
(2004) 04 BOM CK 0092

In the Bombay High Court

Case No : Appeal No. 567 of 2002 in Summons for Judgment No. 117 of 2000 in Summary Suit No. 6294 of 1999

Ved Prakash Agarwal

APPELLANT

Vs

Rama Petrochemicals Ltd.

RESPONDENT

Date of Decision : 21-04-2004

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22, 22(1)

Citation : (2004) 3 ALLMR 5 : (2004) 4 BC 232 : (2004) 4 BomCR 578 : (2004) 122 CompCas 8 : (2005) 1 MhLj 599 : (2004) 56 SCL 116

Hon'ble Judges : S.U. Kamdar, J;H.L. Gokhale, J

Bench : Division Bench

Advocate : P.K. Samadani and Dinesh Purandare, K.S. Kishor, instructed by Shiralkar and Co, for the Appellant; Berjis Coolabawala and Ayaz Bilawala, Jayesh Vyas, instructed by Bilawala and Co., for the Respondent

Final Decision : Dismissed

Judgement

H.L. Gokhale, J.—This appeal seeks to challenge the order passed by a single judge dated April 22, 2002, granting the summons for judgment taken out by the respondent herein (original plaintiff) against the appellant (original defendant) and thereby granting a decree in the summary suit.

2. The suit claim was with respect to the unpaid lease rentals in an agreement of lease finance for equipment, the payment of which rentals was guaranteed by the appellant. The outstanding principal amount due as on the date of filing of the suit was Rs. 43,05,960 to which interest at the rate of 18 per cent per annum for the unpaid period till filing of the suit (i.e., an amount of Rs. 5,49,983) was added leading to a claim of Rs. 48,55,943 with further interest at the rate of 18 per cent. per annum on the principal amount from the date of filing of the suit till payment and/or realisation. The appeal was admitted on July 5, 2002, and the impugned decree was directed to be stayed on the appellant depositing a sum of Rs. 20,00,000 in this court. The appellant preferred a SLP

against this conditional order, but the same was dismissed by the apex court by its order dated December 13, 2002. The apex court, however, observed that the High Court may consider hearing of the appeal as early as possible. Accordingly, the appeal has been heard early. It is, however, material to record that the appellant has not deposited any amount contrary to the order passed at the admission stage.

3. As can be seen from the order of the learned single judge, the only submission canvassed before him was that the affairs of the company, to which the equipment was given on lease, were under investigation before the Board for Industrial and Financial Reconstruction ("BIFR" for short) and, therefore, the suit could not proceed against the guarantor (appellant) in view of the provisions of Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "SICA"). However, in this appeal, it has been additionally argued that the lease finance was essentially a loan or advance granted to the industrial company and, therefore, also the suit should not have been proceeded. Thus two points arise for our determination in this appeal, and they are as follows :

(i) Whether the learned single judge had erred in proceeding with the suit against the appellant/guarantor when the industrial company, to which the lease finance was given (and the repayment of which was guaranteed by the appellant), was before the BIFR ?

(ii) Whether the lease finance granted by the respondent to the industrial company was in fact a loan or advance and, therefore, the suit had to be suspended in view of the provisions of Section 22(1) of the SICA?

4. Before we deal with these points, it will be necessary to refer to the few necessary facts leading to the above suit and this appeal ;

(i) The respondent is a public limited company which carries on business of manufacture, trade, purchase, sale and leasing of various assets on rental basis. The appellant is the managing director of one Prakash Industries Ltd., a public limited company.

(ii) The respondent entered into an agreement of lease finance on March 18, 1994, with the said Prakash Industries Ltd. As per that agreement, the respondent arranged for the finance for purchase of heavy structural rolling mill rolls and leased out the machinery to the said Prakash Industries Ltd. on the terms and conditions as contained in the agreement. The amount spent was over Rs. 70,00,000. The same was to be repaid through lease rentals spread over 20 equated instalments. The appellant was the managing director of this Prakash Industries and had guaranteed payment of these instalments in his personal capacity and for that purpose he executed a personal guarantee before a Special Metropolitan Magistrate on the same day. Clause 4 of the agreement clearly recorded that the property in the equipment shall at all times remain solely and exclusively with the respondent. The guarantee specifically stated that the

liability thereunder was that of a principal debtor ; that it was a continuing guarantee and an irrevocable one and shall continue until the lessee discharges all its obligations.

(iii) It so happened that Prakash Industries honoured the payment of first 11 instalments whereafter it defaulted. A correspondence ensued between the parties ultimately leading to the respondent filing a suit in this court against Prakash Industries bearing Suit No. 4665 of 1997 for various reliefs including recovery of the lease equipment and arrears of the lease rentals. An ad interim order was passed therein on February 18, 1998, which recorded a statement on behalf of Prakash Industries that they will not part with possession or in any way sell the property. Subsequently Prakash Industries lodged a reference with the BIFR on June 12, 1998 . Consequently Suit No. 4665 of 1997 filed by the respondent was liable to be suspended u/s 22 of the SICA. The respondent, therefore, filed Summary Suit No. 6294 of 1999 against the appellant and took out the summons for judgment. The appellant did not file any affidavit in reply though he was served with the summons and oral submissions were made by his counsel before the learned single judge.

(iv) As stated earlier, this suit was decreed by the learned single judge by his impugned order dated April 22, 2002. The learned judge noted that though the defendant was served, he had not filed any reply disclosing any ground on which leave to defend could be granted. He also recorded that an oral submission was made that the company, to which equipment was leased, was before the BIFR and, therefore, the appellant being the guarantor was automatically protected u/s 22 of the SICA. The learned judge referred to his earlier order in the case of Garden Finance Ltd. Vs. Prakash Inds. Ltd. and Another, , wherein the learned judge had considered the law laid down by the apex court in M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, and had held that provisions of Section 22 of the SICA did not apply to a case where the machinery was given on lease to a company which was before the BIFR and the guarantee was sought to be invoked for payment of lease rentals. The learned judge granted the summons for judgment in view of that earlier order.

5. The first point, which arises for our determination, is whether the moment the industrial company was before the BIFR, there will be an automatic suspension of a proceeding against its guarantor. To analyse this submission, it would be necessary to refer to Section 22(1) of the SICA, which is pressed into service and which reads as follows :

"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."

6. In this connection, it is material to note that this section has been amended by Act No. 12 of 1994. The following portion, which is in the bracket as shown above, did not exist in the section under the initial Act of 1985 and it came to be added by the amendment of 1994 :

"and no suit for the recovery of money or for the enforcement of any security against the industrial company."

7. Thus, by this amendment, it came to be specifically added that--no suit,

(a) for the recovery of money ; or

(b) for the enforcement ;

(i) of any security against an industrial company ; or

(ii) of any guarantee in respect of any loans or advances granted to the industrial company ;

shall lie or be proceeded with except with the consent of the Board or the appellate authority.

8. Mr. Samdani, learned counsel for the appellant, canvassed two propositions. Firstly, he submitted that in view of this amendment, no suit for recovery of any money can proceed after the registration of the reference even against the guarantor and, secondly, the industrial company and the guarantor had to be treated equally in view of the judgment of the apex court in the case of M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, . Mr. Coolabawala, learned counsel for the respondent, on the other hand, submitted that both these submissions were erroneous. Firstly, the amendment did not provide that no suit for recovery of money would lie against the guarantor and, secondly, the judgment in Patheja Bros. had not laid down any such blanket proposition of equal treatment to the guarantors in all situations. He submitted that in fact the judgment in Patheja Bros. had been clarified by the apex court in Kailash Nath Agarwal and Others Vs. Pradeshiya Industrial and Investment Corporation of U.P. Ltd. and Another, (for short "PICUP"s" case).

9. It is material to note that the judgments in the cases of M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, and Kailash Nath Agarwal and Others Vs. Pradeshiya Industrial and Investment Corporation of U.P. Ltd. and Another, are subsequent to the amendment introduced by Act

No. 12 of 1994 and are relevant for our purpose. However, there are two earlier judgments rendered by the apex court concerning this section and which also must be looked into in this context and they are in the cases of Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, and Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another, . These two judgments are concerning the section as it stood prior to the passing of the aforesaid amendment. The plea that leasehold rights of a sick company in the leased premises is its property was specifically rejected in Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, . The object of Section 22 is undoubtedly to protect the sick company in a difficult financial situation, yet, while reading the provision regarding suspension of legal proceedings, the apex court declined to read a protection to its rented premises in that section. The term "proceedings" was read as covering only those with respect to recovery of dues in execution proceedings having an effect on the working or finance of the company. The apex court in terms held in paras. 11 and 12 as under (pages 449 and 450) :

"It is, therefore, necessary to consider the second question about the applicability of Section 22(1) to eviction proceedings instituted by the landlord against the tenant who happens to be a sick company. In this regard, it may be mentioned that the following proceedings only are automatically suspended u/s 22(1) of the Act :

- (1) Proceeding for winding up of the sick industrial company ;
- (2) Proceedings for execution, distress or the like against the properties of the sick industrial company ; and
- (3) Proceedings for the appointment of a receiver. Eviction proceedings initiated by a landlord against a tenant company would not fall in categories (1) and (3) referred to above. The question is whether they fall in category (2). It has been urged by learned counsel for the appellant-company that such proceedings fall in category (2) since they are proceedings against the property of the sick industrial company. The submission is that the leasehold right of the appellant-company in the premises leased out to it is property and since the eviction proceedings would result in the appellant-company being deprived of the said property, the said proceedings would be covered by category (2). We are unable to agree. The second category contemplates proceedings for execution, distress or the like against any other properties of the industrial company. The words "or the like" have to be construed with reference to the preceding words, namely, "for execution, distress" which means that the proceedings which are contemplated in this category are proceedings whereby recovery of dues is sought to be made by way of execution, distress or similar process against the property of the company. Proceedings for eviction instituted by a landlord against a tenant who happens to be a sick industrial company, cannot in our opinion, be regarded as falling in this category."

10. In Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another, , the court was concerned with coercive measures against a sick company u/s 29 of the State Financial Corporations Act, 1951. The apex court held that the word "proceedings" in Section 22(1) must be widely construed. It observed at the end of para, 14 of the judgment as follows (page 821) :

"The expression "proceedings" in Section 22(1), therefore, cannot be confined to legal proceedings understood in the narrow sense of proceedings in a court of law or a legal tribunal for attachment and sale of the debtor's property."

11. The court also held in para. 10 as follows (page 818) :

"The words "or the like" which follow the words "execution" and "distress" are clearly intended to convey that the properties of the sick industrial company shall not be made the subject matter of coercive action of similar quality and characteristic till the BIFR finally disposes of the reference made u/s 15 of the enactment."

12. The court, therefore, observed that the provisions of Section 22(1) should receive a broad construction. The court held that the coercive measures resorted by SICOM u/s 29 of the State Financial Corporations Act, 1951, would be hit by Section 22(1) of the SICA.

13. In M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, , ICICI had filed a suit for recovery of the loans against an industrial company. The guarantees were sought to be invoked against the properties of the guarantors. The High Court had taken the view that Section 22 of the SICA was not applicable to the guarantors. It was contended that Section 22 should be read as applying only to an industrial company and not to a suit against a guarantor. The apex court in terms held in this judgment that if there was a guarantee in respect of a loan or advance granted to an industrial company, the suit for enforcement of that guarantee will also not be proceeded with. The court observed that when the words of the legislation are clear, the court must give effect to them as they stand. In paras. 7 and 8 of the judgment, the court noted that there was no requirement in Section 22 that to be covered thereby the suit for enforcement of a guarantee should be against the industrial company only. The protection will be available to a guarantor also. It is material to note that in M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, , there was no dispute that repayment of a loan was guaranteed by the guarantor. The only question was whether the guarantor was also entitled to protection after the amendment of the Section against a suit for enforcing the guarantee and the answer was in the affirmative.

14. In Kailash Nath Agarwal and Others Vs. Pradeshia Industrial and Investment Corporation of U.P. Ltd. and Another, , the court noted that there is a distinction when it comes to the protection granted to the industrial company and to the guarantors. As far as the industrial companies are concerned, it was already

provided before the amendment of the Section that no proceeding for the winding up or for execution, distress or like against its properties or for appointment of receiver would be. Over and above that, it was further added by the amendment that as far as the industrial companies are concerned, no suit also would be permitted for the recovery of money or for enforcement of any security against it. As far as the guarantors are concerned, the amendment extended this protection concerning the suits in respect of guarantees of loans or advances granted to the industrial company. In *Kailash Nath Agarwal and Others Vs. Pradeshia Industrial and Investment Corporation of U.P. Ltd. and Another*, , the question was with respect to the execution proceeding (and not suit) against the guarantors under the U. P. Public Moneys (Recovery of Dues) Act, 1972. The court noted that distinction made in the legislation and held that as far as such recovery proceedings are concerned, they are in the nature of execution and not in the nature of suits, and they were not halted under the amended Section 22(1) of the SICA against the guarantors. The observations of the apex court in paras. 7 and 9 of *M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others*, were specifically referred to and quoted in *Kailash Nath Agarwal and Others Vs. Pradeshia Industrial and Investment Corporation of U.P. Ltd. and Another*, . Then the court observed in para. 34 of the PICUP as follows (page 15) :

"We do not read the observations quoted as holding that protection of guarantors of loans to a sick company is an object of the 1994 Amendment which object must colour our interpretation of the amendment. Till 1994 no protection was afforded to the guarantors under the Act at all. A limited protection has been given in 1994. The expression used being clear and unambiguous, it is not for us to question the wisdom of the Legislature in giving the limited protection it did or why such protection was necessary at all."

15. Thereafter, it observed in para. 35 as follows (page 15) :

"Finally, the phrase introduced by the 1994 Amendment relates to the pre-decree stage because recovery proceedings by way of execution are already covered under the first half of Sub-section (1) of Section 22. If the procedure under the U. P. Act is covered under the word "proceedings" in the first limb of Section 22(1) of the SICA, which it is according to *Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another*, , it is not a "suit" for recovery under the second limb of that section. As rightly contended by learned counsel appearing for PICUP, the proceedings under the U. P. Act are really recovery proceedings within the meaning of the word "proceeding" as defined in *Maharashtra Tubes Ltd.* Since Section 22(1) only prohibits recovery against the industrial company, there is no protection afforded to guarantors against recovery proceedings under the U. P. Act."

16. The result of a survey of these four judgments is clear. 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, . When it comes to the proceedings against the industrial company, the expression must be widely construed because the basic idea is to revive the sick industry as held in Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another, . If there is any loan or advance granted to an industrial company and it is guaranteed to be repaid by a guarantor, no suit for enforcement of such a guarantee will lie against the guarantor also. This was held in M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, . 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 proceedings. 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. All that was submitted before the learned single judge was that the industrial company, to which equipment was given on lease by the guarantor, was before the BIFR and, therefore, the suit against the guarantor cannot be proceeded with. On the submission, as it was placed before him, the learned judge was right in answering that the suit cannot be stayed merely on that footing.

17. Mr. Samdani, learned counsel for the appellant thereafter submitted that while interpreting Section 22(1) of the SICA we must keep in mind the object of the Act and should interpret it in a purposive manner. He contended that the words "for the recovery of money" appearing in the amended portion of the Section which are applicable to the industrial company must also be read in the second part of the said amended section where the protection is given to the guarantor though it is only in respect of any loans or advances. It is his submission that if the section is not interpreted accordingly, the object and purpose of the section for which the legislation has been enacted will be defeated. In furtherance of the aforesaid contention he has argued that we should apply the mischief rule to prevent a mischief by interpreting the words as aforesaid to achieve the purpose and object of the Act. He has referred to para. 22 of the judgment of the apex court in the case of The Bengal Immunity Company Limited Vs. The State of Bihar and Others, to submit that the court must see as to what was the mischief which was sought to be remedied by the

particular Act and what remedy was provided. He also referred to the judgment in the case of *Workmen of Dimakuchi Tea Estate Vs. The Management of Dimakuchi Tea Estate*, . That was a judgment on the definition of "industrial dispute" u/s 2(k) of the Industrial Disputes Act, 1947, and, while dealing with the expression "any person" occurring in the third part of that definition, the apex court held in para. 9 that it clearly meant a person in respect of whom the dispute had arisen.

18. We have considered the aforesaid submission of learned counsel. However, we are unable to agree with the same for more than one reason. Firstly, it is a well settled principle of interpretation that when the language of the section is clear and unambiguous then it should be interpreted on the basis of plain reading thereof and no other aid or interpretation can be put in operation. We find that provisions of Section 22, particularly the amended portion thereof are plain and clear and are unambiguous and on a plain and clear reading of the section it is clear that the words "for the recovery of money" apply only in the case of a suit against an industrial company and do not apply to the case of the guarantors. In view of the said clear and plain language, we do not see any reason for taking aid of mischief rule in the present case. Thus, the judgment of the apex court cited by learned counsel has no application in the facts and circumstances of the present case. Secondly, in the case of *Kailash Nath Agarwal and Others Vs. Pradeshia Industrial and Investment Corporation of U.P. Ltd. and Another*, the hon'ble Supreme Court of India has already 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. Thus, it is not possible to accept the contention of learned counsel for the appellant that we should read the words "for the recovery of money" in such a way so as to expand the meaning of the words "loans and advances" as appearing in the amended Section 22 of the Act. Thirdly, the contention of learned counsel for the appellant if accepted, would tantamount to rewriting a section and/or legislation which is not within the purview and jurisdiction of this court. The words "for the recovery of money" are expressly appearing in the first part of the amended section and apply only in the case of industrial company. They cannot be introduced in the second part of the amended section where the protection is extended in a limited manner in favour of the guarantor. In view thereof we do not find any substance or merit in the contentions advanced by learned counsel for the appellant recommending a so-called purposive interpretation of Section 22 of the said Act is concerned.

19. Then we come to the second point as to whether, as canvassed in the appeal, the lease finance given by the respondent to the industrial company was in fact a loan or advance. To examine this submission, we will have to look to the provisions of the lease agreement and the guarantee given by the appellant.

20. Mr. Samdani and Mr. Purandare, learned counsel for the appellant, submitted in this behalf that although this agreement was styled as a lease agreement, it

was essentially an agreement for finance, i.e., for loan and, in any case, for a sort of advance. They referred to the judgment of the apex court in Sundaram Finance Ltd. Vs. State of Kerala and Another, , and particularly para. 24 thereof. The judgment was in the context of a hire-purchase agreement. In para. 24, the court observed as follows (page 501) : "The true effect of a transaction may be determined from the terms of the agreement considered in the light of the surrounding circumstances. In such case, the court has, unless prohibited by statute, power to go behind the documents and to determine the nature of the transaction, whatever may be the form of the documents. An owner of goods who purports absolutely to convey or acknowledges to have conveyed goods and subsequently purports to hire them under a hire-purchase agreement is not estopped from proving that the real bargain was a loan on the security of the goods. If there is a bona fide and completed sale of goods, evidenced by documents, anterior to and independent of a subsequent and distinct hiring to the vendor, the transaction may not be regarded as a loan transaction, even though the reason for which it was entered into was to raise money."

21. They also referred to a judgment of the House of Lords in the case of De Vigier v. Inland Revenue Commissioners [1964] 1 WLR 1073 to the effect that it matters not how you describe the transaction and it is the purpose thereof which is got to be seen.

22. Mr. Samdani and Mr. Purandare pointed out that the entire amount involved in the transaction was divided into 20 equated instalments and interest was payable thereon, if the lessee made any default in payment of the money or the instalment. Last part of this Clause 22 on interest and cost reads as follows :

"Interest rates will be subject to modification downwards/upwards during lease tenure if there is a downward/upward revision in the interest rates by the bank financing the lease transaction."

23. Similarly, Clause 27, which was with respect to termination on default, provided that upon termination of the lease, consequent upon a default by the lessee, the lessee shall forthwith pay a sum equal to the total amount of the rent payable. They also emphasised that as far as the lessor's commitment was concerned, it was limited to Rs. 70,01,554 under Clause 40 and any additional amount of whatsoever nature was to be paid by the lessee. They also pointed out that a promissory note was taken from Prakash Industries for the principal amount with all the interest included totalling to Rs. 86,11,920. Postdated cheques were taken from Prakash Industries and on payment of 1 per cent. residual amount and after paying the entire amount, the equipment was to become that of Prakash Industries.

24. Mr. Coolabawala, learned counsel for the respondent, on the other hand, submitted that firstly the appellant should not be heard inasmuch as he has not deposited the amount of Rs. 20,00,000 which was directed to be deposited at the time of admission. Secondly, the appellant did not care to file any reply before

the learned single judge and, in any case, the point which is now being canvassed was undoubtedly not canvassed before the learned single judge. Even when the appeal was preferred to challenge the condition imposed by this court (to grant the stay while admitting this appeal), the only submission made over there, as can be seen from the order of the apex court, in S. L. P. No. 2290 of 2003 was that the appeal was covered by the judgment of the apex court, namely the one in the case of M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, . Mr. Coolabawala, therefore, submitted at the outset that this court should not entertain the submission with respect to nature of the lease transaction at this stage. As far as this submission of Mr. Coolabawala is concerned, we quite see that there is some force in his submission. However, we do not think that the appellant should be shut out from canvassing this submission inasmuch as it is an important question of law as well and has got to be answered.

25. Mr. Coolabawala then submitted in reply that as the wording of Section 22(1) itself provides, the suit, if to be suspended against the guarantor, has to be with respect to enforcement of a guarantee in respect of a loan or advance granted to the industrial company. The question, therefore, arises as to what was it that was granted to the industrial company ? was it a loan or an advance, or was it a lease of equipment ? He, therefore, submitted that to begin with what one must see is as to what is understood by the industrial company itself and what was the understanding of the respondent who had entered into the transaction with the industrial company. As far as the respondent is concerned, undoubtedly it was their case that it was an agreement of lease. However, Mr. Coolabawala submitted that even when one sees the treatment given by the industrial company to the transaction, it would be seen that it always treated it as a lease. For that purpose, Mr. Coolabawala drew our attention to the reply of the advocate of Prakash Industries to the advocate of the respondent dated July 21, 1997, which was annexed at exhibit J to the plaint. The reply specifically refers to the document governing the transaction as a lease agreement and at no place it states that it was a loan or a financial transaction. Similarly, it could not be considered as an advance because in an advance, the right of the financier is only in respect of money and not in the property against which the money is advanced.

26. Thereafter, Mr. Coolabawala drew our attention to the specific clauses of the lease agreement and pointed out that the document made it very clear all throughout that the property in the equipment and the ownership thereof at all material times was to remain only with the lessor. Clause 4 of this agreement, which is of particular significance, and which is captioned "ownership" reads as follows :

"Ownership : The property in the equipment shall at all times remain solely and exclusively that of the lessor and lessee shall have no right, title or interest therein except as lessee and the lessee shall not hypothecate, sub-lease or

subject to any form of bailment. The lessee irrevocably undertakes that at no time during the course of the lease agreement's tenure which tenure/period is non-cancelable will the lessee attempt to capitalise the equipment on the lessee's balance-sheet, since the lessee and lessor irrevocably agree that ownership of the equipment during the tenure of lease indisputably rests with the lessor,"

27. Mr. Coolabawala pointed out that Clause 6 of the agreement required the lessee to maintain and preserve on the equipment the identification indicating the proprietary right of the lessor. Clause 8 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 it at the option of the lessor and it shall be the property of the lessor. Besides, Clause 13 provided that upon expiration or earlier termination of the lease agreement and in the event of default, the lessee shall deliver to the lessor the equipment. Clause 14(j) dealing with determination provided that in the event of any default, the lessor had the right to remove or to take possession of the equipment and in the event of lease being terminated, the lessee shall forthwith deliver the certificates and policies of insurance to the lessor. Clause 36 on assignment specifically provided that no title or right in the said property shall pass to the lessee except the lease right therein expressly granted, and that upon termination the lessee will immediately return the equipment. Clause 42 provided that the lease was subject to deed of hypothecation over the equipment owned and leased by the lessor. Mr. Coolabawala, therefore, submitted that there was no manner of doubt when one looks to the entire agreement that it was a lease document. The understanding between the respondent and the industrial company was clear, namely that it was a document of lease and not finance.

28. Mr. Coolabawala then referred to an unreported detailed order of a single judge (S.H. Kapadia), as his Lordship then was in this court) dated September 16, 1998, on Notice of Motion No. 2346 of 1998 in Suit No. 3196 of 1998 filed by the Development Credit Bank against the very Prakash Industries Ltd. In that matter also, the suit was for recovery of possession of four wind electric generators leased to Prakash Industries under the lease agreement. Since there was a default in making the payment of the lease rentals, a receiver was sought. An almost identical lease agreement was entered into between the parties. The bank concerned had not sued to recover the amounts inasmuch as Prakash Industries had filed a reference before the BIFR. Notice of Motion No. 2436 of 1998 was moved for receiver of the equipment. In para. 4 of the order, the learned judge squarely raised the question as to whether the above lease agreement constituted a financial agreement and not a lease agreement. The court noted the submissions that the court was expected to go behind the terms and conditions of the agreement to ascertain as to whether it was a finance agreement although it was under the guise of a lease agreement. In para. 5 of the order, the learned judge noted that under Clause 8.12 of the lease, the lease equipment was to remain the property of the lessor and that it had been given on lease. There was also a similar clause on repossession of the equipment.

Upon termination of the agreement, the lessor had a right to sell the equipment under Clause 15. The judgment of the apex court in the case of Sundaram Finance Ltd. Vs. State of Kerala and Another, was relied upon by Prakash Industries as in the present case. The court examined the clauses, as stated above, and noted that the judgment will not apply to a case of lease finance where the arrangement is different.

29. Thereafter, Mr. Coolabawala drew our attention to another unreported but detailed order passed by S.N. Variava and S.H. Kapadia JJ. (as their Lordships then were in this court) dated October 12, 1998 in Appeal No. 1055 of 1998 in Arbitration Petition No. 19 of 1998 in the case of Parasrampuriah Synthetics Ltd. v. Kotak Mahindra finance Ltd. That was an appeal against an order on an application u/s 9 of the Arbitration and Conciliation Act, 1996. One of the submissions was that a reference was pending before the BIFR and that the agreement in question in reality was not a lease agreement, but a finance agreement. The court looked into the documents and observed in para. 9 that Section 22 of the SICA has no application to a lease agreement, and in such a case the property is not the property of the company.

30. We have considered the submissions made by both counsel. As noted earlier, what we have to examine is as to whether the guarantee concerned was in respect of any loan or advance granted to the industrial company. Having seen the clauses from the agreement, there is no difficulty in saying that the property in the equipment remains with the respondent all throughout and does not pass on to the industrial company. It is again material to note that the industrial company has all throughout understood the document as a lease agreement and not as a finance loan. At no point of time, there is any reference to the document as a finance agreement, not even in the letter of the advocates of the appellant prior to the proceedings. The right of the lessor to take back the property at all material times is clearly writ large on the document. Besides, the guarantee given by the appellant is an independent guarantee given to the respondent. It clearly states in terms that it is as if given by the principal debtor and it will be irrevocable until the lessee discharges all the obligations. The apex court in some of the recent judgments has laid down the guidelines when it comes to interpreting the documents entered into between the parties. In para. 10 of the judgment in the case of M. Arul Jothi and Another Vs. Lajja Bal (Deceased) and Another, , the apex court has observed that "once parties enter into a contract, then every word stated therein has to be given its due meaning which reveals the rights and obligations between the parties. No part of the agreement or words used therein could be said to be redundant". In para. 16 of Roop Kumar Vs. Mohan Thedani, , the apex court observed the following :

"When persons express their agreements in writing, it is for the express purpose of getting rid of any indefiniteness and to put their ideas in such shape that there can be no misunderstanding, which so often occurs when reliance is placed-upon oral statements. Written contracts presume deliberation on the part of the

contracting parties and it is natural they should be treated with careful consideration by the courts and with a disinclination to disturb the conditions of matters as embodied in them by the act of the parties (see Mckelvey's Evidence, page 294)."

31. In the present case, as stated above, we are concerned with the relationship created by the respondent with the industrial company. The respondent is undoubtedly saying that it is a lease document. The industrial company has now where stated in the documents or in correspondence that it is not a lease agreement. When the text of the totality of the clauses and their tenor is seen, one cannot take some clauses with respect to payment of interest apart and hold that it is a finance agreement. One has to read the agreement to provide meaning to all its clauses. Any such interpretation canvassed by the appellant will render the specific clauses on ownership and return on default, identification and insurance etc. redundant. That cannot be permitted as held in *M. Arul Jothi and Another Vs. Lajja Bal (Deceased) and Another*, . Besides, any such interpretation will go against the express intention of the contracting parties. That also cannot be permitted as held in *Roop Kumar Vs. Mohan Thedani*, . The tenor of the entire agreement is clear that the respondent had purchased the particular equipment and leased it to the industrial company and it was to remain as the equipment owned by the respondent throughout the period of the agreement. It is another matter that at the end of the period if the twenty equated instalments and the residual amount was paid, the ownership was to pass on to the industrial company. That will not change the nature of the agreement during the subsistence thereof, viz., that it was an agreement of lease of equipment and not a financial agreement. There is no scope to read the agreement as anything else as in the case of *Sundaram Finance Ltd. Vs. State of Kerala and Another*, . Similarly the principles of purposive interpretation relied upon by the appellant have no application in the present case since the amendment to Section 22 is clear and unambiguous as explained in the *Kailash Nath Agarwal and Others Vs. Pradeshiya Industrial and Investment Corporation of U.P. Ltd. and Another*, .

32. It is clear from the narration that it was the obligation of the industrial company to make the periodical payment and use the machines. The industrial company had defaulted in making the payment and, therefore, the respondent had every right to get back the machinery. As far as the present suit is concerned, it is with respect to the guarantee given by the appellant to fulfil the obligations of the industrial company on his own. The text of the guarantee is also very clear. That guarantee cannot be said to be a guarantee with respect to the repayment of a loan. Similarly, as stated earlier, in an advance of money the right of the financier is only with respect to money and not in the property. In the present case, there are clear rights of the financiers in the property. 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.

33. The appeal is therefore dismissed with costs.