

(2007) 04 CAL CK 0029

In the Calcutta High Court

Case No : C.P. No's. 193, 196, 197, 198, 199, 205, 216, 217 and 219 of 2005

Indian Steel and Wire Products Ltd.

APPELLANT

Vs

Kothari Metals Ltd. etc.

RESPONDENT

Date of Decision : 26-04-2007

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 16, 17, 18, 19

Citation : AIR 2007 Cal 207

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : S.B. Mukherjee and Abhrajit Mitra and Reetabrata Mitra, for the Appellant; P.C. Sen and M. Ghosh and R.R. Sen, for the Respondent

Judgement

Sanjib Banerjee, J.—The problem is not so much in the question that is posed but in the approaches of the two parties that such query has an obvious answer - the petitioner and the company each insists that there is only one view, diametrically opposed to the other, that is possible.

2. The fates of these nine petitions, clubbed together and heard on the solitary issue, hang on that one question which, without doubt, requires to be tested. There is a minor advantage that the petitioner in C.P. No. 197 of 2005 enjoys. Such deviation will entail a different form of order if the question is answered in favour of the petitioners.

3. The facts are brief and not much in dispute. The company cites a legal embargo and the petitioners claim that such defence is an excuse and a cloak for the company's inability to pay. The company made a reference to the Board for Industrial and Financial Reconstruction (BIFR) upon it becoming a sick industrial company within the meaning of Section 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985 (the said Act of 1985). The reference is still pending, in the sense that a scheme of rehabilitation is under implementation and the same is being monitored by the BIFR. In terms of its order sanctioning the scheme, quarterly financial positions of the company have been called for by

the BIFR till such time that the dues required to be paid under the scheme are discharged.

4. The scheme was sanctioned on October 22, 2003, but not immediately implemented, as there were proceedings pending in the Delhi High Court. The writ petition filed by the erstwhile management of the company was dismissed and the cloud on the sanctioned scheme was removed. It is an undisputed position that the present management took over the running of the company on December 20, 2003.

5. Following a direction by the BIFR, IDBI as the operating agency issued an advertisement inviting offers for change in, or take over of, the management of the company. The advertisement indicates that the company has facilities to manufacture wires, wire products, bolts, nuts, rivets, nails, cast iron, steel based rolls and steel and cast iron castings. The negative net worth of the company as at March 31, 2000 was reckoned at about Rs. 7.8 crore excluding revaluation reserves.

6. Tata Iron and Steel Company Limited, now Tata Steel Limited, a creditor of the company, applied to take over the management of the company. The erstwhile management attempted to stall the take over bid and cited imminent German benefactors and possible technical partners, to cling on to the management of a company that obviously had potential but needed funds for revival. The BIFR did not bite the erstwhile management's bait. The erstwhile management, still enjoying the privilege to suing in the company's name, rushed to the Delhi High Court. In order that the Court seriously viewed its charges of transgression of jurisdiction by the BIFR, the erstwhile management offered to deposit the title deeds of a substantial bungalow in Lutyen's Delhi and make over a banker's cheque of Rs. 5 crore. The Delhi High Court final order records that the Court was swayed by such offer as the value of the property was more than the entire offer made by the then Tisco. A conditional order came to be passed by the writ Court, affording the erstwhile management time to make deposit of the title deeds and the cheque for Rs. 5 crore with the BIFR failing which its attempt to retain management of the company was not to be considered by the BIFR. The time passed and the BIFR did not see either the title deeds or the cheque that the erstwhile management promised. Thus, the order of October 22, 2003 that remained suspended following the Delhi High Court's interim order of October 29, 2003, ripened to be effective on November 21, 2003. It was much later on December 10, 2003, that the writ petition was dismissed as withdrawn with costs of Rs. 25,000/- to each of the four respondents who appeared before the Delhi High Court pursuant to its notice. Such order was passed despite a simple prayer of withdrawal made by the erstwhile management, as the Court observed that its process had been abused.

7. Undeterred by the strong words used against it by the Delhi High Court, the erstwhile management pursued an appeal preferred before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) from the order of

the BIFR that become effective on November 21, 2003 and which appeal was filed before the writ petition was sought to be withdrawn. The AAIFR dismissed that and connected appeals by its order of December 8, 2006.

8. Each of the petitioners in the nine sets of proceedings claims to have effected supplies to the company during the financial years 2002-03 and 2003-04 but prior to the present management coming at the helm of the company. Each of the petitioners relies on uncontroverted bills and part payments received and claims balance price of goods sold and delivered. All part payments, save in the case of C.P. No. 197 of 2005, appear to have been made by the company prior to the present management taking over. The additional fact in support of the petitioner's case in C. P. No. 197 of 2005 is that a cheque for Rs. 2,93,104/- was issued it by the company on December 14, 2003 and such cheque drawn on Punjab National Bank bears the additional stamp of IDBI which is the monitoring agency appointed by the BIFR to oversee the working of the sanctioned scheme of rehabilitation.

9. Shortly upon the new management taking over, the company issued a similarly worded letter to most of the petitioners conveying the new management's decision to scrutinise the transactions carried out by the company prior to December 20, 2003 and to freeze payments of the debts appearing in the company's books till such exercise was completed. Such letter of January 15, 2004, relied upon by the petitioner in the lead matter, C. P. No. 196 of 2005, signs off with the following promise:

...We once again assure you payment of your earlier bills after the audit.

10. The written demands for payment made by the petitioners were all subsequent to February, 2004, as the new management had sought time till then to set its house in order. Such subsequent demands for payment and requests for copies of the BIFR order and list of creditors included in such order, were ultimately directed to the company's advocates. The advocates informed the petitioners that the new promoters were required to pay such creditors as had been directed by the BIFR and feigned ignorance of the transactions on which the petitioners founded their demands. The statutory notices were greeted with a similar response.

11. In the affidavits, the company disclosed the BIFR order of October 22, 2003 that became effective on November 21, 2003, but did not disclose the sanctioned scheme. The sanctioned scheme came on record in a supplementary affidavit used in each case by the company. The sanctioned scheme recognises that of the two units of the company, one lay closed for the four years immediately preceding the scheme and the Jemco division was, "only marginally operating". It is the petitioner's assertion in each of the nine petitions that the marginal operation of the Jemco unit was propped up by the supplies effected thereat by the petitioners. There is no dispute that the cut off date fixed for the implementation of the sanctioned scheme is March 31, 2002.

12. The petitioners" alleged dues are not reflected in the sanctioned scheme. The company does not go so far as to say that the claims made are a result of any complicity between the petitioners and the erstwhile management. The stand taken is that the present management cannot be held responsible for such transactions and the merits of the petitioners claim cannot be urged or heard in view of the bar u/s 22(1) of the said Act of 1985. It is contended that once a sanctioned scheme is under implementation, the embargo u/s 22(1) would operate. It is pointed out that Section 22(1) does not envisage complete bar and it does not extinguish a claim or even postpone the right to set up such claim indefinitely. The apparent bar of a claim being urged could be undone, according to the company, by seeking leave of the BIFR as recognized by Section 22(1) of the said Act of 1985. There is no need to assume that such leave, if sought, would not be readily given or that the petitioner in each case would be inconvenienced in seeking such leave. In any event, Section 22(1) of the said Act only postpones the right to institute proceedings in support of a claim and upon the four situations contemplated by Section 22(1) of the said Act being exhausted, a claimant could pursue its ordinary remedies.

13. The company relies on the clear words of the sub-section and urges that in the context of the larger good that the said Act set out to achieve, there cannot be any construction of Section 22(1) of the said Act beyond what is plainly evident therefrom. It is submitted on behalf of the company that Section 22(1) could, at best, take colour from the remaining sub-sections but it would be unwise to travel beyond the ordinary meaning of the words used to make any exceptions in any of the four cases covered by the conditional bar of Section 22(1) of the Act. It is, thus, that the entirety of Section 22 needs to be noticed:

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 of 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 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.

(2) Where the management of the sick industrial company is taken over or changed in pursuance of any scheme sanctioned u/s 18, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or in the memorandum and articles of association of such company or any instrument having effect under the said Act or other law-

(a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company.

(b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.

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

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

(4) Any declaration made under Sub-section (3) with respect to a sick industrial company shall have effect notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law, the memorandum and articles of association of the company or any instrument having effect under the said Act or other law or any agreement or any decree or order of a Court, tribunal, officer or other authority or of any submission, settlement or standing order and accordingly,-

(a) any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration,

and all proceedings relating thereto pending before any Court, tribunal, officer or other authority shall remain stayed or be continued subject to such declaration;

and (b) On the declaration ceasing to have effect-

(i) any right, privilege, obligation or liability so remaining suspended or modified, shall become revived and enforceable as if the declaration had never been made; and

(ii) any proceeding so remaining stayed shall be proceeded with, subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings become stayed.

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded.

14. The petitioners contended that of the four cases covered by the disjunctive conjunctions in the opening words of Sub-section (1), it is only the third which is relevant for the matters at hand. The petitioners suggest that such third case has to be differently viewed from the three other cases. It is argued that if a company implementing a scheme of rehabilitation was immune to any claim of a creditor, no supplier would venture to effect supplies and, thereby, leave the company gasping even while a scheme was under implementation for its resuscitation.

15. The first limb of Section 22(1) encompasses four situations and it is only to such four situations that the bar contemplated thereunder would apply; where an inquiry u/s 16 of the said Act of 1985 in respect of an industrial company is pending; where any scheme referred to u/s 17 of the said Act of 1985 in respect of an industrial company is under preparation or consideration; where a sanctioned scheme in respect of an industrial company is under implementation; or, where an appeal u/s 25 of the said Act of 1985 relating to an industrial company is pending.

16. The avowed purpose of the said Act is to secure the timely detection of sick and potentially sick companies owning industrial undertakings so that under the aegis of an expert body set up thereunder preventive, ameliorative, remedial and other measures can be taken with respect to such companies and such measures can be expeditiously enforced. The statement of objects and reasons of the said Act records, inter alia, as follows:

The ill effects of sickness in industrial companies such as loss of production, loss of employment, loss of revenue to the Central and State Governments and locking up of investible funds of banks and financial institutions are of serious concern to the Government and the society at large. The concern of the Government is accentuated by the alarming increase in the incidence of sickness in industrial companies. It has been recognized that in order to fully utilise the productive industrial assets, afford maximum protection of employment and optimize the use of the funds of the banks and financial institutions, it would be imperative to revive and rehabilitate the potentially viable sick industrial companies as quickly as possible. It would also be equally imperative to salvage the productive assets and realize the amounts due to the banks and financial institutions, to the extent possible, from the non-viable sick industrial companies through liquidation of those companies.

It has been the experience that the existing institutional arrangements and procedures for revival and rehabilitation of potentially viable sick industrial companies are both inadequate and time consuming. A multiplicity of laws and agencies makes the adoption of coordinated approach for dealing with sick industrial companies difficult. A need has, therefore, been felt to enact in public interest a legislation to provide for timely determination by a body of experts of the preventive, ameliorative, remedial and other measures that would need to be adopted with respect to such companies and for enforcement of the measures

considered appropriate with utmost practicable despatch....

17. Towards such end, the BIFR and the AAIFR were set up under the said Act of 1985 and extraordinary powers were conferred, inter alia, under Sections 17, 18 and 22 thereof. For the larger interest that the said Act of 1985 professes to serve, everyday claims of suppliers and others connected with a company having a sick industrial undertaking have found little consideration in the provisions of the Act, though later experience has shown that more than one industrial company has been made sick by suspension of payment of its dues by a sick industrial company. The ordinary recourse to civil remedies available to a claimant is effectively shut out if the claim relates to a sick industrial company. In course of time it has appeared more often than not that unscrupulous managers of sick industrial companies have left creditors in the lurch by merely making a reference. It has been observed more than once that the authority of the clerk at the BIFR office receiving a reference and entering it in the register was such that by one stroke of his pen he could render the highest Court of the land virtually powerless.

18. But it is not for the Court to legislate, it can merely construe and enforce a provision. Fundamental rules of Constitution require the fullest effect to be given to the ordinary meaning of the words contained in an Act. The purpose of the Act the other nuances that the ordinary words used are capable of and purposive construction come only if the plain words betray some ambiguity or the obvious interpretation results in the absurd. The company contends that the words, "where in respect of an industrial company...a sanctioned scheme is under implementation...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...shall lie...except with the consent of the Board...are incapable of any alternative construction than the obvious. It is urged that there is no dispute that the company is an industrial company; that a scheme in respect of it is under implementation; and, that these proceedings are for the winding up of the company. The company asserts that once the inquiries into these three aspects are answered in the affirmative, the bar u/s 22(1) of the said Act of 1985 falls into place.

19. Before the third of the four scenarios envisaged in the opening limb of Section 22(1) of the said Act of 1985 can be taken up, the first two cases must be seen. The said Act of 1985 confers an obligation on the board of directors of an industrial company to make a reference to the BIFR if the networth of the company becomes as is specified. Section 15(1) of the said Act of 1985 uses the definitive "shall" and specifies the time within which a reference ought to be made upon the conditions as to net worth as required by the said Act being met. Section 16 contemplates an immediate inquiry to be made by the BIFR upon a reference being received and, obviously, upon the BIFR being satisfied that such

reference can be proceeded with on the ground of jurisdiction. Such inquiry is deemed to have begun the moment the reference is registered. Upon such inquiry being completed and the BIFR being satisfied that the company had, indeed, become a sick industrial company, the BIFR is required to form an opinion as to whether it is practicable for the company to make its networth exceed its accumulated losses within a reasonable time. It may then make an order to such effect or, if the BIFR is of the other view, it may direct any operating agency to prepare a scheme providing for such measures that would ultimately enable the company to make its net worth exceed its accumulated losses.

20. Section 22(1) requires the alleged sick company to be given a respite at the Section 15 inquiry stage and at the subsequent stage where a scheme is under preparation or a prepared scheme is under consideration. The first two of the four cases to which the bar u/s 2(1) of the said Act of 1985 applies, are at the undecided, premature stage of the reference. Despite such initial stage covering many years in a number of references, the justification of a provision is not to be questioned on its inefficient implementation. At the undecided stage of the reference covered by the first two cases, the BIFR would not have expended the extraordinary powers conferred to it. In course of preparation of a scheme an operating agency would take into account the payments due to the creditors of the concerned company. In considering the scheme presented, the BIFR would make provision for payments to such creditors, on such terms, as it is empowered by, inter alia, Section 18 of the said Act to do.

21. At every stage of the first two cases covered by the initial limb of Section 22(1) of the said Act of 1985, the viability of the industrial company is under consideration. If, during such process the industrial company is threatened with any coercive action, the chances of its survival would be seriously affected. It is, thus, that at these two stages, the simple effect of the words used in Section 22(1) of the said Act would suffice : the bar would not lead to anything impractical or absurd, once it is accepted that suspension of the ordinary remedies of a creditor is not, in itself, absurd.

22. Again, the fourth case covered by the opening words of Section 22(1) of the said Act of 1985 may be looked into before the third, and relevant aspect is taken up. Section 25 of the said Act of 1985 permits an appeal from an order made by the BIFR to the AAIFR. Without in any manner intending to enlarge the scope of the appeal provision, it appears that an appeal may lie from any interim order made by the BIFR or the final order made by it. If an appeal is made from an interim order before a scheme has been sanctioned by the BIFR, then the bar under the fourth case of the opening part of Section 22(1) of the said Act of 1985 need not be cited to resist a creditor; it is more than likely than either of the first two cases would cover it. If, however, it is the order of sanction or the order of recommendation of winding up or such other final order that is the subject-matter of the appeal, then the embargo applies as the appeal would be,

effectively, in continuation of the reference. The pendency of an appeal in such case would imply that a scheme for revival of the company was under consideration: a situation covered by the second case. But, if in the matter of implementation of a sanctioned scheme, an application were to be made to the BIFR and an appeal were to be carried from the order made on the application, it would be difficult to thwart all proceedings for the realization of dues not covered by the sanctioned scheme on the strength of the pendency of such appeal.

23. The third and the fourth cases listed in the opening portion of Section 22(1) of the said Act of 1985 present some problems if a plain, literal construction were to be given them. One has to notice the absurdity that may result in the plain words being read and understood plainly.

24. The wide powers given by the said Act of 1985 to the BIFR (and, consequently, the AAIFR) permit it to specify the cut-off date in respect of a scheme. Subject to the miseries that creditors of a sick industrial company suffer under the provisions of the said Act of 1985, the BIFR may postpone payments to such creditors. Provide for interest, if at all, to them and require payments to be made in dribbles to the creditors spread over several years. It is, after all, the viability of the sick industrial company that BIFR is concerned with, never mind if some of the creditors died in the wake of the ameliorative measures that the BIFR proposes qua the sick company. There is nothing to suggest in the very wide provisions, that the BIFR needs only to single out specified classes of creditors. At least, every ordinary, private creditor is subject to the authority and the discretion of the BIFR in the matter of its realization of its dues from the sick company.

25. Rationally, the BIFR should take into account the future functioning of the sick company at the post-sanction stage, as it is the functioning of the company that it seeks to preserve. If the BIFR, in the sanctioned scheme, does not provide for payment to some creditors whose dues are reflected in the sick company's books, then it is not to be easily concluded that such creditors need not be paid at all, unless there is specific provision therefore which is subject to appeal and judicial review. If the BIFR sanctions a scheme making provision for payments over several years to creditors whose dues are reflected in the company's records up to a specified date, then the dues of the later creditors are not covered by a scheme. An ordinary right of a supplier to receive payment for his wares cannot be deemed to have evaporated upon his claim not finding mention in the scheme sanctioned by the expert body.

26. The petitioners in these cases before the Court, are such creditors. Their dues arose after the cut-off date of March 31, 2002. They are not to be disregarded merely because the scheme was sanctioned at a time subsequent to the entirety or a part of their payments having fallen due. It is the cut-off date which is relevant and, again, it is the inclusion in the scheme of the creditors, whether directly or by necessary implication, that is the pre-eminent consideration.

27. The petitioners have referred to the judgment reported at Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others, , Deputy Commercial Tax Officer and Ors. v. Corromandal Pharmaceuticals and Ors. to bring home the point that such construction of the third of the four cases referred to in Section 22(1) of the said Act of 1985 has been recognized by the highest authority. The company seeks to distinguish the Corromandal Pharmaceuticals case by suggesting that the decision rendered has to be understood in the context that it was rendered. What was complained of in that case was that the sick company had sought to collect sales tax but had sought to resist making over the same to the Revenue. It is submitted that the company in that case was in the position of a trustee and the Revenue in the position of a beneficiary and the trustee could not resist the beneficiary from obtaining the benefit by citing the legal embargo u/s 2(1) of the said Act of 1985.

28. Though the facts of the Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others, were as suggested by the company, the argument of the embargo under the third case of Section 22(1) of the said Act of 1985 was not repelled by the Supreme Court merely because the company had collected sales tax but was refusing to part with it to the rightful owner thereof. That will be clear from Paragraphs 10 to 13 of the report, which read as follows:

10. It is common ground that a sanctioned scheme for the rehabilitation of the petitioner-Company is under implementation. The scheme was sanctioned on 19-11-1990. It is also admitted before us that the sales tax arrears for which proceedings were initiated by the Revenue are for the Assessment Years 1992-93 and 1993-94. The assessment orders for these years were passed on 3-1-1994 and in 1995, long after the sanctioned scheme was brought into force. The main contention of the Revenue before the High Court and still in appeal before us is, that the arrears of sales tax in question for which proceedings are initiated against the petitioner-Company, relate to the period after the sanctioned scheme was brought under implementation and the legal bar or embargo u/s 22 of the Act can only be in respect of the sales tax dues included in a sanctioned scheme. According to the Revenue, the section should be reasonably construed and understood or read down in the above light. It was argued that apparently the embargo or bar envisaged by Section 22 of the Act is of wide import and covers a long period. This bar or embargo begins to operate the moment an inquiry is ordered or pending, and continues during the course of the inquiry, when a scheme is under preparation or consideration, and still later when the scheme is under implementation or even when an appeal u/s 25 of the Act relating to the company is pending. It was urged that the inquiry itself will take time and the pendency of the proceedings from the date of the inquiry till the scheme is implemented or an appeal is disposed of, envisage going through various formalities and till take a long time. If the bar or embargo envisaged by Section 22 of the Act is to cover the entire length of time, the situation may lead to very unreasonable or unintended state of affairs similar to the one in the present

case; the suspension of proceedings specified in Section 22 of the Act should be confined to matters included in pre-package state of affairs only, (in the sanctioned scheme) and not post-package matters like the instant one, which should be outside the pale or area of the "sanctioned scheme". The counsel submitted that when the scheme was sanctioned on 19-11-1990, there was no assessment for the sales tax for the years 1992-93 and 1993-94. The petitioner (assessee) itself could have collected sales tax for the said years only after the scheme was sanctioned. The tax so collected really belongs to the State. But, the amount is not remitted to the State. If the bar or embargo u/s 22(1) of the Act is held to cover such amounts collected by the assessee, which really belong to the State, and enables it to retain the same, till the implementation is over or the appeal u/s 25 of the Act is disposed of, it will result in a state of affairs enabling the assessee to retain the amounts due to the State for no reason and indefinitely; the Revenue will have to obtain consent of the Board or as the appellate authority even for realising the legitimate amounts due to it and withheld by the assessee, unreasonably. There may be similar instances where the petitioner/assessee collects amounts due to the Revenue or others and is yet enabled to keep it back with itself unreasonably for a long time if the immunity u/s 22(1) of the Act operates absolutely. According to the Revenue the bar u/s 22(1) of the Act should not lead to such an undesirable state of affairs; and so the section should be understood or read down to act as a bar or embargo only for such of those pre-package dues reckoned or included in the scheme sanctioned. On the other hand, counsel for the first respondent (petitioner in the writ petition) Company asserted that the embargo u/s 22(1) of the Act is absolute and cannot be diluted or whittled down. All that is required by Section 22(1) of the Act is that in cases where an inquiry is pending or scheme is under preparation or consideration or a sanctioned scheme is under implementation or an appeal is pending, no proceedings, as stated in Section 22 of the Act for execution, distress or the like, shall be proceeded with except with the consent of the Board or the appellate authority. What is contemplated by Section 2(1) of the Act is only a previous consent of the Board for the proceedings to be initiated against a sick company. It is not an absolute bar. The facts pointed out by the Revenue do not call for reading down the wide import of Section 2(1) of the Act.

11. We considered the rival pleas urged before us. In *The Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and others*, the company concerned was declared a sick industrial company and steps were taken under Sections 16 and 17 of the Act by the Board. The question was whether the creditor (Panchayat) could recover the amount due to it from out of the property of the Company without the consent of the Board. This Court, stated the law at p. 443 (Para 10), thus:

In the light of the steps taken by the Board under Sections 16 and 17 of the Act, no proceedings for execution, distress or the like proceedings against any of the properties of the company shall lie or be proceeded further except with the consent of the Board. Indeed, there would be automatic suspension of such

proceedings against the company's properties. As soon as the inquiry u/s 16 is ordered by the Board, the various proceedings set out under Sub-section (1) of Section 22 would be deemed to have been suspended.

The above decision was followed by this Court, in Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another, . The following portion of the headnote of the report at Pages 144-145 sufficiently brings out the ratio relevant for the purpose of the present appeal:

Where an inquiry is pending under Sections 16/17 or an appeal is pending u/s 25 of the 1985 Act there should be cessation of the coercive activities of the type mentioned in Section 2(1) to permit the BIFR to consider what remedial measures it should take with respect to the sick industrial company.

* * * The purpose and object of suspension of proceedings etc. u/s 2(1) of the 1985 Act is to await the outcome of the reference made to the BIFR for the revival and rehabilitation of the sick industrial company. The words "or the like" which follow the words "execution" and "distress" are clearly intended to convey that the properties of the sick industrial company shall not be made the subject-matter or coercive action of similar quality and characteristic till the BIFR finally disposes of the reference made u/s 15 of the 1985 Act. The legislature has advisedly used an omnibus expression "the like" as it could not have conceived of all possible coercive measures that may be taken against a sick undertaking....

Our attention was also drawn to the following High Court decisions: Reliance Ispat Industries Ltd. v. CST (1993) 91 STC 521 (MP); Himalaya Rubber Products Limited and Another Vs. The Board for Industrial and Financial Reconstruction and Others, ; Vijay Mills Co. Ltd. and Others Vs. State of Gujarat and Others, , etc.

12. The Madhya Pradesh and Calcutta High Courts have followed the decision of this Court in The Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and others, .

13. On a fair reading of the provisions contained in Chapter III of Act 1 of 1986 and in particular Sections 15 to 22, we are of the opinion that the plea put forward by the Revenue is reasonable and fair in all the circumstances of the case. Under the statute, the BIFR is to consider in what way various preventive or remedial measures should be afforded to a sick industrial company. In that behalf, BIFR is enabled to frame an appropriate scheme. To enable the BIFR to do so, certain preliminaries are required to be followed. It starts with the reference to be made by the Board of Directors of the sick company. The BIFR is directed to make appropriate inquiry as provided in Sections 16 and 17 of the Act. At the conclusion of the inquiry, after notice and opportunity afforded to various persons including the creditors, the BIFR is to prepare a scheme which shall come into force on such date as it may specify in that behalf. It is in implementation of the scheme wherein various preventive, remedial or other measures are designed for the sick industrial company, steps by way of giving

financial assistance etc. by Government, banks or other institutions, are contemplated. In other words, the scheme is implemented or given effect to, by affording financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices by Government, banks, public financial institutions and other authorities. In order to see that the scheme is successfully implemented and no impediment is caused for the successful carrying out of the scheme, the Board is enabled to have a say when the steps for recovery of the amounts or other coercive proceedings are taken against sick industrial company which, during the relevant time, acts under the guidance/control or supervision of the Board (BIFR). Any step for execution, distress or the like against the properties of the industrial company or other similar steps should not be pursued which will cause delay or impediment in the implementation of the sanctioned scheme. In order to safeguard such state of affairs, an embargo or bar is placed u/s 22 of the Act against any step for execution, distress or the like or other similar proceedings against the company without the consent of the Board or, as the case may be, the appellate authority. The language of Section 22 of the Act is certainly wide. But, in the totality of the circumstances, the safeguard is only against the impediment, that is likely to be caused in the implementation of the scheme. If that be so, only the liability or amounts covered by the scheme will be taken in, by Section 22 of the Act. So, we are of the view that though the language of Section 22 of the Act is of wide import regarding suspension of legal proceedings from the moment an inquiry is started, till after the implementation of the scheme or the disposal of an appeal u/s 25 of the Act, it will be reasonable to hold that the bar or embargo envisaged in Section 2(1) of the Act can apply only to such of those dues reckoned or included in the sanctioned scheme. Such amounts like sales tax, etc., which the sick industrial company is enabled to collect after the date of the sanctioned scheme legitimately belonging to the Revenue, cannot be and could not have been intended to be covered within Section 22 of the Act. Any other construction will be unreasonable and unfair and will lead to a state of affairs enabling the sick industrial unit to collect amounts due to the Revenue and withhold it indefinitely and unreasonably. Such a construction which is unfair, unreasonable and against the spirit of the statute in a business sense, should be avoided.

29. The petitioners have also relied upon the cases reported at Vibgyar Ink Chem (Pvt.) Ltd. Vs. Safe Pack Polymers Ltd., . (2001) 103 Company Cases 122 : 1999 AIHC 2657, Unilab Chemicals and Pharmaceuticals v. Smith Stanistreet Pharmaceuticals Ltd. (2002) 108 Company Cases 176 : 2002 CLC 1632, Fort William Industries Ltd. v. Usha Beltron Ltd. and (2002) Company Cases 237, Taulis Pharma Ltd. v. Bengal Immunity Ltd. In the first of these four cases, a Division Bench of the Andhra Pradesh High Court applied the construction given by the Supreme Court to the third case covered by Section 2(1) of the said Act of 1985 in a matter that did not involve collection of any tax by the sick company on behalf of the Revenue. In the second of the four cases, the Bombay High Court found that the third case envisaged by Section 2(1) of the said Act of 1985

and the embargo thereunder, would apply to such creditors as would be covered by a sanctioned scheme. A learned Single Judge of this Court was of the same view in the Fort William Industries case where the Division Bench judgment in the Taulis Pharma case was followed. The following paragraphs of the Taulis Pharma case are apposite in the context:

The ratio of the Supreme Court in Deputy Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others, , is clear and unambiguous to the extent that the bar as envisaged in terms of Section 22 is restrictive in nature so as to cover the state of affairs up to the date of presentation of the scheme or on the basis of the scheme as prepared by the operating agency and approved by the BIFR.

We cannot accept the contention of Mr. Bhattacharjee to the effect that the ratio of the judgment of the Supreme Court in Deputy Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others, , must be confined only to the sales tax or State revenues collected by the company from third parties in respect whereof it acts as a trustee. The aforementioned submission cannot be accepted keeping in view of the fact that in all recovery proceedings the assets of the company may be the subject-matter of execution. Even in a case of sales tax, the sick company might not have realised the same from customers but still it is liable to pay the same.

30. The company contends, on the strength of the Supreme Court judgments reported at The Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and others, , M/s. Rishabh Agro Industries Ltd. Vs. P.N.B. Capital Services Ltd., , Jay Engineering Works Ltd. Vs. Industry Facilitation Council and Another, , Jay Engineering Works Ltd. v. Industry Facilitation Council and Anr. that the bar u/s 2(1) of the said Act of 1985 has been upheld in every context. In the case of Shree Vallabh Glass Works, the Supreme Court considered three of the four cases covered by Section 2(1) as it stood prior to its amendment. The third case, the one that is relevant for our purpose, does not figure in the discussion at Paragraph 7 of the report. Further, the Shree Vallabh Glass Works case has been noticed in the Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others, . In the Rishabh Agro Industries case AIR 2000 SC 1583 the Supreme Court was of the view that the conduct of the company, however mala fide, would be irrelevant in ascertaining whether the embargo u/s 2(1) of the said Act of 1985 would apply. The conduct of the company in this case has not been complained of. Indeed, the company's conduct has been honourable. It has not ventured to altogether disown the petitioners as creditors, it suggests that since the transactions were at a time that the present management did not appear on the scene, the present management is in no position to deny or admit the claims.

31. The most recent case, that of Jay Engineering Works Ltd. Vs. Industry Facilitation Council and Another, does not throw much light on the solitary matter in issue herein. In that case, the Supreme Court weighed the non-obstante

clause contained in the later Act with the non-obstante clause contained in Section 2(1) of the said Act of 1985 to conclude that the bar u/s 2(1) would prevail.

32. None of the petitioner's claims find mention in the scheme for rehabilitation of the company sanctioned by the BIFR. Nothing has been shown in the scheme that could be construed to obliterate the claims of the petitioners. The claims being the subject-matter of the nine petitions are all for the period beyond that covered by the sanctioned scheme. The embargo in the third case of Section 2(1) of the said Act of 1985 does not apply to any of the claims of the nine petitioners. The other argument of the company that since the BIFR has been given wide authority under the said Act of 1985, it is such forum that ought to be approached to undo the apparent bar u/s 22 (1), is not acceptable. A creditor may not be enamoured of the architecture or climate of the capital to approach the BIFR stationed there, if it is not impeded in pursuing its claim under the embargo envisaged therein, and such creditor cannot be faulted. It is the suspension of the ordinary, usual rights that call for stricter scrutiny than the pursuit thereof.

33. The petitioners have relied on unimpeachable documents in support of their individual claims. The company has indicated that it is in no position to question them. The claims are free from doubt, yet the honourable stand taken by the company is deserving of a further contest on merits, except in the case of the petitioner in C.P. No. 197 of 2005. The petitions in the eight other cases are admitted for the principal sums claimed in the respective statutory notices together with interest at the rate of eight per cent per annum from the respective dates of the statutory notice.

34. If the company secures each of the eight claims, inclusive of interest, by furnishing cash security to the satisfaction of the Registrar, Original Side, of this Court within a period of eight weeks from date, such eight petitions will remain permanently stayed. If the company chooses not to furnish security in any case, such petition will be advertised once in "The Statesman" and once in "Jansatta". Publication in the official gazette will stand dispensed with. The advertisements should indicate that each petition would be returnable on the next available Court day four weeks after the date of the relevant publication.

35. In the event the company chooses to furnish security, the claims of the petitioners in such of the petitions for which security is furnished, will stand relegated to a suit and the security will remain to the credit of such suit that may be instituted by the relevant petitioner within six weeks from the date of the furnishing of the relevant security. In the event the petitioners, or some of them, do not file the suit within time stipulated, the company will be at liberty to seek refund of the security and all the interest accrued thereon, less the Registrar's commission.

36. In C.P. No. 197 of 2005, the petition is admitted in the principal sum of Rs.

2,93,104/- together with interest at the rate of eight per cent per annum from the date of the statutory notice (September 23, 2004). In the event the company tenders such sum, inclusive of interest, to the petitioner within eight weeks from date, C.P. No. 197 of 2005 shall remain permanently stayed. In default of such payment, that petition will be advertised once in "The Statesman" and once in "Jansatta". Publication in the official gazette will stand dispensed with. The advertisements should indicate that such petition would be returnable on the next available Court day four weeks after the date of the relevant publication.

37. Urgent photostat certified copies of this order, if applied for, be issued to the parties upon compliance with requisite formalities.