Navbharat International Ltd. Vs Cargo Onboard m.v. Amitees (at Kandla), Mohsen Line General Trading LLC., Best Food International Pvt. Ltd. and Islamic republic of Iran Shipping Lines

Court: Bombay High Court

Date of Decision: Feb. 20, 2014

Acts Referred: Civil Procedure Code, 1908 (CPC) - Order 6 Rule 1, Order 7 Rule 11, Order 7 Rule 12, Order 7 Rule 13 141
Constitution of India, 1950 - Article 226
Limitation Act, 1963 - Section 2(l)
Negotiable Instruments Act, 1881 (NI) - Section 138
Sick Industrial Companies (Special Provisions) Act, 1985 - Section 16 17 18 22 22(1)

Citation: (2015) 2 ABR 125 : (2015) 5 ALLMR 382 : (2014) 5 BomCR 312

Hon'ble Judges: K.R. Shriram, J

Bench: Single Bench

Advocate: Ashwin Shanker, for the Appellant; David Gomes for Defendant No. 2 and Mr. A.M. Vernekar for Defendant No. 3, for the Respondent

Judgement

K.R. Shriram, J.
Notice of Motion No. 2853 of 2010 is taken out on behalf of Defendant No. 2 and Notice of Motion No. 3649 of 2010

is taken out on behalf of Defendant No. 3. Both the parties have taken out their respective Notices of Motion as parties to whom prejudice was

caused by the ex-parte order dated 12th January 2010 obtained by the Plaintiff for arrest of the cargo on board m.v. Amitees at Kandla. While

obtaining the ex-parte order of arrest, the Plaintiff had given an undertaking in writing to this court under rule 941 of The Bombay High court (OS)

Rules to pay such sums by way of damages as this Hon''ble Court may award as compensation in the event of a party sustaining prejudice by such

ex-parte order. The order of arrest was held to be wrongful by the Division Bench of this Court by a judgment and order dated 23rd March 2010.

2. On 6th September 2010, the Plaintiff sought leave of this Court to withdraw the Suit. The application for withdrawal was opposed by the

counsel for Defendant No. 2. However, the Suit was allowed to be withdrawn with the observation that the withdrawal of the Suit cannot affect

the Defendants'' rights to enforce the undertaking by taking out a Notice of Motion. Against this order, the Plaintiff filed an Appeal bearing (Lodg.)

No. 70 of 2011 which came to be dismissed by an order dated 17th August 2011. While dismissing the Appeal, the Division Bench observed as

under:

2 This is a most frivolous Appeal. The Plaintiff has withdrawn the Suit. The Court permitted him to withdraw the Suit. The Plaintiff before

withdrawing the Suit had applied for interim relief and had given an undertaking to the Court that in case the Defendants suffer any damages as a

result of the interim relief that is granted in his favour, he will make the good loss. All that is done by the learned Single Judge by the order

impugned in the Appeal is that liberty is given to the Defendants to take out proceedings for enforcement of the undertaking which was given by the

Appellant/Plaintiff in his Suit. By no stretch of imagination, the order of the learned Single Judge granting liberty to the Defendants to enforce the

undertaking given by the Plaintiff can be faulted. The Appeal is therefore rejected. The Appellant is directed to pay to the Respondents a sum of

Rs. 25,000/- as and by way of costs.

3. Against this order, the Plaintiff filed an SLP which also came to be dismissed by an order of the Apex Court on 14th January 2012.

4. In both the Notices of Motion the Defendants have requested the Court to direct the Plaintiff to pay damages as per the undertaking given by

the Plaintiff to this Court.

5. On 13th January 2014, when both the Notices of Motion came up for hearing, the Plaintiff filed an affidavit dated 13th January 2014, by which,

the Plaintiff brought to the notice of this Court and Defendant Nos. 2 and 3 that the Plaintiff-Company has filed a reference before the Board for

Industrial and Financial Reconstruction (BIFR) under Sick Industrial Companies Act, 1985 (""SICA"") and the reference is pending.

6. In view thereof, the necessity arose, before going into the merits of the damages mentioned in the notices of motion, to determine whether the

present Notices of Motion can be proceeded with or not in view of the provisions of Section 22 of SICA.

7. The matter was stood over to 20th January 2014 on which date again it was stood over to 24th January 2014. The matter was partly heard on

24th January 2014 and due to paucity of time, was stood over to 27th January 2014 for further hearing.

8. Mr. Vernekar appearing for Defendant no. 3 informed the Court that the matter is pending before the AAIFR and not BIFR. Still the question

remains as to whether we can proceed with both the Notices of Motion or not.

9. Since both the Notices of Motion were taken out in view of the written undertaking given by the Plaintiff to this Court while obtaining an ex-

parte order of arrest and the reference of the plaintiff was pending before the AAIFR, preliminary issue as under has to be determined before both

the notices of motion are heard on merits:

(a) Whether invocation of undertaking given to this Court under Rule 941 of the Bombay High Court (O.S.) Rules at the time of obtaining an ex-

parte order of arrest would be a proceeding and/or suit as contemplated u/s 22 of the Sick Industrial Companies Act, 1985?

10. This issue has to be decided first before the Notice of Motion is heard further to decide whether the applicants have infact suffered prejudice

and if so the quantum of damages to be awarded on compensation. This is because if the Court comes to the conclusion that it has all the

ingredients of a proceeding and/or suit u/s 22 of SICA, this Notice of Motion cannot be proceeded with further except with the consent of the

Board or, as the case may be, the Appellate Authority.

11. Before we proceed further, it is necessary to reproduce Section 22 of SICA :

Section 22. Suspension of legal proceedings, contracts, etc.

(i) 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.

(ii) Where the management of the sick industrial company is taken over or changed, in pursuance of any scheme sanctioned u/s 18],

notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law or in the memorandum and articles of association of

such company or any instrument having effect under the said Act or other law--

(a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the

company;

(b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.

(iii) Where an inquiry u/s 16 is pending or any scheme referred to in section 17 is under preparation or during the period] of consideration of any

scheme u/s 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with

respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements,

awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick

industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and

liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such

manner as may be specified by the Board:

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that

the total period shall not exceed seven years in the aggregate.

(iv) Any declaration made under sub-section (3) with respect to a sick industrial company shall have effect notwithstanding anything contained in

the Companies Act, 1956 (1 of 1956) or any other law, the memorandum and articles of association of the company or any instrument having

effect under the said Act or other law or any agreement or any decree or order of a court, tribunal, officer or other authority or of any submission,

settlement or standing order and accordingly.

(a) any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration, and all proceedings

relating thereto pending before any court, tribunal, officer or other authority shall remain stayed or be continued subject to such declaration; and

(b) on the declaration ceasing to have effect--

(i) any right, privilege, obligation or liability so remaining suspended or modified, shall become revived and enforceable as if the declaration had

never been made; and

(a) any proceeding so remaining stayed shall be proceeded with, subject to the provisions of any law which may then be in force, from the stage

which had been reached when the proceedings became stayed.

(v) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy

for the enforcement thereof remains suspended under this section shall be excluded.

12. Mr. Vernekar, who appeared for Defendant no. 3 submitted as under:

(a) The present Notice of Motion can neither be a proceeding nor a suit and the Proceeding and Suit as contemplated u/s 22 of SICA are not one

and the same.

(b) We need not look into whether it will be a ""proceeding"" because Section 22 only says ""proceedings"" for (i) the winding up of industrial

company, (ii) or execution or distress or the like against properties of the Industrial Company and (iii) or for the appointment of a receiver in

respect thereof. As the present notice of motion is not for winding up or execution or distress or the like against properties of the plaintiff or

appointment of receiver in respect thereof, whether the present notice of motion is ""proceeding"" or not as contemplated u/s 22 need not be gone

into at all.

(c) The admitted position was, in respect of an industrial company, no Suit for recovery of money is maintainable and if it is pending, it is to be

proceeded with further only if the BIFR or the AAIFR consents for the same. Therefore, the question that remains to be determined is whether a

Notice of Motion taken out by a party in view of the undertaking given to this Court at the time of obtaining an ex-parte order of arrest will be a

suit for recovery of money for the bar to apply. The provisions of Section 22(1) of the SICA would not apply to such Notices of Motion pending

before the Court inasmuch as these are not in the nature of Suit for recovery of money.

(d) By amendment made in Section 22(1) of SICA by Act of 1994, the provision was extended, inter-alia, to Suit for recovery of money and a

notice of motion of the kind taken out herein were not Suits. He submitted that the words ""suit for recovery of money has to be given a restrictive

meaning. 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 would have made the necessary provision like it did in inserting as it did for the expression proceedings in

the first para of S. 22 ""or the like"". Therefore, the term ""suit"" has to be confined to those actions which are dealt with under the CPC and not in the

comprehensive or over arching sense so as to apply to any original proceedings before any legal forum. He relied upon the judgment of the Delhi

High Court in the matter of M/s LLoyd Insulations (India) Ltd. and Others Vs. Cement Corporation of India Ltd. and Another, and submitted that

restrictive meaning needed to be given to the expression ""Suit for recovery of money"". In the said matter, the Delhi High Court held that provisions

of Section 22 do not apply to proceedings pending under the Arbitration Act. He also relied upon BSI Ltd. and Another, etc. Vs. Gift Holdings

Pvt. Ltd. and Another, etc., in which the apex court had held that Section 22(i) of SICA is not a hurdle against maintainability and prosecution of

complaint u/s 138 of the Negotiable Instrument Act, 1881. He also relied upon the judgment of the Delhi High Court in Inderjeet Arya & Anr. v/s.

ICICI Bank Ltd. W.P. No. 7253/2011 delivered on 02-05-2012 in which the Court held the term suit in S. 22 of SICA does not apply to action

for recovery proceedings filed before Debt Recovery Tribunal.

(e) Order IV, Rule 1 provides ""every suit shall be instituted by presenting a plaint and every plaint shall comply with the rules contained in Orders

VI and VII, so far as they are applicable. Order VI, Rule 1 of the CPC provides ""pleading shall mean plaint or written statement"". This means the

code envisaged a Suit to begin with a plaint. When a Suit is filed with a plaint, a written statement is filed to the plaint. Issues are also framed. In

contrast, in a Notice of Motion, no plaint is filed and therefore no written statement is filed. No issues are framed and no writ of summons is issued.

The Suit must start with a plaint and culminate in a decree and where the adjudication process is not starting with a plaint and culminating in a

decree, it cannot be termed as ""Suit"". Therefore, a Notice of Motion, by any stretch of imagination, cannot be equated to a Suit.

(f) Even Section 141 of the CPC distinguishes between a Suit and proceeding and Section 141 reads as under :

141. Miscellaneous proceedings-- The procedure provided in this Code in regard to suit shall be followed, as far as it can be made applicable, in

all proceedings in any Court of civil jurisdiction.

[101][Explanation.--In this section, the expression ""proceedings"" includes proceedings under Order IX, but does not include any proceeding under

article 226 of the Constitution.]

Hence notice of motion is certainly not a suit.

(g) In support of his submission that Code envisages a suit to begin with a plaint and culminating in a decree and notice of motion cannot be a suit,

he also referred to Order VII, Rule 11, Rule 12 and Rule 13 of CPC :

11 ""the plaint shall be rejected in the following cases .....

12 ""Procedure on rejecting plaint-- Where a plaint is rejected the Judge shall record an order to that effect with the reasons for such order.

13 ""Where rejection of plaint does not preclude presentation of fresh plaint-- The rejection of the plaint on any of the grounds herein before

mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

(h) Even under Limitation Act, 1963, Suit, as could be seen from Section 2(l) does not include an application and a notice of motion is only an

application.

(i) The undertaking is between the Court and the Plaintiff and notice of motion taken out is only to assist the Court to determine the quantum of

damages to be awarded.

(j) The undertaking that the Plaintiff has furnished to the Court is under Rule 941 of the Bombay High Court (Original Side) Rules which provides :

941. Application to arrest property in a Suit in rem.-

If the Suit is in rem an application for the arrest of the property proceeded against shall be made to the Judge in Chambers and shall be supported

by affidavit. The affidavit shall state the nature of the claim and that it has not been satisfied. It shall also state the nature of the property to be

arrested and if the property is a ship, the name and nationality of the ship. There shall be annexed to the affidavit a certificate of the Prothonotary &

Senior Master certifying that search has been made in the Caveat Warrant Book and that no caveat has been filed against the issue of a warrant of

the arrest of the said property.

A party applying under this rule shall give an undertaking in writing, or through his Advocate, to pay such sum by way of damages as the Court

may award as compensation in the event of a party affected sustaining prejudice by such order.

(emphasis supplied)

Therefore, Rule 941 expressly provides that a party applying for arrest of the property in a Suit in rem shall give an undertaking in writing or

through his advocate to pay such sum by way of damages as the Court may award as compensation in the event of a party affected sustaining

prejudice by such order.

(k) The plaintiff has given such an undertaking. Clause (3) of the undertaking that the Plaintiff gave while obtaining the ex-parte order of arrest

reads as under:

3 The Plaintiffs hereby give an undertaking to this Hon''ble Court to pay such sums by way of damages as this Hon''ble Court may award as

compensation in the event of the Defendants and/or any affected party sustaining prejudice pursuant to the order passed by this Hon''ble Court

directing the arrest of the Defendant cargo.

(emphasis supplied)

(l) Suit u/s 22(1) of the SICA cannot be stretched to include anything other than Suits as provided under the Section itself namely Suit for recovery

of money or for the enforcement of any security against the industrial company or any guarantee in respect of any loans or advance granted to the

industrial company and a Suit has to be construed as different from proceeding and Suit must be something which is commenced in accordance

with the Code i.e. by filing a plaint. If the legislature wanted the Suit to include Notice of Motion or any proceeding or any application which could

end in any company having to pay any money, then Section 22(1) of SICA would have expressly provided for the same.

(m) Even the Bombay High Court Original Side Admiralty Rules in Rule 966 is differentiating between the Suit and the Proceeding on the admiralty

side.

13. Mr. David Gomes, Counsel who appeared for Defendant No. 2, in addition to adopting the submissions of Mr. Vernekar, submitted that the

undertaking that is given by the Plaintiff to the Court while obtaining an ex-parte order of arrest has to be seen as a subject matter between the

Plaintiff and the Court. Here is a case that the Plaintiff had given an undertaking to the court to pay to any party that has suffered prejudice by the

ex-parte order of arrest such sum of money as damages as the Court would award. As the Admiralty Registrar of the court or the Court itself

cannot assess the amount of damages to be paid, since enough material will not be available with the Admiralty Registrar or the Court, the

Defendants have taken out an application by way of Notice of Motion to assist the Court to ascertain the quantum of damages to be awarded and

that is why this Court did not require a Counter Claim to be filed which means no plaint to be filed, no writ of summons to be issued and even

court fees need not be paid. Mr. Gomes suggested that the present proceedings under the undertaking given are like penal proceeding or like

contempt proceedings which is an issue between the Court and the Contemnor. Any other party is only providing the details or material for the

court to conclude whether there is contempt or not like in this case whether prejudice is suffered or not and the damages to be awarded. Mr.

Gomes further submitted that if the present Notice of Motion of the Plaintiff shall not be proceeded with further except with the consent of the

BIFR or AAIFR, it will set a wrong precedent. He submitted that any Plaintiff may give an undertaking to obtain an ex-parte order of arrest of a

ship or cargo which is a very drastic action and once he realises that the Courts are against him after the order was obtained, he would, to avoid

fulfilling the undertaking given to the Court, simply go and file a reference in the BIFR to defeat the undertaking and prolong the matter. Mr. Gomes

also submitted that it is absolutely unnecessary for any Court to take consent of the BIFR or AAIFR to take action against the party which has

given an undertaking in writing to the Court or to invoke the undertaking given to the Court.

14. In response, Mr. Ashwin Shanker for the Plaintiff relied upon various judgments in support of his submissions. For the sake of convenience my

view on each judgments relied upon by him is stated soon after his submissions. Mr. Shanker''s submissions were as under:

(a) The SICA does not provide where to look for definition of Suit. Hence, this Court cannot look anywhere else. For this have a look at Section

3(2)(a) and (b) of SICA which are as under:

3.....

(2) (a) Words and expressions used and not defined in this Act shall have the meanings, if any, respectively assigned to them in the Companies

Act, 1956 (1 of 1956);

(b) Words and expressions used but not defined either in this Act or in the Companies Act, 1956 (1 of 1956), shall have the meanings, if any,

respectively assigned to them in the Industries (Development and Regulation) Act, 1951 (65 of 1951).

Therefore, this Court can look only into the Companies Act or the Industries (Development and Regulation Act) Act, 1951 and the Court cannot

look into the CPC or any other provision to know the meaning of the word ''Suit''. This is also contained in this written submission. Mr. Ashwin

Shanker however, later withdrew this submission of his.

(b) The undertaking cannot be read as penal provision. According to him, penal provision means equating it to criminal action and therefore

reliance upon the judgment reported in BSI Ltd. and Another, etc. Vs. Gift Holdings Pvt. Ltd. and Another, etc., by the Defendants is incorrect.

(c) In Raheja Universal Limited Vs. NRC Limited and Others, it is held that BIFR has jurisdiction to examine the matter and grant or refuse its

consent for institution, continuation and recovery of dues payable to a particular creditor, whatever the nature of such dues may be. According to

Mr. Ashwin Shanker, the words ""whatever the nature of the Suit may be"" has to be given very wide interpretation to include the present

proceeding. He also relied upon paragraph 35 of the same judgment which reads as under :

35 On the analytical analysis of the above-stated dictum of this Court and the legislative purpose and object of the Act, it has to be held that on its

plain reading the provisions of Sections 22(1) and 22(3) of the Act are the provisions of wide connotation and would normally bring the specified

proceedings, contractual and non-contractual liabilities, within the ambit and scope of the bar and restrictions contained in Sections 22(1) and

22(3) of the Act of 1985 respectively. The legislative intent is explicit that the BIFR has wide powers to impose restrictions in the form of

declaration and even prohibitory/injunctive orders right from the stage of consideration of a scheme till its successful implementation within the

ambit and scope of Sections 22(3) and 22A of the Act. Section 22 of the Act of 1985 is very significant and of wide ramifications and application.

More often than not, the jurisdiction of the BIFR is being invoked, necessitated by varied actions of third parties against the sick industrial

company. The proceedings, taken by way of execution, distress or the like, may have the effect of destabilizing the finalization and/or

implementation of the scheme of revival under consideration of the BIFR. It appears that, the Legislature intended to ensure that no impediments

are created to obstruct the finalization of the scheme by the specialized body. To protect the industrial growth and to ensure revival, this preventive

provision has been enacted. The provision has an overriding effect as it contains non obstante clauses not only vis-Ã¯Â¿Â½-vis the Companies Act but

even qua any other law, even the memorandum and articles of association of the industrial company and/or any other instrument having effect under

any other Act or law. These proceedings cannot be permitted to be taken out or continued without the consent of the BIFR or the AAIFR, as the

case may be. The expression ''no proceedings'' that finds place in Section 22(1) is of wide spectrum but is certainly not free of exceptions. The

framers of law have given a definite meaning to the expression ''proceedings'' appearing u/s 22(1) of the Act of 1985. These proceedings are for

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. The expression ''the like'' has to be read ejusdem generis to the term ''proceedings''. The words

''execution, distress or the like'' have a definite connotation. These proceedings can have the effect of nullifying or obstructing the sanctioning or

implementation of the revival scheme, as contemplated under the provisions of the Act of 1985. This is what is required to be avoided for effective

implementation of the scheme. The other facet of the same Section is that, no Suit for recovery of money, or for enforcement of any security

against the industrial company, or any guarantee in respect of any loan or advance granted to the industrial company shall lie, or be proceeded with

further without the consent of the BIFR. In other words, a Suit for recovery and/or for the stated kind of relief''s cannot lie or be proceeded further

without the leave of the BIFR. Again, the intention is to protect the properties/assets of the sick industrial company, which is the subject matter of

the scheme. It is difficult to state with precision the principle that would uniformly apply to all the proceedings/suits falling u/s 22 of the Act of 1985.

Firstly, it will depend upon the facts and circumstances of a given case, it must satisfy the ingredients of Section 22(1) and fall under any of the

various classes of proceedings stated thereunder. Secondly, these proceedings should have the impact of interfering with the formulation,

consideration, finalization or implementation of the scheme. Once these ingredients are satisfied, normally the bar or limitation contained in Section

22(1) of the Act of 1985 would apply. For instance, execution of a decree against the assets of a company, if permitted, is bound to result in

disturbing the scheme, which has or may be framed by the BIFR. The sale of an asset during such execution or even withdrawing the money from

the bank account of the company would certainly defeat the very purpose of the protection sought to be created by the Legislature u/s 22(1) of the

Act of 1985. On the other hand, a proceeding taken out for possession of the tenanted premises, under the provisions of Karnataka Rent Control

Act, have been held to be proceedings not falling within the ambit and scope of Section 22(1) of the Act of 1985. This was for the reason that the

contractual tenancy between the company and the owner had been terminated and the company only had an interest as a statutory tenant. Such

interest was neither assignable nor transferable. This Court held that it could not be regarded as "property" of the sick company for the purposes

of the provisions of Section 22(1) and as such, these provisions were not attracted. (Shree Chamundi Mopeds Ltd. Vs. Church of South India

Trust Association CSI Cinod Secretariat, Madras,).

(emphasis supplied)

(d) It has to be held that on its plain reading the provisions of Sections 22(1) and 22(3) of the Act are provisions with wide connotation and would

normally bring the specified proceedings, contractual and non-contractual liabilities, within the ambit and scope of the bar and restrictions contained

in Sections 22(1) and 22(3) of the Act of 1985 respectively.

(e) Relying on Raheja Universals Judgment, he also submitted that any proceeding before the BIFR or AAIFR should remain obstruction free and

the events should take place as preordained, during consideration and successful implementation of the formulated scheme.

A judgment cannot be read in bits and pieces. In paragraph 35 of the case on which Mr. Shanker largely relied upon expressly provides that

proceeding as mentioned in Section 22(1) is different from Suit mentioned therein. Both, of course, are not free of exception. In fact the Apex

Court has held that the purpose of Section 22(1) of SICA is to avoid the effect of nullifying or obstructing the sanctioning or implementation of the

scheme, as contemplated under the provisions of the Act of 1985. This is because the intention of Section 22 is to protect the property/asset of the

sick industrial companies which is the subject matter of the scheme. The whole thing will depend upon the facts and circumstances of a given case

and it must satisfy the ingredients of Section 22(1) and fall under any of the various classes of proceedings stated there under. The Court further

held that such proceedings that have the impact of interfering with the formulation, consideration, finalization or implementation of the scheme can

be considered for the bar to apply and it is necessary that these ingredients are satisfied for the bar or limitation contained in Section 22(1) of the

Act of 1985 to apply.

The present notice of motion is taken out due to the undertaking given by the plaintiff. It cannot be even suggested at this stage that hearing this

notice of motion will interfere with the scheme that might be under contemplation. Perhaps, while the defendants try to enforce the damages

awarded, it could be looked at. We need not, at this stage, consider or decide that. This judgment therefore is of no use to the Plaintiff. On the

contrary, it goes against the Plaintiff.

(f) Relying on paragraph 12 of the judgment in the matter of Trackparts of India Ltd. Vs. Cosmos Co-operative Bank Ltd. and Others, he

explained the object of SICA.

There is no doubt on the purpose or object of the statute. What we have to see is whether Section 22 of the Statute comes in to play in the present

matter or not?

(g) In any case language of Section 22(1) is very wide and contains non-obstante clause - ""notwithstanding anything contained in the Companies

Act, or any other law..... "". It prohibits proceedings not only under the Companies Act but even qua any other law. The said section gives an

absolute immunity to proceedings and/Suit instituted against a sick company which has been referred to BIFR.

In my opinion, no provision of law can give immunity to any party who has given an undertaking to the Court relying on which, the Court is to pass

an ex-parte order of arrest.

(h) The Apex Court has expressly recognised that this Act is a special statute containing special provisions. Section 22 of SICA has to be strictly

applied. He relied upon paragraph 21 of the judgment in Jay Engineering Works Ltd. Vs. Industry Facilitation Council and Another, , which reads

thus :

21 The 1985 Act was enacted in public interest. It contains special provisions. The said special provisions had been made with a view to secure

the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts for

preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of

the measures so determined and for matters connected therewith or incidental thereto.

Again this judgment is of no use to the Plaintiff inasmuch as the Court held that Section 22 provides that a safeguard against the impediment that is

likely to be caused in the implementation of the scheme to revive the industrial company and that the bar or embargo envisaged in Section 22(1) of

the Act can apply only to such of those dues reckoned or included in the sanctioned scheme. The matter in hand is whether the Plaintiff has given

an undertaking to the Court while obtaining ex-parte order of arrest and the action to make the plaintiff comply with the undertaking to be given to

the court, again, by any stretch of imagination, cannot be termed as the impediment in attempts to restructure or reorganize in industrial company.

(i) Broad meaning should be given to the word ""Suit"". For this he relied upon Maharashtra Tubes Ltd. Vs. State Industrial and Investment

Corporation of Maharashtra Ltd. and Another, .

This judgment is of no use to the Plaintiff inasmuch as the said judgment relates only to "proceeding" and in 1994 there was an amendment to

Section 22(2) of the SICA.

(j) Mr. Shanker also relied upon the judgment of this Court delivered by a Division Bench of this Court in the matter of Hindustan Antibiotics Ltd.

Vs. Special Land Acquisition Officer (14) and Others, . According to him, the Court in paragraph 11, while considering what are the legal

proceedings contemplated by Section 22 of SICA as included ""proceedings for recovery of moneys due from the Company"". Mr. Shanker argued

that therefore the "Proceedings" and "Suit" have one and the same.

It is absolutely incorrect inasmuch as "proceedings"" contemplated by provisions of Section 22(2) of SICA must be such that it should be analogous

to "proceedings" mentioned therein. The word "proceedings" used by the Court in paragraph 11 is a general expression and cannot by any stretch

of imagination be meant to or equated to "Suit". In fact, the Apex Court in the Raheja Universal vs. NRC Limited & Ors. matter and Lloyd

Insulations (India) & Ors. Vs. Cement Corporation of India matter has categorically said the terms ""proceedings"" and ""Suit"" are totally different

from each other.

Moreover, in the judgment of Hindustan Antibiotics, the Division Bench has further relied upon and reproduced paragraph 12 of M/S Patheja

Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, that says :

We have analysed the relevant words in Section 22 and found that they are clear and unambiguous and that they provide that no Suit for the

enforcement of a guarantee in respect of any loan or advance granted to the concerned industrial company will lie or can be proceeded with or

without the consent of the Board or the Appellate Authority. When the words of a legislation are clear, the court must give effect to them as they

stand and cannot demur on the ground that the legislature must have intended otherwise.

(emphasis supplied)

(k) Mr. Ashwin Shanker also submitted that once reference to BIFR is filed all Civil Court jurisdiction is ousted and provisions of Section 22 is

given an overriding effect and relied upon the following :

(i) Real Value Appliances Ltd. Vs. Canara Bank and Others, .

(ii) In Ashok Organic Industries Ltd. Vs. Asset Reconstruction Company (India) Limited (ARCIL), .

(iii) Kiran Singh and Others Vs. Chaman Paswan and Others, .

(iv) Real Value Appliances Ltd. Vs. Canara Bank and Others, .

(l) The submission of the Defendants that the undertaking is an agreement between the Court and the Plaintiff is erroneous since some party has to

enforce the undertaking. He submitted that there is no difference between a Counterclaim or a Suit or a Notice of Motion. Mr. Ashwin Shanker

submitted that in the unreported judgment of this Court in Admiralty Suit No. 8 of 2010 in case of Aviat Chemicals Pvt. Ltd. Vs. Jagmohansingh

Arora & Ors vs. m.v. FU JIN & Anr. (FU JIN). The Court had in paragraph 12 held that when an undertaking is given under Rule 941, it can be

enforced by any person entitled to enforce the same. Therefore, since it has to be enforced, it cannot be read as an issue between the Court and

the Plaintiff.

Mr. Shanker''s submissions are not correct. Paragraph 12 of the said judgment reads as under:

12. In the circumstances, it must be held that where an undertaking is given under Rule 941, it can be enforced by any person entitled to enforce

the same by filing an application in the same proceeding before the same court. In other words, it is not necessary for a party to adopt independent

proceedings or a Counterclaim for the enforcement of an undertaking furnished under Rule 941. That a party would be entitled to file independent

proceedings or a Counterclaim to enforce such an undertaking would not make a difference.

In fact, in the same para the Court has also said ''''.... In other words, it is not necessary for a party to adopt independent proceedings....''''. It is,

therefore, something between the Court and the Plaintiff and Mr. Gomes is correct in his submissions. Moreover, like any judgment, we cannot

read a paragraph in isolation. In the said judgment of FU JIN, the Court has concurred and followed the judgment of another Single Judge of this

Court in Aviat Chemicals Private Limited Vs. Jagmohansingh Arora and others, in which effect of Rule 148 of the Bombay High Court Rules was

considered. Rule 148 is similar to Rule 941. I say "similar" and not "identical" because under Rule 148, there is discretion for the Court to exempt

the party from giving an undertaking in writing. It says ""unless the Court otherwise directs"" whereas under Rule 941, there is no such exemption.

The undertaking, therefore, is mandatory in nature. The object underlying the Rule is to put the party at whose instance an ex-parte order of arrest

is issued on notice that if any party affected by the ex-parte order of arrest is sustains prejudice by the said order, then the party obtaining an ex-

parte order of arrest is bound to pay such sum as damages as the Court may award to the party injured. The Plaintiff, therefore, is aware that by

obtaining such an ex-parte order, he is also exposing himself to serious consequences and may have to pay large sum as damages.

While following Aviat Chemicals Pvt. Ltd. judgment, this Court in paragraphs 8 to 12 held as under :

8. I would, however, reject the contention that a Notice of Motion cannot be filed in these proceedings to enforce the undertaking. Rule 941 is

similar to Rule 148 which reads as under:-

148. Undertaking to pay damages to be given by party applying for interim relief"s.- A party to whom interim relief has been granted shall, before

the order is issued, unless the court otherwise directs, give an undertaking in writing or through his Advocate to pay such sum by way of damages

as the Court may award as compensation in the event of a party affected sustaining prejudice by such order.

9. A learned single Judge of this court in Aviat Chemicals Private Limited Vs. Jagmohansingh Arora and others, considered the effect of Rule 148.

In that case, the Respondent had filed a Company Application for setting aside an order dated 17th December, 1998 on the ground that the

Applicant had obtained the order from the Company Court by suppressing material facts and playing a fraud on the court. On 4th September,

1999, the Respondents were granted ad-interim relief"s whereby the Applicant was restrained from alienating or encumbering its immovable

property and from carrying out production activities from its unit. An undertaking as per Rule 148 was furnished by the Respondents. The

Company Application was, however, dismissed by an order dated 9th April, 1999, wherein it was held that the application made by the

Respondents was not bona-fide and was speculative in nature.

The Applicant took out a Chamber Summons for an order directing the Respondents to pay an amount of Rs. 1,22,77,000/- on account of the

loss of profit and reputation and good-will and legal costs as a result of the ad-interim order wrongly obtained.

It was contended on behalf of the Respondents that the undertaking given under Rule 148 could not be enforced by the Judges Summons; that the

quantification of damages can only be done by a civil court and that the Applicant would have to take out necessary legal proceedings in a civil

court for that purpose. On behalf of the Applicant it was submitted that the only appropriate remedy is to refer the disputed amount to the

Commissioner for Taking Accounts. The learned Judge, rejecting this contention held as under:-

5 I have considered the various submissions made by the learned counsel. In my view, if one was to accept the submission of Mr. V. Krishna that

even if an undertaking is given under Rule 148 of the High Court (O.S.) Rules, the matter of quantification of damages can only be decided by a

Civil Court, it would almost amount to obliterating the Rule. Rule 148 reads as under:

A party to whom interim relief has been granted shall, before the order is issued, unless the Court otherwise directs, give an undertaking in writing,

or through his Advocate to pay such sum by way of damages as the Court may award as compensation in the event of a party affected sustaining

prejudice by such order.

6. A perusal of this Rule shows that it is mandatory in nature. A party to whom interim relief has been granted is bound before the order is issued

to give an undertaking in writing to pay such sum by way of damages as the Court may award as compensation in the event of a party affected

sustaining prejudice by such order. This undertaking can only be waived on the specific directions of the Court. The object underlying the Rule is to

put the party at whose instance the interim order is obtained, on notice that if the other parties sustain any injury, then the party obtaining the interim

order is bound to compensate the party injured.....

9. From a perusal of the above, it shows that there is no limit on the quantum of damages which can be granted under Rule 148 of the High Court

(O.S.) Rules. It also becomes apparent that it is not necessary to compel the parties to undergo the lengthy procedure of the civil Suit to establish

the quantum of damages. The matter can well be left to the Commissioner of this Court to ascertain the damages.

10 In view of the above, the matter is referred to the Commissioner for taking accounts to calculate the amount which is due and payable by

Aroras to Aviat on the basis of the claim put forward in exhibit G to the affidavit in support of the Judge''s Summons. The Commissioner is

directed to submit a report of quantification of damages under the separate heads within a period of four weeks from the receipt of copy of this

order.

10 The relevant part of Rule 941 is almost identical to Rule 148. The only difference is the stage/time when the undertaking is to be furnished. This

is of no consequence to the question under consideration. The ratio of the judgment, therefore, applies to an undertaking under Rule 941. Apart

from being bound by the judgment in Aviat''s case, I am in respectful agreement with the same. A view to the contrary would defeat the very

purpose of the Rule. A view to the contrary would also lead to the undertaking becoming unenforceable in certain cases which itself militates

against the submission on behalf of the Plaintiff. The undertaking is given to the court which passes the order. It is furnished in the proceedings in

which the order is passed. The undertaking, therefore, is enforceable by the court in which the proceedings are filed and in which the order is

passed.

11 If it is held otherwise to wit if the party seeking to enforce the undertaking is driven to a civil Suit, the court to which the undertaking is furnished

would not be in a position to enforce the undertaking if it does not have the pecuniary jurisdiction to try the Suit. This would lead to the most

illogical result and be contrary to Rule 941. It would render Rule 941 nugatory.

12 In the circumstances, it must be held that where an undertaking is given under Rule 941, it can be enforced by any person entitled to enforce the

same by filing an application in the same proceeding before the same court. In other words, it is not necessary for a party to adopt independent

proceedings or a Counterclaim for the enforcement of an undertaking furnished under Rule 941. That a party would be entitled to file independent

proceedings or a Counterclaim to enforce such an undertaking would not make a difference.

(emphasis supplied)

Paragraph 14 of the said judgment reads as under :

14. That the learned Judge, by the order dated 5th May, 2010, granted liberty to the first-Defendant to recover the amounts sought in prayer (b)

of the earlier Notice of Motion by instituting a counter claim or other appropriate proceedings would not dis-entitle the first-Defendant to file

another Notice of Motion for the same relief. For whatever reason, prayer (b) of that Notice of Motion was not pressed at that time. The first-

Defendant was, therefore, granted liberty to institute a counter claim ""or other appropriate proceedings to recover the amounts set out in prayer

clause (b)"". A Notice of Motion to enforce the undertaking is an appropriate proceeding. The first-Defendant is, therefore, at liberty to adopt such

proceedings as well.

Therefore, this Court has itself distinguished between a Counterclaim and a Notice of Motion. Counterclaim has the same effect as a Cross-Suit

and shall be treated as a plaint and governed by the Rules applicable to the plaint. Therefore, a Counterclaim is different from a notice of motion.

This Court has also held that if the party seeking to enforce the undertaking is driven to a civil suit it would render Rule 941 nugatory. Therefore, it

is obvious that a present notice of motion by any stretch of imagination cannot be termed a ""Suit"".

(m) Existence of an undertaking does not change the scenario and the application has to be seen as a Suit or a Counterclaim.

This submission of Mr. Shanker cannot be accepted inasmuch as giving an undertaking to the Court makes all the difference. If the Plaintiff had

moved the Court for an ex-parte order of arrest, the Court would not have issued the ex-parte order but for undertaking given by the Plaintiff

under Rule 941.

(n) That in view of the above case-laws and analysis of the Section 22 of the Act it is clear that the Courts have accepted the wider connotation of

the words "proceedings" and "Suit" appearing in Section 22(1). The proceedings, contractual and non-contractual liabilities are within the ambit

and scope of the bar and restrictions contained in Sections 22(1) of the Act. This has been done to make sure that no such impediments are

created by way of other judicial proceedings which would hinder the implementation of revival schemes of BIFR for a sick company.

(o) The word ""Suit"" is widely defined under Rule 927(7) of the Bombay High Court (Original Side) Rules as ""any Suit, action or proceeding

instituted in the Court in its Admiralty Jurisdiction"".

I am afraid this again is of no use to the plaintiff. Rule 927(7), only provides that Suit referred in part 3 of the Rules refers to Suit action or other

proceeding instituted in the court in its admiralty jurisdiction. This provision cannot be interpolated with Section 22(1) of SICA. In fact, Rule 966

distinguishes between a Suit and proceeding.

(p) The Supreme Court has held that once the civil court"s jurisdiction was ousted in terms of the provisions of Section 22 of the Act, any

judgment rendered by it would be coram non judis.

It is a well settled principle of law that a judgment and decree passed by a court or tribunal lacking inherent jurisdiction would be a nullity. In this

case, the admiralty court"s jurisdiction is not ousted.

15. None of the submission of Mr. Shanker can persuade me to stay these proceedings unless consent from BIFR or AAIFR, as the case may be,

is obtained. The present Notice of Motion has nothing to do with financing or restructuring of the Company. Nobody has proceeded against the

assets or property of the plaintiff. In the case of M/s. Patheja Bros. Forgings & Stamping & Anr. Vs. I.C.I.C.I. Ltd. & Ors. on which Mr.

Shanker relied upon, at paragraph 12 it is stated that ""We have analysed the relevant words in Section 22 and found that they are clear and

unambiguous and that they provide that no Suit for the enforcement of a guarantee in respect of any loan or advance granted to the concerned

industrial company will lie or can be proceeded with or without the consent of the Board or the Appellate Authority.

16. The proposition of the Apex Court is absolutely clear. When the words of a legislation is clear, the court must give effect to them as they stand

and cannot demur on the ground that the legislature must have intended otherwise. In this case also we are giving effect to the words as provided in

Section 22(1). For a bar to apply, it as to come within the ingredients provided u/s 22(1).

17. As regards, the Delhi High Court judgment relied upon by the Defendants in the matter of Indrajeet Arya & Anr. Vs. ICICI Bank Ltd., Mr.

Ashwin Shanker bought to the notice of this Court that the matter was carried in Appeal to the Hon''ble Supreme Court of India which has

decided the matter. He submitted that the ratio of the courts was restricted to the protection sought by the Directors/Guarantors and not the

Company itself from proceeding before a tribunal and in a Civil Court and hence is not applicable to the factual matrix of the present matter. But

the fact is in the said judgment, the Apex Court has also held that if protection u/s 22(1) was to be given then the action should come within the

ambit of the term ''Suit'' which has the necessary ingredients provided u/s 22(1). The Court also reiterated the term ''Suit'' as 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 over-arching

proceedings so as to apply to any original proceedings before any legal forum. Paragraphs 6 and 7 read as under :

6. We need not labour much to answer the question of law raised in this appeal since, as rightly pointed out by the High Court, the same stands

covered by various Judgments of this Court referred to earlier. Appellants, who are the guarantors, can obtain the protection of Section 22(1) of

SICA only if the action filed by the bank comes within the ambit of the term ''Suit''. If the action filed by the respondent bank in the nature of

''proceedings'' and not a ''Suit'', protection u/s 22(1) would not be available, especially, when the appellants are guarantors.

7. This Court, in KSL and Industries Limited (supra) took the view that even though both the conflicting statutes SICA and Recovery of Debts

Due to Banks and Financial Institutions Act, 1993 (for short the ""RDDB"") contain a non-obstante clause, in case of conflict the RDDB Act, 1993

will prevail over SICA, so far as public revenue recoveries are concerned. This Court also emphasized that the liability of surety or guarantor is

coextensive with that of the principal debtor in Kailash Nath Agarwal and others (supra). In Nahar Industrial Enterprises Limited (supra) this Court

reiterated the term ''Suit'' have to be confined in the context of subsection (1) of Section 22 of SICA to those actions which are dealt with under

the Code and not in the comprehensive over-arching proceedings so as to apply to any original proceedings before any legal forum. The term

''Suit'' would apply only to proceedings in civil court and not actions or recovery proceedings filed by banks and financial institutions before a

tribunal such as DRT.

(emphasis supplied)

18. A conjoint reading of all judgments placed before me it is rather clear that the ban imposed u/s 22(1) of the SICA is only against the

maintainability of the following legal actions :

(i) Proceedings for the winding up of the company,

(ii) Proceedings for execution/distress or the likes against any of the property of the companies,

(iii) proceedings for the appointment of a Receiver in respect of such properties,

(iv) Suit for recovery of money or for enforcement or any security against company or guarantee in respect of any loan or advance granted to the

company.

19. If the Parliament intended to exempt sick companies from the action based on an undertaking given to the Court while obtaining an ex-parte

order of arrest, necessary provision would have been included within the ambit of the act.

20. Admittedly, the term ''Suit'' is not defined in CPC or General Clauses Act or in SICA act, but ''Suit'' ordinarily means and must be taken to

mean civil proceedings instituted by the plaint and culminating in a decree and proceedings which are not commenced with a plaint and culminating

in a decree will not be a suit. The word ""'Suit"" in Section 22 of SICA cannot be understood in its broad and generic sense to include any action

before a legal forum including a notice of motion involving an adjudicatory process.

21. When the section was amended to include recovery of money, legislature used the expression ""'Suit"". As explained in the case of M/S. Lloyd

Insulations (India) & Ors. Vs Cement Corporation Of India Ltd. & Ors., Supra, the primary and golden rule of interpretation is the literal

construction. No doubt the object of interpretation is to discover the intention of Parliament, but the intention of Parliament must be deduced from

the language used. Where the language is plain and admits of but one meaning, that meaning is to be given to the language in the Statute. It is only

when words are susceptible of more than one meaning that other rules of interpretation come into play. In the instant case the legislature has

intentionally used the word ''Suit'' in so far as recovery of money is concerned. The un-amended section which covered winding up, execution,

distress etc. has used the expression "proceedings". Thus the legislature had in mind that as far as winding up, execution, distress etc. is concerned,

no proceedings of this nature shall lie or be proceeded with except with the consent of the Board. However, when the section was amended to

add the claims for recovery of money, legislature used the expression, "Suit" and not "proceedings". Thus if one has to really see the intention, it

was to confine to suits only i.e. suits which are understood in common parley namely which are filed in civil courts. The word "Suit" related only to

the civil suits in the court of law which are governed by section 9 of CPC.

22. The legislature, mindful of the expression "proceedings" already occurring in sub section (1) of section 22(1) of SICA still used the expression

"Suit" in so far as recovery of money or the enforcement of any security against the industrial company or any guarantee in respect of any loans or

advance granted to the industrial company is concerned. Therefore legislature wanted to give restricted meaning to the word "Suit" which is

understood in the common parlance and not all kinds of proceedings for recovery of money.

23. The purpose of amendment by adding "Suit for recovery of money" etc. is clear when understood along with sub-section (5) of section 22

inasmuch as it is in suits where the law of limitation applies stricto sensu without any provisions for condonation of delay.

A specific provision had to be added in the form of sub-section (5) because of the expression "Suit" introduced in sub-section (1) of section 22.

24. The expression "Suit" under sub-section (1) of section 22 of SICA is to be given the meaning in which it is normally understood, i.e., civil

proceeding instituted by the presentation of a plaint and culminating in a decree. This would refer to the Suit as contemplated by section 9 of CPC.

A notice of motion to ascertain damages payable under the undertaking given to the Court while obtaining ex-parte order does not commence with

a plaint and therefore, cannot be regarded as a Suit. This is the authoritative pronouncement of Supreme Court in the case of Nawab Usmanali

Khan Vs. Sagarmal, and is sufficient to annihilate all arguments of the plaintiff to the contrary.

25. The undertaking is not simply a statement that nobody will suffer prejudice but the undertaking to the Court is to pay such sum by way of

damages as the Court may award as compensation, in the event of a party affected sustaining prejudice by such order. The Court has relied on the

solemn undertaking given by the Plaintiff whilst passing the ex-parte order of arrest. Therefore, the Plaintiff cannot treat this undertaking as a mere

piece of paper. In fact, the undertaking is also in the form of an affidavit which is solemnly affirmed. The undertaking, therefore, is between the

Court and the plaintiff and the defendants'' notice of motion is only to ascertain whether any prejudice has been suffered and if so to ascertain the

quantum of damages to be awarded.

26. The issue is not whether the reference has commenced or not. The issue is even if reference is commenced, whether there is a bar in the court

calling upon a party to comply with the undertaking given to the Court obtaining an ex-parte order of arrest. Our Court in the matter of FU JIN has

very clearly stated it is not necessary for a party to adopt independent proceedings. The present matter is only for determination of the damages

that the court should levy upon the Plaintiff due to breach of the undertaking given while obtaining ex-parte order. This Court has held that the

undertaking can be invoked by taking out a notice of motion and no independent proceeding is required to be adopted by a party. This, by

necessary implication excludes such notices of motions from the expression ''Suit'' occurring in sub-section (1) of section 22 of SICA.

27. In the circumstances, the bar of Section 22(1) of SICA is not applicable to the present matter. Stand over to 25th February 2014 to decide

and consider whether the defendant Nos. 2 and 3 have suffered any prejudice and if so the quantum of damages to be awarded against the

Plaintiff.