
(2014) 09 BOM CK 0172

In the Bombay High Court

Case No : Criminal Writ Petition No. 1609 of 2014

Kitply Industries Limited

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 05-09-2014

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 139, 141

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 15(1), 16, 17, 18

State Financial Corporations Act, 1951 — Section 29, 31

Citation : (2015) 3 BC 195 : (2015) CriLJ 723

Hon'ble Judges : Revati Mohite Dere, J

Bench : Single Bench

Advocate : A.P. Mundargi, Senior Counsel and Ganesh Gole i/b Rashmi Gagwani, Advocate for the Appellant; Amar Talreja, Anand Talreja and A.R. Patil, APP, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Revati Mohite Dere, J.—This petition, is directed against the order issuing process, dated 29th April, 2013, passed by the learned Magistrate as against the petitioners u/s 138 r/w 141 of the Negotiable Instruments Act. The said order issuing process was confirmed in Revision by the learned Ad-hoc District Judge, vide Judgment and Order dated 3rd April, 2014.

2. A few facts as are necessary to decide the present petition are as under:-

The respondent no. 2 (original complainant) has filed a criminal complaint, being C.C. No. 312/SS/2013 in the Court of learned Judicial Magistrate First Class, Ulhasnagar, Kalyan, alleging offences punishable u/s 138 r/w Section 141 of the Negotiable Instruments Act, 1881. According to the respondent no. 2-complainant, on the basis of the representations and assurances made by the petitioner no. 1-company, through its Directors/Officers, the respondent no. 2 discounted bills of the petitioner no. 1-company and advanced consideration to

the petitioner no. 1-company, from time to time. It is stated that initially the petitioners, had agreed to make payments within 60 days and the discounting charges were fixed at 5% but later, at the request of the petitioners, respondent no. 2, granted time to make payment, within 120 days at a penal interest @2.5% per month, for the delay in payments. According to the respondent no. 2, on 31st March, 2012, the principal bill discounting amount stood at Rs. 4,00,00,000/- and the discounted charges and additional charges accounted to Rs. 1,40,23,529/- i.e. the total amount was Rs. 5,40,23,529/-. The said amount is stated to have been confirmed by the petitioner no. 1-company, vide letters dated 12th March, 2012 and 26th March, 2012. As on 31st March, 2012, the bill discounting charges on the principal amount of Rs. 4,00,00,000/- accounted to Rs. 30,00,000/- and accordingly the petitioner no. 1-company issued post dated cheques of 2,50,000/- each. According to the respondent no. 2-complainant, pursuant to the demand made to the petitioners, for payment and to clear the subsisting liability of the respondent no. 2, against the legally enforceable debt, the petitioner no. 3, issued two cheques dated 30th September, 2012 and 29th September, 2012 for an amount of Rs. 5,40,23,529/- and Rs. 2,50,000/- respectively. On the assurances made by the petitioners, that the aforesaid two cheques will be honoured on presentation, the same were received by the respondent no. 2. Both the aforesaid cheques were presented by the respondent no. 2-complainant, in the HDFC Bank, Ulhasnagar Branch on or about 10th December, 2012. However, the said cheques were returned unpaid by the bankers of the petitioner-company, vide cheque-return-memo dated 11th December, 2012, with the remark "Payment Stopped by the Drawer". The said intimation recording dishonour of the cheques was received by the respondent no. 2 from their bankers vide memo dated 12th December, 2012, pursuant to which, respondent no. 2 issued the statutory notice dated 31st December, 2012, calling upon the petitioners to make payment against the dishonoured cheques, within a period of 15 days from the date of receipt of the notice. The petitioners are stated to have replied to the said statutory notice, through their Advocate, raising certain defences, which was counter replied to, by the respondent no. 2. As the petitioners failed to make payment of the dishonoured cheques, a complaint was filed by the respondent no. 2 in the Court of learned Judicial Magistrate First Class, Ulhasnagar, Kalyan, alleging offences punishable under Sections 138 r/w 141 of the Negotiable Instruments Act, 1881.

It may be noted, that the petitioner no. 1-company had filed a reference with the Board for Industrial and Financial Reconstruction (hereinafter referred to as "the BIFR"), u/s 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to for the sake of brevity as "the SICA"). In the said reference made by the petitioner no. 1-Company, a Miscellaneous Application No. 341 of 2012, came to be preferred by the "Wood Workers Union" of the petitioner no. 1-company, requesting the BIFR to restrain the petitioner no. 1-company from making any payments to the unsecured creditors, without the specific permission of the Board (BIFR); and to direct the company to pay the

dues of the members of the Wood Workers Union. The BIFR observed that the Company has not yet been declared sick by the board, however, after considering the submissions, passed certain directions, and one of the direction was that "the company is restrained from making any payment to unsecured creditors without the approval of the Board till the next date of hearing." The aforesaid direction was given by the BIFR on 21st September, 2012, on the application preferred by the Wood Workers Union. The said order was extended from time to time.

3. The short question, that arises for consideration in the present petition, is whether the direction/order dated 21st September, 2012, passed by the BIFR in a Miscellaneous Application preferred by the "Wood Workers Union", restraining the petitioner no. 1, from making any payment to the unsecured creditors without its approval, created a legal impediment, restraining the petitioners from making payment to the respondent no. 2 and consequently debarring the respondent no. 2, from filing a complaint u/s 138 of the Negotiable Instruments Act, as against the petitioners.

4. Mr. Mundargi, learned senior counsel for the petitioners contended that despite the fact, that the BIFR vide direction/order dated 21st September, 2012, had restrained the petitioners from making any payment to the unsecured creditors, the respondent no. 2, an unsecured creditor had presented the aforesaid two cheques dated 30th September, 2012 and 29th September, 2012 on 10th December, 2012, during the existence of the said direction dated 21st September, 2012. He submitted that the said direction/order was brought to the notice of the respondent no. 2, before the cheques were presented by respondent No. 2 with their Bankers.

5. Mr. Mundargi further submitted that the petitioners had informed the respondent no. 2 of the said direction/order passed on 21st September, 2012 vide letter dated 21st September, 2012 i.e. on the very same day and on 8th October, 2012, a copy of the said order was sent to the respondent no. 2. He submitted that the petitioners had also informed their bankers Axis Bank Limited vide letter dated 24th September, 2012 that they had issued the aforesaid two cheques for an amount of Rs. 5,40,23,529/- and Rs. 2,50,000/- to one of their unsecured creditors, M/s. Dhalumal Holdings-respondent no. 2, which were yet to be presented for clearance. The petitioners requested their bankers to make stop payment of the aforesaid cheques, if presented for encashment, in compliance of the direction/order dated 21st September, 2012.

6. Mr. Mundargi, contended that the respondent no. 2 had infact filed an application seeking vacating of the direction/order passed by the BIFR dated 21st September, 2012, by filing an application on 4th January, 2013, which fact has been suppressed by the respondent no. 2 in its complaint. He submitted that in view of the direction/order dated 21st September, 2012, passed by the BIFR, the petitioners were restrained from making any payment to the unsecured creditors and as such no criminal prosecution could have been initiated u/s 138 of the Negotiable Instruments Act, as against the petitioners. He submitted that even

otherwise, the aforesaid cheques that were given, were only for servicing of the interest component and were given by way of security, as is reflected in the reply to the statutory notice sent by the respondent no. 2. He submitted that in the reply dated 14th January, 2013, it was clearly stated that the cheques were given as security and that the petitioners were not liable to make any payments. Mr. Mundargi also submitted that the respondent no. 2 had suppressed the proceedings pending before the BIFR, though being aware of the same.

7. According to Mr. Mundargi, the case of the petitioners was squarely covered by the Judgment of the Apex Court in the case Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, in particular para 19 of the said judgment. He submitted that in view of the restraint order/direction of the BIFR, proceedings u/s 138 of the Negotiable Instruments Act could not have been instituted.

8. Per Contra, Mr. Amar Talreja, learned counsel for the respondent no. 2, urged that no interference was warranted in the order issuing process or the Judgment and Order passed by the Revisional Court, dismissing the Revision Application preferred by the petitioners. He submitted that there was no bar to the institution of proceedings u/s 138 of the Negotiable Instruments Act, even during the pendency of the reference before the BIFR. He relied on the Judgments of the Apex Court in the case of Kusum Ingots and Alloys Limited v/s. Pennar Peterson Securities Limited and Ors.; BSI Ltd. and Another, etc. Vs. Gift Holdings Pvt. Ltd. and Another, etc., and the order passed by this Court in the case of Harshad Jayprasad Bakshi v/s. State of Maharashtra and Another, dated 9th April, 2013 in Criminal Writ Petition No. 3327 of 2011 to buttress his submission. He contended that Section 22-A of the SICA would not apply to the facts of the present case, as the petitioner no. 1-company has not been declared sick nor has it been wound up. He submitted that infact till the determination of the sickness of the company, no protection u/s 22-A of the SICA is available to the petitioner no. 1-company. It is not the contention of the petitioners that the order was passed u/s 22-A of SICA. According to Mr. Talreja, even the direction/order dated 21st September, 2012 cannot be said to have been passed u/s 22(3) of the SICA, as contended by Mr. Mundargi, inasmuch as, there is no inquiry which is pending u/s 16 of SICA. According to him, if the company had become sick in 2006 itself, the reference ought to have been filed with the BIFR within 60 days, as contemplated u/s 15 of the SICA. He submitted that as the reference was filed in the year 2011, the reference was rightly not registered, in view of the delay and that it was only in Appeal that the Appellate Board, directed that the reference be registered. He contended that the reference has not been decided till date. He also relied on the order dated 14th March, 2014, passed by the BIFR, stating that no protection u/s 22(1) of the SICA will be available to the Company, till determination of the sickness of the company.

9. Mr. Talreja further contended that though the petitioner no. 1-company had allegedly become sick in the year 2006, the petitioners approached the

respondent no. 2 in 2012 and had entered into and accepted certain payment facilities, with the respondent no. 2 after a meeting between them. The terms of payment were recorded in a letter dated 12th March, 2012. He submitted that clause 4 of the said letter dated 12th March, 2012 clearly records that the respondent no. 2 was entitled to deposit the post dated cheques received from the petitioners in discharge of its legal liability. He further submitted that though the reference was filed in the year 2011, the same was suppressed by the petitioner no. 1-company from the respondent no. 2 and that only when the direction/order dated 21st September, 2012 was passed by the BIFR, that the respondent no. 2 was informed of the same. He contended that the BIFR direction/order dated 21st September, 2012, had not restrained the petitioners from making any payment at all, but had only restrained them from making payment to the unsecured creditors, without its approval. He submitted that the parties had agreed on certain terms and conditions which were recorded in the letter dated 12th March 2012 and that the petitioners were bound by the same. According to the learned counsel, the offence u/s 138 of the Negotiable Instruments Act was complete on the dishonour of the cheques and as such the petitioners were precluded from taking protection under the provisions of SICA, considering their conduct. It was contended that the application filed by the Wood Workers Union was in collusion with the petitioners, and the same is evident from the fact, that no steps were taken by the petitioners, to seek the approval of the BIFR for making payments to the respondent no. 2.

10. At the outset, it is necessary to consider the relevant provisions of SICA. u/s 15, when an industrial company becomes a sick industrial company, the Board of Directors of the said Company make a reference to the Board within 60 days from the date of finalisation of the duly audited accounts of the company, from when the company had become a sick company for determination of the measures, which are to be adopted with respect to the company. It is pertinent to note, that making of a reference u/s 15 does not ipso facto, attract the restriction on the right of a sick industrial company to dispose of its assets. Such a restriction has to be imposed by the Board by a specific order passed u/s 22-A of the SICA. Section 16 of the SICA contemplates that on a reference being made u/s 15, the Board may make such inquiry as it may deem fit for determining whether any industrial company has become a sick industrial company under sub-section 1 of Section 16. Under sub-section (2) of Section 16, the Board may, if it deems necessary or expedient so to do for the expeditious disposal of an inquiry under sub-section (1) of Section 16, direct an operating agency to enquire into and make a report with respect to such matters as may be specified in the order. Under sub-section (3) of Section 16 the operating agency or the Board shall complete its inquiry as expeditiously as possible and shall make an endeavour to complete the inquiry within 60 days from the commencement of the inquiry. Sub-section (4) of Section 16 states that where the board deems it fit to make an inquiry or to cause an inquiry to be made into any industrial company under sub-section (1) of section 16 or as the case may

be, under sub-section (2) of section 16, it may appoint one or more persons to be special director or special directors of the company for safeguarding the financial and other interests of the company or in the public interest. Under sub-section 4(A) of Section 16, the board may issue such directions to a special director appointed under sub-section (4) as it may deem necessary or expedient for proper discharge of his duties and under sub-section 5 of Section 16, the appointment of a special director referred to in sub-section (4) of Section 16, shall be valid and effective. u/s 17 the board has powers to make suitable orders on the completion of the inquiry. Section 18 contemplates, where an order has been passed under sub-section (3) of Section 17 in relation to any sick industrial company, the operating agency specified in the order, shall prepare, as expeditiously as possible and ordinarily within a period of 90 days from the date of such order, a scheme with respect to such company for any one or more of the measures as specified therein. Section 19 provides for rehabilitation by giving financial assistance to sick industrial company by way of loans, advances or guarantees or reliefs or concessions from the Central Government, a State Government or any scheduled bank or other bank, etc. Section 19(A) provides for arrangement of continuing operations etc., during inquiry u/s 16. Section 20 provides for winding up of the sick industrial company, where the board after making an inquiry u/s 16 and after consideration of all the relevant facts and circumstances and after giving an opportunity of being heard to all concerned parties, is of the opinion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time, while meeting all its financial obligations and that the company as a result thereof is not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record and forward its opinion to the concerned High Court. Thereafter the High Court on the basis of the opinion of the Board, may order winding up of the sick industrial company in accordance with the provisions of the Companies Act, 1956. Section 21 spells out that the Board may through an Operating Agency prepare complete inventory etc., for proper discharge of the functions of the Board under the Act. Section 22 contemplates suspension of legal proceedings, contracts, etc., pending an inquiry u/s 16 or under any scheme referred to u/s 17 in subsection (3) of section 22 where an inquiry u/s 16 is pending or where any scheme referred u/s 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. u/s 22, the Board may by an order declare with respect to the sick industrial company, 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 is 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 in such a manner, as may be specified by the Board. u/s 22-A, where the board is of the opinion, that any direction is necessary in the interest of the sick industrial company or creditors

or shareholders or in the public interest, the board may by order in writing, direct the sick industrial company not to dispose of, except with the consent of the Board any of its assets during the period of preparation or consideration of the scheme u/s 18 and during the period beginning with the recording of opinion by the Board for winding up of the company under sub-section (1) of section 20 and upto commencement of the proceedings relating to the winding up before the concerned High Court.

11. The parties are ad-idem on the point, that Section 22-A of SICA will not apply to the facts of the present case, as the petitioner no. 1-company has not been declared as a sick industrial company. The only question, therefore, in the facts of the present case, is whether the petitioner no. 1-company is entitled to any protection u/s 22(3) of the SICA ? The answer is in the negative.

12. In 2006, the petitioner no. 1-company was stated to be a sick company, pursuant to which a reference came to be filed by the petitioner no. 1-company in 2011, which is pending before the BIFR. After filing of the reference with the BIFR, certain terms and conditions were entered into and agreed upon between the petitioner no. 1-company and the respondent no. 2 and the same were recorded in the letter dated 12th March, 2012. The filing of the reference was not brought to the notice of respondent no. 2, at the time when the parties had entered into certain terms and conditions. It appears that in the meeting held at Mumbai, on 12th March, 2012, accounts came to be finalized between the parties, in respect of the bill discounting facility, granted by the respondent no. 2 to the petitioner no. 1 and certain terms of payments came to be mutually agreed and accepted by the parties. Pursuant to the terms and conditions, the petitioner no. 1-company issued one post dated cheque of Rs. 5,40,23,529/- in favour of the respondent no. 2, for a total amount to be worked out (excluding additional discounting charges from 1/4/2012 to 30/9/2012) upto 31/3/2012 as security. As per clause (3) in addition, the petitioner no. 1-company issued 16 post dated cheques for an amount of Rs. 30,00,000/- plus additional discounting charges payable every month starting from April 2012 to September, 2012 in favour of the respondent no. 2 and assured that all the 16 PDC"s would be credited into the account of respondent no. 2. It may be noted that all the 16 PDC"s were to be honoured as per clause (4) of the said terms and conditions, which directed that if the Financial Resolution/Accord was not accomplished by the petitioner no. 1-company and the full account was not settled by 1st October, 2012, then M/s. Dhalumal Holdings (respondent no. 2) was entitled to deposit the PDC with the Bank and it was the responsibility of the petitioner no. 1-company to reimburse/honour the cheque issued without delay/extension. It may be noted that the petitioner no. 1-company had lodged a reference with the BIFR in 2011, much prior to the letter dated 12th March, 2012, which fact was not brought to the notice of respondent no. 2. It appears that the reference was not accepted in view of the delay, however, subsequently in Appeal, the Appellate Board/Authority directed that the reference be registered and accordingly the reference was registered by the BIFR u/s 15(1) of the SICA and the same is

pending. The Wood Workers Union filed a Miscellaneous Application No. 341 of 2012 and sought certain directions, pursuant to which, a direction/order dated 21st September, 2012, was passed by the BIFR, restraining the petitioner no. 1-company from making any payment to the unsecured creditors without the approval from the BIFR. In the said Misc. Application, amongst other directions, the petitioner no. 1-company was restrained from making any payment to unsecured creditors "without the approval of the Board, till the next date of hearing". The only contention of the petitioner no. 1-company in the reply to the Miscellaneous Application, was that the board be pleased to vacate or recall the direction/order dated 21st September, 2012. Can the petitioners seek protection or refuge only in view of their statement in the reply dated 14th December, 2012? Certainly not. A perusal of the direction/order shows that there was nothing in the direction/order dated 21st September, 2012, restraining the petitioners from taking steps, before the BIFR, for making payments to the respondent no. 2, with the approval of the BIFR. Admittedly, the petitioner no. 1-company had not preferred an application before the BIFR seeking permission to make payment to the respondent no. 2, who was an unsecured creditor nor challenged the said order.

13. With regard to the submission, that the cheques were given by the petitioner no. 1-company to respondent no. 2 as security, the letter dated 21st September, 2012, addressed by the petitioner no. 1-company to the respondent no. 2 is material alongwith the letter dated 12th March, 2012. The letter dated 21st September, 2012 reads thus;

"As you may be aware that in view of mandatory provision of Section 15 of Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), the company has made a reference for revival thereunder to the Hon"ble Board for Industrial and Financial Reconstruction (BIFR) which has since been registered as Case no. 23/2012 and is pending consideration before the Hon"ble BIFR.

The said reference was listed today before the Hon"ble BIFR for consideration of an Application filed by Wood Workers Union, a registered trade union of our factories at Assam seeking payment of their dues and also seeking to restrain the Company from making any payment to any unsecured creditors without specific permission from the Hon"ble Board wherein despite our protest and resistance, vide order passed in today's hearing the Hon"ble BFR has restrained the Company from making any payment to any unsecured creditor of the Company including you.

We are in consultation with our lawyers are examining the possibility of challenging the order passed in today's hearing.

However, in the mean time till further orders from the Hon"ble BIFR or Hon"ble Appellate Authority in the proposed Appeal, if advised and filed by us, we request you not to present and bank any cheque including No(s). 920618 and 920620 issued by us to you and lying with you for encashment.

We will keep you posted of further developments and will also send you a copy of the order passed by the Hon''ble BIFR in today''s hearing on receipt of the same."

(emphasis supplied)

First and foremost, it is pertinent to note that pursuant to the said letter, no steps were taken by the petitioners, to challenge the said direction/order dated 21st September, 2012; secondly, no steps were taken by the petitioners to seek permission of the BIFR, for making payments to the respondent no. 2 and lastly the said letter does not state that the cheques were given only as a security and were not meant for encashment. To the contrary, the said letter only requested the respondent no. 2 not to present the two cheques issued by the petitioner no. 1-company "lying with them for encashment". The statement in the letter clinches the issue that the cheques were liable to be encashed by respondent no. 2 in the event the financial accord was not accomplished and the account was not settled by the petitioners by 1st October, 2012.

14. The fact that the cheques were not given only as a security is further fortified by clause (4) of the letter dated 12th March, 2012. Clause (4) of the letter dated 12th March, 2012, reads as under:-

4) If this Financial Resolution\\accord is not accomplished by Kitply Industries limited and Full account is not settled by 01.10.2012 then Dhalumal Holdings will be entitled to deposit the post dated cheque received as per clause (2) above with Bank and it will be responsibility of Kitply Industries Limited to reimburse\\honor the Cheque issued without delay\\extension.

It is thus evident, that although the petitioners may have given the aforesaid post dated cheque of Rs. 5,40,23,529/- as security, however, clause (4) of the said letter dated 12th March, 2012, clearly reveals, that if the financial resolution/accord was not accomplished by the petitioners and if the full account was not settled by 1.10.2012, the respondent no. 2 was entitled to deposit the said post dated cheque which was received as per clause (2) as security. It also stipulated that the petitioners would reimburse or honor the cheque so issued, without any delay or without seeking any extension for making payment of the same. Both the cheques were presented on 10th December, 2012 and dishonored on 12th December, 2012. Thus, prima-facie, both, the letter dated 12th March, 2012 coupled with the letter dated 21st September, 2012 clinch the issue that the cheques were liable to be encashed. There is no merit in Mr. Mundargi's contention that the cheques were given only as a security.

15. Before dealing with Mr. Mundargi's contention that the petitioners were entitled to protection under the provisions of SICA, it would be necessary to set out the relevant paragraphs of the Judgments on which both the parties seek to rely.

16. The Apex Court in the case of Kusum Ingots and Alloys Limited (supra) has observed as under:-

"15. The next question for consideration is whether under the provisions of the SICA there was any legal impediment for payment of the amount for which the cheques were drawn and for that reason the appellants cannot be taken to have committed an offence u/s 138 NI Act. A bare reading of the section 22 of the SICA makes the position clear that during pendency of an inquiry u/s 16 or during the preparation of a scheme referred to u/s 17 or during implementation of a sanctioned scheme or pendency of an appeal u/s 25, no proceedings for 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 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, the Appellate Authority, as the case may be. The section only deals with proceedings for recovery of money or for enforcement of any security or a guarantee in respect of any loans or advance granted to the company and a proceedings for winding up of the company. The section does not refer to any criminal proceeding. In M/s. B.S.I. Ltd. & Anr. v. Gift Holdings Pvt. Ltd., Criminal Appeal No. 847 of (1999) we held that pendency of proceeding u/s 22(1) of SICA alone is not sufficient to get absolved from the liability u/s 138 of the NI Act.

18. In our considered view section 22 SICA does not create any legal impediment for instituting and proceeding with a criminal case on the allegations of an offence u/s 138 of the NI Act against a company or its Directors. The section as we read it only creates an embargo against disposal of assets of the company for recovery of its debts. The purpose of such an embargo is to preserve the assets of the company from being attached or sold for realisation of dues of the creditors. The section does not bar payment of money by the company or its directors to other persons for satisfaction of their legally enforceable dues.

19. The question that remains to be considered is whether section 22A of SICA affects a criminal case for an offence u/s 138 NI Act. In the said section provision is made enabling the Board to make an order in writing to direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets-(a) during the period of preparation or consideration of the scheme u/s 18; and (b) during the period beginning with the recording of opinion by the Board for winding up of the company under sub-section (1) of section 20 and up to commencement of the proceedings relating to the winding up before the concerned High Court. This exercise of the power by the Board is conditioned by the prescription that the Board is of the opinion that such a direction is necessary in the interest of the sick industrial company or its creditors or shareholders or in the public interest. In a case in which the BIFR has submitted its report declaring a company as "sick" and has also issued a direction u/s 22-A restraining the company or its directors not to dispose of any of its assets except with consent of the Board then the contention raised on behalf of the appellants that a criminal case for the alleged offence u/s 138 NI Act cannot be instituted during the period

in which the restraint order passed by the BIFR remains operative cannot be rejected outright. Whether the contention can be accepted or not will depend on the facts and circumstances of the case. Take for instance, before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order of the BIFR u/s 22-A was passed against the company then it cannot be said that the offence u/s 138 NI Act was completed. In such a case it may reasonably be said that the dishonouring of the cheque by the bank and failure to make payment of the amount by the company and/or its Directors is for reasons beyond the control of the accused. It may also be contended that the amount claimed by the complainant is not recoverable from the assets of the company in view of the ban order passed by the BIFR. In such circumstances it would be unjust and unfair and against the intent and purpose of the statute to hold that the Directors should be compelled to face trial in a criminal case."

(emphasis supplied)

17. The Apex Court in the case of M/s. BSI Limited and Another v/s. Gift Holdings Private Limited and Another (supra) has observed as under:-

"20 A criminal prosecution is neither for recovery of money nor for enforcement of any security etc. Section 138 of the NI Act is a penal provision the commission of which offence entails a conviction and sentence on proof of the guilt in a duly conducted criminal proceedings. Once the offence u/s 138 is completed the prosecution proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to the penal liability. What was considered in Maharashtra Tubes Ltd. (supra) is whether the remedy provided in Section 29 or 31 of the State Finance Corporation Act, 1951 could be pursued notwithstanding the ban contained in Section 22 of the SICA. Hence the legal principle adumbrated in the said decision is of no avail to the appellants.

21. In the above context it is pertinent to point out that Section 138 of NI Act was introduced in 1988 when SICA was already in vogue. Even when the amplitude of the word "company" mentioned in Section 141 of the NI Act was widened through the Explanation added to the section, Parliament did not think it necessary to exclude companies falling u/s 22 of SICA from the operation thereof. If Parliament intended to exempt sick companies from prosecution proceeding, necessary provision would have been included in Section 141 of the NI Act. More significantly, when Section 22(1) of SICA was amended in 1994 by inserting the words ["and no suit for the recovery of money or for enforcement of any security against industrial company or of any guarantee in respect of any loans or advance granted to industrial company"] Parliament did not specifically include prosecution proceedings within the ambit of the said ban."

18. From a perusal of the aforesaid judgments, it appears that passing of an order u/s 22 or u/s 22-A of the SICA, does not as a natural consequence thereof, result in quashing of the proceedings filed u/s 138 of the Negotiable Instruments

Act. There is no bar under the SICA to institute a complaint alleging an offence punishable u/s 138 of the N.I. Act. The Apex Court in the case of Kusum Ingots and Alloys Limited (supra), in para 19, has observed that "the case in which the BIFR has submitted its report declaring a company as "sick" and has also issued a direction u/s 22-A restraining the company or its directors not to dispose of any of its assets, except with consent of the Board, then the contention raised on behalf of the appellants that a criminal case for the alleged offence u/s 138 Negotiable Instruments Act cannot be instituted during the period in which the restraint order passed by the BIFR remains operative cannot be rejected outright." The Apex Court further observed that "whether the contention can be accepted or not will depend on the facts and circumstances of the case." In the present case, admittedly, the petitioner no. 1-company had not been declared as a sick company and as such, Section 22-A will have no application. The said position has also not been disputed by the learned counsel for the petitioners. It appears that a reference is pending u/s 15(1) of the SICA, before the BIFR. The direction/order dated 21st September, 2012, has been passed by the BIFR on an application preferred by the Wood Workers Union, restraining the petitioner no. 1-company from paying the unsecured creditors, without the prior approval of the Board. According to Mr. Mundargi, the said order dated 21st September, 2012, has been passed in terms of Section 22(3) of the SICA. The said contention is strongly refuted by Mr. Talreja. According to Mr. Talreja, no inquiry has commenced u/s 16 of SICA. It appears that what is contemplated u/s 22(3) is commencement of an inquiry u/s 16. No order passed by the BIFR is brought on record to show that an inquiry was constituted or ordered, pursuant to section 22(1) of the SICA. Thus, Section 22(3) of SICA will have no application to the facts of the present case. It may also be noted, that vide order dated 14th March, 2014, passed in the reference preferred by the petitioner no. 1-company before the BIFR, it is categorically stated that "no protection u/s 22(1) of SICA will be available to the company till determination of sickness of the company."

19. Be that as it may, even otherwise, despite the direction/order dated 21st September, 2012, no steps were taken by the petitioner no. 1-company to seek the approval of the BIFR, for making payments to the respondent no. 2, an unsecured creditor or to challenge the order, and therefore the petitioners are precluded from seeking protection of the said direction/order passed by the BIFR, on a Miscellaneous Application preferred by the Wood Workers Union. Mere filing of a reply to the application preferred by the Wood Workers Union, stating therein that the order/direction dated 21st September, 2012 be vacated or recalled, would not in anyway further the petitioners case. The petitioners were not prevented from taking steps, if they genuinely so desired. The petitioners, as is evident, had also suppressed the filing of BIFR proceedings from the respondent no. 2, when they entered into certain terms and conditions vide letter dated 12th March, 2012. The conduct of the petitioners clearly disentitles them from seeking refuge under the direction/order dated 21st September, 2012.

20. A perusal of the complaint filed by the respondent no. 2 would reveal that

the offence u/s 138 of the Negotiable Instruments Act is complete and that there was no legal impediment for instituting and proceeding with the case, as against the petitioners, u/s 138 of the Negotiable Instruments Act. There can be no dispute, that a criminal prosecution is neither for recovery of money nor for enforcement of any security. Section 138 of the Negotiable Instruments Act is a penal provision. It entails a conviction and sentence, at the end of the criminal proceedings. There is a statutory presumption u/s 139 of the Negotiable Instruments Act, in favour of the holder of the cheque. A prosecution u/s 138 of the Negotiable Instruments Act is ultimately to bring the offender to suffer penal consequences. A prosecution u/s 138 of the Negotiable Instruments Act has not been excluded under the provisions of SICA, nor exemption has been granted to sick companies from prosecution under the Negotiable Instruments Act. Thus, merely because a party has approached the BIFR, by itself is not sufficient to seek protection and claim that there is a legal bar for instituting and proceeding with a complaint u/s 138 of the Negotiable Instruments Act.

21. Considering the peculiar facts of the case, no interference is warranted in the order issuing process as well as the order dismissing the revision application. The petition being devoid of merit is dismissed.

22. It is made clear, that the observations made herein are prima facie, for deciding the present petition and the Trial Court shall conduct the trial on its own merits, uninfluenced by the observations made in the present petition.

23. All contentions of the parties are kept open.