

(2011) 04 MAD CK 0250
In the Madras High Court
Case No : O.S.A. No. 254 of 2010

Salem Textiles Ltd. and R. Prabhakaran	APPELLANT
Vs	
Simpson and General Finance Co. Ltd.	RESPONDENT

Date of Decision : 20-04-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16

Citation : (2011) 04 MAD CK 0250

Hon'ble Judges : V. Periya Karuppiyah, J;R. Banumathi, J

Bench : Division Bench

Advocate : Vijay Narayan for R. Parthiban, for the Appellant; Krishna Srinivas, for Ramasubramaniam Associates, for the Respondent

Final Decision : Allowed

Judgement

R. Banumathi, J.—In view of the Case No. 252 of 1998 pending before the Board for Industrial and Financial Reconstruction (in short, "BIFR"), whether suit " C.S. No. 889 of 2005 filed against the Appellants-Defendants, the Company " Salem Textiles Limited and the 2nd Defendant - the Managing Director of the 1st Appellant is liable to be rejected is the point falling for consideration in this appeal. This appeal arises out of the order dated 4.11.2009 in Application No. 518 of 2006 in C.S. No. 889 of 2005 dismissing the application filed by the Appellants under Order 7 Rule 11 Code of CPC read with Order XIV Rule 8 of Original Side Rules.

2. The appeal arises on the following facts:

The first Appellant Company is carrying on business in Textiles. The 2nd Appellant is the Managing Director of the 1st Appellant Company. Respondent/Plaintiff is engaged in the business of leasing and hire purchase finance for machines, equipments, motor vehicles, etc. In the course of their business, the Respondent/Plaintiff extended lease finance facility to the 1st Appellant for which a personal guarantee was executed by the 2nd Appellant. On behalf of the 1st

Appellant Company, the 2nd Appellant entered into a lease agreement dated 18.9.1995 in respect of two Lakshmi Rieter Comber Machines and one silver Lap Machine for a total contract value of Rs. 40,50,000/- inclusive of finance charges, payable in 60 equal monthly installments of Rs. 67,500/- each. The first of such installment was to be paid on 18.9.1995 and the last on 18.8.2000. As additional security, in his personal capacity, the 2nd Appellant had executed a demand promissory note on 18.9.1995 in favour of the Respondent promising to pay the Respondent a sum of Rs. 40,50,000/- jointly and severally on demand by the Respondent for value received. The rentals had been remitted up to 14th installment and only a part of 15th installment was paid. The rental for the rest of the installments viz., 16th installment onwards remain unpaid.

3. The Respondent filed Company Petition in C.P. No. 163 of 1998 for winding up the first Appellant - Company u/s 433(1)(e) on the ground that the 1st Appellant Company is unable to pay its debts. There were also other Company Petitions filed by other creditors against the 1st Appellant Company. In the Company Petition, 1st Appellant filed counter stating that Company has preferred Case Nos. 252 of 1998 and 168 of 2001 before BIFR and the matter is pending before BIFR. By the Order dated 19.9.2003, C.P. No. 163 of 1998 had been closed with liberty given to the Respondent to revive the same on the disposal of BIFR proceedings. According to Plaintiff, the proceedings before BIFR are still pending. Stating that the 2nd Appellant had stood as guarantor and has given personal guarantee, which is co-existent with the liability of the 1st Appellant, Respondent filed the suit " C.S. No. 889 of 2005 for recovery of Rs. 84,16,083/-. Case of Respondent is that the 2nd Appellant had given a personal guarantee for the loan availed by the 1st Appellant and 2nd Appellant is also bound to pay the amount due to the Plaintiff from the 1st Appellant Company and the liability of the 2nd Appellant is distinct and can be enforced against the guarantor without any recourse to the borrower. The Respondent averred that in view of Section 22(5) of the Sick Industrial Companies (Special Provisions) Act, 1985, (in short, "SICA"), the suit is not barred by limitation.

4. The Appellants filed Application No. 518 of 2006 under Order 7 Rule 11 Code of CPC read with Order XIV Rule 8 of Original Side Rules to reject the plaint. The Appellants sought for rejection of plaint on the ground that case was registered by BIFR as Case No. 252 of 1998 and ICICI Limited was appointed as the operating agency u/s 16(2) of the Act and the matter is still pending before BIFR for consideration. Further case of Appellants is that in view of Section 22(1) of SICA, no suit or legal proceedings shall lie or be proceeded with except with the consent of the Board or as the case may be, the appellate authority. Case of Appellants is that when the suit itself cannot be filed except with the consent of the BIFR, the filing of the suit itself is barred and therefore the suit for enforcement of any guarantee in respect of the loan advanced to the industrial Company would come within the scope of Section 22(1) of the Act. Since the Appellants prayed for rejection of the plaint on the ground that Respondent had not obtained the consent of the BIFR for filing of the suit against the guarantor

and the suit is barred u/s 22, consequently the suit is liable to be dismissed.

5. The Respondent resisted the application contending that the proceedings before BIFR would not vitiate the suit proceedings filed by the Respondent against the 2nd Appellant, which is based on the promise to pay the assured amount by way of demand promissory note dated 18.9.1995 in his personal capacity. The Respondent is seeking relief only against the 2nd Defendant, which is not barred u/s 22 of the SICA and therefore the plaint cannot be rejected.

6. Upon consideration of the contentions, the learned single Judge held that the suit is not a suit for recovery of money for the loan granted to the Company, but it is a suit for recovery of rentals payable by the Company on the basis of the lease agreement for which 2nd Appellant offered personal guarantee and therefore the consent of the Board is not at all necessary before instituting the suit. The learned single Judge further held that the suit is only for recovery of rental arrears for which E.M.I. of Rs. 67,500/- each is payable under the lease agreements and not a loan or advance given to the Company. Section 22(1) of the SICA will not get attracted and therefore the plaint cannot be rejected at the threshold itself as barred by law.

7. Challenging the impugned order, on behalf of the Appellants, the learned Senior Counsel Mr. Vijay Narayanan has interalia contended that the pleadings in the suit proceeded on the basis that it is for recovery of money based on promissory note and while so learned single Judge erred in saying that the suit is only for recovery of arrears of rentals. The learned Senior Counsel interalia made the following submissions:

The Respondent is a party to Order in C.P. No. 163 of 1998 and therefore the Respondent can make claim only after BIFR proceedings are over and the Order in C.P. binds the Respondent and the suit is barred by res judicata. The agreement between the parties, even though termed as lease finance facility and as such the financial arrangement was in essence a loan and even according to the Respondent, the provisions of Section 22 would apply and consequently the suit is barred. When principal debtor/Company is declared as sick industry, the bar equally applies to the guarantor. Invoking Section 22(5) of SICA, Plaintiff claims the benefit of limitation and if Section 22 does not apply, then Section 22(5) also will not apply and in such case the suit will be barred by limitation.

8. Countering the arguments, the learned Counsel for Respondent " Mr. Krishna Srinivas has submitted that the suit has been filed for recovery of the rental arrears from the 2nd Appellant, who gave personal guarantee and there is no embargo for invoking the personal guarantee against the 2nd Appellant. The learned Counsel would further submit that the plaint has to be read as a whole and the word "loan" occurring in paragraph 15 of the plaint cannot be put against the Plaintiff.

9. The learned Counsel would further contend that upon consideration of the terms of lease, finance agreement for extending the lease finance facility, the

learned single Judge rightly held that the suit is only for rental charges and not for a loan or advance given to the Company and therefore Section 22(1) of SICA will not get attracted and the plaint cannot be rejected at the threshold as barred under law.

10. We have considered the materials on record, impugned order and the rival contentions.

11. As pointed out earlier, about 12 company petitions including C.P. No. 163 of 1998 filed by the Respondent, were filed against the 1st Appellant Company by various creditors. In all the Company Petitions, the 1st Appellant " Company filed counter stating that the Company has preferred Case Nos. 252 of 1998 and 168 of 2001 before BIFR and that BIFR has passed Order on 27.11.2002. Learned Senior Counsel has drawn our attention to the Order of BIFR dated 26.5.2009, wherein BIFR passed the order issuing certain directions for reviving the unit. By perusal of the said order, it is seen that the 1st Appellant Company was declared sick and IDBI was appointed as an operating agency u/s 17(3) of SICA to prefer a rehabilitation scheme, if feasible, for the Company. In the said order, BIFR issued various directions to revive the 1st Appellant Company. Be that as it may, C.P. No. 163 of 1998 filed by the 1st Appellant Company was closed by the Order dated 19.9.2003 giving liberty to the Respondent to revive the Company Petition as and when finality is arrived in BIFR and if situation warrants. Two years after closure of the Company Petition, the Respondent has filed the suit on the personal guarantee by the 2nd Appellant, who is none other than the Managing Director of the 1st Appellant Company.

12. Mr. Vijay Narayanan, learned Senior Counsel appearing for the Appellants mainly contended that the provisions of Section 22 of SICA are clear and there under, no suit for the enforcement of any guarantee in respect of any loan or advance granted to the industrial company concerned would lie or could be proceeded with except with the consent of the Board of the Appellate Authority under the said Act. Placing reliance upon Patheja Bros. M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, , learned Senior Counsel would further contend that the object of Section 22 of SICA in protecting guarantors from legal proceedings pending a reference to BIFR by the principal debtor was to ensure that a Scheme for rehabilitation would not be defeated by isolated proceedings adopted against the guarantors of a sick Company.

13. Countering the above submissions, the learned Counsel for Respondent contended that the suit claim was not a loan transaction, but only for collection of rentals for which the 2nd Appellant has given personal guarantee. The learned Counsel would further submit that the key words in Section 22 are "..... for recovery of money " or of "any guarantee in respect of any loan or advance granted to the industrial Company", but the instant case is only for recovery of rental arrears and therefore the present case would not fall within the ambit of Section 22. The learned Counsel for Respondent further contended that only a

limited protection had been afforded to guarantors and the suit invoking personal guarantee on the recovery of rental arrears would stand outside the protection afforded u/s 22(1) of SICA.

14. Placing reliance upon *Kailash Nath Agarwal and Others Vs. Pradeshia Industrial and Investment Corporation of U.P. Ltd. and Another*, , the learned Counsel for Respondent contended that in the said case, the Supreme Court has held that "the Legislature by an amendment to Section 22 intended to provide only limited protection to the guarantor, i.e., in respect of suits for loans and advances guaranteed by them on behalf of the industrial company".

15. Learned Counsel for Respondent contended that in the case on hand we are concerned with the lease agreement and the totality of the clauses lead to the conclusion that it is only a "lease document" and that it cannot be held as a "finance document" and therefore, protection u/s 22 is not available to the lease agreement and rentals payable thereon. Contending that SICA has no application in respect of lease agreement, learned Counsel for Respondent placed reliance upon *Ved Prakash Agarwal Vs. Rama Petrochemicals Ltd.*, . In the said case, based on the lease agreement, machinery was leased out to the industrial company and the machinery was to remain equipment owned by the Respondent throughout the period of the agreement. Observing that the relationship created by the Respondent with the industrial company was only a lease agreement/ lease finance given by the Respondent to the industrial company which was guaranteed by the Appellant thereon, the Division Bench of Bombay High Court held as under:

... As far as leasehold rights of a sick company in a leased premises are concerned, they are not a property protected u/s 22 of the SICA as decided in *Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras*, And lastly, as held in *Kailash Nath Agarwal and Others Vs. Pradeshia Industrial and Investment Corporation of U.P. Ltd. and Another*, , the protection under the amended Section 22(1) is not available to the guarantors, when it comes to execution proceeds. The effect of the amendment is to stall suits of a particular type but not the recovery proceeding against the guarantor. The upshot of the above discussion is that firstly execution or recovery proceedings on the basis of existing decrees is not at all covered by the amendment of 1994. When it comes to guarantors, it is only the suits for enforcement of any guarantee which would be stayed as against them provided they are in respect of loans or advances granted to the industrial company. Thus it is not that merely because the industrial company has become sick that the suits against the guarantors thereof would automatically get halted. The guarantors will have to show that they are suits in respect of loans or advances granted to the industrial company to get the protection and not otherwise. Therefore, merely because the industrial company is protected, the guarantor does not get protected automatically.

16. Pointing out that the text of the guarantee is also very clear, in *Ved Prakash*

Agarwal Vs. Rama Petrochemicals Ltd., the Division Bench of Bombay High Court held "That being so, it cannot be said that the lease finance given by the Respondent to the industrial company was in fact a loan or an advance and which was guaranteed by the Appellant. In view of this conclusion arrived at, on the second point for determination also there is no substance in the appeal."

17. Heavily placing reliance upon Ved Prakash Agarwal Vs. Rama Petrochemicals Ltd., the learned Counsel for Respondent has contended that in the case on hand we are concerned only with the lease document. Learned Counsel for the Respondent contended that by reading the totality of the clauses in the document, it could only be a "lease document" and cannot be held to be "finance document" and SICA has no application in respect of lease agreement. It was further contended that the industrial company or 2nd Appellant nowhere denied that the document is not a lease agreement. The tenor of the entire document would show that it is only a "lease agreement". Learned Counsel has drawn our attention to the specific clauses of the lease agreement and pointed out that the document made it very clear that it is only "lease agreement". Clause-4 of agreement captioned as "ownership" reads as follows:

4. OWNERSHIP " The Equipment shall at all times remain the sole and exclusive property of the Lessor and the Lessee shall have no right, title or interest therein except as Lessee.

18. Clause-6 of the agreement required "the lessee to maintain the equipment, identification and not to deface the machinery". Clause-12 deals with the loss and damage and it states that "in the event of any loss or damage to the equipment, the lessee shall replace the equipment with equipment which is in the opinion the lessor comparable and in good repair and conditions and working order". Clause 12 further stipulates "such equipment shall be for all purposes be the property of the lessor". Clause-23 provides for default. In the event of default or in the circumstances, in Clause-23 the lessor has the right to repossess and retake the equipment.

19. Laying emphasis upon the various Clauses in the lease agreement and also heavily placing reliance upon Ved Prakash Agarwal Vs. Rama Petrochemicals Ltd., learned Counsel for Respondent contended that the case before the Division Bench of Bombay High Court was identical dealing with the lease finance facility and the suit was filed against the guarantor for enforcement of the guarantee. It was submitted that the decision of the Bombay High Court that "lease finance given by the Respondent to the industrial company was only in respect of the machinery and the text of the guarantee is also very clear and the guarantee cannot be said to be a guarantee with respect to the repayment of the loan".

20. As held by the Supreme Court in SUNDARAM FINANCE LIMITED CASE AIR 1965 SC 116 the true effect of the transaction could be determined from the terms of the agreement considered in the light of the surrounding circumstances only when the parties adduce oral and documentary evidence. On the materials

available and by cursory reading of the plaint, in our considered view, the suit based on promissory note is only for recovery of the money from the 2nd Appellant who is a guarantor of the 1st Appellant company. We are of the view that to proceed with the suit against the 2nd Appellant, consent of BIFR is required.

21. We are unable to subscribe the view taken by the learned single Judge that the suit is for recovery of rentals. Of course, the document in question was a lease finance facility for Rs. 40,50,000/- on which E.M.I. is payable at Rs. 67,500/- per month. By a reading of the plaint, it is seen that the suit is for recovery of money based on a promissory note. In paragraph 15 of the plaint, Plaintiff has averred that "the 2nd Defendant having given a personal guarantee for the loan availed of by the 1st Defendant, the 2nd Defendant is also bound to pay the amounts due to the Plaintiff from the 1st Defendant" Again in paragraph 17 " cause of action, it was averred that the suit claim is based on promissory note as seen from the following averments:

... and on 18.9.1995 when Lease Agreement were entered into between the Plaintiff and the Defendants and on 18.9.1995 when the Defendants had given a Demand promissory Note to the Plaintiff standing guarantee for the 1st Defendant and

22. In paragraph No. 12 of the counter affidavit filed by the Respondent/Plaintiff to Application No. 518 of 2005, reiterating the plaint averments, it is stated that "the Respondent/Plaintiff have proceeded to file the said Suit against the Second Applicant/Defendant based on the promise to pay the assured amount by way Demand promissory note dated 18.9.1995 in his personal capacity." Also, in Paragraph No. 13 of the counter affidavit, it is reiterated that "the 2nd Defendant has executed a separate Demand Promissory Note."

23. It is thus clear that the suit is filed mainly on the promissory note executed by the 2nd Appellant, which was taken as a security/personal guarantee for the amount payable by the 1st Appellant Company. The averments are to the effect that the money is due from the 1st Appellant Company for which the 2nd Defendant stood as guarantor. As held in M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, , the ambit of Section 22 extends even to third parties, who have acted as guarantors in respect of loans or advances or debts incurred by an industrial company in respect of which inquiry has been registered u/s 16 of SICA.

24. Section 22 of SICA, so far as it is relevant, reads thus:

22. Suspension of legal proceedings, contracts, etc."(1) Where in respect of an industrial company, an inquiry u/s 16 is pending or any scheme referred to u/s 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal u/s 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of

the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof [and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the appellate authority.

25. In *M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others*, , the Supreme Court has analyzed the provisions of Section 22 in the light of the amendments made to the Act in 1994 holding that the embargo u/s 22 will also cover the guarantors to the sick industrial company. In *M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others*, , the Supreme Court held as under:

7. The words in the square brackets above were inserted into Section 22 by Act 12 of 1994 and it is these words which are relevant for our purposes. As we read them, they provide that no suit

(a) for the recovery of money, or

(b) for the enforcement

(i) of any security against the industrial company, or

(ii) of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with except with the consent of the Board or the appellate authority under the said Act. For our purposes, therefore, the relevant words are: "no suit ... for the enforcement ... of any guarantee in respect of any loans or advance granted to the industrial company" shall lie without the consent of the Board or the appellate authority. The words are crystal clear. There is no ambiguity therein. It must, therefore, be held that no suit for the enforcement of a guarantee in respect of a loan or advance granted to the industrial company concerned will lie or can be proceeded with, without the sanction of the Board or the appellate authority under the said Act.

8. It is not possible to read the relevant words in Section 22 as meaning that only a suit against the industrial company will not lie without such consent. There is no requirement in Section 22, as analyzed above, that, to be covered thereby, a suit for the enforcement of a guarantee in respect of a loan or advance to the industrial company should be against the industrial company.

10. Section 22-A empowers the Board to direct the industrial company not to dispose of, except with its consent, any of its assets. Learned Counsel for the first Respondent pointed out that there was no provision in the said Act which empowered the Board to order the guarantor of a loan or advance to an industrial company not to dispose of his assets. This is true, but Section 22 provides that the suit would lie or be proceeded with after the consent of the

Board has been obtained. It would, therefore, be open to the claimant on a guarantee to obtain such consent from the Board.

11. It remains to deal with the judgment of the Division Bench of the Bombay High Court in *Madalsa International Limited, Mumbai and others Vs. Central Bank of India*, . The Division Bench found no ground to so read Section 22 as to hold that a suit against the guarantor also stands suspended. It said: "The guarantor could be absolute third parties or directors of an industrial company. However, in both cases it would be the guarantors, whether third parties or directors, who would be affected personally; and we see no reason to interpret the section in such a manner that apart from the properties of the industrial company, the legislature intended to protect the personal interest of the guarantors as proceedings against guarantor and their personal property would not affect the revival of the industrial company in any manner whatsoever. In the circumstances the words "of any guarantee in respect of any loans, or advance granted to the industrial company" in the context will have to be read as the guarantee given by the industrial company itself and none else."

12. We have analyzed the relevant words in Section 22 and found that they are clear and unambiguous and that they provide that no suit for the enforcement of a guarantee in respect of any loan or advance granted to the industrial company concerned will lie or can be proceeded with without the consent of the Board or the appellate authority. When the words of a legislation are clear, the court must give effect to them as they stand and cannot demur on the ground that the legislature must have intended otherwise.

26. However, in a subsequent decision in *Kailash Nath Agarwal and Others Vs. Pradeshia Industrial and Investment Corporation of U.P. Ltd. and Another*, , the Supreme Court took a contrary view. The Supreme Court pointed out that "the object of enacting the SICA and of introducing the 1994 amendments to Section 22(1) thereof inserting the words "and no suit for the recovery of money for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company" was to facilitate the rehabilitation or the winding up of sick industrial companies." The Supreme Court further held that the words "suit" and "proceedings" have not been used interchangeably in the SICA. In *Kailash Nath Agarwal and Others Vs. Pradeshia Industrial and Investment Corporation of U.P. Ltd. and Another*, , the Supreme Court held that proceedings under the UP Public Demands (Recovery of Dues) Act, 1972 are really recovery proceedings within the meaning of the word "proceedings". The Supreme Court held that since Section 22(1) only prohibits proceedings against the industrial company there is no protection afforded to guarantors against recovery proceedings under the UP Act.

27. Thus two co-ordinate benches of the Supreme Court had taken contrary views in this regard in *Kailash Nath Agarwal and Others Vs. Pradeshia Industrial and Investment Corporation of U.P. Ltd. and Another*, and *Paramjeet Singh Patheja v. ICDS Ltd.* (2006) 13 SCC 322) When the question once again came up

before the apex Court in Zenith Steel Tubes and Industries Ltd. and Another Vs. SICOM Limited, court, in view of the divergence of judicial views recommended that the matter be referred to a larger Bench for resolution of the controversy.

28. Drawing our attention to the decision of Zenith Steel Tubes and Industries Ltd. and Another Vs. SICOM Limited, , learned Counsel for the Respondent contended that in view of contrary view taken by two co-ordinate benches of the Supreme Court, based on the ratio of the decision in Paramjeet Singh Patheja case (2006) 13 SCC 322, it cannot be held that protection u/s 22 is extended even in respect of suit filed against the guarantors for enforcement of guarantee.

29. In our considered view, the above contention does not merit acceptance. The decision in Kailash Nath Agarwal and Others Vs. Pradeshia Industrial and Investment Corporation of U.P. Ltd. and Another, has been rendered by the Supreme Court in the context of interpretation of the expressions "suit" and "proceedings" used in Section 22(1) of SICA. In construing the expressions "suit" and "proceedings", the Supreme Court was of the view that while the expression "proceedings" used in Section 22(1) would have to be confined to Companies alone; the expression "suit" had been introduced by amendment to extend the protection covered by Section 22 to guarantors.

30. The learned Senior Counsel Mr. Vijay Narayan has submitted that the purpose for which amendment had been effected viz., to explain the protective cover of Section 22 to guarantors also would be rendered meaningless if coercive action continued to be taken against the guarantor who is none other than the Managing Director of the 1st Appellant company. The learned Senior Counsel would submit that notwithstanding reference to a larger Bench the suit filed against the 2nd Appellant/guarantor would fall within the ambit of the protection u/s 22(1).

31. Pointing out the anomaly warranting reference to a larger Bench, in Zenith Steel Tubes and Industries Ltd. and Another Vs. SICOM Limited, , the Supreme Court held as under:

37. In Kailash Nath Agarwal and Others Vs. Pradeshia Industrial and Investment Corporation of U.P. Ltd. and Another, this Court has taken the view that the legislature appears to have knowingly used two different expressions in Section 22(1) of SICA, namely, "proceedings in the first part and the expression "suit" in the second part and the protection of Section 22 extended to guarantors in respect of suits alone and the use of the expression "proceedings could not be extended to include suits as well nor could the expression "suit" be extended to include the expression "proceedings" also.

38. On the other hand, in Paramjeet Singh Patheja case (2006) 13 SCC 322, it was held that the expression "suit" which extends the protection of Section 22(1) to guarantors, would have to be interpreted to include "proceedings also, in view of the intention of the legislature to protect sick industrial companies where references were pending before BIFR.

39. It is also evident from the decision in Paramjeet Singh Patheja case (2006) 13 SCC 322, that the views expressed in Kailash Nath Agarwal and Others Vs. Pradeshia Industrial and Investment Corporation of U.P. Ltd. and Another, had not been brought to the notice of the learned Judges who decided the matter. Even if we are inclined to agree with one of the two interpretations, the anomalous situation will continue since the decisions are that of co-ordinate Benches.

32. In our considered view, reference to a larger Bench has not in any way diluted the ratio laid down in Paramjeet Singh Patheja case (2006) 13 SCC 322), extending the protection of Section 22(1) to guarantors. Having regard to the plaint averments, we are of the view that Section 22 puts a bar on the suit filed against the 2nd Appellant.

33. We are also fortified by the other plaint averments also. Alleging that in view of Case No. 252 of 1998 pending before BIFR and that the suit is not barred by limitation, in the plaint, the Respondent/Plaintiff has incorporated a paragraph, which reads as under:

The 1st Defendant Company has been referred to BIFR in Case No. 252 of 1998 and the proceedings were still pending before the Authority Vide order dt.19.9.2003 made in Company Petition No. 163 of 1998. The Plaintiff states that, to the best of the Plaintiff's knowledge, the proceedings before BIFR are still pending. The Plaintiff therefore submits that in view of Section 22(5) of the Sick Industrial Companies Act (SICA) for short, the suit is not barred by limitation.

For saving the limitation, the Respondent seeks to avail the benefit, which flows from Section 22(5). While so, the Respondent cannot contend that the suit does not fall within the scope of Section 22(1).

34. The learned Senior Counsel Mr. Vijay Narayan has nextly submitted that the closure of Company Petition in C.P. No. 163 of 1998 on the ground that the proceedings are pending before BIFR is binding upon the Respondent/Plaintiff and that the present suit is barred by res judicata. The above contention does not merit acceptance. In view of Case No. 252 of 1998 is pending before BIFR, the Company Petition has been ordered to be closed and kept in a suspended animation giving liberty to the Respondent/Plaintiff to revive the Company Petition by filing application as and when finality is arrived in the said case pending before BIFR and if the situation warrants. In our considered view, the Order in C.P. No. 163 of 1998 cannot be put against the Respondent.

35. The petition - A. No. 518 of 2006 has been filed under Order 7 Rule 11(d) Code of CPC for rejection of the plaint. The plaint could be rejected when the suit appears from the averments in the plaint to be barred by any law. Even though Section 22(1) is an embargo for proceeding with the suit, it cannot be said that the suit filed by the Respondent/Plaintiff is liable to be rejected. The object underlying Section 22 is obvious. The recognition of an entity as a sick industrial

Company would entail in formulation of several claims in the direction of its revival. It is not as if Section 22 wipes away the obligation under various proceedings which it purports to suspend once for all. The obligations are only deferred for some time to ensure that the Scheme formulated by the BIFR or AIFR are not hampered or hindered in any manner. Section 22(1) contains the provision for suspension of various proceedings against the Company. However, the Board at its discretion may accord its approval for proceeding against the 2nd Defendant/guarantor, who is the Managing Director of the 1st Appellant Company.

36. For the fore-going reasons, we are unable to subscribe to the view taken by the learned single Judge that the suit is for recovery of rental arrears. The nature of the transaction could be gone into only at the time of trial. Going by the plaint averments and the available materials, at this stage, prima facie indications are that the suit is for recovery of money based on promissory note. In our considered view, for Plaintiff to proceed with the suit, the consent of BIFR is required.

37. In the result, the impugned Order passed by the learned single Judge dated 4.11.2009 in A. No. 518 of 2006 in C.S. No. 889 of 2005 is set aside and the Appeal is partly allowed. It is open to the Respondent/Plaintiff to get the consent of Board for Industrial Financial Reconstruction (BIFR) in Case No. 252 of 1998 to continue the suit. Till the Respondent/Plaintiff so obtains consent from BIFR or the proceedings in Case No. 252 of 1998 are closed, which ever is earlier, the suit " C.S. No. 889 of 2005 shall remain stayed. However, there is no order as to costs.