*       **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%                                    *Judgment Reserved On :February 29, 2016*
*Judgment Delivered On : March 03, 2016*

\+                                   **W.P.(C) 8617/2015**

OM PRAKASH PARASRAMPURIA & ORS.          .....Petitioners
Represented by: Ms.Purti Marwaha, Advocate with Ms.Henna George and Mr.Arvind Kumar, Advocates

versus

UNION OF INDIA & ANR.          .....Respondents
Represented by: Mr.Sanjiv Kakra, Advocate with Mr.Amrendra Kumar Singh and Mr.Bheem Sain Jain, Advocates for R-2

**W.P.(C) 8732/2015**

RATAN LAL PARASRAMPURIA & ORS.          .....Petitioners
Represented by: Ms.Purti Marwaha, Advocate with Ms.Henna George and Mr.Arvind Kumar, Advocates

versus

UNION OF INDIA & ANR.          .....Respondents
Represented by: Mr.Sumit Bansal, Advocate with Mr.Ateev Mathur and Ms.Richa Oberoi, Advocate for R-2

**CORAM:**
**HON'BLE MR. JUSTICE PRADEEP NANDRAJOG**
**HON'BLE MS. JUSTICE MUKTA GUPTA**

**PRADEEP NANDRAJOG, J.**

1. Whether the decision pronounced by a Three Judge Bench of the Supreme Court, reported as (2015) 1 SCC 166 *KSL & Industries Ltd. vs. Arihant Threads Ltd. & Ors.* has changed the track in which the river was flowing heretofore, is the question which arises for consideration in the two appeals. As per the writ petitioners the said decision holds that recovery proceedings under Recovery of Debts Due to Banks and Financial Institutions Act, 1993 are to be treated as a suit and therefore if the principal borrower is declared as a sick industrial company proceedings under Recovery of Debts due to Banks and Financial Institutions Act, 1993 cannot lie or be continued against the guarantors. Is that so?

2. The question arises in the backdrop of sub-Section 1 of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, which reads as under:-

> "***22. Suspension of legal proceedings, contracts, etc.—***
>
> *(1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 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."*

3. The phrase : *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,* in sub-Section (1) of Section 22 was inserted with effect from February 01, 1994 by Act No.12 of 1994, and prior thereto the sub-Section read : *Where in respect of an industrial company, an inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 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 shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.*

4. A plain grammatical reading of the sub-Section as originally enacted would reveal that the bar created was to the continuation or institution of 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 and for the appointment of a receiver in respect thereof without the consent of BIFR, and post-amendment, to the continuation or institution of suits 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.

5. It is by now well settled that protection to a sick industrial company gets accorded under SICA, 1985 immediately on registration of a reference as held in the decision reported as (1998) 5 SCC 554 *Real Value Appliances Ltd. Vs. Canara Bank & Ors.* After a reference is admitted under section 15 of SICA, 1985, the protection under Section 22 SICA, 1985 gets triggered. An inquiry has thereafter to be made by BIFR under Section 16 and for which powers are vested in BIFR under Section 17. Provisions concerning preparation and sanction of the scheme are in Section 18 with Section 19, providing for grants of relief and concessions which may include even sacrifices to be made are enacted. If no scheme can be sanctioned the Board has to make a reference to the High Court for appropriate orders, recommending winding up of the industrial company, which opinion is not binding on the High Court as per the law declared in the decision reported as (1997) 89 Comp.Cas.609 *V.R. Ramaraju Vs. Union of India & Ors.* It is between these two ends of the spectrum that Section 22 of SICA, 1985 comes into play.

6. Perusal of sub-Section (1) of Section 22 of SICA, 1985 makes it evident that it suspends proceedings such as '*winding up*' of the industrial company, '*execution*', '*distress*' or '*the like*' against the '*properties of the industrial company*' or, even initiation of steps for appointment of a receiver qua the *properties of the industrial company*. The use of the expression '*industrial company*' as against '*sick industrial company*' is significant because there may arise situations which warrant protection to be accorded to an industrial company prior to it being formally declared as a Sick Industrial Company by BIFR.

7. The second limb of sub-Section (1) of Section 22, which begins with the expression '*and no suit'* concerns itself with actions for recovery of money or for enforcement of security once again against the industrial company. The latter part of this second limb which reads, '*or of any guarantee in respect of any loans or advances granted to the industrial company'* creates some kind of a doubt as regards the guarantors i.e. whether notwithstanding proceedings being suspended by virtue of sub-Section 1 of Section 22 of SICA against the sick industrial company, could the proceedings continue or be instituted against the guarantors.

8. The word used in sub-Section 1 of Section 22 is '*guarantee*' and not '*guarantor*'. The possible argument that the term '*guarantee*' meant a guarantee extended by the sick industrial company need not be debated upon in view of the law declared by the Supreme Court in the decision reported as (2000) 6 SCC 545 *M/s.Pathreja Brothers Forging & Stamping & Anr. Vs. ICICI Ltd. & Ors.* wherein it has been held that the term '*guarantee*' would also extend to the guarantors.

9. In the decision reported as (2006) 13 SCC 322 *Paramjit Singh Patheja Vs. ICDS Ltd.*, the appellant before the Supreme Court was a guarantor qua a debt owed by one Patheja Forging and Autoparts Manufacturers Limited. Both, the guarantor and company were sued in an arbitration proceedings initiated by the respondent/creditor. The company was registered with BIFR. An award was rendered by the Arbitrator despite being informed about the registration of the reference. On the basis of the award, an insolvency notice was taken out under Section 9(2) of the Presidency Towns Insolvency Act, 1909 (hereinafter referred to as the Insolvency Act).

10. Section 9(2) of the Insolvency Act stipulates that a debtor commits an act of insolvency if a creditor who has obtained a '*decree'* or an

'*order'* against him for payment of money, issues him a notice in the prescribed form, to pay the amount and the debtor fails to do so within the time specified in the notice. It is in this context that the appellant/guarantor challenged the insolvency notice. A learned Single Judge of the Bombay High Court differed with a view taken earlier by another Single Judge of that court holding that an award is neither a decree nor an order for the purpose of the Insolvency Act. The Single Judge referred the matter to a Larger Bench, which answered the reference in the affirmative, by holding that an award was a decree for the purpose of Section 9 of the Insolvency Act, and therefore, an insolvency notice could be issued on the basis of an award. It is in this context that the Supreme Court framed two questions of law for adjudication, as under:-

(i). whether an Arbitrator's award is a decree for the purposes of Section 9 of the Insolvency Act; and

(ii). Whether an insolvency notice can be issued on the basis of such an award.

11. The Supreme Court held that the award is not a decree, and hence insolvency notice under Section 9(2) of the Insolvency Act could not be taken out on the basis of the award. In the process of its reasoning the Supreme Court examined whether the Arbitrator was a Court and whether the award was a decree. In this context, that the court examined several judgments. Some of the observations would illuminate the road map drawn by the Supreme Court. These would be:-

> *"17. We are of the view that the Presidency Towns Insolvency Act, 1909 is a statute weighed down with the grave consequence of "civil death" for a person*

*sought to be adjudged an insolvent and therefore the Act has to be construed strictly. The Arbitration Act was in force when the PTIA came into operation. Therefore it can be seen that the lawmakers were conscious of what a "decree", "order" and an "award" are. Also the fundamental difference between "courts" and "arbitrators" was also clear as back as in 1909.*

*XXXXXXX*

*21. The words "court", "adjudication" and "suit" conclusively show that only a court can pass a decree and that too only in a suit commenced by a plaint and after adjudication of a dispute by a judgment pronounced by the court. It is obvious that an arbitrator is not a court, an arbitration is not an adjudication and, therefore, an award is not a decree."*

12. The conclusions were stated by the Supreme Court in the following words:-

*"43. For the foregoing discussion we hold:*

*(i) That no insolvency notice can be issued under Section 9(2) of the Presidency Towns Insolvency Act, 1909 on the basis of an arbitration award.*

*(ii) That execution proceedings in respect of the award cannot be proceeded with in view of the statutory stay under Section 22 of the SICA Act. As such, no insolvency notice is liable to be issued against the appellant.*

*(iii) Insolvency notice cannot be issued on an arbitration award.*

*(iv) An arbitration award is neither a decree nor an order for payment within the meaning of Section 9(2). The expression "decree" in the Court Fees Act, 1870 is liable to be construed with reference to its definition in CPC and hold that there are essential conditions for a "decree":*

*(a) that the adjudication must be given in a suit,*

*(b) that the suit must start with a plaint and culminate in a decree, and*

*(c) that the adjudication must be formal and final and must be given by a civil or Revenue Court.*

*An award does not satisfy any of the requirements of a decree. It is not rendered in a suit nor is an arbitral proceeding commenced by the institution of a plaint.*

*(v) A legal fiction ought not to be extended beyond its legitimate field. As such, an award rendered under the provisions of the Arbitration and Conciliation Act, 1996 cannot be construed to be a "decree" for the purpose of Section 9(2) of the Insolvency Act.*

*(vi) An insolvency notice should be in strict compliance with the requirements in Section 9(3) and the rules made thereunder.*

*(vii) It is a well-established rule that a provision must be construed in a manner which would give effect to its purpose and to cure the mischief in the light of which it was enacted. The object of Section 22, in protecting guarantors from legal proceedings pending a reference to BIFR of the principal debtor, is to ensure that a scheme for rehabilitation would not be defeated by isolated proceedings adopted against the guarantors of a sick company. To achieve that purpose, it is imperative that the expression "suit" in Section 22 be given its plain meaning, namely, any proceedings adopted for realisation of a right vested in a party by law. This would clearly include arbitration proceedings.*

*(viii) In any event, award which is incapable of execution and cannot form the basis of an insolvency notice.*

*44. In the light of the above discussion, we further hold that the insolvency notice issued under Section 9(2) of the PTI Act, 1909 cannot be sustained on the basis of arbitral award which has been passed under the Arbitration and Conciliation Act, 1996. We answer the two questions in favour of the appellant."*

13. As held in the decision reported as (2003) 2 SCC 111 *Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd. & Ors.*, a judgment is a precedent for what is decided and not what logically follows from it, therefore a Division Bench of this Court in the judgment reported as ILR (2012) Vol.5 Delhi 218 *Inderjeet Arya & Anr. Vs. ICICI Bank Ltd.* held that the judgment of the Supreme Court in *Paramjit Singh Patheja*'s case (supra) cannot be interpreted to conclude that each and every kind of action is contemplated to be included in the term 'suit' because the Supreme Court was dealing with a specific issue i.e. whether an award was a decree or an order within the meaning of Section 9(2) of the Insolvency Act.

14. In *Inderjeet Arya*'s case (supra), the Division Bench of this Court also considered the decision of the Supreme Court reported as (2003) 4 SCC 305 *Kailash Nath Agarwal & Ors. Vs. Pradeshiya Industrial & Investment Corporation of UP Ltd. & Anr.* wherein the enforcement of debt against the guarantors was initiated by Pradeshiya Industrial Investment Corporation of UP Limited (in short, PICUP) for loans granted to the principal debtor, one, Shaifali Papers Limited, by triggering the provisions of the UPPM Act. The Division Bench highlighted that the Supreme Court noted two significant aspects pertaining to SICA, 1985. The first being : the interpretation accorded by the Supreme Court to the expression '*proceedings*' in the first part of Section 22(1) of SICA. The Division Bench also noted that the Supreme Court considered an earlier judgment reported as (1993) 2 SCC 144 *Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corpn. of Maharashtra Ltd.* wherein the word '*proceedings*' used in the first limb of Section 22(1) had been widely construed and thereafter highlighted the fact that the said judgment was rendered prior to 1994, i.e., before the

amendment to sub-Section (1) of Section 22 of SICA when the second part of Section 22 which reads : '*and no suit for recovery of money or enforcement of any security against the industrial company or any guarantee in respect of any loans or advances granted to the industrial company*;' was introduced. The Division Bench opined that in this context the Supreme Court noted that the Supreme Court was called upon to determine whether an action against an industrial concern under Section 29 and/or Section 31 of the State Financial Corporation Act, 1951 would fall within the ambit of the term '*proceedings*' set out in the first part of sub-Section (1) of Section 22. The Division Bench held that in *Kailash Nath Agarwal*'s case (supra) the Supreme Court noted that in *Maharashtra Tubes Limited*'s case it had been observed that the term '*proceedings*' should not be limited to legal proceedings as understood in the narrow sense but should include actions taken out under Sections 29 and 31 of the State Financial Corporation Act. It was then noted by the Division Bench that the Supreme Court's analysis as to why in *Maharashtra Tubes Limited*'s case such a course was adopted was set out in paragraph 18 of the judgment in *Kailash Nath Agarwal*'s case, and since the reasoning, being apposite and informative, needed to be set out, noted the same, which is as under:-

> *"18. It appears that there were three reasons why this Court construed the word "proceeding" as including action which may be taken under Section 29 of the State Financial Corporations Act:*
>
> *1. The recovery proceedings were against an industrial company, the revival of which was one of the objects of the Act.*
>
> *2. The use of the omnibus expression "or the like" after the word "proceeding".*

> *3. The fact that the entire scheme as contained in Sections 16 to 19 of SICA would be rendered nugatory and the process short-circuited if State Financial Corporations were allowed to recover their dues from the assets of the Company." (emphasis supplied)*

15. The Division Bench noted that thereafter the Supreme Court analyzed the pre 1994 situation and undertook the exercise of analyzing the insertion made to sub-Section (1) of Section 22 (with which, the Division Bench was called upon to grapple;), and observations in para 19 to 25 of the decision in Kailash Nath Agarwal's case were relevant to be noted, and noted the same. Paras 19 to 25 in Kailash Nath Agarwal's case read as under:-

> *"19. After this decision was rendered, Section 22(1) was amended by the Sick Industrial Companies (Special Provisions) Amendment Act (12 of 1994). The following words were inserted in Section 22(1):*
>
> ***"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"***
>
> *20. There is an apparent distinction between the expressions "proceeding" and "suit" used in Section 22(1). While it is true that two different words may be used in the same statute to convey the same meaning, that is the exception rather than the rule. The general rule is that when two different words are used by the same statute, prima facie one has to construe these different words as carrying different meanings. In Kanhaiyalal Vishindas Gidwani this Court found that the words "subscribed" and "signed" had been used in the Representation of the People Act, 1951 interchangeably and, therefore, in that context the Court came to the conclusion that when the legislature used the word "subscribed" it did not intend anything more than "signing". The words "suit" and "proceeding" have not been used interchangeably in*

*SICA. Therefore, the reasons which persuaded this Court to give the same meaning to two different words in a statute cannot be applied here.*

*21. In none of the decisions cited before us, has the word "suit" been defined in a context similar to that of SICA. The decisions cited by the appellants do not relate to the same or similar statutes nor do they seek to define the word "suit" in contradistinction to the word "proceeding". The decision in Ghantesher Ghosh v. Madan Mohan Ghosh was given in the context of the Partition Act where a distinction between "filing a suit for partition" and "suing for partition" has been drawn. It was held that "suing for partition" was a wider phrase than the phrase "suit for partition" without defining what a suit meant.*

*22. The decision in CCE v. Ramdev Tobacco Co. related to the construction of the bar of suit section in the Central Excises and Salt Act, 1944. The section as it stood at the relevant time provided that "no suit, prosecution or other legal proceedings shall be instituted for anything done or ordered to be done under the Act ...". The Court held: (SCC p. 124, para 6)*

*"There can be no doubt that 'suit' or 'prosecution' are those judicial or legal proceedings which are lodged in a court of law and not before any executive authority, even if a statutory one."*

*23. A definition of the word "suit" has been given in Pandurang R. Mandlik v. Shantibai R. Ghatge[6] but in the context of Section 11 of the Code of Civil Procedure. This is what the Court said: (SCC p. 639, para 18)*

*"In its comprehensive sense the word 'suit' is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceedings may be various but that if a right is litigated between parties in a court of justice the proceeding by which the decision of the court is sought may be a suit."*

*24. According to these decisions, a suit is an action taken in a court of law.*

*25. Having regard to the judicial interpretation of the word "suit", it is difficult to accede to the submission of the appellants that the word "suit" in Section 22(1) of the Act means anything other than some form of curial process."*

16. The Division Bench thereafter noted that the conclusions in paras 29 and 30 of the decision in *Kailash Nath Agarwal*'s case were in the following words:-

*29. One of the reasons for the word "proceeding" in Section 22(1) being construed widely by this Court in Maharashtra Tubes was that the proceedings were against the Company itself. Having regard to the object of the Act viz. if possible to revive the Company, as also the operation of the various sections towards this end, the Court held that it would be unreasonable to give such meaning to the word "proceeding" as would result in dealing a death-blow to the Company so that the entire procedure envisaged under SICA would be set at naught.*

*30. We have been unable to find a corresponding reason for widening the scope of the word "suit" so as to cover proceedings against the guarantor of an industrial company. The object for enacting SICA and for introducing the 1994 Amendment was to facilitate the rehabilitation or the winding up of sick industrial companies. It is not the stated object of the Act to protect any other person or body. If the creditor enforces the guarantee in respect of the loan granted to the industrial company, we do not see how the provisions of the Act would be rendered nugatory or in any way affected. All that could happen would be that the guarantor would step into the shoes of the creditor vis-à-vis the company to the extent of the liability met.*
*(emphasis supplied)*

17. The Division Bench interestingly noted that the judgment in <u>*Kailash Nath Agarwal*</u>'s case was delivered by a Bench comprising Hon'ble Ms.Justice Ruma Pal and Hon'ble Mr.Justice B.N.Shrikrishna and Hon'ble Ms.Justice Ruma Pal was also a part of the Bench which delivered the judgment in <u>*Patheja Brothers Forgings and Stamping*</u>'s case. The Division Bench noted that the decision in <u>*Patheja Brother Forging and Stamping*</u> was distinguished in <u>*Kailash Nath Agarwal*</u>*'s* case and proceeded to note the reasoning to distinguish the same, in paragraphs 31 to 34 in <u>*Kailash Nath Agarwal*</u>'s case which read as under:-

> *31. It is true that this Court in Patheja Bros. Forgings & Stamping v. ICICI Ltd. construed the 1994 Amendment to Section 22(1) to hold: (SCC p. 548, para 7)*
>
> *"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."*
>
> *32. This is in keeping with the well-established principle of statutory interpretation that where the language of the provision is explicit the language of the statute must prevail.*
>
> *33. The appellants have, however, sought to draw sustenance from the following passage in the judgment: (SCC p. 548, para 9)*
>
> *"The argument on behalf of the first respondent is that while this provision provides for the continuation of*

*proceedings against the industrial company, there is no provision in the said Act which provides for the continuation of any held-up proceeding against the guarantor of a loan or advance to such company and that, therefore, Section 22 should be read as applying only to a suit against the industrial company and not a guarantor. Apart from the fact that, as indicated above, the language of Section 22 is explicit, the scheme would provide for the repayment of the loan or advance and, therefore, would take within its ambit the claim on the guarantee; the question of proceeding with the suit against the guarantor would not arise. On the other hand, if the industrial company cannot be revived by a scheme, the embargo under Section 22 would cease to operate."*

*34. These observations do not mean that when the words used are unambiguous, other extrinsic interpretative aids such as the objects of the statute, or the difficulties that would be faced by creditors will be relevant in interpreting the expression. The Court in Patheja case merely observed that the creditor could recover its sum from the principal debtor under the scheme and, therefore, the claim on the guarantee would not arise if the amount is so recovered under the scheme. 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." (emphasis supplied)*

18. The Division Bench highlighted that it was noticeable that the Supreme Court categorically observed that the observations in Patheja Brothers and Forging and Stamping's case do not suggest that the

protection to guarantors of loan taken by a company which later on becomes a sick industrial company is the object of the amendment brought about in sub-Section (1) of Section 22 when the amendment was made in the year 1994.

19. The Division Bench thereafter noted, in para 20 to 20.2 as under:-

> *"20. It is in this background that the Supreme Court referred the issue raised in Zenith Steel Tubes & Industries Ltd. for consideration by a Larger Bench. Briefly, the facts in this case were that the appellants before the Supreme Court were both the principal debtor company as well as the guarantor. The loan from the financial institution i.e., SICOM Limited had been taken by the principal debtor company which was, inter alia, secured by a personal guarantee of the second appellant. Since, there were defaults, notices were issued demanding payment of the amounts owed to SICOM Ltd. Upon failure, SICOM Ltd. filed a petition against the second appellant under section 31(1)(aa) of the SFC Act. In the meanwhile, the first appellant was declared a sick industrial company by the BIFR. Against the action of SICOM Ltd., a writ petition was filed before the Bombay High Court. The learned Single Judge of the Bombay High Court rejected the contentions of the second appellant /guarantor that by virtue of provision of section 22 of SICA, its liability under the personal guarantee could not be enforced. The Division Bench came to a somewhat similar conclusion and also went on to hold that, the liability of the guarantor being co-extensive with that of the principal debtor, the creditor was not required to exercise his right first against the principal debtor and only thereafter, against the guarantor. This is how the matter travelled to the Supreme Court.*
>
> *20.1 The Supreme Court in paragraph 20 noticed the observations in Paramjit Singh Patheja's case that the term 'suit' would have to be understood in the larger context to include other proceedings as well, which*

*were filed before a 'legal forum' The court noticed that the decision in Kailash Nath Agarwal's case was not brought to the notice of the Division Bench in Paramjit Singh Patheja's case. After noticing the observations of the court in Kailash Nath Agarwal's case, the bench decided to refer the matter to a Larger Bench.*

*21. We may also at this stage take note of the observations of the Supreme Court in JT 2009 (10) SC 199 Nahar Industrial Enterprise Limited Vs. Hong Kong and Shanghai Banking Corporation*

*21.1 The Supreme Court in this case was dealing with a situation where the appellant before it – Nahar Industrial Enterprises Ltd. had filed a suit against HSBC, in a civil court at Ludhiana seeking a declaration that the foreign interest derivative contracts executed with HSBC, be declared void as they were illegal and violative of the Foreign Exchange Management Act (in short FEMA). On the other hand, HSBC had filed an action under the RDDB Act. The OA was filed before the DRT, Mumbai. HSBC thereafter moved the High Court of Punjab and Haryana by way of an application seeking transfer of the proceedings filed before the civil court at Ludhiana to the DRT at Mumbai. The learned Single Judge of the High Court allowed the application in the form of a counter claim to the OA pending in the DRT, Mumbai.*

*21.2 A special leave petition was filed against the said order of the High Court. Other banks and financial institutions filed applications by way of transfer under section 25 of the Code of Civil Procedure, 1908 ( in short the Code). By virtue of this judgment, the special leave petition against the judgment of the High Court of Punjab as well as the transfer petitions were disposed of. It is in this context, the Supreme Court considered as to whether the DRT was a court and hence, a court subordinate to the High Court for exercising a power of transfer. In dealing with this issue, the Supreme Court in paragraph 113 touched upon what are the attributes of a civil court as against*

*the Tribunal. The Supreme Court concluded by holding that a tribunal under the RDDB Act is not a civil court. The observations being apposite, are extracted hereinafter :-*

> *"113. The Tribunal was constituted with a specific purpose as is evident from tis statement of objects. The preamable of the Act also is a pointer to that too. We have also noticed the scheme of the Act. It has a limited jurisdiction. Under the Act, as it originally stood, did not even have any power to entertain a claim of set off or counter claim. No independent proceedings can be initiated before it by a debtor. A debtor under the common law of contract as also in terms of the loan agreement may have an independent right. No forum has been created for endorsement of that right. Jurisdiction of a civil court as noticed hereinbefore is barred only in respect of the matters which strictly come within the purview of section 17 thereof and not beyond the same. The Civil Court, therefore, will continue to have jurisdiction. Even in respect of set off or counter claim, having regard to the provisions of sub sections (6) to (11) of section 19 of the Act, it is evident :-*
>
> *a) That the proceedings must be initiated by the bank.*
>
> *b) Some species of the remedy as provided therein would be available therefor.*
>
> *c) In terms of sub section (11) of Section 19, the bank or the financial institution is at liberty to send a borrower out of the forum.*
>
> *d) In terms of the provisions of the Act, thus, the claim of the borrower is excluded and not included.*

*e) In the event the bank withdraws his claim the counter claim would not survive which may be contrasted with Rule 6 of Order VIII of the Code.*

*f) Sub section (9) of section 19 of the Act in relation thereto has a limited application.*

*g) The claim petition by the bank or the financial institution must relate to a lending/borrowing transaction between a bank or the financial institution and the borrower.*

*h) The banks or the financial institutions, thus, have a primacy in respect of the proceedings before the Tribunal.*

*i) An order of injunction, attachment or appointment of a receiver can be initiated only at the instance of the bank or the financial institution. We, however, do not mean to suggest that a Tribunal having a plenary power, even otherwise would not be entitled to pass an order of injunction or an interim order, although ordinarily expressly it had no statutory power in relation thereto.*

*j) It can issue a certificate only for recovery of its dues. It cannot pass a decree.*

*k) Although an appeal can be filed against the judgment of the Tribunal, pre-deposit to the extent of 75% of the demand is imperative in character.*

*l) Even cross-examination of the witnesses need not be found to be necessary.*

*m) Subject to compliance of the principle of natural justice it may evolve its own procedure*

*n) It is not bound by the procedure laid down under the Code. It may however be*

> *noticed in this regard that just because the Tribunal is not bound by the Code, it does not mean that it would not have jurisdiction to exercise powers of a court as contained in the Code. Rather, the Tribunal can travel beyond the Code of Civil Procedure and the only fetter that is put on its powers is to observe the principles of natural justice. [see Industrial Credit and Investment Corpn. Of India Ltd. Vs. Grapco Industries Ltd. [1999 (4) SCC 710]*
>
> *The tribunal, therefore, would not be a Civil Court."*
>
> *(emphasis supplied)*

20. The Division Bench thereafter noted that what emerges on a reading of the objects and reasons alongwith the interpretation accorded by the Supreme Court, to the provisions of sub-Section (1) of Section 22, is that :

(i). the 1994 amendment which brought in the relevant insertion with which we are confronted, was not necessarily intended to accord protection to the guarantors of loans given to an industrial company; (see observations in *Kailash Nath Agarwal*'s case)

(ii). till 1994, no protection was accorded to the guarantors under SICA;

(iii). post 1994, a limited protection has been granted by the legislature to the guarantors;

(iv). the legislature has consciously used the two different terms, i.e., 'proceedings' and 'suit'; and

(v). the term. 'proceedings' has been given a wider interpretation by the Supreme Court in the case of Maharashtra Tubes.

(vi). the amendment in sub section (1) of section 22 was brought about w.e.f. February 01, 1994, when the RDDB Act was already in force that is, w.e.f. June 24, 1993. Therefore, the Legislature while bringing about the amendment in sub-Section (1) of Section 22 of SICA on February 01, 1994 was aware of the enactment of the RDDB Act. The term. 'suit' would have to be read and understood in the context of this legislative history and in the background of the scheme of SICA as also the setting of the term in issue, in the very provision under consideration i.e., sub-Section (1) of Section 22.

21. Thus, it was held that having regard to the law laid down in the various judgments, the word '*suit*' cannot be understood in its broad and generic sense to include any action before a legal forum involving an adjudicatory process. If that were so, the legislature which is deemed to have knowledge of existing statute would have made the necessary provision, like it did, in inserting in the first limb of Section 22 of SICA, where the expression proceedings for winding up of an industrial company or execution, distress, etc. is followed by the expression or '*the like'* against the properties of the industrial company. There is no such broad suffix placed alongside the term '*suit*'. The term suit would thus have to be confined, in the context of sub-Section (1) of Section 22 of SICA, to those actions which are dealt with under the Code and not in the comprehensive or overarching sense so as to apply to any original proceedings before any legal forum as was sought to be contended before us. The term, '*suit*' would therefore apply only to proceedings in a civil court and not actions for recovery proceedings filed by banks and financial institutions before a Tribunal, such as, the 'DRT'.

22. That takes us to the nub of the question which we have to decide. What is the impact of the three Judge Bench decision of the Supreme Court in *KSL & Industries Ltd.*'s case (supra). According to the writ petitioners para 26 and 27 of the judgment would show that the Supreme Court held that on account of sub-Section 1 of Section 22 of SICA all proceedings before any fora concerning debt of a sick industrial company would be stayed including the guarantors. Paragraphs 26 and 27, relied upon read as under:-

> *"26. It may also be noted that the Section, along with the SICA was enacted in 1985. At that time the remedies which were later on provided by the RDDB Act 1993, for recovery by a creditor through an application to the Debt Recovery Tribunal were not in existence nor contemplated. There is naturally no reference to such a mode of recovery in the SICA and neither is a stay contemplated of such a proceedings in express terms. We say this in view of the submission advanced before us that Section 22 only contemplates a stay of proceedings for the distress or execution of the properties of the sick company and suits for recovery and that therefore an application for recovery under the RDDB Act cannot be stayed, and must proceed. We might also observe that the consequence of accepting the submission that Section 22 cannot affect or render untenable an application for recovery under the RDDB Act, would result in an anomaly. The submission is that Section 22 lays down that only proceeding for winding up or execution, distress or the like shall not lie or be proceeded with where an enquiry is pending or a scheme is under preparation or consideration or a sanction scheme is under implementation etc.; whereas a proceeding for recovery of a debt may proceed. To put it another way, that a proceeding for recovery shall lie against a sick company but an order made in it could not be executed against any of the properties of the industrial company, the effect being that the proceedings may continue without any consequence.*

*Thus there cannot be any execution or distraint against the properties of the company but creditors may continue to apply for recovery before the DRT. We do not think that such an anomalous purpose can be attributed to Parliament in the present legislative scheme. Though there is no doubt that Parliament may expressly bring about such a situation if it considers it desirable. Even otherwise, it appears that the legislative purpose for reconstruction of companies could be thwarted if creditors are allowed to encumber the properties of the company with decrees of the DRT while the BIFR is engaged in reviving the company, if necessary, by leasing or selling the properties of the company for which there is an express power.*

*27. Plainly, the purpose of laying down that no proceedings for execution and distraint or the like or a suit for recovery shall not lie, is to protect the properties of the sick industrial company and the company itself from being proceeded against by its creditors who may wish to seek the winding up of the company or levy execution or distress against its properties. It protects the company from all such proceedings. It also protects the company from suits for recovery of money or for the enforcement of any security or of any guarantee in respect of any loans, or advances granted to the industrial company. But as is apparent, the immunity is not absolute. Such proceeding which a creditor may wish to institute, may be instituted or continued with the consent of the Board or the Appellate Authority. In the Section as originally enacted, the words "and no suit for the recovery of money or for the enforcement of any security .............." were not there. These words appear to have been inserted to expressly provide, rather clarify that no suits for the recovery of money etc. would lie or be proceeded with against such a company."*

23. We find nothing in the two paragraphs which would support the argument that the decision in KSL and Industries Ltd. has changed the legal position. As a matter of fact, the observations of the Supreme Court

in paras 28 to 31 concerning law declared in *Kailash Nath Agarwal*'s case would establish to the contrary. The said paragraphs read as under:-

> *"28. Furthermore, the Parliament must be taken to be aware of the decision in Maharashtra Tubes and the fact that the word 'proceeding' used in Section 22(1) had been widely construed to include proceedings for recovery of dues by State Financial Corporation as arrears of land revenue. The deliberate choice of the word 'suit' in the circumstances would indicate that Parliament intended to limit the ambit of the amendment introduced to particular modes for the recovery of money or enforcement of guarantees.*
>
> *29. One of the reasons for the word 'proceeding' in Section 22(1) being construed widely by this Court in Maharashtra Tubes was that the proceedings were against the company itself. Having regard to the object of the Act viz., if possible to revive the company, as also the operation of the various sections towards the end, the Court held that it would be unreasonable to give such meaning to the word 'proceeding' as would result in dealing a death blow to the Company so that the entire procedure envisaged under the SICA would be set at naught.*
>
> *30. We have been unable to find a corresponding reason for widening the scope of the word 'suit' so as to cover proceedings against the guarantor of an industrial company. The object for enacting the SICA and for introducing the 1994 amendment was to facilitate the rehabilitation or the winding up of sick industrial companies. It is not the stated object of the Act to protect any other person or body. If the creditor enforce the guarantee in respect of the loan granted to the industrial company, we do not see how the provisions of the Act would be rendered nugatory or in any way affected. All that could happen would be that the guarantor would step into the shoes of the creditor vis-a-vis the company to the extent of the liability met.*

> *31. It is true that this Court in Patheja Bros. Forgings & Stampings v. ICICI Ltd. (supra) construed the 1994 amendment to Section 22(1) to hold:*
>
> > *"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 evidence 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."*

24. That apart, the ratio in KSL and Industries' case is entirely different because the issue considered and decided was entirely different.

25. Arihant Threads Ltd. had defaulted in a credit granted by IDBI which filed an application on December 20, 2001 before the Debts Recovery Tribunal for recovery of its dues under the Recovery of Debts due to Banks and Financial Institutions Act, 1993. The claim was decreed on July 15, 2003. Executing the decree passed by the Debts Recovery Tribunal a property of Arihant was attached and at a sale terminating on October 30, 2004 sale certificate was issued in favour of KSL & Industries Ltd. being the highest bidder. On December 15, 2004 Arihant applied for the sale to be set aside on the ground that the valuation was low. The sale was set aside by the Recovery Officer on July 26, 2005 but upon a condition. Two appeals were filed. KSL & Industries challenged the sale being set aside and Arihant challenged the condition imposed on December 21, 2005 Arihant was registered under SICA as a sick company before BIFR. On February 10, 2006 appeal filed

by Arihant was dismissed by the Debt Recovery Appellate Tribunal and that filed by KSL was allowed. The High Court allowed the writ petition filed by Arihant on February 23, 2006 noting that the bar created by Section 22 of SICA did not permit the attachment and sale of the assets of Arihant.

26. Issue considered by the three Judge Bench was whether the provisions of Recovery of Debts due to Banks and Financial Institutions Act, 1993 should be given primacy over SICA by virtue of Section 34 of Recovery of Debts due to Banks and Financial Institutions Act, 1993 as it was a subsequent registration because of a difference of opinion by two Hon'ble Judges on the issue. Hon'ble Justice C.K.Thakker held that the provisions of Recovery of Debts due to Banks and Financial Institutions Act, 1993 should be given primacy but Hon'ble Chief Justice Altamash Kabir held to the contrary, but on facts held that the petition filed by KSL & Industries Ltd. before the Supreme Court challenging the decision of this Court had to be allowed. In other words two Hon'ble Judges reached the same destination but on a different process of reasoning. The issue therefore decided by the three Judge Bench of the Supreme Court was whether the view taken by Hon'ble Mr.Justice C.K.Thakker was correct or that by Hon'ble Chief Justice Altamash Kabir. The answer given was that provisions of SICA shall prevail over the provisions of the recovery of debts under the Recovery of Debts due to Banks and Financial Institutions Act, 1993. The appeal was therefore allowed by the Supreme Court on the legal interpretation as also for the reason the substantive proceedings under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 had concluded and the sale had taken place much prior to Arihant being registered under SICA for an inquiry as to its sickness i.e. whether the company was a sick industrial company.

27. The two appellants are guarantors and notwithstanding the principal borrower company being a sick industrial company, the Debts Recovery Tribunal as also the Debts Recovery Appellate Tribunal have rightly opined that proceedings under Recovery of Debts due to Banks and Financial Institutions Act, 1993 can continue against the two.

28. The writ petitions are dismissed but without any order as to costs.

**(PRADEEP NANDRAJOG)**
**JUDGE**

**(MUKTA GUPTA)**
**JUDGE**

**MARCH 03, 2016**
***mamta***