
(2012) 05 DEL CK 0357

In the Delhi High Court

Case No : Writ Petition (C) No. 7253 of 2011

Inderjeet Arya and Another

APPELLANT

Vs

ICICI Bank Ltd.

RESPONDENT

Date of Decision : 02-05-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6, 11, 17, 25
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 482
Limitation Act, 1963 — Section 29(2), 5
Negotiable Instruments Act, 1881 (NI) — Section 138
Presidency Towns Insolvency Act, 1909 — Section 9, 9(2), 9(3)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 15(1), 16, 17, 18
State Financial Corporations Act, 1951 — Section 29, 31, 31(1)(aa)

Citation : (2012) 5 ILR Delhi 218

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : Maneesha Dhir, Ms. Jayashree Shukla, Mr. Gaurav Shrivastava and Mr. Abhirup Das Gupta, for the Appellant; Sumit Bansal and Mr. Ateev Mathur, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Shakdher, J.—The present writ petition is directed against the judgment of the Debt Recovery Appellate Tribunal (in short DRAT)

dated 29.08.2011 passed in miscellaneous appeal no. 306/2011 in OA No. 118/2009 and the orders dated 30.05.2011 and 03.05.2010 passed

by the Debt Recovery Tribunal - II, Delhi (in short DRT). In so far as the first order of the DRT is concerned, i.e., order dated 03.05.2010, the

petitioners are aggrieved by the fact that the DRT has directed sine die adjournment of proceedings only qua the principal debtor, which is, Rajat

Pharma Chem Ltd. (in short, RPL) and not extended the said direction in their favour. The petitioners aver that they are the guarantors to the debt

owed by the aforementioned principal debtor. Though we must point out here that one of the defences taken before the DRT, by RPL, is that, it is

not the principal debtor and that another entity, being State Trading Corporation of India Ltd. (in short, STC) is the principal debtor, given the

nature of the transaction. This is an aspect we have touched upon in the latter part of our judgment. We would, however, in our judgment refer to

RPL as the principal debtor. Furthermore, it is their case that the DRT's order dated 03.05.2010, which was passed in IA No. 1046/2009,

combined the relief to the principal debtor though relief was sought qua the principal debtor as also the guarantors.

1.1 The second order of the DRT dated 30.05.2011, is assailed on the ground that the petitioner's application for clarification/modification/review

of the DRT's earlier order dated 03.05.2010, has not been allowed.

2. In order to adjudicate upon the present writ petition it is necessary to notice some broad facts, insofar as they, are relevant to the present

proceedings.

2.1 RPL is, evidently engaged in the business of manufacturing, trading and export of generic pharmaceuticals formulations and products. Petitioner

no. 1, is the Chairman-cum-director of RPL, while petitioner no. 2 is its director.

2.2 It appears that the Bank of Rajasthan, prior to its amalgamation with the respondent, instituted recovery proceedings in the DRT, which was

registered as OA No. 118/2009. In the said proceedings, STC is impleaded as defendant no. 1, while RPL, alongwith its director-guarantors is

arrayed as defendant nos. 2, 3 & 4 respectively. By way of the said recovery proceedings, Bank of Rajasthan (now the respondent bank) seeks

recovery of Rs. 26,55,35,824.50/-, which includes interest, in the sum of Rs. 2,79,43,736/-, till the date of institution of the action in DRT. Future

interest, at the rate of 18% per annum, payable from the due date of the respective bills till their actual realization, is also sought.

2.3 It is, broadly, the say of the respondent in the OA filed before the DRT that, RPL alongwith the petitioners had sought a usance bill discounting

facility, which was sanctioned by it, vide its letter dated 09.03.2006. RPL in turn had placed the said sanction accorded by the respondent bank,

before its board of directors, which approved the same by way of a resolution of even date, i.e., 09.03.2006. To secure the respondent bank's

interest various security documents were executed both by RPL as well as the petitioners. This facility allowed RPL to draw a loan to the extent of

Rs. 15 crores.

2.4 It appears that RPL had sought enhancement of this loan facility to the extent of Rs. 25 crores, which was conveyed by the respondent bank

evidently vide letter dated 30.10.2006. As in the first instance, the decision was placed by RPL, before its board of directors. The board of

directors, evidently, vide their resolution dated 10.11.2006, accepted the terms and conditions conveyed by the respondent bank vide its sanction

letter dated 30.11.2006. Once again, various security documents were executed, both by RPL as well as the petitioners.

3. It is pertinent to note that STC got roped-in the recovery proceedings, initiated by the respondent/bank, on account of the fact that against

goods purportedly supplied by RPL to STC for export to the ultimate foreign buyers, bills of exchange were raised, which were payable

apparently within 180 days from the date of their acceptance. In the OA, filed by the respondent/bank, it is averred that the bills of exchange were

accepted by STC, which in turn, had been discounted by RPL, with the respondent/bank. On the bills of exchange becoming overdue, payments

were sought by the respondent/bank both from RPL as well as STC, and upon, their failure to make the payment, the respondent bank issued legal

notices dated 02.01.2009 to the petitioners as well as STC and RPL. The STC, in response to the legal notice, sent a reply dated 05.02.2009,

inter alia refuting its liability to pay monies against outstanding bills of exchange on the ground that they were accepted on a back-to-back basis

against export bills presented to the foreign buyers, and that, the respondent bank would receive payment only if, STC received payments from the

foreign buyers. A reply dated 27.02.2009, to the legal notice, was also sent by RPL wherein, it refuted the liability inter alia on the ground that

STC was the principal debtor since it had accepted the bills of exchange.

3.1 It appears, RPL apprehending institution of recovery proceedings, took the next best step which was to seek registration of its reference u/s 15

of the Sick Industrial Companies (Special Provisions) Act, 1985 (in short "the

SICA") with the Board for Industrial and Financial Reconstructions

(in short "the BIFR"). The reference was filed on 02.04.2009. The BIFR vide its communication dated 09.04.2009, intimated its registration and

accorded it as case no. 14/2009.

3.2 As expected, the respondent/bank followed the legal notices, with the institution of an original application (OA) No. 118/2009 in the DRT, on

13.05.2009.

3.3 It may be pertinent to note at this stage, that since STC in turn, had been issued cheques in their favour by RPL, on dishonor of the cheques,

instituted proceedings u/s under Section 138 of the Negotiable Instruments Act, 1881 (in short N.I. Act). As a matter of fact proceedings u/s 138

of the N.I. Act were lodged before the Metropolitan Magistrate, in Delhi. Against summons issued by the Magistrate, proceedings u/s 482 of the

Criminal Procedure Code, 1973 (in short Cr. P.C.) were taken out being CrI. M.C. No. 1951/2009. Incidentally, these proceedings came up

before one of us (Rajiv Shakhder, J), when by an order dated 24.07.2009, the criminal complaint was ordered to be returned to be filed in the

competent court on the ground of lack of territorial jurisdiction. We are not informed as to whether any challenge has been laid to the said order

passed by this court. We, however, notice from the record filed before us, that an application u/s 22(3) of the SICA was filed before the BIFR. In

this application, suspension of the contract between STC and RPL was sought, which according to RPL formed the basis of the cheques issued in

favour of STC. The BIFR, however, by an order dated 10.09.2009 rejected the application. Against these proceedings, an appeal was filed

before the Appellate Authority for Industrial & Financial Reconstruction (in short AAIFR). The said appeal bearing No. 249/2009 is pending

adjudication.

3.4 In the recovery proceedings notices were issued by the DRT to all defendants, which included the petitioners, on 20.11.2009.

3.5 On 14.12.2009, the petitioners alongwith RPL preferred an application u/s 22 of SICA. This application was registered as IA No.

1046/2009. The substantive reliefs sought in the said application are as follows:

(a) Allow the present application;

(b) Dismiss the instant OA as the same has been filed without the prior permission of the AAIFR/BIFR in terms of Section 22(1) of SICA.

(c) Sine die adjourn the proceedings in the above matter u/s 22(1) of SICA.

3.6 IA No. 1046/2009 came to be listed before the DRT on 22.12.2009. The DRT, after noting the submissions of the counsel for the parties,

directed the respondent/bank to file a reply based on the request of its counsel. The application alongwith the main proceedings, i.e., the OA No.

118/2009, was listed for disposal and further directions on 22.02.2010. What is important, however, is that, in the OA, the following directions

were passed by the DRT.

IA No. 1046/2009

xxx

xxx

OA No. 118/09

On Behalf of defendant no. 1, sh. Harsh Parikh seeks more time to file written statement in view of the subsequent facts happened after filing of the

present OA. Defendant no. 1 is hereby granted further opportunity to file its written statement within a period of 30 days.

Defendant no. 2 to 4 are also directed to file written statement within the said period.

(Emphasis supplied)

3.7 In the interregnum, another secured creditor of RPL, i.e., Dena Bank initiated proceedings under The Securitisation and Reconstruction of

Financial Assests and Enforcement of Security Interest Act, 2002 (in short SARFAESI Act). In pursuit of the same, symbolic possession of the

properties belonging to the RPL was taken over by the Dena Bank. RPL, appears to have laid a challenge to the said proceedings both before the

BIFR as well as the DRT, Mumbai. The BIFR, however, by an order dated 23.12.2009 came to the conclusion that the reference before it had

abated in view of Dena Bank having filed an action u/s 13(4) of SARFAESI. The said order of the BIFR, was challenged by RPL before the

AAIFR in an appeal filed u/s 25 of the SICA, on 19.01.2010. The said appeal is registered as appeal no. 21/2010.

3.8 The DRT, Mumbai by an order dated 18.02.2010, stayed the action taken by

the Dena Bank under SARFAESI Act, till final disposal of the securitization application (in short S.A.) filed by RPL.

3.9 Evidently, RPL had also filed some additional documents with the DRT, on 22.02.2010, in support of its application u/s 22 of SICA being: IA

No. 1046/2009. The additional documents being: a copy of RPL's appeal no. 21/2010 filed before AAIFR; DRT, Mumbai order dated

18.02.2010 passed in SA no. 12/2009; and lastly, DRT's judgment in the case of Montari Industries Ltd. vs State Bank of Patiala Appeal No.

9/2004 decided on 17.11.2004.

4. The DRT, at the hearing held on 03.05.2010, in so far as, IA No. 1046/2009 was concerned passed the following order:

...IA No. 1046/09

5. The above-stated application has been moved on behalf of the defendant no. 2 for suspension of the proceedings stating the ground that a

reference was filed by the company in the BIFR which was rejected and an appeal against the order passed by the BIFR has been admitted in the

AAIFR and notice was issued to the bank, therefore, the proceedings are liable to be suspended.

6. I have considered the submissions. In my opinion, the proceedings are liable to be suspended, in view of the bar created u/s 22 of the SICA

Act. The proceedings are therefore sine-die adjourned qua defendant no. 2. The parties to inform the outcome of the appeal.

7. I.A. stands disposed off.

4.1 Thereafter, the matter was, it appears, posted before the Ld. Asstt. Registrar of the DRT, on 25.05.2010 when, at the request made by the

counsel for RPL and the petitioners, the matter was placed before the Presiding Officer of the DRT on 31.05.2010 for further directions. Since the

order is crucial for adjudication of the present case and being not too lengthy, we propose to extract it for sake of convenience :

Dated 25/05/2010

Present:

Mr Ajay Rewal, Ld. Counsel for the applicant bank.

Mr Suresh Arora, Ld. Counsel for the defendant no. 1.

Mr Abhiroop Das Gupta, Ld. Counsel for the defendant no. 2 to 4

IN THIS MATTER TOTAL NO OF DEFENDANTS ARE D-4.

Today the matter was listed for filing the WS by the defendants. Ld. Counsel for the defendant no. 2 to 4 stated that the order of Hon''ble AAIFR

is placed in the file and further he request that matter may kindly be placed before the Hon''ble Presiding Officer for clarification of the order dated

03/05/10 of Hon''ble Presiding Officer. There are no direction for filing the WS of defendant no. 3 and 4 for which the matter is placed for clarification.

Ld. Counsel for the defendant no. 1 states that he has recently engaged and further submits that he has filed an application alongwith Vakalatnama

vide diary no. 472 dated 25/05/10 for supplying the legible paper book of OA and seeks 4 weeks time for filing the WS after supply the legible paper book of the OA.

Let, the matter be placed before the Hon''ble Presiding Officer on 31/05/10 for further directions.

(Emphasis supplied)

4.2 The matter, thereafter, evidently was placed in court on 31.05.2010 when, it was adjourned to 04.06.2010, as the Presiding Officer was on

leave. There was no appearance either on behalf of RPL or on behalf of the petitioners. On 04.06.2010, the Presiding Officer after issuing

direction qua other aspects, listed the matter for further proceedings on 06.07.2010. On 06.07.2010 once again, there was no appearance on

behalf of either RPL or the petitioners. The matter came to be listed on 26.07.2010. The situation was no different, as on 26.07.2010, once again

there was no appearance on behalf of either RPL or petitioners. The matter was posted for further proceedings by the Presiding Officer on

23.08.2010 at the joint request of counsels who were present before him. The matter was then listed for hearing on 23.08.2010. On the said date,

it appears one Sh. Apporva appeared on behalf of RPL and the petitioners. Since the Presiding Officer was on leave, the matter was posted on

07.11.2010. Even though it is not clear from the record filed with us, as to why the matter came to be filed on 07.09.2010 what is however not in

dispute that proceedings were held before the Presiding Officer of the DRT on 07.09.2010, when Ms Jayashree Shukla appeared for RPL and the

petitioners. On the said date, after issuing directions on other aspects, the

matter came to be listed for disposal on 15.10.2010.

4.3 It is in the interregnum, that is, on 08.10.2010, after nearly five (5) months had elapsed from the date of passing of the order dated

03.05.2010, that an application, which was compendiously referred to as an application for clarification/modification/review, came to be filed on

behalf of the petitioners under Rule 5A of the Debts Recovery Tribunal (Procedure) Rules, 1993 (in short, Rules). It is important to note that Rule

5A gives a window of sixty (60) days for filing a review and no more.

4.4 The aforementioned application seeking review of order dated 03.05.2010, came to be numbered as IA No. 6425/2010. The application was

finally heard and disposed of on 30.05.2011. In addition, the DRT also disposed of IA No. 1013/2010, filed by the respondent, seeking a

direction from the DRT to close the right of RPL and the petitioners to file their respective written statements on the ground that, even though they

had entered appearance on 20.11.2009, the same had not been filed till date. In so far as this application was concerned, the DRT after recording

submissions, directed the petitioners to file their written statement before the next date of hearing, failing which, their right to file written statement

would be deemed to be closed. As regards IA No. 6425/2010 was concerned, the learned Presiding Officer, disposed of the same with the

following directions:

15. In my opinion, this review petition is time barred. The impugned order was passed on 3rd May, 2010 and, therefore, this application should

have been filed within 30 days from the date of passing of the order. On this ground only, the application is not tenable and liable to be dismissed."

16. Besides, there are conflicting view of the Hon"ble Apex Court as to whether the guarantors are protected u/s 22 of the SICA in an OA filed

by the bank. The matter is pending before a larger Bench for adjudication. However, on this ground the proceedings in the OA cannot be allowed

to remain suspended sine die. The execution of the decree may, however, be kept suspended until this law is established by the Hon"ble Apex

Court as to whether the guarantors are entitled to protection u/s 22 of the SICA in addition to the borrower company whose reference is pending

before BIFR or an appeal is pending before AAIFR.

17. With these directions the IA stands disposed off.

4.5 The petitioners being aggrieved, preferred an appeal with the DRAT. In the appeal, the petitioners prayed for the following substantive reliefs.

(a) Quash/set aside the impugned order dated 30.05.2011;

(b) Sine die adjourn the proceedings qua the Appellants in view of section 22(1) of SICA;

4.6 The DRAT, however, by virtue of the impugned order came to the conclusion that, since, no explanation whatsoever was given for filing the

review application beyond the period of limitation, the order of the DRT dated 30.05.2011 did not call for its interference. As regards the DRT's

direction with regard to closure of the right of the petitioners to file the written statement was concerned, the DRAT observed that since, the

proceedings only qua RPL had been suspended, the petitioners right to file written statement ought not to have been closed. Therefore, the DRAT

proceeded to set aside that part of the order, and accorded time to the petitioners, to file their written statement by 30.09.2011, failing which their

right would stand closed.

5. Aggrieved by the aforesaid, the petitioners before us, as noticed above, have impugned the orders of the DRAT as well as those passed by the

DRT.

6. By our order dated 30.09.2011 read with order dated 11.01.2012, we had stayed the proceedings before the DRT. In support of the writ

petition arguments were addressed by Ms Jayashree Shukla and Ms Maneesha Dhir. The respondent was represented by Mr Sumit Bansal and

Mr Ateev Mathur.

6.1 Messr Shukla and Dhir in their submissions seemed to have side stepped the issue of limitation and concentrated their entire energy on the

aspect of grant of protection u/s 22 of SICA to the petitioners in their capacity as the guarantors of the debt owed by RPL. The learned counsels

in support of their submissions relied upon the following judgments:

M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, ; Montari Industries Ltd. vs State Bank of Patiala Misc.

Appeal No. 9/2004 decided on 17.11.2004; Paramjeet Singh Patheja Vs. ICDS Ltd., ; Kailash Nath Agarwal and Others Vs. Pradeshiya

Industrial and Investment Corporation of U.P. Ltd. and Another, and Zenith Steel Tubes and Industries Ltd. and Another Vs. SICOM Limited, .

7. It is important to note that a compilation of the said judgments were handed over to us at the hearing held on 13.03.2012, by Ms Shukla when arguments were concluded. The matter was listed on 26.03.2012 to enable counsels to file their written synopsis. On 26.03.2012 alongwith the synopsis, a compilation was filed which included in addition to the judgments already filed, eight (8) additional judgments, though it was made clear to the counsels that after arguments had been concluded no further judgments would be taken on record.

SUBMISSIONS OF COUNSELS

8. In their submissions both Ms Jayashree Shukla and Ms Maneesha Dhir contended as follows:

(i) Section 22 of SICA provides protection not only to a sick industrial company which, in this case is the principal debtor, i.e., RPL but also the

guarantors. The petitioners being guarantors ought to have been accorded the same protection which the DRT afforded to RPL.

(ii) The judgment of the Supreme Court passed in Patheja Bros. Forging and Stamping & Anr. (supra) makes this amply clear, and that, if there

was any doubt the same was reiterated by the Supreme Court in the case of Paramjit Singh Patheja (supra). A special emphasis was laid by Ms

Dhir on the observations made in paragraph 43 (iii) at page 346 of the judgment of the supreme Court in Paramjit Singh Patheja (supra). It was

contended by the learned counsels for the petitioners that in Kailash Nath Agarwal (supra) the Supreme Court was dealing with proceedings taken

out against the guarantors under U.P. Public Money (Recovery of Dues) Act, 1972 (in short UPPM Act). It is in that context that the Court held

that the term ""suit"" referred to in section 22(1) of the SICA did not take within its ambit the proceedings taken out to enforce rights under the

UPPM Act against the guarantors. The learned counsel contended that the recovery proceedings taken out under the Recovery of Debts Due to

Banks & Financial Institutions Act, 1993 (in short RDDB Act) would surely be covered under the term "suit" as it fulfilled the test laid down in

Paramjit Singh Patheja (supra). The learned counsel for the petitioners thus submitted, that the fact that, the Supreme Court in Zenith Steels Tubes

and Industries Ltd. (supra), had referred the matter to a larger bench to reconcile the views of the court taken in Patheja Bros, Forging and

Stamping & Anr. (supra) and Paramjit Singh Patheja (supra) would have no impact in the present case in view of the fact that the recovery

proceedings filed by the respondent required adjudication before a legal forum, unlike the proceedings initiated under the UPPM Act and hence,

would fall within the ambit of the term suit referred to in Section 22(1) of SICA.

9. As against this, Mr Bansal contended that the petitioners, who are guarantors, can obtain protection of Section 22 of SICA only if, the action

filed by the respondent comes within the ambit of the term, "suit". The action filed by the respondent being in the nature of ""proceedings"" and not a

suit, the protection u/s 22 of the SICA would not be available-the petitioners being guarantors. Mr Bansal contended that, the term suit would not

include the proceedings of the nature taken out by the respondent/bank, and that, the legislature consciously had used two different expressions

"suit" and "proceedings" in the same sub-section i.e., sub-section (1) of Section 22 of SICA. To drive home his point, Mr Bansal contended that a

suit is an action which is ordinarily presented before a civil court and not before a tribunal, such as the DRT. For this purpose, he relied upon the

judgment of the Supreme Court in Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation, . Special emphasis was

sought to be laid on the observations made by the Supreme Court in paragraph 113 of the said judgment. Mr Bansal, thus submitted, that even

though a tribunal may have the trappings of a Court, it was still not a civil court. Mr Bansal went on to say that, the provisions of SICA would not

apply to an action taken out before the DRT. The action before the DRT is initiated under the provisions of the RDDB Act which, by virtue of

being enacted later in point of time, would override all other laws. Reliance in this regard was placed on Section 34 of the RDDB Act. It was thus

contended that, Section 22(1) of SICA would have no application. As a matter of fact, in support of this submission, Mr Bansal relied upon the

judgment of the Supreme Court in the case of KSL and Industries Ltd. Vs. Arihant Threads Ltd. and Others, . In particular, emphasis was laid on

paragraphs 19-25, 66, 67 and 112 of the said judgment. It is important to note that because of a difference of opinion between the members of the

Bench, the issue raised in the said judgment, was referred for consideration to a larger bench.

REASONS

10. We have heard learned counsels for the parties and perused the record filed before us. To our minds, there are two issues which arise for

consideration: Issue no. 1 pertains to limitation, while issue no. 2 relates to the aspect as to whether protection u/s 22(1) of SICA should be

accorded to a guarantor qua an action filed by a Bank under the RDDB Act.

11. From the discussion hereinabove, what has clearly emerged is that the petitioners had notice of the proceedings before the DRT since

20.11.2009. At the hearing held on 22.12.2009 before the DRT, the petitioners alongwith RPL were clearly directed to file their written statement

within a period of thirty (30) days. On the said date, the main proceedings i.e., OA alongwith IA No. 1046/2009, filed u/s 22(1) of SICA, by RPL

alongwith petitioners, was fixed for disposal on 22.02.2010. Though, on record, the proceeding of 22.02.2010 evidently has not been filed. What

has been brought on record, is a compilation of the documents filed on the said date. These documents, which have been noticed hereinabove by

us, were perhaps filed only to reiterate that proceedings under SICA, before the AAIFR, were pending at the relevant point in time. The first

impugned order of the DRT came to be passed on 03.05.2010. By virtue of the order dated 03.05.2010, the DRT disposed of IA No.

1046/2009 confining the protection to RPL by adjourning the proceedings sine die qua the said defendant. It is important to note that there was no

confusion, as is averred in the writ petition filed before us, in view of the fact that in the earlier proceeding held on 22.12.2009, the Presiding

Officer of DRT clearly noticed that the said application (i.e., IA No. 1046/2009) was filed on behalf both, RPL and the petitioners. On this day,

direction was issued to the petitioners to file their respective written statements. The matter, it appears thereafter, was placed before the learned

Assistant Registrar on 25.05.2010, when on the say so of the counsel for the petitioners, that there was no direction in the order dated 03.05.2010

to them to file a written statement, and hence a clarification was required. It is in this background that the learned Assistant Registrar of the DRT

placed the matter before the Presiding Officer of the DRT on 31.05.2010. On 31.05.2010, the matter had to be adjourned as the Presiding

Officer was on leave. It was, therefore, listed for further proceedings on

04.06.2010. On 04.06.2010, the counsel for petitioners chose not to appear. The DRT, after issuing directions on other interlocutory applications, listed the matter on 06.07.2010. Once again, on 06.07.2010, there was no appearance by the counsels for the petitioners on the said date. The matter was directed to be listed on 26.07.2010. The counsel for the petitioners played truant even on the said date, though counsel for STC was present. The DRT, directed the matter to be listed on 23.08.2010.

After a gap of nearly three (3) months, for the first time on 23.08.2010, counsel for the petitioners and RPL emerged on the scene. Since the Presiding Officer of DRT was on leave, the matter was adjourned to 07.11.2010. As indicated above by us, the matter was listed before the DRT on 07.09.2010. Though there is no proceeding on record to show how the matter came to be posted on 07.09.2010, a perusal of the order of 06.07.2010 seems to indicate that the Registrar may have issued a date for listing the matter before the Presiding Officer in view of IA No. 472/2010 (not concerning the petitioners) being listed before him on, 14.07.2010. The petitioners in their petition have averred that they were "shocked" on noticing that the OA was listed before the Presiding Officer on 07.09.2010. In our view, the purported shock received by the petitioners could have been avoided if alacrity had been shown by the petitioners in following the matter. Nevertheless, on 07.09.2010 directions were issued for listing of the OA on 15.10.2010. The petitioners having realized that they had overshot the period of limitation of sixty (60) days provided under Rule 5A of the DRT Rules, came up with an ingenious argument that since the Assistant Registrar was not clear as to whether there was a direction issued to the petitioners to file a written statement, they had tarried along in the hope that such a clarification would be made by the Presiding Officer and therefore, no application for review was filed. In our view, this explanation is a complete hogwash and therefore, unacceptable. The impugned order dated 03.05.2010 was passed in the presence of counsels for the petitioners. Our analysis above have shown that there was a subsisting direction, issued on 22.12.2009, calling upon the petitioners to file their respective written statements, which had already remained outstanding for five (5) months. Furthermore, the proceedings of 22.09.2009, would show quite clearly that, the DRT was conscious of

the fact that IA No. 1046/2009 had been filed by the petitioners and RPL. The petitioners have sought to make much of the observation in the

DRT's order dated 03.05.2010, that the said application, I.A. 1046/2009 has been moved on behalf of RPL. Similarly, the submission alluding to

the purported confusion as to whether petitioners were required to file their written statement (since no protection had been granted to them), are

clearly manufactured at the stage of the first appeal filed before the DRAT and in the writ petition, as there is no reference to this aspect of the

matter in the application for review i.e., IA No. 6425/2010. The application for review being barred by limitation, was clearly liable to be

dismissed, as noticed by the DRT. However, having regard to the reference made to a larger bench of the Supreme Court in the case of Zenith

Steels Tubes and Industries Ltd., the DRT granted a limited protection to the guarantors against execution of the decree, if any, obtained, till the

decision in that case of the Supreme Court. This protection was extended to RPL as well.

12. In appeal, the DRAT correctly noticed these facts and by the impugned order, dismissed the same. Under Article 226 of the Constitution of

India, this court could have interfered if the DRAT or the DRT had exercised jurisdiction either with material irregularity or exercised jurisdiction

where none was conferred on it or had acted perversely in law on facts placed before it. We find no such error in the judgment.

13. It is trite to say that statute of limitation bars or runs against the remedy, but does not impair the right, obligation or cause of action. (see

Bombay Dyeing and Manufacturing Co. Ltd. Vs. The State of Bombay and Others, .

13.1 It is pertinent to note that before us, no challenge is laid to the Rule 5A of the DRT Rules. Rule 5A gives a leeway to the DRT to entertain an

application for review, only if, it is filed latest, by the sixtieth day from the date of the order of which review is sought. There is in sub rule (2) of

Rule 5A, an express bar imposed on the DRT in entertaining review applications after the expiry of sixty (60) days. The RDB and the Rules made

thereunder, being a special statute prescribes its own period of limitation, leaving no scope for entertaining applications for review beyond the

stated period. There is, therefore, possibly no scope even for entertaining an application for condonation of delay by invoking Section 5 of the

Limitation Act, 1963 (in short Limitation Act). The language of Sub Rule (2) of Rule 5A appears to make this abundantly clear by providing : ""no

application for review shall be made after the expiry of a period of sixty days from the date of the order and no such application shall be

entertained unless it is accompanied by an affidavit verifying the application.

13.2 We are also conscious of the provisions of Section 24 of the RDDB Act, which provides, that the provisions of the Limitation Act shall as far

as may be applied to an application made to a Tribunal. Undoubtedly, the application adverted to in the said provision refers to the OA filed by a

bank/financial institution to seek recovery of its debt and not interlocutory applications, such as, one for review. It is, therefore, perhaps the

legislature's intention to apply the provisions of the Limitation Act to a limited extent and ""as far as may be"" to the original action for recovery of

debt. This would not translate, perhaps, in the provisions of Section 5 of the Limitation Act being made applicable to an application for review of

an order passed in an OA. It is interesting to note that there is no provision for review in the RDDB Act. The power to review orders has been

provided in the Rules enacted by Central Government in exercise of its power u/s 36 of the RDDB Act. Therefore, if one were to apply the

provisions of Section 29(2) of the Limitation Act, it appears that RDDB, which is a special statute, seeks to provide exclusion of Section 5 of the

Limitation Act qua application for review of orders passed by the DRT. (See observations of the Supreme Court in the case of Union of India Vs.

M/s Popular Construction Co.,) Chhattisgarh State Electricity Board Vs. Central Electricity Regulatory Commission and Others, .

13.3. We are, therefore, leaving the issue open to be decided in an appropriate case, since in this case, in any event, petitioners have not taken the

trouble of filing an application for condonation of delay u/s 5 of the Limitation Act. Therefore, having regard to the entirety of the facts and

circumstances emerging in this case, we are not inclined to interfere with the impugned orders. It is precisely for this reason that judgments in the

case of Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, , Ram Nath Sao @ Ram Nath Sahu and Others Vs.

Gobardhan Sao and Others, and N. Balakrishnan Vs. M. Krishnamurthy, which relate to principles to be applied while considering the plea made

to condone the delay does not require a discussion by us. We also find that the petitioners cannot be aggrieved by continuation of the legal

proceedings, since the DRT has granted a stay against execution of the decree, if any, obtained against them pending the decision in the case of

Zenith Steels Tubes and Industries Ltd.

14. For the reasons, as indicated by us hereinabove, Issue no. 1 is decided in favour of the respondent and against the petitioners.

Issue No. 2

15. The other aspect of the matter as to whether the action filed in the DRT by the respondent in which the petitioners are also arrayed would fall

within the ambit of the term, "suit", requires us to examine the statement of objects and reasons and some relevant provisions of SICA, as also, the

view expressed by various courts with respect to the very same term.

16. The statement of objects and reasons of SICA recognizes firstly, the ill effects of sickness in industrial companies, such as, loss of production,

loss of employment, loss of revenue as also the blockage of investable funds of banks and financial institutions. These being the concerns, and

therefore, in order to fully utilize industrial assets, afford maximum protection to employees and optimize the use of funds invested by banks and

financial institutions; the revival and rehabilitation of potentially viable sick industrial companies, was thought imperative. It is also recognized that it

is equally imperative, to salvage productive assets and realize amounts due to banks and financial institutions to the extent possible from non-viable

sick industrial companies through liquidation of those companies.

16.1 Therefore, the ethos behind the Act is to ensure, if possible, the revival and rehabilitation of a potentially viable sick industrial company, as

also, where the same cannot be achieved, to salvage productive assets and realize the amounts due to banks and financial institutions by liquidating

such nonviable sick industrial companies. The stress, it is to be noted is on the "sick industrial companies".

16.2 The protection to a sick industrial company therefore gets accorded under SICA immediately on registration of a reference. [See Real Value

Appliances Ltd. Vs. Canara Bank and Others,]. After a reference is filed u/s 15 of the SICA, which is mandatory the protection u/s 22 of SICA

gets triggered. The scheme of the Act, as it obtains, provides for an enquiry u/s

16 by the BIFR followed by the powers that a board may exercise

u/s 17 of SICA, for completion of such an enquiry. The provisions for preparation and sanction of a scheme are contained in Section 18 while

Section 19 provides for grant of reliefs and concessions or even eliciting sacrifices from banks and financial institutions and various other entities

such as, the Central Government, State Govt., as also state level institutions and authorities. Once a scheme is sanctioned, it is binding upon all concerned.

16.3 In the event, the BIFR is unable to prepare a sanctioned scheme, it can u/s 20 of SICA recommend winding up of the sick industrial

company. The recommendation of winding up is placed before the concerned High Court for appropriate orders. This recommendation, however,

is not binding on the High Court. (See V.R. Ramaraju Vs. Union of India and Ors., (1997) 89 Comp. Cas 609). It is between these two ends of

the spectrum that Section 22 of SICA comes into play. Section 22 provides for suspension of legal proceedings and contracts. Since we are

concerned with the provisions of sub section (1) of section 22, the same are extracted hereinbelow:-

22. Suspension of legal proceedings, contracts, etc. - (1) Where in respect of an industrial company, an inquiry u/s 16 is pending or any scheme

referred to u/s 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal u/s 25 relating to an

industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the

memorandum and articles of Association of the industrial company or any other instrument having effect under the said Act or other law, no

proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial

company or for the appointment of a receiver in respect thereof [and no suit for the recovery of money or for the enforcement of any security

against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be proceeded

with further, except with the consent of the Board or, as the case may be, the Appellate Authority.

16.4 A reading of section 22 would show that while, the reference is pending

before the BIFR, at various stages, which commences with its registration, the legislature provides for suspension of certain kinds of actions. This protection extends to the appellate stage as well, that is, when an appeal u/s 25 relating to the industrial company is pending before the AAIFR. A careful perusal of sub section (1) of Section 22 would show that, it suspends proceedings such as winding up of the industrial company, "execution", "distress" or "the like" against the "properties of the industrial company" or, even initiation of steps for appointment of a receiver qua the properties of the industrial company. The use of the expression "industrial company as against "sick industrial company" is significant as there may arise a situation which requires protection to be accorded to an industrial company prior to it being formally declared as a Sick Industrial Company by the BIFR, which is really the period between registration of reference and a declaration of sickness by the BIFR. Therefore, this limb of sub section (1) of section 22 is restricted to actions of the like nature described above, against the industrial company or its properties.

16.5 The second limb of sub section (1) of section 22 which begins with "and no suit" concerns itself with actions for recovery of money or for enforcement of security once again against the industrial company. The second sub part so to say of this limb which speaks of "or of any guarantee in respect of any loans or advances granted to the industrial company" creates the difficulty, presently faced in the writ petition.

16.6 It may be relevant to note that the term used in this sub part of sub section (1) of section 22 is "guarantee" and not "guarantor". One possible explanation could have been, taking into account the overall scheme of SICA, which is, to rehabilitate and resuscitate viable sick industrial companies, and if, necessary to liquidate assets of sick industrial companies where they become non viable, to read the term "guarantee" to mean perhaps a guarantee extended by an entity in which the industrial company has an interest as it could impact directly affairs of the industrial company since the industrial company's interest in such an entity would ordinarily be shown as an asset in its balance sheet. But this debate can no longer be taken forward for the reason that the Supreme Court in the case of "Patheja Brothers Forgings and Stamping"(supra) has categorically interpreted the term "guarantee" as that which relates to a guarantor who has

furnished a guarantee as a security in lieu of loans and advances granted to an industrial company. It is important to note that Patheja Brothers Forging and Stamping dealt with a case where the suit was filed in a civil court both against the sick industrial company in its capacity as a principal debtor and the individual guarantors. The Supreme Court, interpreting the provision of sub section (1) of section 22 came to the conclusion by process of strict interpretation, that protection was also available to guarantor(s) of loans advanced to a sick industrial company.

17. In *Paramjit Singh Patheja (supra)*: the facts obtaining were somewhat different. In the said case, the appellant before the Supreme Court was a guarantor qua a debt owed by one Patheja Forging and Autoparts Manufacturers Limited. Both, the guarantors and the aforementioned company were sued in an arbitration proceedings initiated by the respondent/creditor. The aforementioned company got itself registered with the BIFR. In the meanwhile, an award was rendered by the Arbitrator despite, being informed about the registration of the reference by the aforementioned company. On the basis of the award, which was passed both against the aforementioned company and the appellant/guarantor before the Supreme Court, an insolvency notice was taken out u/s 9(2) of the Presidency Towns Insolvency Act, 1909 (in short the Insolvency Act).

17.1 It is pertinent to note at this stage, that section 9(2) of the Insolvency Act provides that a debtor commits an act of insolvency if a creditor who has obtained a ""decree"" or an ""order"" against him for payment of money, issues him a notice, in the prescribed form, to pay the amount and, the debtor, fails to do so, within the time specified in the notice. It is in this context that, the appellant/guarantor challenged the insolvency notice, by moving a notice of motion before the Bombay High Court. The Single Judge in the Bombay High Court differed with the view taken earlier (by another Single Judge of that court) that an award is neither a decree nor an order for the purposes of the provisions of the Insolvency Act. A reference was made by the learned Single Judge to the Division Bench. The Division Bench answered the reference in the affirmative by holding that an award was a decree for the purposes of section 9 of the Insolvency Act, and therefore, an insolvency notice could be issued on the basis of an award passed by an Arbitrator.

17.2 It is in this context that the Supreme Court framed two questions of law for the purposes of adjudication, in the appeal, which was filed

before it. These being:-

(i). whether an arbitrator's award is a decree for the purposes of section 9 of the Insolvency Act; and

(ii). Whether an insolvency notice can be issued on the basis of such an award.

17.3 After a detailed discussion, the court came to the conclusion that the award is not a decree and hence, insolvency notice u/s 9(2) of the

Insolvency Act could not be taken out on the basis of an arbitration award. In the process of its reasoning, the Supreme Court examined whether

the arbitrator was a court and whether the award was a decree. In this context, that the court examined several judgments. The following

observations highlight what the court was grappling with:-

17. We are of the view that the Presidency Towns Insolvency Act, 1909 is a statute weighed down with the grave consequence of "civil death" for

a person sought to be adjudged an insolvent and therefore the Act has to be construed strictly. The Arbitration Act was in force when the PTIA

came into operation. Therefore it can be seen that the lawmakers were conscious of what a "decree", "order" and an "award" are. Also the

fundamental difference between "courts" and "arbitrators" was also clear as back as in 1909.

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21. The words "court", "adjudication" and "suit" conclusively show that only a court can pass a decree and that too only in a suit commenced by a

plaint and after adjudication of a dispute by a judgment pronounced by the court. It is obvious that an arbitrator is not a court, an arbitration is not

an adjudication and, therefore, an award is not a decree.

17.4 The Supreme Court, therefore, confined itself to the issue that the award could not be executed by issuance of a insolvency notice, (see

observations in para 43(ii) at page 346). Thus, the observations made in para 43(iii), on which great stress has been laid by the learned counsel for

the petitioners have to be read in the context of the facts obtaining in the said case. For the sake of convenience, the conclusions given in

paragraphs 43 and 44 of the said judgment are extracted hereinafter:-

43. For the foregoing discussion we hold:

(i) That no insolvency notice can be issued u/s 9(2) of the Presidency Towns Insolvency Act, 1909 on the basis of an arbitration award.

(ii) That execution proceedings in respect of the award cannot be proceeded with in view of the statutory stay u/s 22 of the SICA Act. As such, no

insolvency notice is liable to be issued against the appellant.

(iii) Insolvency notice cannot be issued on an arbitration award.

(iv) An arbitration award is neither a decree nor an order for payment within the meaning of Section 9(2). The expression ""decree"" in the Court

Fees Act, 1870 is liable to be construed with reference to its definition in CPC and hold that there are essential conditions for a ""decree"":

(a) that the adjudication must be given in a suit,

(b) that the suit must start with a plaint and culminate in a decree, and

(c) that the adjudication must be formal and final and must be given by a civil or Revenue Court.

An award does not satisfy any of the requirements of a decree. It is not rendered in a suit nor is an arbitral proceeding commenced by the

institution of a plaint.

(v) A legal fiction ought not to be extended beyond its legitimate field. As such, an award rendered under the provisions of the Arbitration and

Conciliation Act, 1996 cannot be construed to be a ""decree"" for the purpose of Section 9(2) of the Insolvency Act.

(vi) An insolvency notice should be in strict compliance with the requirements in Section 9(3) and the rules made thereunder.

(vii) It is a well-established rule that a provision must be construed in a manner which would give effect to its purpose and to cure the mischief in

the light of which it was enacted. The object of Section 22, in protecting guarantors from legal proceedings pending a reference to BIFR of the

principal debtor, is to ensure that a scheme for rehabilitation would not be defeated by isolated proceedings adopted against the guarantors of a

sick company. To achieve that purpose, it is imperative that the expression ""suit"" in Section 22 be given its plain meaning, namely, any proceedings

adopted for realisation of a right vested in a party by law. This would clearly include arbitration proceedings.

(viii) In any event, award which is incapable of execution and cannot form the basis of an insolvency notice.

44. In the light of the above discussion, we further hold that the insolvency notice issued u/s 9(2) of the PTI Act, 1909 cannot be sustained on the basis of arbitral award which has been passed under the Arbitration and Conciliation Act, 1996. We answer the two questions in favour of the appellant.

17.5. It is well settled law that a judgment is a precedent for what it decides and not what logically follows from it. [See observations in Bhavnagar

University Vs. Palitana Sugar Mill Pvt. Ltd. and Others,]. Therefore, in our view, to conclude from the said judgment that each and every kind of

action is contemplated to be included in the term "suit" is not what to our minds is the ratio of the judgment. The Supreme Court was dealing with a

specific issue as to whether an award was a decree or an order within the meaning of the provisions of Section 9(2) of the Insolvency Act.

18. In Kailash Nath Aggarwal (supra): the enforcement of debt against the guarantors was initiated by Pradeshia Industrial Investment

Corporation of UP Limited (in short, PICUP) for loans granted to the principal debtor, one, Shaifali Papers Limited, by triggering the provisions of

the UPPM Act. Importantly, the Supreme Court noted two significant aspects pertaining to SICA. The first being: the interpretation accorded by

the Supreme Court to the expression "proceedings" in the first part of section 22(1) of SICA in the case of Maharashtra Tubes Ltd. Vs. S.I.I.

Corporation of Maharashtra Limited (supra). The Supreme Court also noticed the fact that the aforesaid judgment was rendered prior to 1994,

i.e., before the amendment of sub section (1) of section 22 when the second part of section 22 which reads as follows : "and no suit for recovery

of money or enforcement of any security against the industrial company or any guarantee in respect of any loans or advances granted to the

industrial company;" was introduced. In this context, the Supreme Court noticed that the court was called upon to determine whether an action

against an industrial concern u/s 29 and/or section 31 of the State Financial Corporation Act, 1951 (in short SFC Act) would fall within the ambit

of the term "proceedings" set out in the first part of sub section (1) of section 22. The court noticed that in Maharashtra Tubes Limited, it had been

observed that the term "proceedings" should not be limited to legal proceedings as understood in the narrow sense but should include actions taken

out under sections 29 and 31 of the SFC Act. The court's analysis as to why in Maharashtra Tubes Limited case such a course was adopted is set

out in paragraph 18 of its judgment. The reasons being apposite and informative are set out hereinafter for the sake of convenience.

18. It appears that there were three reasons why this Court construed the word ""proceeding"" as including action which may be taken u/s 29 of the

State Financial Corporations Act:

1. The recovery proceedings were against an industrial company, the revival of which was one of the objects of the Act.

2. The use of the omnibus expression ""or the like"" after the word ""proceeding"".

3. The fact that the entire scheme as contained in Sections 16 to 19 of SICA would be rendered nugatory and the process short-circuited if State

Financial Corporations were allowed to recover their dues from the assets of the Company.

(Emphasis is ours)

18.1 After analyzing the pre 1994 situation, the court undertook the exercise of analyzing the insertion made to sub section (1) of section 22 (with

which, we are also called upon to grapple;), in paragraph 19 to 25 of the Judgment. For the sake of convenience, the same are extracted

hereinbelow:-

19. After this decision was rendered, Section 22(1) was amended by the Sick Industrial Companies (Special Provisions) Amendment Act (12 of

1994). The following words were inserted in Section 22(1):

and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any

loans or advance granted to the industrial company

20. There is an apparent distinction between the expressions ""proceeding"" and ""suit"" used in Section 22(1). While it is true that two different words

may be used in the same statute to convey the same meaning, that is the exception rather than the rule. The general rule is that when two different

words are used by the same statute, prima facie one has to construe these different words as carrying different meanings. In *Kanhaiyalal Vishindas*

Gidwani this Court found that the words ""subscribed"" and ""signed"" had been used in the Representation of the People Act, 1951 interchangeably

and, therefore, in that context the Court came to the conclusion that when the legislature used the word ""subscribed"" it did not intend anything more

than ""signing"". The words ""suit"" and ""proceeding"" have not been used interchangeably in SICA. Therefore, the reasons which persuaded this Court

to give the same meaning to two different words in a statute cannot be applied here.

21. In none of the decisions cited before us, has the word ""suit"" been defined in a context similar to that of SICA. The decisions cited by the

appellants do not relate to the same or similar statutes nor do they seek to define the word ""suit"" in contradistinction to the word ""proceeding"". The

decision in Ghantesher Ghosh v. Madan Mohan Ghosh was given in the context of the Partition Act where a distinction between ""filing a suit for

partition"" and ""suing for partition"" has been drawn. It was held that ""suing for partition"" was a wider phrase than the phrase ""suit for partition

without defining what a suit meant.

22. The decision in CCE v. Ramdev Tobacco Co. related to the construction of the bar of suit section in the Central Excises and Salt Act, 1944.

The section as it stood at the relevant time provided that ""no suit, prosecution or other legal proceedings shall be instituted for anything done or

ordered to be done under the Act ..."". The Court held: (SCC p. 124, para 6)

There can be no doubt that "suit" or "prosecution" are those judicial or legal proceedings which are lodged in a court of law and not before any

executive authority, even if a statutory one.

23. A definition of the word ""suit"" has been given in Pandurang R. Mandlik v. Shantibai R. Ghatge but in the context of Section 11 of the Code of

Civil Procedure. This is what the Court said: (SCC p. 639, para 18)

In its comprehensive sense the word "suit" is understood to apply to any proceeding in a court of justice by which an individual pursues that

remedy which the law affords. The modes of proceedings may be various but that if a right is litigated between parties in a court of justice the

proceeding by which the decision of the court is sought may be a suit.

24. According to these decisions, a suit is an action taken in a court of law.

25. Having regard to the judicial interpretation of the word ""suit"", it is difficult to accede to the submission of the appellants that the word ""suit"" in

Section 22(1) of the Act means anything other than some form of curial process.

18.2 The conclusion in a sense is set out in paragraphs 29 and 30. Once again, for easy reference, we extract the same hereinafter:-

29. One of the reasons for the word ""proceeding"" in Section 22(1) being construed widely by this Court in Maharashtra Tubes was that the

proceedings were against the Company itself. Having regard to the object of the Act viz. if possible to revive the Company, as also the operation

of the various sections towards this end, the Court held that it would be unreasonable to give such meaning to the word ""proceeding"" as would

result in dealing a death-blow to the Company so that the entire procedure envisaged under SICA would be set at naught.

30. We have been unable to find a corresponding reason for widening the scope of the word ""suit"" so as to cover proceedings against the

guarantor of an industrial company. The object for enacting SICA and for introducing the 1994 Amendment was to facilitate the rehabilitation or

the winding up of sick industrial companies. It is not the stated object of the Act to protect any other person or body. If the creditor enforces the

guarantee in respect of the loan granted to the industrial company, we do not see how the provisions of the Act would be rendered nugatory or in

any way affected. All that could happen would be that the guarantor would step into the shoes of the creditor vis-à-vis the company to the

extent of the liability met.

(Emphasis is ours)

18.3 Importantly, the judgment in Kailash Nath Aggarwal's case was delivered by a bench comprising Hon"ble Ms. Justice Ruma Pal and

Hon"ble Mr. Justice B.N. Shrikrishna (as they then were). Hon"ble Ms. Justice Ruma Pal was also a part of the bench which delivered the

judgment in the case of Patheja Brothers Forgings and Stamping. This judgment was specifically distinguished by Hon"ble Ms. Justice Ruma Pal in

Kailash Nath Aggarwal's case. The discussion in that regard are contained in paragraphs 31 to 34 of the judgment. What is noticeable is that, the

court quite categorically observes that, it is not that the observations made in the Patheja Brothers Forgings and Stamping, seem to suggest that the

protection of guarantors of loans to a sick industrial company is the object of the amendment brought about in sub section (1) of section 22 in

1994. The relevant observations in this behalf are as follows:-

31. It is true that this Court in *Patheja Bros. Forgings & Stamping v. ICICI Ltd.* construed the 1994 Amendment to Section 22(1) to hold: (SCC

p. 548, para 7)

For our purposes, therefore, the relevant words are: "no suit... for the enforcement ... of any guarantee in respect of any loans or advance granted

to the industrial company" shall lie without the consent of the Board or the Appellate Authority. The words are crystal clear. There is no ambiguity

therein. It must, therefore, be held that no suit for the enforcement of a guarantee in respect of a loan or advance granted to the industrial company

concerned will lie or can be proceeded with, without the sanction of the Board or the Appellate Authority under the said Act.

32. This is in keeping with the well-established principle of statutory interpretation that where the language of the provision is explicit the language of the statute must prevail.

33. The appellants have, however, sought to draw sustenance from the following passage in the judgment: (SCC p. 548, para 9)

The argument on behalf of the first respondent is that while this provision provides for the continuation of proceedings against the industrial

company, there is no provision in the said Act which provides for the continuation of any held-up proceeding against the guarantor of a loan or

advance to such company and that, therefore, Section 22 should be read as applying only to a suit against the industrial company and not a

guarantor. Apart from the fact that, as indicated above, the language of Section 22 is explicit, the scheme would provide for the repayment of the

loan or advance and, therefore, would take within its ambit the claim on the guarantee; the question of proceeding with the suit against the

guarantor would not arise. On the other hand, if the industrial company cannot be revived by a scheme, the embargo u/s 22 would cease to

operate.

(Emphasis is ours)

34. These observations do not mean that when the words used are unambiguous, other extrinsic interpretative aids such as the objects of the

statute, or the difficulties that would be faced by creditors will be relevant in interpreting the expression. The Court in Patheja case merely

observed that the creditor could recover its sum from the principal debtor under the scheme and, therefore, the claim on the guarantee would not

arise if the amount is so recovered under the scheme. We do not read the observations quoted as holding that protection of guarantors of loans to

a sick company is an object of the 1994 Amendment which object must colour our interpretation of the amendment. Till 1994 no protection was

afforded to the guarantors under the Act at all. A limited protection has been given in 1994. The expression used being clear and unambiguous, it is

not for us to question the wisdom of the legislature in giving the limited protection it did or why such protection was necessary at all.

(emphasis is ours)

19. It is in this background that the Supreme Court referred the issue raised in Zenith Steel Tubes & Industries Ltd. for consideration by a Larger

Bench. Briefly, the facts in this case were that the appellants before the Supreme Court were both the principal debtor company as well as the

guarantor. The loan from the financial institution i.e., SICOM Limited had been taken by the principal debtor company which was, inter alia,

secured by a personal guarantee of the second appellant. Since, there were defaults, notices were issued demanding payment of the amounts owed

to SICOM Ltd. Upon failure, SICOM Ltd. filed a petition against the second appellant u/s 31(1)(aa) of the SFC Act. In the meanwhile, the first

appellant was declared a sick industrial company by the BIFR. Against the action of SICOM Ltd., a writ petition was filed before the Bombay

High Court. The learned Single Judge of the Bombay High Court rejected the contentions of the second appellant/guarantor that by virtue of

provision of section 22 of SICA, its liability under the personal guarantee could not be enforced. The Division Bench came to a somewhat similar

conclusion and also went on to hold that, the liability of the guarantor being co-extensive with that of the principal debtor, the creditor was not

required to exercise his right first against the principal debtor and only thereafter, against the guarantor. This is how the matter travelled to the

Supreme Court.

19.1 The Supreme Court in paragraph 20 noticed the observations in Paramjit

Singh Patheja's case that the term "suit" would have to be understood in the larger context to include other proceedings as well, which were filed before a "legal forum" The court noticed that the decision in Kailash Nath Aggarwal's case was not brought to the notice of the Division Bench in Paramjit Singh Patheja's case. After noticing the observations of the court in Kailash Nath Aggarwal's case, the bench decided to refer the matter to a Larger Bench.

20. We may also at this stage take note of the observations of the Supreme Court in Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation, .

20.1 The Supreme Court in this case was dealing with a situation where the appellant before it - Nahar Industrial Enterprises Ltd. had filed a suit against HSBC, in a civil court at Ludhiana seeking a declaration that the foreign interest derivative contracts executed with HSBC, be declared void as they were illegal and violative of the Foreign Exchange Management Act (in short FEMA). On the other hand, HSBC had filed an action under the RDDB Act. The OA was filed before the DRT, Mumbai. HSBC thereafter moved the High Court of Punjab and Haryana by way of an application seeking transfer of the proceedings filed before the civil court at Ludhiana to the DRT at Mumbai. The learned Single Judge of the High Court allowed the application in the form of a counter claim to the OA pending in the DRT, Mumbai.

20.2 A SLP was filed against the said order of the High Court. Other banks and financial institutions filed applications by way of transfer u/s 25 of the Code of Civil Procedure, 1908 (in short the Code). By virtue of this judgment, the SLP against the judgment of the High Court of Punjab as well as the transfer petitions were disposed of. It is in this context, the Supreme Court considered as to whether the DRT was a court and hence, a court subordinate to the High Court for exercising a power of transfer. In dealing with this issue, the Supreme Court in paragraph 113 touched upon what are the attributes of a civil court as against the Tribunal. The Supreme Court concluded by holding that a tribunal under the RDDB Act is not a civil court. The observations being apposite, are extracted hereinafter:-

113. The Tribunal was constituted with a specific purpose as is evident from its statement of objects. The preamble of the Act also is a pointer to

that too. We have also noticed the scheme of the Act. It has a limited jurisdiction. Under the Act, as it originally stood, did not even have any power to entertain a claim of set off or counter claim. No independent proceedings can be initiated before it by a debtor. A debtor under the common law of contract as also in terms of the loan agreement may have an independent right. No forum has been created for endorsement of that right. Jurisdiction of a civil court as noticed hereinbefore is barred only in respect of the matters which strictly come within the purview of section 17 thereof and not beyond the same. The Civil Court, therefore, will continue to have jurisdiction. Even in respect of set off or counter claim, having regard to the provisions of sub sections (6) to (11) of section 19 of the Act, it is evident:-

- a) That the proceedings must be initiated by the bank.
- b) Some species of the remedy as provided therein would be available therefor.
- c) In terms of sub section (11) of Section 19, the bank or the financial institution is at liberty to send a borrower out of the forum.
- d) In terms of the provisions of the Act, thus, the claim of the borrower is excluded and not included.
- e) In the event the bank withdraws his claim the counter claim would not survive which may be contrasted with Rule 6 of Order VIII of the Code.
- f) Sub section (9) of section 19 of the Act in relation thereto has a limited application.
- g) The claim petition by the bank or the financial institution must relate to a lending/borrowing transaction between a bank or the financial institution and the borrower.
- h) The banks or the financial institutions, thus, have a primacy in respect of the proceedings before the Tribunal.
- i) An order of injunction, attachment or appointment of a receiver can be initiated only at the instance of the bank or the financial institution. We, however, do not mean to suggest that a Tribunal having a plenary power, even otherwise would not be entitled to pass an order of injunction or an interim order, although ordinarily expressly it had no statutory power in relation thereto.
- j) It can issue a certificate only for recovery of its dues. It cannot pass a decree.
- k) Although an appeal can be filed against the judgment of the Tribunal, pre-

deposit to the extent of 75% of the demand is imperative in character.

l) Even cross-examination of the witnesses need not be found to be necessary.

m) Subject to compliance of the principle of natural justice it may evolve its own procedure

n) It is not bound by the procedure laid down under the Code. It may however be noticed in this regard that just because the Tribunal is not bound

by the Code, it does not mean that it would not have jurisdiction to exercise powers of a court as contained in the Code. Rather, the Tribunal can

travel beyond the CPC and the only fetter that is put on its powers is to observe the principles of natural justice. [see The Industrial Credit and

Investment Corporation of India Ltd. Vs. Grapco Industries Ltd. and Others,

The tribunal therefore, would not be a Civil Court.

(Emphasis supplied)

21. What emerges on a reading of the objects and reasons alongwith the interpretation accorded by the Supreme Court, to the provisions of sub

section (1) of section 22, is that :

(i). the 1994 amendment which brought in the relevant insertion with which we are confronted, was not necessarily intended to accord protection

to the guarantors of loans given to an industrial company; (see observations in Kailash Nath Aggarwal's case)

(ii). till 1994, no protection was accorded to the guarantors under SICA;

(iii). post 1994, a limited protection has been granted by the legislature to the guarantors;

(iv). the legislature has consciously used the two different terms, i.e., "proceedings" and "suit"; and

(v). the term. "proceedings" has been given a wider interpretation by the Supreme Court in the case of Maharashtra Tubes.

(vi). the amendment in sub section (1) of section 22 was brought about w.e.f. 01.02.1994, when the RDDB Act was already in force that is, w.e.f.

24.06.1993. Therefore, the Legislature while bringing about the amendment in sub section (1) of section 22 of SICA on 01.02.1994 was aware of

the enactment of the RDDB Act. The term. "suit" would have to be read and understood in the context of this legislative history and in the

background of the scheme of SICA as also the setting of the term in issue, in the

very provision under consideration i.e., sub section (1) of section 22.

22. Thus, in our view, having regard to the facts set out hereinabove, the word "suit" cannot be understood in its broad and generic sense to include any action before a legal forum involving an adjudicatory process. If that were so, the legislature which is deemed to have knowledge of existing statute would have made the necessary provision, like it did, in inserting in the first limb of section 22 of SICA, where the expression proceedings for winding up of an industrial company or execution, distress, etc. is followed by the expression or ""the like"" against the properties of the industrial company. There is no such broad suffix placed alongside the term "suit". The term suit would thus have to be confined, in the context of sub section (1) of section 22 of SICA, to those actions which are dealt with under the Code and not in the comprehensive or overarching sense so as to apply to any original proceedings before any legal forum as was sought to be contended before us. The term, "suit" in our opinion would apply only to proceedings in a civil court and not actions for recovery proceedings filed by banks and financial institutions before a Tribunal, such as, the "DRT".

23. We may briefly also touch upon certain other judgments which the counsels for the petitioners place on record after the arguments had been concluded.

23.1 The first judgment is of the Division Bench of this court in Asset Reconstruction Co. India P. Ltd. Vs. Shamken Spinners Ltd. and Others, .

This judgment dealt with the interpretation to be accorded to the second proviso of section 15(1) of SICA. The said proviso provides that no reference shall be made to the BIFR after the commencement of SARFAESI where financial assets have been acquired by a securitization company or reconstruction company under sub section (1) of section 5 of SARFAESI. The court came to a conclusion that the said proviso would have to be read harmoniously with the third proviso whereby it is provided that a reference before the BIFR shall abate if the secured creditors representing not less than 3/4th in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors have taken measures u/s 13(4) of SARFAESI. The Division Bench in that case

came to the conclusion that the base limit of 75% of the value of the amount outstanding against financial assistance disbursed to the borrower would also have to be applied to the second proviso where no such limit was provided. We are of the opinion that one cannot but agree with the principle enunciated therein requiring the need to harmoniously construe provisions of a section. The judgment, therefore, in our view does not carry the arguments advanced by the petitioners any further as on facts it renders no assistance in dealing with the issue before us.

23.2 The judgment in *M.D., Bhoruka Textiles Limited Vs. Kashmiri Rice Industries*, was cited to stress the point that if the civil courts' jurisdiction was ousted in terms of provision of section 22 of SICA, any judgment rendered by such a forum would be *coram non iudice*. This again a case where the principle evolved cannot but be accepted but the fact remains in the circumstances obtaining in the present case, the said judgment once again has no applicability. This is specially so as the moot question is whether the term "suit" appearing in sub-section (1) of section 22 of SICA would apply to a forum which is decidedly not a civil court.

23.3 The next judgment relied upon by learned counsels for the petitioners is *Intercraft Limited Vs. Cosmique Global and Another*, . In this case, the issue was whether the provisions of section 22 would come into play immediately on registration of the reference u/s 15 of the SICA. The DRAT had apparently applied an earlier judgment of this court rendered in the case of *Industrial Development Bank of India Vs. Surekha Coated Tables and Sheets Ltd.*, ignoring the judgment of the Supreme court in *Real Value Applicances Ltd.* (supra). Quite correctly the Division Bench of this court reversed the order. The court incidentally also cited the judgment in *Bhoruka Textiles Ltd.* (supra) to emphasize that an order passed in violation of section 22 would be one, which is, without jurisdiction. The Division Bench in that case was not deciding as to whether forum constituted under the RDDB Act are civil courts. The judgment therefore has no applicability to the issues which arise in the present case.

23.4 The other judgments relied upon by learned counsels for the petitioners are *A.L.S.P.I. Subramania Chettiar (decd.) and Another Vs. Moniam P. Narayanaswami Gounder, and Aypunni Mani Vs. Devassy Kochouseph and Others*, . These judgments have been cited to emphasize

the point that liability of the surety is co-extensive with that of the principal debtor if the latter liability is scaled down the liability of the surety will

accordingly stand reduced or even extinguished. The principle in so far as this aspect is concerned is pivoted on the fact that the liability of a

guarantor i.e., the surety being co-extensive is both joint and several. Therefore, a creditor need not sue a principal debtor in order to bring an

action against a guarantor. This aspect has been squarely considered by the Supreme Court in Kailash Nath Aggarwal's case, therefore, it need

not detain us any further.

24. For the aforesaid reasons, we are of the view that the second issue will also have to be decided against the petitioners. Having held so, we are

of the view that the impugned judgments both, of the DRT and the DRAT do not call for our interference. The petition is accordingly dismissed.