and Others

APPELLANT

Vs

Shiv Shankar Trading Co. and Others

RESPONDENT

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**Date of Decision :** 06-01-2014

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1(r), 104, 21, 9  
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 16, 18, 22,  
22(1)

**Citation :** (2015) 188 CompCas 245 : (2015) 1 CompLJ 587

**Hon'ble Judges :** Ujjal Bhuyan, J

**Bench :** Single Bench

**Advocate :** K.N. Choudhary, Senior Advocate, A. Dhar and A. Kohli, Advocates for the Appellant; N. Dutta, D.K. Mishra, Senior Advocates, S.C. Keyed and A. Lal, Advocates for the Respondent

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**Judgement**

Ujjal Bhuyan, J.—F.A.O. No. 10 of 2013 was tagged with W.P. (C) No. 4303 of 2013 following order dated August 14, 2013, passed in W.P. (C) No. 4303 of 2013. Thereafter, as per order dated November 1, 2013, passed in W.P. (C) No. 6286 of 2013, the said case was tagged with W.P. (C) No. 4303 of 2013. The subject matter of all the three cases being interrelated, and as agreed to by learned counsel for all the parties, those were heard together and are being disposed of by this common judgment and order. F.A.O. No. 10 of 2013 has been filed by one Sri Ghanshyam Sarda against an order of injunction dated May 13, 2013, passed by the learned Civil Judge No. 3, Kamrup, Guwahati in Misc. (J) Case No. 254 of 2013, arising out of Title Suit (TS) No. 166 of 2013. By the aforesaid order of injunction, the Board for Industrial and Financial Reconstruction (BIFR) has been restrained from proceeding further with BIFR Case No. 149 of 1994. The suit has been filed by one M/s. Shiv Shankar Trading Co., an unsecured creditor of J.K. Jute Mills Co. Ltd. (company), which has been declared as a sick industrial company under the Sick Industrial Companies (Special Provisions) Act, 1985, reference under which has been registered with

the BIFR as BIFR Case No. 149 of 1994.

2. W.P. (C) No. 4303 of 2013 has been filed by the said M/s. Shiv Shankar Trading Co., the plaintiff in T.S. No. 166 of 2013, challenging the legality and validity of the proceedings before the BIFR dated May 16, 2013 and order of the BIFR dated July 1, 2013, passed in BIFR Case No. 149 of 1994 on the ground that the proceedings and order of the BIFR are in violation of the injunction order of the civil court.

3. W.P. (C) No. 6286 of 2013 has been filed by the company challenging the legality and validity of the order dated September 5, 2013, passed by the BIFR in BIFR Case No. 149 of 1994 on the ground that the said order is not only in violation of the injunction of the civil court, but stood vitiated because of participation of respondent No. 2, a Member of the BIFR, in the proceedings of the said case, though he had earlier recused himself from hearing the matter as per order dated January 31, 2013.

4. Though papers filed before the court are voluminous, and exhaustive arguments were advanced by learned counsel for the parties, attempt has been made to confine the proceeding only to the immediate issues confronting the court in the present litigation. Consequently, only the bare essential facts relevant for the present adjudication are briefly set out hereunder.

5. The plaintiff in T.S. No. 166 of 2013 claims to be an unsecured creditor of the company having supplied raw jute to it during the year 2002-03. As the company did not make payment for the supply made, which was to the tune of Rs. 38,65,607 the plaintiff made enquiries and came to know that the company had moved the BIFR for a declaration that it is a sick company and seeking protection under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). The BIFR had, in fact, declared the company as a sick company under the SICA and proceedings are on under the provisions of the SICA for revival of the company. In spite of its status as a sick company, the company entered into the above deal with the plaintiff without informing it about the said position.

6. The plaintiff contended that as per latest audited balance-sheet of the company, its net worth has become positive. Since its net worth has become positive, it would no longer be a sick company and, therefore, it would no longer have the protection of the BIFR under the SICA. In other words, the BIFR would no longer have jurisdiction to continue the proceedings in BIFR Case No. 149 of 1994 which would pave the way for the plaintiff to institute appropriate legal proceeding against the company for realisation of dues.

7. The plaintiff then instituted T.S. No. 166 of 2013 at Guwahati seeking a declaration that the company is not a sick company within the meaning of the SICA, that the BIFR would cease to have jurisdiction over the company and that the plaintiff is entitled to a decree of Rs. 38,65,607 from the company with interest. Injunction was also sought to restrain the BIFR from proceeding further

with BIFR Case No. 149 of 1994. The plaintiff also filed an injunction petition, which was registered as Misc. (J) Case No. 254 of 2013.

8. The learned Civil Judge No. 3, Kamrup, Guwahati passed injunction order dated May 13, 2013, restraining the BIFR from proceeding further with BIFR Case No. 149 of 1994

9. Against the aforesaid injunction order, Sri Ghanshyam Sarda has preferred an appeal before this court, which has been registered and numbered as F.A.O. No. 10 of 2013. This court by order dated June 14, 2013, admitted the appeal and without staying the injunction order, additionally issued certain further directions.

10. When the injunction order of the civil court as well as the above order of this court were brought to the notice of the BIFR, the latter ignored the same and proceeded with BIFR Case No. 149 of 1994. Proceedings were held on May 16, 2013 and thereafter order was passed on July 1, 2013, which would be adverted to in a little more detail in the subsequent stage of the judgment. The BIFR held the civil court's order to be without jurisdiction and, therefore, void; in fact, the civil court was declared to be coram-non-judice.

11. As noticed above, the unsecured creditor, who is the plaintiff in the suit, has filed W.P. (C) No. 4303 of 2013, challenging the legality and validity of the proceedings before the BIFR dated May 16, 2013 and the order of the BIFR dated July 1, 2013.

12. This court by order dated September 30, 2013, had admitted the writ petition and had stayed further proceedings in BIFR Case No. 149 of 1994. However, on a writ appeal being filed by Sri Ghanshyam Sarda (respondent No. 3 in the writ petition), the Division Bench had vacated the stay order.

13. The second writ petition has been filed by the company against the order dated September 5, 2013, passed by the BIFR in BIFR Case No. 149 of 1994, whereby the BIFR continuing with the proceedings notwithstanding the injunction order of the civil court and the order of this court in appeal, directed the parties to file their submissions/comments on the Special Investigative Audit (SIA) report submitted by the State Bank of India on the audited balance-sheet of the company as on December 31, 2013. Though the audited balance-sheet declared the net worth of the company to be positive, as per the SIA report, the net worth of the company is still in the negative, which enables the BIFR to retain jurisdiction. Contention of the company is that the said order of the BIFR is not only in violation of the injunction order of the civil court, but is also vitiated by participation of Sri J.P. Dua, a Member of the BIFR. In an earlier proceeding in the said case, i.e., on January 31, 2013, counsel representing the company stated before the BIFR that both Sri Aditya Sarda, present management, and Sri Ghanshyam Sarda had association with Sri J.P. Dua when he was working in the Oriental Bank of Commerce. Sri J.P. Dua also declared that when he was working with the Oriental Bank of Commerce, there might have been some interactions with the Sarda brothers. Expressing his reservation, he offered to recuse himself

from hearing the matter. Notwithstanding the above, Sri Dua again participated in the proceedings on September 5, 2013, raising grave apprehension in the mind of the company, a key stakeholder in the proceedings before the BIFR, about the fairness of such proceeding.

14. Mr. K.N. Choudhury, learned senior counsel appearing for Sri Ghanshyam Sarda, the appellant in the appeal and the contesting respondent in the two writ petitions, has painstakingly taken the court to various stages of the proceedings before the BIFR. He contended that though the company was lying closed since the year 2003, following negotiations between the Singhania family, the erstwhile promoter of the company, and the Sarda group, there was change in the shareholding pattern of the company which was approved by the BIFR. Consequent thereupon, the company resumed its business activities. Though the management and control of the company was taken over by the Sarda brothers, dispute arose between them because of the activities of the elder brother, Sri Govind Sarda and his son, which led to a whole lot of litigations. Ultimately, the BIFR circulated a Draft Revival Scheme (DRS) submitted by his client Sri Ghanshyam Sarda for revival of the company. As per the DRS, the BIFR has recognized the appellant as the person responsible for execution of the DRS and he has been entrusted to constitute the board of directors. It is from that stage onwards and to prevent finalisation of the DRS, a number of cases have been instituted in different courts across the country. In the meanwhile, the company also suddenly submitted a balance-sheet as on December 31, 2012, to show that its net worth has turned positive and, therefore, it should be discharged from the BIFR. Mr. Choudhury would submit that the sudden filing of the balance-sheet, that too of 9 months as on December 31, 2012 and not of one year as is the regular practice, and institution of cases in various places are only intended to prevent and frustrate finalisation of the DRS.

15. The BIFR, however, did not discharge the company by accepting the balance-sheet as presented. It asked the State Bank of India to examine the balance-sheet and to submit report. The State Bank of India has submitted report and as per its report, the net worth of the company is still in the negative. A writ petition was filed in the Jabalpur Bench of the Madhya Pradesh High Court by one M/s. Shyam Jute claiming to be an unsecured creditor of the company for realisation of dues. The Madhya Pradesh High Court by order dated April 25, 2013, dismissed the writ petition on the ground of lack of territorial jurisdiction.

16. Likewise, a writ petition was also moved before the Allahabad High Court by a labour union of the company, called J.K. Jute Mazdoor Sabha, contending that since the company is no longer sick, the scheme for rehabilitation is not required. Writ petition was dismissed by the single judge, which order was upheld by the Division Bench by holding that all such issues as to whether the company is no longer a sick company may be raised before the BIFR. He, therefore, submits that it is in this context, institution of the civil suit at Guwahati becomes highly suspicious.

17. Learned senior counsel submits that the appellant had filed an application for impleadment in the suit on May 30, 2013, which has been registered as Misc. (J) Case No. 341 of 2013, but no decision has been taken thereon. On the other hand, because of a petition filed by the plaintiff seeking amendment, entire suit has been kept in abeyance by the civil court.

18. Attacking the injunction order dated May 13, 2013, learned senior counsel submits that the civil suit itself is barred by section 22(1) and section 26 of the SICA. Consent sought by the plaintiff to institute civil suit was declined by the BIFR. Thus, in view of the express statutory bar, the civil court could not have entertained the suit and passed the injunction order. Therefore, the injunction order passed by the civil court is without jurisdiction, and such an order would be void being an order from a coram-non-judice. He also contends that as the registered office of the company is at Kanpur in the State of Uttar Pradesh and the BIFR is located at Delhi, Civil Court at Guwahati has no territorial jurisdiction either to entertain the suit.

19. Mr. Choudhury, further submits that the plaintiff had evidently suppressed about the Division Bench order of the Allahabad High Court, which was passed on May 1, 2013, before the civil court. He submits that it is evident that the suit filed is a result of collusion between the plaintiff and the company, as the company readily came forward and told the civil court that its net worth had turned positive, thereby supporting the case of the plaintiff to ensure that further proceedings before the BIFR are stalled. In so far as the writ petitions are concerned, Mr. Choudhury has questioned the maintainability on the ground of lack of territorial jurisdiction and also on the ground that interference with the BIFR proceeding is uncalled for and unwarranted. Mr. Choudhury has referred to a number of decisions in support of his contentions and those would be adverted to in the course of the judgment.

20. Mr. D.K. Misra, learned senior counsel appearing for respondent No. 1/ plaintiff, at the threshold, submitted that the appeal filed is not maintainable. The appellant is not yet a party in the civil suit. Without getting himself impleaded as a party to the suit, the appellant could not have filed the instant appeal when primary objection/challenge to the injunction order is on the ground of lack of jurisdiction. No leave has also been obtained from this court before preferring appeal. He, therefore, submits that in view of section 21 of the Code of Civil Procedure, 1908 (C.P.C.), the appeal is not maintainable and is liable to be dismissed. He also submits that the civil court is a court of plenary jurisdiction and has the power to determine its own jurisdiction. Ouster of jurisdiction of civil court is not to be readily inferred. He submits that the BIFR is a statutory tribunal of limited jurisdiction and, therefore, it is not competent to determine jurisdictional issues. He further contends that once the net worth of the company has turned positive, meaning thereby that it is no longer a sick company, it cannot be subjected to the provisions of the SICA. Since there is no provision in the SICA for discharging of an earlier sick company on its net worth turning

positive, the civil court would be competent to examine this aspect of the matter. Therefore, the bar under sections 22 and 26 of the SICA would not be applicable. He has also placed reliance on a number of decisions, which would be adverted to in the course of the judgment.

21. Mr. P.K. Tiwari, learned counsel for the petitioner in W.P. (C) No. 4303 of 2013, who is also the plaintiff in the suit, submits that territorial jurisdiction of the Civil Court at Guwahati has to be decided on the basis of the averments made in the plaint. From the pleadings in the plaint/it is evidently clear that a part of the cause of action, if not the whole, has arisen within the territorial limits of the Civil Court at Guwahati. Therefore, the Civil Court at Guwahati would have the territorial jurisdiction to decide the suit. He further submits that considering the relief sought for by the plaintiff, the alternative remedy provided under section 25 of the SICA is neither adequate nor effective. Exhaustion of alternative remedy is a matter of public policy, convenience and discretion and is not an inflexible rule. In the present case, the subject matter of the suit takes itself out of the ambit and scope of the provisions of section 25 of the SICA. For the said reason, the bar under sections 22 and 26 of the SICA would also not be attracted. In such circumstances, grant or refusal to grant permission by the BIFR to file civil suit would not be decisive while determining maintainability. Order and direction of the Allahabad High Court cannot take away the civil and legal rights of the plaintiff/petitioner to seek relief from the civil court. In any case, the petitioner was not a party to the proceedings before the Allahabad High Court. The petitioner did not know about such order of the Allahabad High Court. Question of suppression does not arise. DRS of Ghanshyam Sarda does not vest any legal right on him to contest the claim of the plaintiff/petitioner. He is a total stranger in so far as the claim of the petitioner is concerned. Moreover, circulation of the said DRS has been stayed by the Appellate Authority for Industrial and Financial Reconstruction (AAIFR). When the civil court had enjoined the BIFR, the latter, being a statutory tribunal, is bound to comply with the order of the civil court and cannot ignore or question it by terming the same as of coram-non-judice. The civil court has the inherent jurisdiction to decide its own jurisdiction. A litigant or a tribunal cannot disobey the order of the civil court by terming the same to be coram-non-judice. If a party is aggrieved, remedy is to move higher judicial forum for cancellation of such order and not to take it upon himself to decide the correctness or otherwise of the order. On territorial jurisdiction, he submits that since the writ petition draws sustenance from the order of the Civil Court at Guwahati, therefore, a part of the cause of action has admittedly arisen within the territorial limits of this court.

22. Mr. N. Dutta, learned senior counsel for the petitioner in W.P. (C) No. 6286 of 2013, which is the company, submits that the company is the owner of J.K. Jute Mill, situated at Kanpur. It was declared as a sick unit under the SICA. The net worth of the company has now become positive as would appear from the audited balance-sheet of the company as on December 31, 2012, which was informed to the BIFR and the AAIFR vide letters dated March 25, 2013. The said

audited balance-sheet was filed before the BIFR after approval was taken from the shareholders in the annual general meeting of the company. With the net worth of the company becoming positive as on December 31, 2012, the company would no longer be a sick company and therefore, the BIFR has ceased to have jurisdiction to pass any order in respect of the company. According to him, with the company becoming solvent, one Sri Ghanshyam Sarda has started making attempts to take over the management of the company. Mr. Dutta would submit that Sri Ghanshyam Sarda has started misusing the mechanism of BIFR to further his own interest and as such he wants continuation of the proceedings before the BIFR.

23. He further submits that in the suit filed at Guwahati, the learned civil judge while passing the injunction order recorded the fact that the company's net worth has become positive and, therefore, it is not entitled to plead the defence of section 22 of the SICA. Sri Ghanshyam Sarda has challenged this order in appeal before this court. But this court did not stay the injunction order, rather issued certain additional restrictive directions.

24. Continuing his submissions, Mr. Dutta submits that showing deference to the injunction order passed by the Civil Court at Guwahati, the company refrained from participating in the proceedings before the BIFR but the BIFR by disregarding the injunction order of the civil court is proceeding with the matter. The two members comprising the Bench of the BIFR hearing the case of the company, Sri J.P. Dua and Sri S.C. Sinha were former bankers of Oriental Bank of Commerce. They were close associates of Sri Ghanshyam Sarda. When this was pointed out before the BIFR by lawyers of the company, Sri J.P. Dua in the order dated January 31, 2013, recused himself from hearing the matter on the ground that he is personally known to Sri Ghanshyam Sarda, but strangely enough on September 5, 2013, he was again a part of the Bench of BIFR hearing the case and passed order seeking submission of comments by the parties on the report submitted by the State Bank of India on the audited balance-sheet of the company. His participation in the proceedings of September 5, 2013, has vitiated the said order. On the other hand, Mr. S.C. Sinha continues to remain a part of the Bench and is hearing the case despite apprehension and objection raised by the parties. He vehemently argues that all the orders passed by the BIFR after the injunction order was passed are illegal and liable to be set aside. He has also pointed out, what according to him, is the dubious conduct of the J.K. Jute Mills Mazdoor Ekta Union (respondent No. 4 in W.P. (C). No. 4303 of 2013). The Union had entered into an agreement with the company to the effect that the company will clear the dues of the workers as expeditiously as possible. But strangely the Union is opposing the company before the BIFR as well as before this court while supporting the stand of Sri Ghanshyam Sarda, who is a complete outsider and has no role in the affairs of the company. On the issue of jurisdiction of the civil court, learned senior counsel submits that unlike a tribunal of limited jurisdiction, civil court is competent to decide its own jurisdiction. Power to grant injunction while determining jurisdiction is inherent in the civil court, he would submit. Final

finding as to jurisdiction is inconsequential in so far as grant of injunction in the interregnum is concerned. Learned senior counsel has placed reliance on a number of decisions, which will be adverted to in the course of the judgment.

25. Mr. S.S. Dey, learned counsel appearing on behalf of Libra Retailers P. Ltd., a secured creditor of the company, while supporting the stand taken by Mr. D.K. Misra and Mr. N. Dutta, learned senior counsel as well as that of Mr. P.K. Tiwari, submits that as the net worth of the company has turned positive, it is no longer a sick industrial company. Therefore, the BIFR has ceased to have jurisdiction over the company. Viewed in the above context, the civil court was justified in injuncting the BIFR from proceeding further. The BIFR being an inferior tribunal cannot decide its own jurisdiction, whereas the civil court being a court of plenary jurisdiction can decide its own jurisdiction. He submits that the whole effort of Sri Ghanshyam Sarda is to misuse the forum of the BIFR and get the DRS which is favourable to him finalised and binding on the company. He further submits that time has come to terminate the proceedings before the BIFR as despite the case being pending before the BIFR for almost two decades, no effective decision could be taken by the BIFR while preventing the creditors, both secured and unsecured, from realising their dues.

26. Mr. I. Choudhury, learned counsel appearing for J.K. Jute Mills Mazdoor Ekta Union, respondent No. 4 in W.P. (C) No. 4303 of 2013, has supported the stand taken by Mr. K.N. Choudhury, learned senior counsel appearing on behalf of the appellant, Sri Ghanshyam Sarda. He submits that the Union is primarily concerned with the payment of outstanding dues of the workers by the management of the company, which would be more than 65 crores and has remained unpaid for several years now. The Union has got itself impleaded in the proceedings before the BIER and has been pursuing the matter so that the sick industrial company can be revived, which, in turn, will lead to clearing the dues of the workers. The BIER has found that the DRS submitted by Sri Ghanshyam Sarda is satisfactory and the same was circulated. It was then that the audit balance-sheet of the company for the period only up to December 31, 2012 and not for the whole year was suddenly submitted before the BIER by the company with the projection that the net worth of the company has turned positive and, therefore, it is no longer a sick company. He submits that the question as to whether the net worth of the company has turned positive or not can be better appreciated by the BIER being a body of experts as was observed by the Allahabad High Court. He would therefore, submit that institution of the civil suit at Guwahati is highly suspicious. He also questions the bona fides of the plaintiff and submits that the attending facts and circumstances would clearly show the collusive character of the suit. In any case, the Civil Court at Guwahati has no jurisdiction to entertain the suit relating to a sick industrial company which is being monitored by the BIER under the SICA. Furthermore, the Civil Court at Guwahati lacks territorial jurisdiction to injunct the BIER located at Delhi from proceeding further. Mr. Choudhury has also questioned the correctness of the audited balance-sheet of the company and submits that no fetters should be

placed on the BIER from proceeding with the matter keeping in view the mandate of the SICA.

27. Submissions made have been considered.

28. Before proceeding further, relevant provisions of the SICA may be briefly referred to.

29. The SICA is an Act to secure timely detection of sick and potentially sick companies owning industrial undertakings and for 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. Thus, objective of the SICA is to secure the timely detection of sick and potentially sick companies owning industrial undertakings so that an expert body can take ameliorative steps for its revival. The SICA is all about making a sick industrial company healthy and if it is not viable, to go for liquidation, expeditiously, keeping in view the fact that rights of the creditors to realise their dues would remain suspended during pendency of proceeding before the BIER. "Sick industrial company" is defined in section 3(1) (o) of the SICA. It means an industrial company registered for not less than five years which has, at the end of any financial year, accumulated losses equal to or exceeding its net worth. While section 4 provides for establishment of the BIFR, section 5 provides for constitution of the AAIFR. Section 15 of the SICA lays down the procedure for making a reference to the BIFR for determination of the measures to be adopted with respect to the sick industrial company. The BIFR then makes an inquiry into the working of such company under section 16. Following completion of enquiry under section 16, the BIER is empowered to make suitable order or to take decision to enable the company to make its net worth exceed the accumulated losses within a reasonable period. If the BIFR finds that it is not practicable for a sick industrial company to make its net worth exceed the accumulated losses within a reasonable time, it may direct any operating agency (OA) to prepare a scheme to provide for the various measures as laid down in section 18, which includes financial reconstruction, change of management, amalgamation, sale or lease of the industrial undertaking of the sick industrial company, etc. When enquiry under section 16 is pending, or where scheme as referred to above, is under consideration or is under implementation, there shall be suspension of legal proceedings, contracts, etc., as provided under section 22(1). As per the second part of section 22(1), no suit for recovery of money or for the enforcement of any security against industrial company, etc., shall lie or be proceeded with, except with the consent of the BIFR or as the case may be of the AAIFR. As per sub-section (3) of section 22, during the period of enquiry under section 16 or during the preparation or consideration or during implementation of the scheme, the BIFR may direct suspension of all contracts, etc., with respect to the sick industrial company for such period which shall not exceed seven years in the aggregate. Section 25 provides for filing of appeal before the AAIFR from any order passed by the BIFR under the SICA. Under

section 26, no civil court shall have jurisdiction in respect of any matter over which the BIFR or the AAIFR are empowered to determine under the SICA and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance to any power conferred by or under the SICA.

30. In a recent case, *Continental Carbon Ltd. v. Modi Rubber Ltd.*, i.e., W.P. (C) No. 4854 of 2011, decided on July 31, 2012, a Division Bench of the Delhi High Court while examining the claim of an unsecured creditor against a sick industrial company under the SICA, held that such a party would also have to face the consequences of the legal remedies being kept in abeyance for a period which may extend up to a maximum of 7 years. The question before the Delhi High Court was whether on approval of a scheme by the BIFR under the SICA, an unsecured creditor has the option not to accept the scaled down value of his dues and to wait till the scheme for rehabilitation of the company has worked itself out so that it can recover the debt with interest post such rehabilitation.

31. In an earlier case of *Catholic Syrian Bank Vs. Board of Industrial and Financial Reconstruction and Others*, , a Division Bench of the Delhi High Court was examining the challenge made to an order passed by the AAIFR holding that the industrial company in question, was no more a sick industrial company under section 3(1)(o) of the SICA. In that case, the AAIFR referred to and relied upon a judgment of the Madras High Court in W.P. (C) No. 2442 of 2006, wherein it was held that the company in question had ceased to be a sick industrial company. The Madras High Court had examined the audited balance-sheet of the said company as on March 31, 2007 and found that the audited balance-sheet was showing positive net worth. The company had moved an application before the BIFR praying for deregistration of the case on the ground that it was no longer a sick industrial company, but no decision was taken by the BIFR. It was held by the Madras High Court that with the net worth of the company turning positive, the company had ceased to be a sick company and, therefore, the BIFR could not have retained its jurisdiction over the company any further. The Madras High Court had examined in detail the balance-sheet of the company and declared that its net worth had become positive as it had wiped out the entire accumulated losses, which was certified by the statutory auditors. It was observed that sickness or otherwise of an industrial company is to be decided ex facie on the basis of the audited balance-sheet of the company and when the net worth becomes positive, the BIFR would cease to have any jurisdiction. It was further observed that there is no provision in the SICA providing for deregistration of a reference when the net worth of the company becomes positive after wiping out the accumulated losses. Importantly, the Madras High Court held that once a company ceased to be a sick industrial company as defined by the SICA, all proceedings taken by the BIFR in relation to it must thereafter absolutely cease. The question which the Madras High Court sought to answer was whether the BIFR can come to a conclusion as to loss of its own jurisdiction in relation to an industrial company, which was once sick, but

subsequently ceased to be a sick company any longer. In the absence of any express provision allowing a tribunal to decide its own jurisdiction, the age-old principle must be applied that an authority cannot vest jurisdiction to itself and, accordingly, it is incompetent to decide its own jurisdiction. On the other hand, the courts decide about their own jurisdiction because there is no other authority which can decide it for them. Following the decision of the Madras High Court, the AAIFR held that as the net worth of the company before it had turned positive, it was no more a sick industrial company. As such, the BIFR as well as the AAIFR ceased to have jurisdiction over the company and, accordingly, the appeal was dismissed. The said decision of the Madras High Court was followed by the Delhi High Court and the writ filed against the decision of the AAIFR was dismissed.

32. In *International Finance Corporation v. Bihar State Industrial Development Corporation* reported in [2005] 10 SCC 179, the apex court held that repeated interference in the proceedings of the BIFR is not justified as it benefits nobody except the persons who continue in the management of the company. In the meanwhile, the secured creditors would be deprived of their normal rights to recover their dues by reason of the provisions of the SICA. Therefore, it is also essential for the BIFR to dispose of the matter before it expeditiously.

33. In *Tata Motors Ltd. Vs. Pharmaceutical Products of India Ltd. and Another*, , the apex court was considering interpretation/application of the provisions of the SICA vis-a-vis the Companies Act, 1956. The apex court held that the SICA is a special statute and, thus, overrides other Acts, like Companies Act, 1956. Section 26 of the SICA bars jurisdiction of civil courts in respect of any matter for which the AAIFR or the BIFR is empowered. Even the jurisdiction of the High Court would be limited and all issues pertaining to preparation of scheme by the OA for revival and rehabilitation of the sick industrial company is within the domain of the BIFR.

34. This view was reiterated in the subsequent case of *M.D., Bhoruka Textiles Limited Vs. Kashmiri Rice Industries*, . That was a case where the High Court had upheld the judgment and decree of a civil court, whereby it was held that section 22 of the SICA would have no application to the claim of the plaintiff for recovery of dues from the company. It was held that a suit would be barred when an inquiry under section 16 is pending. It was further held that, if the civil court's jurisdiction is ousted in terms of the provisions of section 22, any judgment rendered by it would be *coram-non-judice*, as it is a settled law that a judgment and decree passed by a court or a Tribunal lacking jurisdiction would be a nullity.

35. The apex court in the case of *Raheja Universal Limited Vs. NRC Limited and Others*, , after tracing the legislative scheme of the SICA and its nature and scope, held that it is predominantly remedial and ameliorative in so far as it empowers a quasi-judicial body, the BIFR, to take appropriate measures for revival and rehabilitation of viable sick industrial companies and for liquidation of non-viable companies. The SICA hardly contemplates adversarial proceedings. It

was also held that it may be against the principles of equity if the creditors are not allowed to recover their dues from the company but such creditors may approach the BIFR for permission to proceed against the company for recovery of their dues. If permission is granted, the suit can be filed but if permission is not granted, the remedy is not extinguished. It is only postponed.

36. Having broadly noticed the relevant provisions of the SICA and some of the judicial pronouncements as above which were cited at the Bar, the other issue, namely, ouster of jurisdiction of civil court may now be briefly attended to.

37. The Privy Council way back in 1940 in the case of Raheja Universal Limited Vs. NRC Limited and Others, , was examining the question of jurisdiction of the civil court to entertain the related suit in view of the provisions of the Sea Customs Act, 1878. It was held that exclusion of jurisdiction of the civil court is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It was further held that even if jurisdiction is so excluded, the civil courts would have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or where the statutory tribunal has not acted upon in conformity with the fundamental principles of judicial procedure.

38. This well-settled legal principle has been reiterated and restated by the hon''ble apex court from time to time. In Bhatia Co-operative Housing Society Ltd. Vs. D.C. Patel, , the hon''ble Supreme Court held that it is well-settled that a civil court has inherent power to decide the question of its own jurisdiction, although, as a result of its enquiry, it may turn out that it has no jurisdiction over the suit.

39. Prakash Narain Sharma Vs. Burmah Shell Cooperative Housing Society Ltd., , is a case where the hon''ble apex court held that even where exclusion of jurisdiction of the civil court is statutorily provided still on availability of requisite grounds the civil court can entertain a civil suit on the well defined parameters settled by the Constitution Bench of the apex court in Dhulabhai and Others Vs. The State of Madhya Pradesh and Another, . In that case, the hon''ble apex court held that it could not subscribe to the view that the Registrar of Co-operative Societies could have ignored the order of the civil court as not binding on him in view of certain provisions contained in the Co-operative Societies Act. The hon''ble Supreme Court cautioned that it would be a dangerous proposition to be laid down as one of law that any individual or authority can ignore the order of the civil court by assuming authority upon itself to decide that the order of the civil court is one by coram-non-judice. It was held that the proper course in such a case would be for the person aggrieved first to approach the civil court inviting its attention to the relevant provisions of law and call it to adjudicate upon the question of its own jurisdiction and to vacate or recall its order, if it be one which it did not have jurisdiction in law to make. The hon''ble apex court categorically held that so long as it is not done or till it is declared void in a duly constituted juridical proceeding, the order of the civil court must be obeyed and respected by

all concerned.

40. In *Dwarka Prasad Agarwal (D) by Lrs. and Another Vs. Ramesh Chandra Agarwala and Others*, the hon'ble apex court held that bar of jurisdiction of a civil court is not to be readily inferred. A provision seeking to bar jurisdiction of a civil court requires strict interpretation. The court would normally lean in favour of the construction, which would uphold retention of jurisdiction of the civil court.

41. Having broadly noticed the relevant legal parameters as above, we may now turn to the individual cases.

F.A.O. No. 10 of 2013

42. As already noticed, this appeal has been preferred by Sri Ghanshyam Sarda. Appeal has been filed under the provision of Order XLIII, rule 1(r) of the Code of Civil Procedure, 1908, i.e., against the order of injunction. This provision is relatable to section 104 of the C.P.C. Admittedly, the appellant is not a party to the suit. In the appeal filed, the appellant has basically assailed the injunction order on the ground of lack of jurisdiction, though other grounds are also taken. It is contended that in view of the provisions contained in section 22(1) read with section 26 of the SICA, the civil court's jurisdiction is ousted, inasmuch as the said suit has not been filed with the consent of the BIFR or AAIFR. It was argued in the hearing on behalf of the appellant that consent sought by the plaintiff was declined by the BIFR. Further contention of the appellant is that the Civil Court at Guwahati lacks territorial jurisdiction to entertain the civil suit inasmuch as the registered office of the company is at Kanpur in the State of Uttar Pradesh, whereas the BIFR is located at New Delhi.

43. Section 21 of the C.P.C. deals with objections to jurisdiction. It provides that no objection as to the place of suing shall be allowed by any Appellate Court or by any Revisional Court unless such objection is taken in the court of first instance at the earliest possible opportunity, and, in all cases where issues are settled at or before such settlement, and unless there has been consequent failure of justice.

44. Though section 9 of the C.P.C. provides that the civil court has jurisdiction to try all suits of a civil nature, excepting suits of which their cognisance is either expressly or impliedly barred, having regard to the discussions made above and since, this is a matter of jurisdiction, a decision in this regard would have to be taken by the civil court itself as to whether the suit filed by the plaintiff is maintainable or not. Without raising that issue before the civil court of the first instance, the appellant would be precluded from raising the issue of jurisdiction before the Appellate Court.

45. It is a settled proposition of law that the right of appeal is a creature of the statute and would be governed by the conditions of the statute. Being a vested right, it enables a party to the suit to prefer an appeal subject to fulfillment of the required conditions. However, there may be cases where a person, who may

not be a party to the suit, but may feel the necessity to prefer an appeal, against an order passed in the suit. Such a person can also file an appeal provided he seeks leave of the court and the court grants the leave for the purpose.

46. The apex court in the case of Smt. Jatan Kumar Golcha Vs. Golcha Properties (P) Ltd., , spelt out the law that it is well-settled that a person who is not a party to the suit may prefer an appeal with the leave of the Appellate Court and such leave should be granted if he would be prejudicially affected by the judgment.

47. In the case of State of Punjab (Now Haryana) and Others Vs. Amar Singh and Another, , the apex court relying on the above proposition of law, laid down the tests which have to be satisfied before leave is granted. The tests are:

- (i) The applicant seeking leave must either be bound by the order, or,
- (ii) He must be aggrieved by it, or,
- (iii) He must be prejudicially affected by the order.

48. In the present case, it is seen that the appellant has not sought leave of the Appellate Court and, consequently, no leave to file appeal has been granted. Since the appellant is not yet a party to the civil suit, question of him raising the objection as to jurisdiction before the civil court also does not arise at this stage. However, as has been stated by the appellant, his application for impleadment, which has been registered as Misc. (J) Case No. 341 of 2013 and stated to have been filed on May 30, 2013, is still pending consideration before the civil court.

49. In the circumstances and having regard to the discussions made above, this court is of the considered opinion that the appeal filed by the appellant is not maintainable in the present form. As the appeal is being held to be not maintainable, deliberation on the merit of the injunction order dated May 13, 2013, is considered not necessary.

50. However, having regard to the nature of the controversy and considering the relevant legal provisions as discussed above, including the provisions of the SICA, the court is of the view that Misc. (J) Case No. 341 of 2013 filed by the appellant for impleadment and stated to be pending before the Civil Judge No. 3, Guwahati is required to be decided without any further delay. In case, the appellant is impleaded as a defendant in the suit, it would be open to him to file such application as may be provided under the law for discharging or variation or setting aside of the injunction order by the civil court which passed the said injunction order. If such an application is filed, the same shall be taken up and considered expeditiously in the light of the discussions made above. As counsel for the plaintiff has pointed out that plaintiff has filed a petition for amendment of the plaint, considering the above, such amendment petition filed by the plaintiff shall be kept in abeyance till decision is rendered by the civil court on Misc. (J) Case No. 341 of 2013 and thereafter, if any application is filed by the appellant for discharge or variation or setting aside of the injunction order as indicated above.

51. As already noticed, the petitioner in this case, is the plaintiff in the civil suit. He seeks quashing of the proceedings before the BIER dated May 16, 2013 and the order of the BIER dated July 1, 2013, passed in BIFR Case No. 149 of 1994 on the ground that those have been passed in violation of the injunction order dated May 13, 2013, passed by the Civil Court at Guwahati. In the civil suit, the company filed written objection stating that on and from the financial year 2012-13, it is no longer a sick company. Since other than the company and the BIER, which is a formal party, there were no other parties before the civil court to make a different projection about the financial health of the company, proceeding on the assumption that the company is no longer a sick company, the civil court took the prima facie view that the BIFR has ceased to have any jurisdiction over the company. Consequently, injunction order was passed. The civil court held as under:

"In the case at hand, it is an admitted fact that opposite party No. 1 is not a sick industrial company any more. Therefore, in view of the above case-law, BIER (i.e., opposite party No. 2) has ceased to have any jurisdiction over opposite party No. 1. Consequently, the petitioners definitely have a strong prima facie case and the other golden principles for granting injunction are also in their favour, as elucidated in paragraph 13 of the instant injunction petition.

But a question that is still required to be answered at this juncture is as to whether this court has the jurisdiction to grant the relief of temporary injunction as sought for in the instant case. Section 26 of the SICA, which provides, inter alia, that no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act, shall not be applicable to opposite party No. 1 company any more as it is no more a sick industrial company admittedly and the provisions of the SICA are not applicable to it anymore and, therefore, the civil court will definitely have jurisdiction over it. Hence, this court has the jurisdiction to grant the relief as sought for in the instant case.

In the result, it is directed that the opposite parties are injuncted/restrained, during the pendency of the suit from proceeding with BIFR Case No. 149 of 1994 pending before opposite party No. 2. The case at hand, accordingly, stands allowed on contest with cost."

52. This order of the civil court has not been overturned by any judicial forum till date. Though, appeal was filed by respondent No. 3 before this court in F.A.O. No. 10 of 2013, the same has been dismissed by this court, as per decision in the preceding part of this judgment. At present, there is no challenge to the said injunction order before any judicial forum. Therefore, as on date, the said injunction order is in operation. But notwithstanding the same, the BIFR considered the audited balance-sheet of the company as on December 31, 2012, in the proceedings on May 16, 2013 and by order dated July 1, 2013, directed

the State Bank of India to appoint an independent auditor to examine the net worth position of the company as on December 31, 2012 and thereafter to submit SIA report. In the process, BIFR observed that the injunction order was a nullity being passed by the civil court without jurisdiction. The civil court was described as coram-non-judice. It was further observed that the civil court overreached the order of the Allahabad High Court and that the BIFR would follow the Allahabad High Court being the superior forum. As already explained by the apex court in Prakash Narain Sharma Vs. Burmah Shell Cooperative Housing Society Ltd., , the BIFR being a quasi judicial body, could not have ignored the order of the civil court. The BIFR not being a judicial forum superior to the Civil Court at Guwahati could not have ignored the order of the civil court by terming the same to be one by coram-non-judice. Until and unless the injunction order of the civil court is vacated or recalled by an appropriate judicial forum, the same must be respected and given effect to. Moreover, the Allahabad High Court did not give any direction to the BIER to examine net worth of the company. While dismissing the writ, it was observed by the Allahabad High Court that the issue can be raised before the BIFR. This cannot be construed to mean a positive direction to the BIER to proceed and decide the issue. There is thus no inconsistency or conflict between the order of the Allahabad High Court and the order of the civil court as observed by the BIFR.

53. Further, in F.A.O. No. 10 of 2013, which has been dismissed by the present judgment, this court by order dated June 14, 2013, had admitted the appeal for hearing and had passed an interim order to the following effect till the disposal of the appeal:

- "(i) The respondents shall not take any major decision relating to the financial matter;
- (ii) The respondents shall not pay to the secured and unsecured creditors;
- (iii) The respondents shall keep proper accounts of the amount spent or received; and
- (iv) No third party right in respect of the property of the respondents shall also be created."

54. A reading of this order would show that this court in appeal did not stay the injunction order dated May 13, 2013, whereby the BIER was enjoined from proceeding further with BIER Case No. 149 of 1994, rather, the above additional directions were issued.

55. It is true that there should be minimum interference in the proceedings of the BIFR having regard to the object of SICA. In this case, or rather in this group of cases, the civil suit was filed in the year 2013 and the injunction order was passed on May 13, 2013. On the other hand, the BIFR case has dragged on since 1994 for almost two decades now, though as per the mandate of the SICA, the body of experts, i.e., the BIFR has to take expeditious steps for revival of the sick

industrial company and if that is not possible, to liquidate its assets to meet the debts as far as possible. Therefore, it is obvious that proceedings before the BIFR has not been delayed because of the injunction order of the civil court.

56. Therefore, having regard to the discussions made above, on and from May 13, 2013, all proceedings before the BIFR in BIFR Case No. 149 of 1994 would stand stayed and those would be of no legal consequence. W.P. (C) No. 4303 of 2013 is disposed of accordingly.

W.P. (C) No. 6286 of 2013

57. In the hearing of BIFR Case No. 149 of 1994 on January 31, 2013, it was pointed out by learned counsel for the company that the two brothers, Sri Aditya Sarda, presently in control of the management, and Sri Ghanshyam Sarda were having long association with one of the Members of the Bench, Sri J.P. Dua, since he was working with the Oriental Bank of Commerce. Acknowledging that there were some interactions between him and the Sarda brothers, Sri J.P. Dua offered to recuse himself from hearing the case as would be evident from the order dated January 31, 2013. Since January 31, 2013, Sri J.P. Dua did not participate in the proceedings of BIFR Case No. 149 of 1994 as a Member of the BIFR. But in the proceedings held on September 5, 2013, whereby the BIFR directed the parties to file their comments and submissions on the SIA report of the State Bank of India on the net worth of the company within two weeks, Sri J.P. Dua was a Member of the Bench and passed the said order.

58. It goes without saying that justice must not only be done, but must be seen to have been done. Likewise, to dispel any apprehension of bias which a party may harbor against the presiding officer hearing the case, the test applied should be from the stand point of the litigant. It is his apprehension which must be addressed and dispelled even though the presiding officer may not at all be biased in the case. Coming to the present case, having once recused himself from hearing the case, it is neither desirable nor expected that the hon''ble Member should again start hearing the case, moreso when proceedings have assumed almost adversarial character.

59. In view of above and having regard to the order passed in W.P. (C) No. 4303 of 2013, no separate order is called for in the present petition, save and except that the hon''ble Member of the BIFR, who having recused himself from participating further in the proceeding once, should refrain from participating in the proceedings of BIFR Case No. 149 of 1994. With the above directions, all the cases are disposed of accordingly. No costs.