

(2023) 05 CAL CK 0054

In the Calcutta High Court

Case No : F.M.A No. 1370 Of 2022, IA No. CAN 1 Of 2022

M/S. India Power Corporation Ltd.

APPELLANT

Vs

Sbicap Trustee Company Ltd. & Ors.

RESPONDENT

Date of Decision : 16-05-2023

Acts Referred:

Code Of Civil Procedure, 1908 — Section 104, 152, Order 43, Order 23 Rule 1, Order 7 Rule 11
Insolvency and Bankruptcy Code, 2016 — Section 7, 14
Specific Relief Act, 1963 — Section 41(b)
Companies Act, 1956 — Section 108
Indian Contract Act, 1872 — Section 23
Electricity Act, 2003 — Section 142

Citation : (2023) 05 CAL CK 0054

Hon'ble Judges : Harish Tandon, J;Prasenjit Biswas, J

Bench : Division Bench

Advocate : Deepak Khosla, Anjana Banerjee, Rohan S. Nandy, Sourajit Dasgupta, Soumya Nag, Jishnu Saha, Debnath Ghosh, Shwetank Ginodia, Bhavesh Garodia, Ratnadipa Sarkar

Final Decision : Dismissed

Judgement

Harish Tandon, J

The present appeal arises from an order dated 9.9.2022 passed by learned Judge, Commercial Court at Alipore in Money Suit no. 1 of 2022 whereby and whereunder an application for injunction is rejected on contest. By an impugned order the Commercial Court also vacated the ex parte ad interim order of injunction passed on 24th January, 2022 by which the contesting Respondent nos. 3-20 were restrained from initiating proceeding or continuing proceeding for recovery of debt against the appellant on the basis of a deed of guarantee executed on 23rd September, 2016. The said ex-parte ad interim order of injunction was directed to operate till 29th January, 2022 and on the said returnable date an application was taken out by the appellant for correction of a

typographical error with further related reliefs which were eventually allowed and the challenge was made to the Commercial Appellate Division in FMAT 142 of 2022. The Appellate Court reversed the order by which the ex-parte ad interim order of injunction was sought to be extended beyond its initial peripheral with categorical finding that taking aid of Section 152 of the Code, the Court cannot vary, modify or expand the horizon of the order. The Appellate Court directed the injunction application to be disposed of at an earliest. By the impugned order, Commercial Court vacated the ex-parte ad interim order of injunction and rejected the application for temporary injunction.

Both the learned Counsels argued on a several points and relied upon the plethora of judgments in support of such contentions. Before we proceed to decide the points urged before us, salient facts are required to be narrated in pursuit thereof.

One Meenakshi Energy Pvt. Ltd. (MEL) was incorporated as coal based power Project Company initially promoted by the Meenakshi Engineering and Infrastructure Holdings Ltd., subsequently a French company namely NG Global Development (BW) acquired 89 per cent of shares in MEL and became the largest shareholders of the said company. Several financial assistance by way of a loan, credits etc. were provided in different phases for development of the projects undertaken by the said company. Subsequently, the French Government decided to shift from generation of energy by any other mode to the renewable energy which led the said company which was a State based backed company to opt out from the said project which opened the path for the appellant to acquire the share held by the said French company at the cost of US \$ 1. Interestingly, the said French company further agreed to pay US \$ 40 million to the appellant for completion of the transaction so that the same can be invested in the project with further infusion of USD \$ 300 million before transfer of the shareholding of the appellant.

After taking over all the majority shares, the appellant and the said MEL approached the lenders who extended the financial assistance for approval of the transfer of shares held by the French company which was duly accorded on the condition that all the obligations held by the French company shall be taken over by the appellant by providing an undertaking and the corporate guarantee under the financial documents. Pursuant to the said conditions imposed while according approval, the erstwhile Director of the appellant submitted an affidavit dated September 23, 2016 certifying, declaring and confirming that the appellant is a distribution licensee in terms of the West Bengal Electricity Regulatory Commission (Licensing and Condition of License) Regulations, 2019 and there is no necessity to obtain a prior permission or consent from the West Bengal Electricity Regulatory Commission for furnishing a corporate guarantee. Simultaneously therewith a corporate guarantee was also executed which is the subject matter of the suit instituted by the appellant before the Commercial Court. Even after such arrangements, the MEL continued in defaulting the

repayment of the debts which resulted into the classification of the account of MEL as Non-Performing Assets. The Respondent no. 1 in the capacity of an agent of the primary lender i.e., State Bank of India recalled the loan so extended and demanded the payment within the stipulated time. Since the entire shares were pledged, the invocation was made and the same were transmitted into a Dematerialisation Account of the agent.

Subsequently, the corporate guarantee was sought to be invoked, the appellant along with MEL instituted a commercial suit being COS 266 of 2017 before the Commercial Court, City Civil Court, Hyderabad seeking declaration that the deed of guarantee dated 23.9.2016 executed by the appellant be declared null and void having issued in contravention to the statutory provisions contained in the said regulation. However, the said suit was withdrawn without seeking any leave to file a fresh suit. The moment the lenders put an advertisement inviting the bid for change of the management of the MEL, a writ application was filed before the High Court of Andhra Pradesh being Writ Petition no. 26999 of 2018 wherein an interim order was passed that no coercive steps shall be taken by the lenders of the Phase-I and II against the appellant. Interestingly, the said writ petition was subsequently withdrawn as it was dismissed as such. Another writ petition was filed, simultaneously with the other writ petition which was subsequently withdrawn being WP 26977 of 2018, assailing the action of the respondents in transferring the equity shares without conducting the valuation thereof. Initially an interim order was passed in the same tune and line that coercive step should not be taken but the same was later on vacated. In an another Writ Petition being no. 30048 of 2018 filed before the High Court challenging the recall notice wherein an interim order was passed in the same tune that no coercive step shall be taken on the basis of such notice which was later on vacated on January 23, 2019. The order vacating an interim order was carried to an intra-court appeal before the said High Court which was eventually dismissed.

Thereafter the proceeding under Section 7 of the IBC Code, 2016 was filed by the SBI against the MEL before the National Company Law Tribunal, Hyderabad seeking a commencement of CIRP which was duly admitted on November 7, 2009 with categorical finding that invocation of pledge did not amount to discharge of debt. The aforesaid fact was disclosed in the pending writ petitions before the High Court of Andhra Pradesh and the interim order so passed therein was modified to the extent that the said interim order shall not put fetter in the way of the respondents from approaching the National Company Law Tribunal for appropriate remedies taking recourse to law. Amidst the pendency of the insolvency proceedings against the MEL the appellant was served with a demand notice in respect of the aforesaid corporate guarantee and on failure thereof the SBI filed an application under Section 7 of the IBC for initiation of CIRP alleging that the default in respect of a corporate guarantee has been made.

On the backdrop of the aforesaid facts, the appellant has filed the instant suit primarily for a decree of declaration that the contract of guarantee executed by

the appellant company is null and void ab initio being in breach of Regulation 5.13.2 of the West Bengal Electricity Regulatory Commission (Licensing and Condition of License) Regulation, 2013 with further decree of declaration that the sale and transfer of the equity shares held by the appellant company in MEL is not less than 4.406.50 crores and a mandatory injunction be passed to pay the said amount with interests to the plaintiff. Though the Commercial Court passed ex-parte ad interim order of injunction at the initial stage, the tenet whereof has been succinctly narrated hereinbefore but on a contested hearing the Commercial Court rejected the application for temporary injunction which is a subject matter of appeal before us.

At the very outset we must record the stand of the appellant so far as the allegation as to the transfer of shares into the de-mat account of the Respondent no.1 is concerned, it is concededly submitted that in view of the judgments rendered by the Supreme Court in PTC India Financial Services Ltd. Vs. Venkateswarlu Kari & Anr., reported in (2022) SCC Online SC 608 wherein it is held that resumption of shares into a demat account upon invocation of a contract of pledge does not tantamount to transfer, therefore, the aforesaid plea is not taken at this stage.

The learned Counsel for the appellant unequivocally submitted that the said plea has not been abandoned for all time to come but is not pressed for the present in view of the decision of the Supreme Court in the abovementioned judgment. We, therefore, do not delve to go into the aforesaid aspect and venture to decide the appeal on the other points urged before us.

The learned Advocate for the appellant is very much critical on the observation of the Commercial Court recorded in the impugned order that even after holding that the plaint clearly shows the cause of action and the dispute is required to be adjudicated on trial, it proceeds to hold that there is no prima facie case made out for the purpose of injunction. It is arduously contended that the cause of action is synonymous to a prima facie case and, therefore, there is an apparent inconsistency in the impugned order which needs interference. It is further contended that the moment the corporate guarantee is found to have been issued in violation of the statutory provisions such guarantee cannot be legally enforced being void ab initio and placed reliance upon a judgment of the Apex Court in case of Mannalal Khetan vs. Kedar Nath Khetan, reported in AIR 1977 SC 536. It is further contended that the distinction is real between a prohibitory provisions and the restrictive provisions as in the former case any act forbidden by law is per se void and cannot be enforced before the Court. It is further contended that there is no distinction, in law between a debt recovery proceedings and a proceeding for recovery of debt and, therefore, the proceeding under IBC may not be a typical debt recovery proceeding but have an avowed object of recovery of debt may be with an intent to keep the company alive by bringing back into a healthy financial state. It is further submitted that an application under Order 7 Rule 11 of the CPC filed by the respondent having

dismissed by the Trial Court lead to an unequivocal conclusions that the proceeding is maintainable and, therefore, that the proceeding is otherwise barred under the law is not available at the stage of temporary injunction. According to the learned Advocate for the appellant the Trial Court ought to have considered that the balance of convenience lies in passing a protective order as in the event the insolvency proceeding is allowed to continue the plaintiff would be non-suited because of the moratorium envisaged under Section 14 of the IBC and the consequences to follow thereafter. It is further contended that there is a manifest perversity in the findings of the Commercial Court on the aspect of irreparable injury as it did not consider the consequence of the proceeding under IBC causing immense injury to the appellant without deciding all the issues involved in the suit. It is contended that when a serious question of fraud is pleaded in the plaint which unravels all the solemn act, protective order must be passed against the party as any act done during the pendency of the suit may invite an irreversible situation. In support of the same, the reliance is placed upon a judgment of the Supreme Court in case of Agricultural Produce Marketing Committee, Bangalore vs. State of Karnataka &Ors. (Civil Appeal nos. 1345-1346 of 2022 decided on 22.3.2022)

On the other hand, the contesting respondents while repelling the contention of the appellants submits that in view of the categorical statements made in Paragraph 97 of the plaint the plaintiff themselves have indicated that do not want to forestall the hearing of a proceeding under Section 7 of IBC but later on turned around and intended to seek the relief by way of preventive injunction which is impermissible in law. It is further contended that in view of the express embargo upon the Civil Court to entertain the suit, no injunction can be passed. It is further contended that the several proceedings initiated by the plaintiff could not yield the desired results and in fact, the identical suit filed before the Commercial Court, City Civil Court, Hyderabad was later on withdrawn without seeking any leave to file a fresh on the self same cause of action or the reliefs. It is arduously submitted that the affidavit as well as the corporate guarantee issued by the appellant company through its erstwhile director categorically evinced that they were aware of a embargo under the aforesaid statutory rules but the said corporate guarantee was in relation to non regulated assets which according to the appellant does not come within the mischief of the said statutory provision. They cannot resile from their stand.

According to the learned Counsels there is a fallacy in the submission of the appellant that there is no apparent distinction between a cause of action and a prima facie case. Even if the suit discloses the cause of action but for the purpose of granting a temporary injunction, there is no infirmity in the Court to arrive at the findings that prima facie case for the purpose of passing the injunction has not been made out. It is emphatically submitted that the Commercial Court being not a superior Court to NCLT, cannot pass an order of injunction preventing a party from initiating a proceeding before NCLT in view of the provisions contained under Section 41(b) of the Specific Relief Act and relied

upon a judgment of the Bombay High Court in case of PSL Ltd., reported in 2018 SCC Online Bombay 36. It is further contended that the ratio of the said Bombay judgment has been reiterated and reinstated by the Supreme Court in *Forech (India) Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd.*, reported in (2019) 18 SCC 549. It is further submitted that there is a lack of pleadings in relation to a fraud, coercion or undue influence and, therefore, in absence thereof the Court should not presume the existence of the same while granting a temporary injunction. The learned Counsel submits that the reliance upon *Mannalal Khetan* (supra) is misplaced as the said decision is relatable to a situation concerning the transfer of shares and the interpretation of the provisions contained under Section 108 of the Companies Act, 1956 and, therefore, has no application in the present context when the regulation simplicitor provides for a penalty. It is contended that a distinction has to be drawn between a prohibitory provision and a provision which requires an approval and invites the penalty without rendering the contract void or unenforceable. It is further submitted that the moment the appellant have taken a firm stand in the affidavit and the corporate guarantee as well as in the audited balance sheets that no permission is required for non-regulated asset, the appellant cannot be permitted to approbate and reprobate as the conduct of the parties seeking an injunction is also one of the relevant factors for granting injunction.

On the conspectus of aforesaid submissions, let us decide whether the impugned order can be justified or needs interference. Recently a trend is developed in the Bar in interpreting the words used in common parlance in most different manner to inculcate a sense that the finding arrived by the Court in judicial dispensation suffers from the several infirmities and reflects the mind of a Judge in hind side which in our opinion does not reveal so. The words or expressions are segregated and projected in such a manner that the entire decision making process is vitiated and the order cannot stand on a well established principle of law. The words of insignificance is attempted to project the words or expression of vital importance in adjudicatory process with the rhetoric of reasoning which does not appear to be of any significant value. The words or the expressions divorced from the context should not be permitted to be agitated. Every word so used have to be understood in juxtaposition with the context in which it is used and cannot be allowed to assign a different meaning treating the same as standalone words or expressions carrying a meaning which impinges the process of reasoning in the orders or judgments. Every word is capable of more than one meaning given in the dictionary and it is an ardent duty of the Court to find out its meaning in the perspective of the context in which it is used and not to assign a meaning perceived by the aggrieved litigant. The words or expressions which are commonly used having no bearing in adjudication of the dispute but merely an expression under the common parlance should not be permitted to interpret differently having no bearing on the core issue.

In the instant case, the expression "if any" in relation to a reply filed by the party is critically examined by the learned Counsel for the appellant in the sense that

the learned Judge in the Court below was sceptical whether such reply are filed and taken on record. The aforesaid expression is sought to be interpreted as according to the Counsel for the appellant gives an impression that the learned Judge was not sure whether such reply is on record or even if such reply is on record may not have read it. The impugned order would reveal that the pleadings of the parties in relation to a temporary injunction, the opposition and the reply have been succinctly jotted down therein which by no stretch of imagination may inculcate a sense in the appellant that either the Judge is not aware of such reply is on record nor the same has been read. The aforesaid expression cannot be permitted to be divorced from the context and/or the tenet of the order more particularly when it can be reasonably ascertained therefrom that the same has been taken note of and the crux of the pleading in reply is narrated extensively. The arguments should be restricted to a point involved in the proceeding emanating from the facts and law and it is not appreciated that the arguments are advanced using the interpretative process having no bearing thereupon. Often the Court faces a criticism from the Bar that an ample opportunity to argue the matter has not been given yet, it is a corresponding duty of the Bar to restrict the argument on the facts and law applicable in relation to a dispute and should not unnecessarily invest the time on an inconsequential and/or insignificant points, more particularly, on the words or expressions of common use as of seminal importance. It admits no ambiguity that language used in the judgments rendered by the Court are not ordinarily read as a statute. The words or expressions used in the statute carries an intention of the legislature, its purpose and object and relevant in the subject for which it is enacted. The aforesaid observations have been made, though not relevant, but for the purpose of imparting a sense of responsibility amongst the members of the Bar to restrict the argument on the issues involved in the proceeding and assist the Court in arriving at the decision so that it can achieve the very object of avoiding the wastage of time in addressing such insignificant thing.

The point which in essence involved in the instant appeal is whether the Commercial Court's order in rejecting an application for temporary injunction as a consequence whereupon the ad interim orders stood vacated, cannot be justified on the reasoning provided in the impugned order. The reliefs claimed in the plaint is essentially aimed against the contract of guarantee executed by the appellant no. 1 company in favour of the lenders as well as the security trustee being null and void ab initio and the price of the shares which are allegedly transferred in the record of the respondent no. 2 to the respondent no. 1 should be treated as a consideration due to the appellant no. 1 and a direction to pay the amount so determined along with an interest. It is thus a composite suit relating to a declaration in respect of a corporate guarantee and also recovery of sum with interest upon determining the reasonable price or the ascertained sum to the appellant no. 1.

The substantive reliefs in relation to a corporate guarantee is basically founded on the assertion that the said guarantee being violative of Regulation 5.13.2 of

the West Bengal Electricity Regulatory Commission (Licensing and condition of Licence) Regulations, 2013 is null and void ab initio and, therefore, any action or steps taken thereupon is impermissible in law. For the purpose of clarity, we must record that the other point relating to a transfer of shares and the price to be paid is not pressed, as indicated hereinbefore, by the appellant in view of the judgment of the Apex Court rendered in case of P.T.C (Supra). It is a specific stand of the appellant that the appellant no. 1 being a distribution licensee engaged in a generation and/or distribution of the electricity are regulated by a statutory Rules framed by the legislature and, therefore, any act or thing done in contravention thereto is per se illegal null and void ab initio.

We have narrated the facts hereinbefore in relation to a several proceedings between the parties before the Civil Court, High Court and NCLT. It is manifest from the record that both the MEL and the appellant no. 1 has been taken to the NCLT for initiation of CIRP under IBC and the matter is pending therein. A point has been taken by the respondents that for the self-same reliefs a suit was instituted in the Commercial Courts, the City Civil Court at Hyderabad which was later on withdrawn without any leave to institute a suit for self-same reliefs debarred the appellants from instituting the instant suit under Order 23 Rule 1 of the Code of Civil Procedure. A further plea is taken by the respondents that the nature of the temporary injunction sought in the instant proceeding is in effect impinges upon their right to take recourse to provisions of IBC before a proper form which is impermissible under Section 41 (b) of the Specific Relief Act.

We are not oblivious of the proposition of law that the Court while deciding the application for temporary injunction must travel within the parameters well accepted in the judicial parlance namely existence of prima facie case, balance of convenience and inconvenience and irreparable loss and injury. An argument is advanced by the appellant that the cause of action in a suit is synonymous to the existence of prima facie case and, therefore, in the event the Court has found that the plaint discloses the cause of action it ipso facto lead to a presumption of existence of prima facie case. There is a fallacy in this regard as the cause of action and the existence of prima facie case are two distinct and separate aspects and cannot be blended or merged into one. The cause of action is neither defined in the statute nor in the constitutional provision but well understood to mean the bundle of facts pleaded by the party inviting the Courts to determine the reliefs claimed therein. The disclosure of the cause of action cannot be read or construed in the perspective of the existence of a prima facie case being one of the important factors for granting an interim or temporary injunction pending final adjudication in the suit. The cause of action has to be understood in the perspective of a right to institute a suit and the reliefs claimed therein. Though the cause of action may be an important factor at the time of considering the application for temporary injunction but cannot be equated with the existence of prima facie case. The object of passing a temporary injunction is to protect the right of the parties to the proceedings pending final adjudication upon a full-fledge trial and to prevent any mischief or dissipation of the property involved

therein. Any findings made in this regard do not necessarily mean that it would have a vital impact at the time of final disposal of the suit. Technically, it somewhat partakes a character of a mini trial but that is not so as the findings are mere tentative and returned on the basis of the pleading and the documents produced by the respective parties which must stand on trial. The nature of finding made by the Court at temporary injunction stage is prima facie in the sense that what appears from the existence of such document and the pleadings made therein if proved to be true but it does not dispense with proving such facts or the documents in trial. The cause of action, therefore, is important for the purpose of maintaining a proceeding and inviting the Court to adjudicate the reliefs claimed therein; on the other hand, the temporary injunction is decided on an existence of prima facie case based upon such pleading and/or documents to be true and correct to stand on trial. Because of the nature of the finding returned by the Court in an application for temporary injunction, the legislature in their wisdom have provided the remedy by way of an appeal under Section 104 and Order 43 of the Code of Civil Procedure. We, therefore, do not find any substance in the stand of the appellant that once the Court has recorded that the plaint discloses the cause of action it leads to an inevitable conclusion that it discloses the existence of a prima facie case for the purpose of temporary injunction.

Admittedly, the appellant no. 1 gave corporate guarantee as the French company holding majority shares in MEL decided to opt out from the project undertaken by the said outgoing concern. Interestingly, after investing a substantial amount of money the French company agreed to forego all its right may be for the reason that the French Government decided to invest on a renewable energy, upon payment of USD 1 with further stipulation that they would infuse further money and even pay 40 million USD to the appellant to be invested in the project of MEL. Though the Counsels for the respondents are very much vocal on such issue as according to them even after receiving 40 million dollar from the French Government, the same was not invested in MEL but we do not intend to go into the aforesaid aspect as the explanation is also offered by the appellant in this regard. The facts remained that the French company while disassociating himself from the project of the MEL offered to the Appellant no. 1 to undertake such project which includes not only the assets belonging to said company but also to meet out the liability so that such project is not frustrated. The pleading would reveal that the lenders while considering such proposal of the French company and accepting the Appellant no. 1 to acquire the entire shareholding of the said departed company indicated several conditions including the issuance of a corporate guarantee. It is not in dispute that the director of the Appellant no. 1 gave a corporate guarantee to the lenders, conjointly or severally and continued to hold the management and the administration of the MEL. An affidavit was also shown by the director of the Appellant no. 1 that there is no impediment in giving the corporate guarantee which is restricted to a non-regulated assets as the embargo created under aforesaid regulation is not applicable. It is contended

by the appellant that the said corporate guarantee was obtained by inducing coercion, misrepresentation and/or commission of fraud as an opinion was sought by the lenders from the legal jurist which is unusual. According to him, the opinion has to be sought by the appellant company before it proceed to give a guarantee which appears to be reverse situation in this case.

It is no doubt true that the fraud unravels all the solemn act and, therefore, is always viewed seriously when it is alleged in course of the proceedings. The person who alleges the fraud to have been committed by the other side must plead particulars of such fraud under the rule of pleading and procedures. Mere using the word 'fraud' without any specification or particulars shown in the pleading may not be sufficient. The fraud has to be discerned in the transaction and the stand of the parties and the conduct in relation thereto. It cannot be applied abjunctly nor in abstract manner. Two corporate entities who are well equipped to understand their commercial interests, entered into a transaction, the allegation as to fraud has to be understood keeping in mind the above aspect. It is quite improbable that the appellant no. 1 who acquired the majority shares in MEL at USD 1 is induced to give a corporate guarantee.

Let us examine the implications and the effect of Regulation 5.13.2 of the Regulation 2013 which runs thus:

"...5.13.2 The licensee shall obtain prior written consent from the Commission in making any loans to, or issuing any guarantee for any obligation of any person which is beyond the normal area of business activities of the licensee in respect of its core activities. Loan to the employees pursuant to the terms of services and advances to the suppliers etc. in the ordinary course of business are excluded from the requirement to seek such approval. If any affiliates of the licensee undertake any loan for which the licensee's business may be affected directly or indirectly then in such case licensee is required to obtain such written consent from the Commission in a manner as already specified."

It is manifest from the above quoted provision that the distribution of the licensee company are bound by the provisions contained under the said regulation which postulates that in making any loans or issuing any guarantee for any obligation beyond the normal area of business activities of the licensee in respect of its core activities is permissible after obtaining a prior written consent from the commission. The exception is also created therein relatable to the loans to the employees provided in the terms of the employment and services. A further mandate can be seen in the language used therein that in the event of any affiliates of the licensee undertake any loan which may affect directly or indirectly, its business then in such event the prior consent in writing from the commission is required . The appellant contends that in view of the embargo created under the aforesaid provision any guarantee given by the licensee or distribution company, be it corporate or otherwise, is per se null and void ab initio and does not create any enforceable right into a person in whose favour such guarantee was given. A distinction was sought to be made between a

prohibition and restrictions attracting penalty without any consequence to follow otherwise. In case of an absolute prohibition the things done in derogation thereof may entail the act or the thing illegal and void. However, the situation would be different when the prohibition is not absolute but requires a prior consent in writing and the consequence by way of penalty is provided. The affidavit and the corporate guarantee if read harmoniously is explicit to the extent that the Appellant no. 1 was conscious of such embargo having created and represented that a distinction in this regard is manifestly seen in the sense that there is no fetter in giving a corporate guarantee on a non-regulated assets as it has no impact on its business to be affected directly or indirectly. In fact there was no attempt made by the appellants unless it senses that lenders may invoke corporate guarantee because of the default having committed by the MEL.

The contents of the deed of guarantee dated 29th September, 2016 may be looked into in order to ascertain the stand of the appellant no. 1 in relation to the requirement under the aforesaid regulation. The non-regulated asset is defined to mean all assets of guarantor other than the regulated assets in the deed of guarantee. Clause 2 thereof indicates that the guarantor furnished the said guarantee irrevocably, absolutely and unconditionally to the phase I security trustees for the benefit of the phase I lenders with clear stipulation that the guarantor shall forthwith pay from non-regulated assets to phase I lenders without demur or protest or without the right of any Set off, deductions or adjustment of any kind whatsoever. Even Clause 27 makes the obligation more clear that in order to perform the obligation of guarantee the non-regulated asset shall be utilized. Clause 12 of the deed of guarantee which contained the broad head "liability not affected" manifestly indicate that it would not be so effected by any illegality, invalidity, irregularity or unenforceability of all or any part of the guarantee obligations. The appellant no. 1 further made representation and gave warranties under Clause 7 of the deed of guarantee that there is no contravention of the regulations or the laws in the following:

"(V) No Contravention: The execution, delivery and performance of this Guarantee and all instruments and agreements required hereunder do not and would not contravene, violate or constitute a default under (a) any applicable law; (b) any provision of any constitution document of the Guarantor; (c) any corporate authorisations of the Guarantor; (d) any provision of any agreement or other instrument to which the Guarantor is a party or by which the Guarantor or any of its assets is or may be bound; (e) any treaty, law or regulation applicable to the Guarantor; or (f) any judgment, injunction, order or decree binding upon the Guarantor or any of its assets."

The affidavit shown by the director of the appellant no. 1 would evince that the appellants were conscious that such guarantee would be regulated by the provisions contained therein but the same is not required as such guarantee is restricted to a non-regulated assets in the following:

"3. That in relation to change in shareholding of MEPL and in accordance with the

terms of Common Loan Agreement, IPCL as the new promoter of MEPL is required to furnish a corporate guarantee in favour of the Phase I Lenders ("Corporate Guarantee").

4. That, I hereby certify, declare and confirm on behalf of IPCL that IPCL is a distribution licensee in terms of the West Bengal Electricity Regulatory Commission (Licensing and Conditions of Licensee) Regulation, 2013, and it is not required to obtain the prior consent of the West Bengal Electricity Regulatory Commission for issuing the Corporate Guarantee in accordance

with terms thereof."

The appellant vociferously contended that the contract of guarantee issued in violation of the statutory provisions has always been recognized as an illegal act and, therefore void as held in Mannalal Khetan (Supra) in the following:

"7. Therefore, in the present case, the Contract of Guarantee is squarely hit by Section 23 of the Contract Act, being contrary to another statutory provision i.e. the WBERC Regulation. (Reliance: Mannala IKhetan vs. KedarNath Khetan – AIR 1977 SC 536), in which it was held as under:

19. Where a contract, express or implied, is expressly or by implication forbidden by statute, no Court will lend its assistance to give it effect. (See *Milliss v. Shirley Local Board*, (1885) 16 QBD 446). A contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. The penalty may be imposed with intent merely to deter persons from entering into the contract or for the purposes of revenue or that the contract shall not be entered into so as to be valid at law. A distinction is sometimes made between contracts entered into with the object of committing an illegal act and contracts expressly or impliedly prohibited by statute. The distinction is that that in the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is made to do a prohibited act, that contract will be unenforceable. In the latter class, one has to consider what act the statute prohibits, but what contracts it prohibits. One is not concerned at all with the intent of the parties, if the parties enter into a prohibited contract, that contract is enforceable. (See *St. John Shipping Corporation v. Joseph Bank*, (1957) 1 QB 267). (See also *Halsbury's Laws of England Third Edition Vol. 8, p. 141*).

20. It is well established that a contract which involves in its fulfilment the doing of an act prohibited by statute is void. The legal maxim *a pactisprivatorum public juri non derogatur* means that private agreements cannot alter the general law. Where a contract, express or implied, is expressly or by implication forbidden by statute, no Court can lend its assistance to give it effect. (See *Melliss v. Shirley Local Board*, (1885) 16 QBD 446). What is done in contravention of the provisions of an Act of the Legislature cannot be made the subject of an action.

21. If anything is against what though it is not prohibited in the statute but only a penalty is annexed is void. In every case where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful, because it is not intended that a statute would inflict a penalty for a lawful act.

22. Penalties are imposed by statute for two distinct purposes (1) for the protection of the public against fraud, or for some other object of public policy; (2) for the purpose of securing certain sources of revenue either to the State or to certain public bodies. If it is clear that a penalty is imposed by statute for the purpose of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty is imposed is not enforceable.

23. The provisions contained in Section 108 of the Act are for the reasons indicated earlier mandatory. The High Court erred in holding that the provisions are directory."

The law expounded in the above noted report is explicit in the sense that where the contract is expressly or by necessary implication is prohibited by a statute, no effect shall be given to such a contract as what is forbidden in law cannot get a recognition in the Court of Law. The concept of imposition of the penalty with regard to an act prohibited by a statute would render such contract unenforceable and may be regarded as an unlawful act but in order to ascertain whether such contract is absolutely prohibited or prohibition can be seen from the act of the parties and a consequence to follow are essentially a question of fact requires an adjudication upon a full-fledged trial. For the purpose of ascertaining the implication of law laid down in *Mannalal Khetan* (supra) the subsequent judgment of the Supreme Court rendered in case of *BOI Finance Ltd. Vs. Custodian & Ors.* may be looked into. The Apex Court after analyzing the act of a party vis-à-vis the third party held that even if non-compliance may attract prosecution or levy of penalty under the substantive provision in this case Section 142 of the Electricity Act, it may not render the contract with the third party invalid in the following:

"33. The aforesaid principles will clearly be applicable in the present case as well. The non-compliance of the directions issued by the Reserve Bank may result in prosecution/or levy of penalty under Section 46, but it cannot result in invalidation of any contract by the bank with the third party. If the contention of the Custodian is accepted it will result in invalidation of agreements by the banks, even where the third parties may not be aware of the directions which are being violated. To give an example if the Reserve Bank by confidential circulars fixes the limit in excess of which the banks cannot give any loan but, without informing the third party, the bank while exceeding its limit gives a loan which is then utilised by the bank's customer. It will be inequitable and improper to hold that as the directions of the Reserve Bank had not been complied with by the bank, the grant of loan cannot be regarded as valid and, as a consequence thereof, the customer must return the amount received even though he may

have utilised the same in his business. Yet another instance maybe where the bank advances loan by charging interest at a rate lower than the minimum which may have been fixed by the Reserve Bank, in a direction issued under Section 36 (1)(a). As far as the customer is concerned, it may not be aware of the direction fixing the minimum rate of interest. Can it be said, in such a case, that the advance of loan itself was illegal or that the bank would be entitled to receive the higher rate of interest? In our opinion it will be wholly unjust and inequitable to hold that such transactions entered into by the bank with a customer, which transactions are otherwise not invalid, can be regarded as void because the bank did not follow the directions or instructions issued by the Reserve Bank of India.

34. The instructions which were issued by the said circulars were meant to be complied with by the banking companies only and did not purport to, nor could they, be binding on the third parties. This being so, even if the appellant banks had been prohibited from entering into the buy-back arrangements in question, that by itself, would not invalidate the contracts though the infringement of the said directions may lead to action being taken under Section 46 of the Act."

In view of the law expounded hereinabove mere non-compliance of the requirement under the statutory provisions attracting prosecution or levy of penalty does not render the contract void or invalid in relation to a third party. Thus the stand of the appellant that the entire contract is vitiated having rendered null or void ab initio, is not acceptable. Furthermore, in view of the specific stand taken by the appellant that the corporate guarantee in relation to a non-regulated assets are beyond the mischief of the said regulation is essentially a fact to be decided in the suit itself based upon the evidence to be adduced by the parties in this regard.

The aforesaid observations are made for the simple reason that the appellant all along stood, before the issues are raised with the regulatory authorities, that the said prohibitory clause under the regulations in relation to a non-regulated assets which forms part of the corporate guarantee is kept outside the purview thereof. The appellant has construed the said provision while furnishing the corporate guarantee, that the non-regulated assets has no impact directly or indirectly on the licensees business and, therefore, it does not come under the mischief of the aforesaid provision. Regulation 5.13.2 envisages that a prior written consent from the Commission is to be obtained by the licensee in making any loan or issuing any guarantee for any obligation which is beyond the normal area of business activities in respect of its core activities. The appellant has interpreted the aforesaid provisions that the non-regulated assets as defined in the corporate guarantee shall mean all assets of the guarantor other than the regulated assets. The said corporate guarantee further defines the regulated assets to mean all the revenues and receivables of the business and operations of the Dishargarh Electrical License. It is essentially a question of fact whether the guarantee in respect of a non-regulated asset is beyond the core activities of the licensee or within the core activities of the licensee. The moment the promises are made to

a third party by way of a corporate guarantee who acted thereupon is required to be viewed in this regard. The pleadings of the party and the stand taken therein are the factors to be taken into account as the party cannot make a departure therefrom as held in *Bacchaj Nahar vs. Nilima Mandal & Anr.*, reported in (2008) 17 SCC 491 in the following:

"12. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

13. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when the defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief."

Even apart there was an unequivocal promise of the corporate guarantor and acts and things have been done thereupon in relation to a transaction with the third party, the estoppel by such promise or representation has to be viewed in the perspective of the equitable principles which can be discerned from the decision of the Supreme Court in *State of Jharkand & Ors. Vs. Brahmputra Metalics Ltd.*, reported in (2022) 7 SCC 323 in the following:

"35. This Court has given an expansive interpretation to the doctrine of promissory estoppel in order to remedy the injustice being done to a party who has relied on a promise. In *Motilal Padampat (supra)*, this Court viewed promissory estoppel as a principle in equity, which was not hampered by the doctrine of consideration as was the case under English Law. This Court,

speaking through justice P.N.Bhagabati (as he was then), held thus:

"12....having regard to the general opprobrium to which the doctrine of consideration has been subjected by eminent jurists, we need not be unduly anxious to project this doctrine against assault or erosion nor allow it to dwarf or stultify the full development of the equity of promissory estoppel or inhibit or curtail its operational efficacy as a justice device for preventing injustice... We do not see any valid reason why promissory estoppel should not be allowed to found a cause of action where, in order to satisfy the equity, it is necessary to do so."

H.4 From estoppel to expectations

36. Under English Law, the doctrine of promissory estoppel has developed parallel to the doctrine of legitimate expectations. The doctrine of legitimate expectations is founded on the principles of fairness in government dealings. It comes into play if a public body leads an individual to believe that they will be a recipient of a substantive benefit. The doctrine of substantive legitimate expectation has been explained in *R v. North and East Devon Health Authority, ex p Coughlan* in the following terms:

"55.... But what was their legitimate expectation?"

Where there is a dispute as to this, the dispute has to be determined by the court, as happened in *In re Findlay*. This can involve a detailed examination of the precise terms of the promise or representations made, the circumstances in which the promise was made and the nature of the statutory or other discretion.

.....

56.... Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too that court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."

A further plea has been taken herein that what is intended by the appellant in the instant suit is to forestall the proceedings initiated before the NCLT having a direct or indirect impact on the CIRP and, therefore, hit by the provisions of 41(b) of the Specific Relief Act. There is no quarrel to the proposition of law that the power or jurisdiction exercised by the NCLT under IBC cannot be regarded as a forum subordinate or inferior to the Civil Court. Such settled proposition of law need not be dealt with in extenso as we do not find any ambiguity in this regard. Section 41(b) of the Specific Relief Act contained a negative language that the injunction may be refused nor can be granted to restrain any person from instituting or prosecuting any proceeding in Court not subordinate to that forum for which the injunction is sought. It is manifest from the aforesaid provision

containing a negative language that the Court cannot pass an order of injunction restraining a party from instituting or prosecuting any proceedings pending in different fora which is not subordinate to that jurisdiction of the Court. The Court which does not have a supervisory or a superintendence as a Court of superior jurisdiction is denuded of power to issue any injunction against a person from taking recourse to law in a different forum not inferior or subordinate to it as held by the Division Bench of this Court in Bhagwandas Auto Finance Ltd. & Ors. Vs. Citicorp Finance (India) Ltd., reported in AIR 2009 CAL 231 held in:

"9. In the case before us, the learned Judge, City Civil Court has granted an ad interim order of injunction restraining the appellants from giving effect to the notice dated January 7, 2009 issued by the appellants threatening prosecution of the respondent with both civil and criminal litigation for the alleged forgery committed by the plaintiff. In substance, by virtue of the order of injunction granted by the learned Trial Judge, the appellants are restrained from filing a civil suit before the City Civil Court or before the original side of this Court for avoiding the alleged agreement between the parties and at the same time, are also restrained from initiating any criminal prosecution against the respondent. It may not be out of place to mention here that even according to the plaint case, the alleged agreements between the parties were executed in the office of the plaintiff within the territorial jurisdiction of the City Civil Court at Calcutta or within the original side of this Court, the plaintiff is also carrying on business within the said jurisdiction and at the same time, the notice dated January 7, 2009 was issued by a lawyer having office within the territorial limit of the above court. Therefore, now if the appellants want to file any civil suit against the respondent for avoiding the alleged agreements, such civil litigation should be filed either in the City Civil Court or in the original side of this Court depending upon the valuation of the proceedings. However, in such circumstances, the order impugned has really restrained the appellants from filing a civil suit either in a coordinate jurisdiction or in a superior jurisdiction clearly violating clause (d) of the said section by restraining the appellant from initiating a criminal proceedings."

We do not find any substance in the stand of the appellant on an apparent distinction between money recovery proceedings and a proceeding for recovery of money. The coinage of the expression does not make any substantial distinction in relation to a proceedings initiated before the NCLT under IBC. It has been categorically held by the Supreme Court in Invent Asset Securitisation and Reconstruction Pvt. Ltd. vs GirnarFibres Ltd., reported in 2022 SCC Online SC 808 that a proceeding before the NCLT is not a money recovery proceeding as it intended to invoke the provisions of the code so as to enforce the recovery against the corporate debtor. Though it sought to achieve a purpose of enforcing the recovery against the corporate debtor yet the various provisions of the IBC would indicate that it cannot be regarded as a money recovery proceedings nor a proceeding for recovery of money as the fall out on failure to honour the obligations may invite several consequences including insolvency, appointment of

resolution professional, revival of the company and so on and so forth.

It takes to another point that the appellant filed the suit before the Commercial Court, City Civil Court at Hyderabad for the same reliefs which was subsequently withdrawn without any leave obtained from the Court required under Order 23 Rule 1 of the CPC. The aforesaid provisions of the Code postulate that in the event the appellant abandons any suit or a part of a claim without seeking any permission to institute a fresh suit in respect of a subject matter of such suit, he shall not only be liable to cost as a Court may award but shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim. But in order to attract the aforesaid embargo created under the aforesaid provision, it is to be ascertained whether the cause of action and the reliefs claimed therein are identical with those in the subsequent suit and in the event it is found that the cause of action has been similar and identical to the suit which was withdrawn without any leave or permission, the same would attract mischief under aforesaid provision relating to the maintainability of the said suit (see *Ballavh vs. Madanlal* AIR 1970 SC 987). In order to attract the aforesaid provision, the pleadings filed in the earlier litigations and the issues involved therein are required to be seen. Since the application for rejection of the plaint has been dismissed by the Court and the said order is still operative having not interfered by a higher forum, it would not be proper to make any observations thereupon at this stage.

Both the Counsels are very much critical on the averments made in the paragraph made in the plaint wherein it has been categorically averred that the said suit is not intended to challenge any measure taken or intended to be taken by the lenders under the various acts for recovery of the money and is only restricted to the recovery of the proceeds of the sale and transfer of the shares of the appellant no. 1 in Respondent no. 21 to the Respondent no. 1 because of the malicious and fraudulent action of the respondent or each of them against the appellants. We have already discussed in the preceding paragraphs that the reliefs couched in such a fashion would indicate that not only the appellant seeks declaration in relation to a corporate guarantee being null and void ab initio but also a declaration that the transfer of the said share cannot be done without ascertaining the reasonable price or the ascertained sum. Such being the pleading in essence does not manifestly appear to have forestalled the proceedings before the NCLT nor the Court was invited to pass an order of injunction in this regard. The moment the appellants have taken a specific stand, subsequent variation may operate as an obstacle in contending so as the parties are bound by their own pleadings and cannot be permitted to approbate and reprobate at the same time. Though it has been vociferously contended by the appellant that the pleading has to be read in its entirety and it is not permissible to segregate or divorce some portion therefrom which suits the other side but upon reading the pleading so made in paragraph 97, it leaves no ambiguity that the appellants were of the view that they do not intend to forestall the ongoing proceeding under the IBC before the NCLT. Although we have made certain

observations as the arguments are advanced by the respective Counsels but that would be regarded as a mere prima facie observations as we have held that the injunction of such nature cannot be passed in view of the embargo created under Section 41 (b) of the Specific Relief Act. We, thus, do not find any infirmity and/or illegality in the order.

The appeal is thus dismissed.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.