

CASE NO.:
Appeal (civil) 5347 of 2007

PETITIONER:
Zenith Steel Tubes & Industries Ltd & Anr.

RESPONDENT:
SICOM Limited

DATE OF JUDGMENT: 21/11/2007

BENCH:
Altamas Kabir & B.Sudershan Reddy

JUDGMENT:
J U D G M E N T
Arising out of S.L.P. (CIVIL) NO.8486 OF 2007

Altamas Kabir, J.

1. Leave granted.
2. The appellant no.1 company was carrying on business of manufacturing galvanised pipes. In November, 1992 the appellant-company approached the respondent for financial assistance amounting to Rs.1,42,000/- to meet a part of the cost for setting up a factory in village Madap, Taluq Kolhapur in the District of Raigarh for the manufacture of galvanised pipes. The said amount was duly sanctioned and the said sum of Rs.1,42,000/- was advanced by the respondent to the appellant company. An agreement was entered into for a term loan and the appellant-company also created a security for repayment of the amount by hypothecating its plant and machinery and creating an equitable mortgage of its factory premises situated in the above mentioned village. A loan agreement was executed on 30.3.1993 for repayment of the loan in various instalments. On the same day, the second appellant executed a personal guarantee for repayment of the loan amount in case of default by the appellant-company.
3. The appellant-company committed several defaults in repayment of the loan amount compelling the respondent to issue a notice on 16.10.98 calling upon the appellant-company to pay the overdue amount within a stipulated period. Despite such notice, the appellant-company failed to make payment and accordingly, by a further notice dated 10.1.1999 the respondent called upon the appellant-company to repay the entire amount due and payable to the respondent by 3.2.1999 failing which the possession of the assets of the appellant-company would be taken on 5.2.1999.
4. Since, despite such notice the appellant-company failed and neglected to pay the entire amount as demanded, the respondent issued a notice to the appellant no.2 on 13.6.2000 calling upon him to pay the entire amount by invoking the personal guarantee given by the second appellant. As in the case of the appellant-company, the second appellant did not also make the payment as demanded, and

consequently, the respondent filed a petition against the second appellant under Section 31(1)(aa) of the State Financial Corporations Act, 1951, on 10.10.2000 for enforcing the personal guarantee given by the said appellant.

5. In the meantime, the appellant-company applied to the Board for Industrial and Financial Reconstruction (BIFR) and was declared a sick company by the BIFR under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, (SICA), and the company is still under the said Board.

6. Taking advantage of the aforesaid position, the second appellant contended before the single Judge of the Bombay High Court that in view of Section 22 of the aforesaid Act, the personal guarantee given by the second appellant could not be invoked. It was also contended that the respondent could not enforce the guarantee till such time as the assets which had been mortgaged in its favour had not been realised. Both the said contentions were rejected by the learned single Judge upon holding that the liability of the guarantor was independent of that of the principal debtor, and accordingly, the guarantee could be invoked and the amount could be recovered from the guarantor. The guarantor was directed to pay Rs.1,67,89,225/- with further interest on the principal amount of Rs.92 lakhs from the date of the petition till payment at the rate of 12%. The said decision of the learned single Judge was challenged by the appellants herein before the Division Bench of the Bombay High Court in Appeal No.1/2007. The Division Bench on consideration of the different decisions of this Court came to the conclusion that the provisions of Section 22 of SICA, as amended in 1994, did not prohibit any proceeding, other than a suit for enforcement of any security against the guarantor. On such finding and also upon holding that the liability of the guarantor was co-extensive with the principal debtor and that the creditor was not required to exercise his right as a mortgagee before proceeding against the guarantor, the Division Bench dismissed the appeal with costs on 29.1.2007. It is the decision both of the learned single Judge as also the Division Bench of the High Court which is the subject matter of this appeal.

7. Appearing in support of the appeal, Mr. Shekhar Naphade, learned Senior Advocate, submitted that both the learned single Judge and the Division Bench of the High Court had erred in giving a narrow meaning to the word 'suit' as used in Section 22 of SICA. He submitted that the context in which the expression 'suit' had been used in Section 22 of the aforesaid Act made such expression all pervasive to include other proceedings as well before a court or other authority empowered to recover debts and other dues against the company. It was urged that in the case of Maharashtra Tubes Limited v. State Industrial Corporation of Maharashtra Ltd. (1993) 2 SCC 144, it had been held that the expression 'proceedings' in Section 22(1) of SICA must be widely construed and could not be confined to legal proceedings understood in the narrow sense of proceeding in a court of law or a legal tribunal for attachment and sale of the debtor's property.

However, since the said decision could be applied to companies only and not to guarantors, the legislature amended the provisions of Section 22(1) so as to extend the protection given to companies to guarantors also so that they too were given the protection of Section 22 of the Act. Mr. Naphade submitted that the object with which the 1985 Act was enacted was primarily to assist sick industries which had failed to meet their financial obligations. It was urged that in certain cases it was the Directors of the company who themselves stood guarantee for the loans advanced to the company and the enforcement of such guarantee against the Directors would cause obstructions in the way of the BIFR to revive the said company, which was also one of the objects of the 1985 Act.

8. In this regard, Mr. Naphade also referred to the decision of this Court in *Patheja Bros. Forgings & Stamping and anr. v. ICICI LTD. and others*, 2000 (6) SCC 545, where the question involved was whether Section 22 of the SICA would cover a suit against a guarantor of a loan or advance that had been granted to an industrial company. Mr. Naphade pointed out that upon holding that the words of Section 22 were crystal clear and there was no ambiguity therein, this Court had held that no suit for enforcement of a guarantee in respect of a loan or advance granted to the industrial company concerned would lie or could be proceeded with without the consent of the Board or the Appellate Authority under the Act. Mr. Naphade also submitted that while dealing with the aforesaid question, this Court had overruled the decision of the Bombay High Court in *Madalsa International Ltd. v. Central Bank of India*, AIR 1998 Bom 247, wherein it had been held that Section 22 would apply to companies only and not to guarantors who would be affected personally and the words "of any guarantee in respect of any loan or advance granted to the industrial company" would have to be read as the guarantee given by the industrial company itself and none else.

9. To emphasise his aforesaid submission Mr. Naphade laid particular emphasis on the decision of this Court in *Paramjit Singh Patheja vs. ICDS Ltd.* (JT 2006 (10) SC 41) where in connection with the enforcement of an arbitral award and the issuance of an insolvency notice under Section 9(2) of the Presidency Towns Insolvency Act, 1909 this Court, inter alia, held that 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. It was further observed 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. In order to achieve such purpose, it was 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.

10. Mr. Naphade then submitted that the Bombay High Court had wrongly relied upon the decision of this

Court in Kailash Nath Agrawal & Ors. vs. Pradeshia Industrial & Investment Corporation of U.P. Ltd. & Anr. (2003 (4) SCC 305), wherein the decision rendered by this Court in the Maharashtra Tubes case (supra) as also in Patheja Bros. Forging case (supra) were distinguished and it was held that in both the cases while considering the effects of the amendment to Section 22(1) of SICA, the Courts were concerned with \021suits\022 which had been dealt with in the case of Patheja Bros, and not with \021proceedings\022 indicated in the first part of Section 22(1) of the 1985 Act. Mr. Naphade added that the decision in the Maharashtra Tubes case (supra) had been rendered prior to the amendment of Section 22(1) of SICA, where as Patheja\022s case, as also the case of Paramjit Patheja were rendered after the amendment was effected, to extend the protection of Section 22 to guarantors as well.

11. Mr. Naphade submitted that the decision in Kailash Nath Agrawal\022s case had been rendered by this Court in the context of interpretation of the expressions \021suit\022 and \021proceedings\022 used in Section 22(1) of SICA, 1985. In construing the said two expressions this Court was of the view that while the expression \021proceedings\022 used in Section 22(1) would have to be confined to companies alone, the expression \021suit\022 had been introduced by amendment to extend the protective cover of Section 22 to guarantors as well. It was submitted that the purpose for which such amendment had been effected, namely, to extend the protective cover of Section 22 to guarantors also, would be rendered meaningless if coercive action continued to be taken against guarantors who could even be the Directors of the company in question. It was urged that the continuing ambiguity was sought to be explained in the Paramjit Singh Patheja case (supra) wherein it was explained that the expression \021suit\022 would have to be understood in a larger context to include other proceedings as well before a legal forum.

12. Mr. Naphade submitted that, in any event, the liability of the appellant No. 2 under the guarantee given could be enforced under Section 31((1)(aa) of the State Financial Corporations Act, 1951, only if and when the appellant made a default in repayment of the loan. Having regard to the fact that the appellant No.1 had made a reference to the BIFR under Section 15 of the 1985 Act, the liability of the appellant-company stood suspended under Section 22 of the said Act. As the liability of the appellant-company stood suspended, there could be no question of any default having been committed by the appellant company towards repayment of the loan. According to Mr. Naphade, since the respondent had filed an application under Section 31(1)(aa) of the above Act making only a monetary claim against the appellant no.2, on a true construction of the above provisions the said Section permits enforcement only of the security given by the guarantor and since in the instant case the respondent had filed an application not for enforcement of any security but for claiming only the amount of guarantee the same could not be enforced against the appellant No.2. According to Mr. Naphade the appellant No.2 has not given any other security which could be proceeded

against by the respondent.

13. Mr. Naphade submitted that the Bombay High Court had no jurisdiction to entertain the application made under Section 31(1)(aa) of the Act and the order passed there above was a nugity.

14. It was also submitted that I.A. No.1 of 2007 was filed in the special leave petition for leave to place on record additional grounds as set out in the application and prayed that the same be allowed to be placed on record by way of additional grounds. Inasmuch as, such prayer was objected to on behalf of the respondent, Mr. Naphade referred to the decision of this Court in the Management of State Bank of Hyderabad vs. Vasudev Anant Bhide etc., 1969 (2) SCC 491, wherein while considering as to whether a claim was barred under Article 137 of the Limitation Act, an objection was taken that such ground had not been raised either before the Labour Court or even in the special leave petition filed in this Court. In the said case, on an application made to permit the appellant to raise the question of limitation based upon Article 137 of the Limitation Act, this Court permitted the appellant to raise such plea as no fresh facts were required to be investigated and the matter could be dealt with as a pure question of law.

15. Mr. Naphade also referred to the decision of this Court in Pandurang Ramchandra Mandlik v. Shantibai Ramchandra Ghatge and ors. (1989 Supp (2) SCC 627) which was a case dealing with ousting of jurisdiction of the Civil Court with regard to the provisions of Section 80 and Section 85 of the Bombay Tenancy and Agricultural Lands Act, 1948. Referring to the decision of the Judicial Committee in Secretary of State v. Mask and Company (AIR 1948 PC 105), where it was observed that the exclusion of the jurisdiction of the Civil Court was not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied, it was held that there was nothing in the language or context of Section 80 or Section 85 of the above Act to suggest that the jurisdiction of the Civil Court was expressly or by necessary implication barred with regard to the question as to whether the defendants have become statutory owners of the land.

16. Mr. Naphade concluded his submissions by urging that both the learned single Judge and the Division Bench of the Bombay High Court had misconstrued the provisions of Section 22 of the 1985 Act, as amended, in holding that the amended provisions granting protection to guarantors in suits for enforcement, could not be stretched to include proceedings for enforcement as well.

17. Appearing for the respondent, Mr. Jay Savla, learned advocate, contended that the controversy regarding the protection given by Section 22 of SICA to guarantors had been set at rest by this Court in Kailash Nath Agrawal\022s case (supra). He submitted that while in the case of Patheja Bros. Forgings & Stamping case (supra) this court had to consider whether a suit against a guarantor would be covered by the protection provided under Section 22(1) of SICA, the question in Kailash Nath Agrawal\022s case this Court was concerned not with a \023suit\024 but a \023proceeding\024 for recovery of dues and in those

circumstances this Court had examined the use of the expressions '\023proceeding\024' and '\023suit\024' used in different parts of Section 22(1) of SICA. It was in that context that this Court distinguished the earlier decision in *Patheja Bros. Forgings & Stampings* case and upon holding that since the legislature had expressly chosen to make a distinction between suits for recovery of money and enforcement of guarantees and proceedings for the recovery of money, such distinction had to be given effect to. It was held that even under the amended provisions only a limited protection had been afforded to guarantors with regard to the recovery of dues by way of suit, but not by way of proceedings, and, accordingly, a proceeding for recovery of money against a guarantor would stand outside the protection afforded under Section 22(1) of the 1985 Act.

18. It was urged that in the instant case, a situation similar to that in *Kailash Nath Agrawal\022s* case had arisen, since the proceeding had been initiated against the guarantor under the relevant provisions of the State Financial Corporations Act, 1951, which stood outside the purview of Section 22(1) of SICA.

19. Mr. Savla submitted that although the decision in *Kailash Nath Agrawal\022s* case was not referred to by the Division Bench of the Bombay High Court, a similar decision rendered by the Division Bench of the Bombay High Court in *Dewal Singhal vs. State of Maharashtra* (2001 (106) Company Cases 587) was relied upon. In the said decision it was held that the protection conferred on guarantors under Section 22 of SICA is a limited protection and the bar is restricted only to a suit and did not apply to any other proceedings.

20. Mr. Savla referred to the decision of this Court in *BSI Ltd. and Anr. v Gift Holdings Pvt. Ltd. and Another*, (2000 (2) SCC 737), which was rendered in a slightly different situation involving a fine imposed on a company in a criminal case against the company and its Directors under Section 138 of the Negotiable Instruments Act, 1881. It was held in that case that the ban envisaged in Section 22(1) of SICA would not be attracted in case of punishment of fine imposed on the company for such offence if it was with the consent of the BIFR. Furthermore, the ban imposed under the said provision of SICA against maintainability of a suit for recovery of money would not cover prosecution proceedings for an offence under Section 138 of the Negotiable Instruments Act. This Court observed that as the ambit of '\023suit\024' has been clearly delineated in Section 22(1) itself, it could not be stretched by employing the maxim that contemporaneous exposition is the best and strongest in law.

21. Mr. Savla urged that a proceeding under the State Financial Corporations Act could not be equated with a suit as had been held by this Court in *Gujarat State Financial Corporation vs. M/s. Natson Manufacturing Co.(P) Ltd.* (1979 (1) SCR 372) and having regard to the decision in *Kailash Nath Agrawal\022s* case (supra) such a proceeding would not be entitled to the protection envisaged under Section 22(1) of SICA.

22. As to the second limb of Mr. Naphade's submission regarding the right of the respondent to proceed against the guarantor before realising its securities, Mr. Savla reiterated the High Court's view that the claim against the guarantor was against him personally and was independent of the sureties given in mortgage by the Principal Debtor. Mr. Savla submitted that the decision rendered in Kailash Nath Agrawal's case does not appear to have been brought to the notice of the Hon'ble Judges deciding the Paramjeet Singh Patheja case (supra) and same was decided on other earlier decisions of this Court which dealt essentially with suits for recovery of dues.

23. It was submitted that since the Division Bench of the High Court took a view which finds support in Kailash Nath Agrawal's case, no case had been made out for interference with the same.

24. In the decisions of this Court cited before us, two divergent views have been expressed in respect of the same issue involved in this appeal. In the other decisions, this Court had no occasion to go into the said issue which involved the interpretation of the Section 22(1) of the SICA in respect of either 'proceedings' or 'suits' respectively. In Kailash Nath Agrawal's case (supra) this Court has taken the view that the legislature appears to have knowingly used two different expressions in Section 22(1) of SICA, namely, 'proceeding' 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 'proceeding' could not be extended to include suits as well nor could the expression 'suit' be extended to include the expression 'proceeding' also. On the other hand, in Paramjeet Singh Patheja's case (supra) it was held that the expression 'suit' which extends the protection of Section 22(1) to guarantors, would have to be interpreted to include 'proceeding' also, in view of the intention of the legislature to protect sick industrial companies where references were pending before the BIFR. It is also evident from the decision in Paramjeet Singh Patheja's case (supra) that the views expressed in Kailash Nath Agrawal's case (supra) 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 coordinate Benches.

25. In such circumstances, we consider it fit and proper that the matter should be referred to a larger Bench to resolve the existing anomaly resulting from the different views expressed in the two above-mentioned cases.

26. Accordingly, the Registry is directed to place this matter before the Hon'ble the Chief Justice of India for appropriate orders in the light of what has been stated hereinbefore.