

(2002) 09 CAL CK 0010

In the Calcutta High Court

Case No : G.A. No's. 2439 of 2002 and 1975 and 1253 of 2001 and C.S. No. 149 of 2001

Kal Electronic and Consultancy (P.) Ltd.

APPELLANT

Vs

Hindustan Development Corporation Ltd. and Others

RESPONDENT

Date of Decision : 20-09-2002

Acts Referred:

Companies Act, 1956 — Section 391(2), 634

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22

Citation : (2004) 119 CompCas 337

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : K.V. Viswanathan, M. Dasgupta and S. Bose, R. Basu Chowdhury, D. Sinha and D. Das, for the Appellant; S.N. Mookerji, R. Mitra and G.S. Asopa for defendant No. 1, for the Respondent

Judgement

Amitava Lala, J.—Defendant No. 1 is a company having financial stringency. Defendant No. 3 company is a going concern. This is a joint application of both the companies. The plaintiff-company is the debenture holder of defendant No. 1 company. The convertible part of such debentures has already been converted into equity shares and the non-convertible part has been redeemed. Defendant No. 2 is the trustee bank of the debenture holders.

2. Upon observing recent recession in the steel industry defendant No. 1 and defendant No. 3 wanted to make arrangement amongst themselves. As a result whereof an application for consideration and confirmation of the scheme of arrangement was jointly made before this High Court having company jurisdiction. Shareholders of both the companies were directed to hold separate meetings. The shareholders of both the companies by an overwhelming majority accorded approval of the scheme of arrangement. Subsequently, a joint application was made u/s 391(2) of the Companies Act, 1956, before this High Court. Advertisements were published as per direction of the court. Notice was served upon the Central Government through the Regional Director, Eastern

Region, Company Law Board. Besides the Central Government various secured creditors of the company like Industrial Development Bank of India (IDBI), Air Force Group Insurance Society, Unit Trust of India, Naval Group Insurance Fund, Industrial Finance Corporation of India Ltd. (IFCI) and Industrial Credit and Investment Corporation of India Ltd. (ICICI) gave their "no objection" letter through the Company Law Board in respect of the scheme of arrangement. On April 26, 2000, the said scheme of arrangement was duly confirmed by this High Court.

3. The Bank of Baroda, trustee of the debenture holders did not appear in the scheme at any stage. However, Bank of Baroda, during the pendency of the confirmation, expressed its desire to hold separate meetings of the debenture holders series (vii), (viii) and (ix) which were pending for redemption. By a notice dated January 28, 2000, of defendant No. 1, debenture holders meeting was held on February 22, 2000. Such notice was not only sent by post to the debenture holders but the same was published in the newspaper, i.e., The Financial Express all over India. According to the petitioners such newspaper published from Bangalore, where the office of the debenture holder company is situate. In any event on February 22, 2000, a meeting was held and ballots were counted on the basis of the debenture value. The meeting was further adjourned till March 7, 2000, where the proposals were finally resolved. This is to be noted hereunder that the Bank of Baroda being the trustee of such debenture holders not only took the initiative of calling the meetings of the debenture holders but also drew up the resolution.

4. The relevant part of the resolution is that the debenture trustee was thereby authorised to elevate the existing second charge of the Punjab National Bank on the movable and immovable properties relating to the company's composite steel plant of its unit Madhya Pradesh Iron and Steel Company situate at Malanpur, District Bhind (Madhya Pradesh) for the outstanding credit facilities granted by the Punjab National Bank, to a first charge ranking pari passu with the existing charges thereon of the debenture holders/lenders. It was further resolved that the trustee-Bank of Baroda be and are hereby permitted and authorised to release the mortgage on the entire cyanide plant of Cyanides and Chemicals Company comprising land situated at Olpad, District Surat along with buildings and structures, plant and machinery, and other fixed movable assets created on February 24, 1993, in favour of the trustee. It was also resolved that the trustee-Bank of Baroda be and are hereby permitted and authorised to accept additional security by way of legal mortgage of land at block No. 690, having an area of 3,946 sq. metres of the company's unit : Cyanides and Chemicals Company at Olpad, District Surat, in the place of the cyanide plant.

5. The scheme of arrangement was already filed and an order to that extent had already been passed on April 25, 2000. The scheme became operative. Various steps were taken for the purpose of implementation of the scheme. Consent from the Punjab National Bank was obtained. Various correspondence were exchanged

by or between the company and the Bank of Baroda being the debenture trustee. The bank never objected to release the mortgage and upgradation of the charge with the Punjab National Bank but for unknown reason no effect was given. Under these circumstances, an application was made by the company in this High Court having company jurisdiction for obtaining certain reliefs in connection thereto. Ultimately, the court passed an order on September 11, 2000, by holding that the bank issued a letter to the Adjudicating Authority, Superintendent of Stamps Surat, for all necessary documents and papers. But the bank is not standing in the way to release of the mortgage as aforesaid since the debenture holders had no objection in the matter. It was further held in such order that since the bank was also agreeable to the proposal made by the petitioners there shall be no order in the application. The second order was also passed almost on similar circumstances in respect of the consent of IFCI when the court found that the stage is premature.

6. On October 21, 2000, the proposed deed of release and proposed deed of additional security were duly adjudicated by the office of the Superintendent of Stamps, Gandhinagar, Gujarat, after making payment of stamp duty of Rs. 52,08,798 by defendant No. 3 company. Such deeds of release and the additional security were prepared by the advocates of the Bank of Baroda being Dapthary Ferreira and Diwan. Even the fees of the advocates of Rs. 1,75,000 was asked to be paid by defendant No. 1-company to expedite the matter. Regarding the upgradation of charge, the Industrial Finance Corporation (IFCI) had also given the consent vide letter dated January 22, 2001. Even thereafter no step was taken by the Bank of Baroda. It is specifically contended on affidavit in support of this application that including stamp duty, registration and for all incidental charges a sum of Rs. 93,63,543 has already been spent by the company. Ultimately, the matter was amicably settled by or between both the companies and the Bank of Baroda on the terms of settlement duly signed by the authorised representatives of both the companies, the Bank of Baroda and also by their advocates and filed before this High Court having company jurisdiction. An order was passed disposing of the matter on such terms and conditions on March 13, 2001. The entire terms of settlement are stated hereunder :

"Upon negotiation and by mutual consent of all parties concerned, namely, Hindustan Engineering and Industries Ltd. (HEI), the petitioner, Hindustan Development Corporation Ltd. (HDC), respondent No. 1 and the Bank of Baroda (BOB), respondent No. 2, the matter has been amicably settled and BOB has agreed to implement the resolutions passed by the holders of debentures of series VII, VIII and IX in the meeting held on March 7, 2000, and accept security of plot of land at Olpad, District Surat, in substitution of cyanides plant, to release mortgage of cyanides plant, to release mortgage of cyanides plant situated at Olpad, District Surat, as mentioned in the original debenture trust deed dated February 24, 1993, from the charge of security for debenture series IX on the following terms :

I. HEI agrees to create additional security for debenture series IX of HDC on a piece of land at Olpad, District Surat, Gujrat, in favour of trustees BOB, upon payment by HEI of registration charges and stamp duty dues as applicable and BOB as debenture trustees for series IX agrees to release mortgage in respect of cyanides plant in favour of HEI.

II. HEI agrees to give corporate guarantee to BOB as debenture trustees for holders of debenture series IX for an amount of Rs. 20 crores as to secure repayment of the second instalment of debenture of series IX and release of cyanides plant.

III. HDC agrees to comply with statutory guidelines for rollover of debentures of series VII, VIII and IX. HDC agrees to deposit with BOB in escrow the amount of claims received by BOB, trustees for holders of debentures series VII, VIII and IX as on March 7, 2001, from dissenting debenture holders, who have either filed their claims before the Company Law Board, consumer courts or other judicial authorities for repayment of dues of such debenture holders together with interest due and payable to the holders of debenture series IX due and payable on January 31, 2001, and the BOB as trustees agrees to upgrade the charge of the Punjab National Bank for working capital limit of Rs. 82 crores (approx.)

7. The details of the negotiations for sale of its composite steel plant at Malanpur, District Bhind, Madhya Pradesh have been given by HDC to BOB and HDC agrees to disburse sale proceeds of the said steel plant and pay all statutory dues including dues of MPAKVN and workers, if any, and dues of debenture holders and secured creditors in consultation with secured creditors.

8. HDC agrees to apply for and obtain all relevant consents and approvals of lenders, debenture holders as well as shareholders for sale of the said steel plant within a period of six months from the date hereof unless extended otherwise and immediately initiate a process for sale of the said steel plant, failing which BOB shall be entitled to take at their sole discretion suitable action for protection of interest of debenture holders including legal action for recovery of dues of debenture holders etc.

9. I. Upon opening of L/C in favour of HDC by the buyer of steel plant and upon receipt of 15 per cent. advance and other sale consideration, HDC agrees to deposit with BOB the proportionate amount as follows :

A. 50 per cent. of 15 per cent. of advance payment received against bank guarantee of any other bank other than BOB to be furnished by HDC to the buyer of the said steel plant.

B. 60 per cent. of 10 per cent. of sale consideration received against despatch of each of the seven lots of consignments of machinery for payment to debenture holders and secured creditors.

C. 60 per cent. of 10 per cent. of sale consideration received after commissioning and performance test.

D. 60 per cent. of 5 per cent, of sale consideration received after performance is achieved.

VIII. HDC agrees to furnish BOB as debenture trustees with certificate from their statutory auditors in respect of liabilities of statutory dues and dues of various secured creditors vis-a-vis assets as on March 31, 2000, or such extended period as possible.

IX. In the event of failure in payment of any of the agreed instalments by HDC to the BOB as trustees for holders of debenture series VII, VIII and IX, BOB as trustees would be entitled to claim a charge on the entire amount to sale proceeds of steel plant and cause sale of security in totality or by segregation as may be feasible.

X. HDC is not a sick company as on date under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, and in case HDC is to be referred to BIFR under the provisions of SICA 1985, HDC shall give an intimation to BOB while making such reference."

10. After filing the terms of the settlement the company deposited a sum of Rs. 87,60,708 in the escrow account of Bank of Baroda to protect the interest of the debenture holders who had filed their claims before the Company Law Board, consumer courts or other judicial authorities for a sum of Rs. 53,08,000 covered under Clause (IV) of the terms of settlement and a sum of Rs. 27,10,000 about the dues of the debenture holders which are not covered under Clause (IV) of the terms of settlement. The total amount is Rs. 80,18,000 and accrued interest thereon arrived at a final figure of Rs. 87,60,708.

11. However, no effect in respect of the terms of settlement was given as yet. On the other hand, this suit was instituted by the aforesaid debenture holder company on March 23, 2001, not only praying for monetary decree but also asking for perpetual injunction from giving effect or further effect to resolution dated March 7, 2000. This court observed with an utter surprise that on March 23, 2001, just ten days after the filing of the terms of settlement as aforesaid and after a year of the resolution of the meeting of the debenture holders the present suit was instituted by the debenture holder company whose interest is protected not only under the self-same terms of settlement but also by deposit of money in the escrow account of the Bank of Baroda, debenture trustee. In these circumstances, it will not be out of place to mention hereunder that unless and until somebody plays a vital role behind the veil to frustrate the entire effort this type of litigation cannot persist.

12. At the time of institution of the suit three leaves were sought by the plaintiff. Firstly, leave under Clause 12 of the Letters Patent because, according to the plaintiff, part of the cause of action is arising out of the jurisdiction which was granted by the court. Secondly, leave under Order 1, Rule 8 of the CPC since, according to the plaintiff, debenture holders should have notice and knowledge of the suit which was also granted by the court in respect of the parties who have

raised their claims before different forums. Lastly, leave under Order 2, Rule 2 of the CPC of which this court has no knowledge because no submission is made to that extent and presently there is no connection in respect of such leave. However, an interlocutory application was made there where under an interim order was passed in terms of prayer C of the notice of motion of the application, i.e., for not giving effect or further effect to the resolution of the debenture holders' meeting.

13. However, let me confine to the background of the application. This is a joint application of defendants Nos. 1 and 3 companies. As and when the suit and other applications were assigned before this Bench, the self-same facts were stated by the petitioners herein verbally. This court observed that unless and until a formal application is made, the court cannot hear out verbal submissions in this regard. This application is the outcome of the same, praying for certain reliefs, inter alia, to give effect to the terms of settlement as follows :

"(a) Respondent No. 2-Bank of Baroda being the trustee for the debenture holders do within seven days of passing this order or such other time as may deem fit to this hon''ble court execute appropriate documents to effect upgradation of the existing charge in favour of the Punjab National Bank to first charge, ranking pari passu with the charge in favour of the Bank of Baroda, in respect of the working capital advance.

(b) Immediately, after execution of the aforesaid documents mentioned in prayer (a) above the Bank of Baroda shall release payment of the dues of the plaintiff and all other debenture holders mentioned at paragraph 37 hereinabove in full and final satisfaction of their claims on account of debentures held by them.

(c) Respondent No. 2-Bank of Baroda, herein shall after payment as mentioned in prayer (b) above refund the sum of Rs. 29,61,027 deposited in excess of the requirement as stated in paragraph 37 hereinabove within seven days of passing this order or such other time as may deem fit to this hon''ble court.

(d) Respondent No. 2-Bank of Baroda, do within seven days of passing this order or such other time as may deem fit to this hon''ble court execute the deed of release of the cyanide plant of Hindustan Engineering and Industries Ltd.

(e) Further, a special officer be appointed who will carry out the order made in terms of prayers hereinabove on behalf of the Bank of Baroda and do report to this hon''ble court within 10 days from the date of passing of the order regarding its compliance.

(f) Ad interim order in terms of prayers above.

(g) Such further or other order or orders be made and directions given as this hon''ble court may deem fit and proper."

14. After making this application the petitioner wanted to get interim order in this connection. But this court was pleased to direct the parties to file their

respective affidavits and hear out the application finally in the place and instead of passing any interim relief.

15. Mr. S.N. Mukherjee, learned counsel appearing on behalf of the petitioners/defendants Nos. 1 and 3 herein contended that claim of money decree means the claim of the debenture amount which has already been deposited in the escrow account of the Bank of Baroda, debenture trustee. Resolution was passed in a meeting of the debenture holders. This is a proposal of the trustee bank. The arrangement in between the two companies is the subject matter of an approved scheme. Therefore, there cannot be any embargo in upgrading charge as per the terms of settlement.

16. On the question of maintainability he cited a judgment of this court reported in Dr. Ashis Ranjan Das Vs. Rajendra Nath Mullick, , to establish that a defendant is entitled to ask for any interlocutory relief in the suit of a plaintiff. He also relied upon another judgment reported in Pranab Kumar Sarkar v. Basanti Ray 91 CWN 65 on that score. This point is by now well settled.

17. In the midst of his argument, learned counsel for the trustee board has shown two apprehensions. One apprehension is that there is a claim of the Madhya Pradesh Electricity Board in a civil matter pending in the appropriate court therein. Therefore, unless and until the amount in connection with the same is paid effect to the terms of settlement cannot be given. Mr. Mukherjee answered by citing an unreported judgment of miscellaneous appeal in between M. P. Iron and Steel Company Ltd. and M. P. Electricity Board, dated August 9, 2001, from which it appears that the Division Bench, Madhya Pradesh High Court already set aside the order of the learned Additional District Judge. Therefore, the apprehension is baseless.

18. A further apprehension is shown that the Securities and Exchange Board of India (SEBI) guidelines has to be followed in the case of roll over of debentures. In answer to the same Mr. Mukherjee stated that an application is already pending before the appropriate adjudicating officer of the SEBI and the civil court has no jurisdiction in respect of the same (see M.R. Goyal Vs. Usha International Ltd., . Moreover all the questions which are tried to raise here were already raised before and ultimately settled between the parties and become part and parcel of the terms and settlement. Therefore such question cannot be reopened hereunder.

19. However, I have called upon Mr. Viswanathan, learned counsel appearing for the trustee bank to know their stand in this respect. I find that most of the grounds, as taken by him, are technical in nature leaving aside very few questions on the merits including the above two questions which are already discussed.

20. So far as the technicalities are concerned, firstly, he has taken the plea that almost on a similar question, an application was pending before the court having company jurisdiction.

21. Immediately, upon coming to know such fact this court adjourned the matter and directed the petitioners to take appropriate steps in connection with their choice of forum if any, and then come back and mention the matter about the happening. I have noticed that the pending application before the court having company jurisdiction was withdrawn. Even thereafter learned counsel on behalf of the trustee bank took a plea that mere withdrawal of the application cannot justify the test of proceeding with the similar matter because the same will be hit by res judicata or principles analogous thereto.

22. He cited a judgment reported in Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, to show that withdrawal of a writ petition and filing afresh on the self-same cause of action is against the public policy and an abuse of the process of the court. He also cited a Division Bench judgment of the Gujarat High Court in Krashnkumar Balakram Pande Vs. Municipal Corporation of the City of Baroda and Another, in which the said principle was followed by holding that the second writ petition is hit by principles of res judicata. He further cited a judgment reported in Ferro Alloys Corpn. Ltd. and Another Vs. U.O.I. and Others, and stated that even the principles of constructive res judicata can be applied in between the contesting respondent in such situation. In effect, principles of estoppel and acquiescence u/s 115 of the Evidence Act are the guiding factors in such case. Therefore, without leave under Order 21, Rule 1 of the CPC subsequent proceeding ought to be hit by principles of constructive res judicata.

23. In reply, Mr. Mookherjee contended that principles of res judicata are not applicable in the present case. Under normal circumstances, such principle applies in instituting suit or proceeding subsequent to the final disposal of the earlier one. But such principle cannot be applicable in respect of the pending application before any other court prior to disposal of other. The cited judgments are not speaking for the same. In the first cited judgment, a writ petition was withdrawn without permission to institute the fresh and subsequently filed on the self-same cause of action which is not maintainable. Such situation is not available herein. Section 11 of the CPC says no court shall try any suit or issue in which the matter directly and substantially in issue and has been heard and finally decided by such court. Therefore, the present situation is factually distinguishable from any of the cited judgments.

24. According to me, the guiding principle is nobody should misuse the power or process of the court of law by withdrawing the same and subsequently instituting the same in future on the self-same cause of action. Subsequent institution is the guiding principle in respect of earlier disposed of suit of proceeding or abandonment of any claim. But neither the section nor any rule of the CPC prescribes that if two simultaneous proceedings are pending and one is withdrawn the other cannot be allowed to be proceeded with. The intention of the Legislature is to prevent the unscrupulous litigants to institute a suit or proceeding on the self-same cause of action when they become aware of the

defence without obtaining leave to institute. But in a case of simultaneous proceedings there is no such scope. There cannot be any scope of improvement of the case by the petitioners herein in the second proceeding because that is already pending prior to withdrawal of the application from the court having jurisdiction. Therefore, the present case cannot be said to be attracted by the principles of "res judicata" because the principle of "res sub judice" is attracted herein. But the respondent-bank never raised any objection by making any application in the nature of Section 10 of the CPC to stay this application but allowed it to continue on various other points. The same principle of "instituting any fresh suit" is restricted also under Order 23, Rule 1, Sub-rule (4) of the CPC when one abandons any suit or part of the claim but nowhere is it precluded from proceeding with the application which is already pending. Further I find, as pointed out by Mr. Mukherjee, u/s 634 of the Companies Act, 1956, any order made by a court under the Companies Act may be enforced in the same manner as if it was a decree made by the court in a suit and when a suit has been filed to frustrate the order of the court having company jurisdiction the petitioner cannot be debarred from making application in such suit to protect his interest either for enforcement of the compromise made by them with the bank before the court having company jurisdiction or for any collateral purpose. Therefore, this application is maintainable.

25. Secondly, Mr. Viswanathan has taken a plea that previously these petitioners made an application that this court has no territorial jurisdiction in hearing the suit which is still pending. There they have prayed that leave which has been granted under Clause 12 of the Letters Patent be revoked and/ or suit be dismissed. The present stand of the petitioners is militating with the original stand taken by them. Hence I have called upon Mr. Raja Basuchowdhury, learned counsel appearing for the plaintiff, because it is his suit. He has to satisfy this court how the suit is maintainable herein. In turn, he contended that bank cannot take such plea now because it had not taken such point at the time of institution of the suit. Moreover, the petitioners are not raising such issue. Therefore, the court will not be bothered with the same.

26. According to me, there is a gulf difference between the court asking inherent jurisdiction and the court lacking territorial jurisdiction. The court having or not having territorial jurisdiction will be borne out from the factual matrix of each case. The suit is basically made for injunction from giving effect or further effect of the shareholders meeting which was held in Calcutta within the jurisdiction and monetary relief in connection thereto. Therefore, the suit cannot be said to be without having territorial jurisdiction like "suit for land". In the case of territorial jurisdiction, the court has to find out whether any part of the cause of action is arising within the territory or not. It appears that the same is arising within the jurisdiction. That apart when the petitioner made a substantive application to get a relief touching the merits of the suit it has to be construed that they have submitted to the jurisdiction. Mr. Mukherji, learned counsel, appearing for the petitioner, at the time of reply, categorically submitted that

they are waiving their claim in such application. This issue is hereby resolved. Therefore, such application is infructuous in the eye of law.

27. Thirdly, learned counsel for the bank has taken a plea of invocation of jurisdiction of the Board for Industrial and Financial Reconstructions (BIFR) in case No. 158 of 2001 in respect of Malanpur Steel Ltd. (MSL) formerly known as Hindustan Development Corporation Ltd. (HDCL). It appears to this court that the Board has furnished a summary record dated June 14, 2002, u/s 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985, to the Bank of Baroda, a copy of which has been placed before this court. To that learned counsel appearing for the plaintiff stated that the suit was instituted prior to the invocation of jurisdiction of the BIFR. Therefore, the provisions of the Act cannot be applicable against defendant No. 1 company.

28. On that score, Mr. Viswanathan learned counsel appearing for the bank cited a decision in Real Value Appliances Ltd. Vs. Canara Bank and Others, to establish the principle that as soon as an application is filed in the BIFR and reference is registered u/s 15 of the Act it will be treated to be the pendency of the application before the BIFR which has exactly happened in this case. Therefore, this court cannot take up the matter. He further cited The Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and others, to show that when the matter is pending before the BIFR under the relevant Act without any consent, any recovery proceeding cannot be proceeded with before the court of law. He cited Burn Standard Co. Ltd. v. McDermott International Inc. [1997] 2 CHN 148 whereunder a Division Bench of this court held that a proceeding before an arbitrator is not coercive in nature therefore the same can be proceeded with in spite of pendency of the reference before the BIFR. I fail to understand the necessity of citing such judgment because principally it goes against the argument of learned counsel himself.

29. However, he further cited Engineering Construction Services v. Mining and Allied Machinery Corporation Ltd. [1996] 85 Comp Cas 53 whereunder a Bench of this court held that when the reference is pending u/s 15(1), the court cannot proceed with the matter.

30. In reply thereto, Mr. Mukherji has brought my notice towards certain factual aspects of the matter. From the terms and conditions filed before the court, having company jurisdiction, I find that defendant No. 1 company was not a sick company at the relevant point of time, i.e., March 13, 2001. It is recorded in the terms and conditions that in case the company is referred to the BIFR intimation will be given to the Bank of Baroda, trustee of the debenture holders which was accordingly done. Therefore, firstly, there was no question of suppression of material facts. Secondly, at the relevant point of time the company was not at all a sick company. Thirdly, the present suit cannot lie without making defendant No. 3 company a party herein. Fourthly, the present application is made jointly by two companies one of which is a running concern. I find from the report of the BIFR dated June 14, 2002, that the Bench of the BIFR noted that defendant No.

3, one of the joint petitioners, was not a party before the Bench of the BIFR and did not require permission of the Bench to proceed against such company. Lastly, he contended that when so many questions arose in respect of proceedings before the BIFR it is necessary to understand what is the scope and ambit of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985. It says that no proceeding for winding up of the industrial company or any execution, distress or the like against any of the properties of the industrial company or for the appointment of the receiver in respect thereof and no suit for the recover of money or for the enforcement of any security against the industrial company or for any guarantee in respect of any loan or advance granted by 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.

31. According to my reading of such section no coercive action can be taken against an industrial company when the BIFR reference is pending. No suit for money or enforcement of security will also be proceeded against the company in such circumstances. Therefore, if the court accepts such situation, defendant No. 1 company will be in a happy position. Neither will there be any obligation towards the bank nor towards debenture holders until and unless an appropriate order is passed or leave is granted by the BIFR or the appellate authority. Therefore, such submission of the trustee bank is in effect, going against the interest of the debenture holders. Hence, before making any bare submission one should ascertain the position of law first clearly and make it fit into the factual matrix. The present action is not against the company but by the company. Is there any bar ? My answer is "No". This is a case of revival of a company on the basis of an arrangement in between it with another going concern jointly for protecting interest of all concerned including debenture holders, creditors, etc. Defendant No. 3-company, a going concern is a joint petitioner herein. Such going concern is not before the BIFR. Therefore even technically the application cannot be disallowed it is far to say about merit of the case. Moreover, the real intention of the debenture holders is to stop the resolution by way of perpetual injunction incidentally claiming money out of it only making first prayer to camouflage the court of law. Had it been the money claim simpliciter there would not have been any necessity of the plaintiff for obtaining leave under Order 1, Rule 8 of the Code of Civil Procedure. The suit is comprehensive in nature in connection with the right of debenture holders as per the resolution of the meeting. The stand point of the trustee bank is that the bank is only concerned about the trust of the debenture holders. If the debenture holders are happy they do not want to stand in the way. Therefore, there cannot be any express bar on the part of the BIFR against the company in proceeding with the matter nor Section 22 is the true reflection of the same. That apart, since this is a comprehensive application on behalf of both the companies from the very beginning and one of such companies is a running concern there cannot be any scope to take the plea of the pendency of the proceeding before the BIFR u/s 15 of the Act in respect of one of the companies. Therefore, even on this

ground the stand of the respondent-bank cannot be sustainable.

32. So far as the merits are concerned, Mr. Mukherji contended before this court that upon being called, a valuation report has been produced by the trustee bank. In this context, it is significant to mention that the court was curious to know the valuation when it found that the trustee bank was giving a rough idea of the value of the cyanide plant as about Rs. 27 crores and the value of the steel plant about Rs. 1,000 crores leaving aside a small plot of land which the companies wanted to give as additional security. On two occasions this court called upon learned counsel appearing for the trustee bank to give an idea about the value of the plot of land being additional security so that there should not be misunderstanding about the same against the claim of the debenture holders. But instead of giving such report, a report of A.V. Sampat, chartered accountant, has been produced before this court. It appears that the same is dated August 26, 2002, whereunder only book value is reflected on the basis of the balance-sheet but not the market value. That apart, no answer has been given by learned counsel in respect of the judgment and order of the Madhya Pradesh High Court in respect of the M. P. Electricity Board matter. So far as the question of roll over is concerned the same is the subject matter of the SEBI as per its regulation, Presently, the dispute is only in respect of up-gradation of charge which is an independent obligation. Such obligation is very much clear in Clause (IV) of the terms of settlement.

33. It appears to me that on numerous occasions the trustee bank stated that the bank has to comply with the terms but full shape cannot be given due to non-compliance of the defendants/petitioner companies non-fulfilment of terms and conditions. I have called upon Mr. Mukherji to give answer to that extent. He has given answer about the clauses one by one. He stated that they have given the additional security in respect of the land. They are agreeable to give a corporate guarantee. It is an admitted position that defendant No. 3 company is a rich company. They have already applied to the SEBI for roll over of the debentures of the series of the debenture holders therein. They have already deposited the cash amount of about Rs. 87 lakhs in the Bank of Baroda, escrow account as against the claim of the debenture holders. They have spent about Rs. 93 lakhs for execution of documents etc. A negotiation of sale of the composite steel plant is going on which is not a myth. The true reflection of the same is available not only in the petition but also in the terms of settlement itself. The buyer has made a proposal of USD 135 million equivalent to Rs. 627 crores. If the negotiation derived in a final sale, interest of every one will be sub served. Other parts are required to be complied with periodically subject to fulfilment of the unfulfilled terms which is necessary to be done by the bank.

34. Therefore, upon taking into account pros and cons of this application I find that except an apprehension on the part of the debenture holders in respect of losing their status by upgradation of the charge with the Punjab National Bank no other case is nearer for due consideration. As per original terms and conditions,

the debenture holders shall rank pari passu inter se without any preference or priority of one over the other or others of them. Debenture amount, etc., are fully secured by first legal mortgage in English form, i.e., debenture trust deed dated February 24, 1993, in favour of the trustee of all the present and future immovable and movable properties. Therefore the rank pari passu is applicable amongst the debenture holders themselves not with others. Pari passu means on par with other or others. Pari passu inter se means debenture holders are at par amongst themselves. It has got nothing to do with the policy matter of the companies whether they can make the Punjab National Bank pari passu with the debenture holders or not. The requirement in such policy matter is that the same is beneficial to the debenture holders or not. Debenture itself is a priceless paper unless and until it fetches its value. Therefore this is a question of survival. Hence when such interest is protected by a scheme which has been approved by the Registrar of Companies and thereafter by the High Court and further when the terms and conditions of settlement between the companies and trustee bank of the debenture holders become order of the court, there is no scope for opposing the same. Even to that extent not only the security of immovable properties are given but also liquid sums were deposited with the escrow account of the trustee bank adjustable with the debenture holders claim in various courts, forum, etc. The company is even eager to pay off the shortfall, if and when this court puts such question. Moreover, the trustee bank is protected not only by the existing right over the properties but future right as per the clause regarding security under debenture certificates.

35. Therefore, taking into totality of the matter I am of the view that the petitioners' prayer for reliefs, if ignored, not only the companies' but also debenture holders' interest will be jeopardised particularly when the debenture holder company contended before this court that the amount so deposited in the escrow account of the bank will cover their claim as well as other similarly placed debenture holders added or to be added as party defendants/respondents. Moreover, they have already stated if the sums directed to be released simultaneously with the upgradation of charge with the Punjab National Bank they will have no objection.

36. Therefore the following reliefs are granted hereunder. Mr. Kalyan Banerjee, an advocate of this High Court is appointed as a special officer to execute appropriate documents for the upgradation of the existing charge in favour of the Punjab National Bank to a first charge pari passu (ranking similar with) with the Bank of Baroda in respect of working capital advance within a period of seven days from the date of communication of this order simultaneously with release the amount of Rs. 57,99,681 in favour of the debenture holders leaving aside balance of Rs. 29,61,027. Payment of such balance sum and any additional sum in the case of shortfall towards the debenture holders, if any remain unpaid or refund of the same to the companies will be considered later on upon being satisfied with the other part of the order. The application for addition of parties by the debenture holders being G. A. Nos. 3158, 3245, 3157, 3217, 3155, 3159,

3156, 3738, 3571, 3425 of 2001 and G. A. No. 3414 of 2002 are formally allowed hereunder without imposition of costs. If added parties claims are arising out of the sum of Rs. 57,99,681 they will be entitled to get release from such amount simultaneously with the upgradation of charge as above. If they are not falling under such category, their claim will be considered later on, on the basis of the satisfaction of the action of the upgradation by the Special Officer. Additionally, Mr. Tridib Kr. Sarkar, another advocate of this court is appointed as a Special Officer to execute a deed of release of the charge of the cyanide plant of defendant No. 3 company and execute with the Registrar a deed of additional mortgage in respect of the plot of land being plot No. 690 at Olpad, Gujarat. Such action will also be carried out by such special officer within a period of seven days from the date of communication of this order. All the parties will render necessary assistance and co-operation with the Special Officers for rendering their respective services. Both the special officers will have power to execute all relevant documents and deeds on behalf of the Bank of Baroda, i.e., debenture trustee before the Registrar under the Registration Act or Registrar of Companies and do the needful in the case of any exigency. The Special Officers will be entitled to remuneration of 1,000 gms. each which will be paid by the defendant companies at the first instance. Conveyances and other incidental charges will also be borne out by them. Further or other remunerations, etc., of the Special Officers will be considered later upon verifying their tenure and volume of the work. This application is formally disposed of with liberty to mention since the court has seisin over the pending suit. However, no order is passed as to costs. This order will prevail over any earlier order in connection with any of the applications arising out of the suit.

37. Prayer for stay is made, considered and refused.

38. Xeroxed certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisites for drawing up and completion of the order and certified copy of this judgment.

39. All parties are to act as on a signed copy minute of the operative part of this judgment on the usual undertaking and subject to satisfaction of the officer of the court in respect as above.