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

+ **CS(OS) 1252/1999, I.A. 6301/2019**

M/S PERCEPT ADVERTISING LTD. Plaintiff

Through: Mr.Venancio D'costa, and Ms.Astha,
Advs.

versus

KEDIA CASTLE DELLON INDUSTRIES LTD. Defendant

Through: Ms. Jasvin Dhama, Adv.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

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08.08.2019

I.A. 6300/2019 (application under Order 9 Rule 13 CPC and Section 151 CPC for setting aside of Ex-parte Decree dated 27th May, 2009 passed in suit No. 1252/1999)

1. This is an application filed by the Judgment Debtor under Order IX Rule 13 CPC seeking setting aside of the *ex-parte* judgment and decree dated 27th May, 2009.

2. The Applicant/Judgment Debtor was proceeded *ex-parte* on 28th January, 2002 and a final *ex-parte* judgment decree was passed on 27th May, 2009. The present application has been filed on 25th April, 2019. It is contended that Applicant was unaware of the suit proceedings. Recently, pursuant to a show cause notice dated 17th November, 2018 in Execution Petition No.

61/2016, the applicant got the knowledge of the ex- *parte* decree.

3. It is further contended that the show cause notice dated 17th November, 2018 was delivered on the Counsel, who informed an ex-employee of Applicant/Judgment Debtor about the same vide e-mail dated 28th November, 2018. The employee obtained the copy of the show cause notice and the Execution Petition from the said counsel and filed the present application. It is also contended that Applicant was under a *bona fide* belief that the counsel engaged by them was diligently following the matter. The callous and negligent attitude of the counsel is the main reason that prevented them from appearing before this Court to prosecute the present suit. It is further contended that the Judgment Debtor/Defendant was declared as a sick company under the provisions of Sick Industrial Companies Act, 1985 (SICA), pursuant to the reference bearing No. 162/1998 registered with Board of Industrial and Financial Reconstruction (BIFR) on 18th September 1998. For the period from 18th September, 1998 till the 18th September, 2014, the reference remained pending. Learned counsel for the Applicant/Judgment Debtor contends that the institution of the present suit and the decree is in contravention of Section 22 of the SICA. On the date of filing, the suit was not maintainable and the decree passed in consequence thereof, is null and void. Judgment Debtor additionally refers to a summary suit bearing No. 1240/1998 tilted as ***New Television India Ltd (now known as Star India Pvt. Ltd) v. M/s Kedia Castle Dellon Industries Ltd. & Anr***, filed before the High Court of Bombay seeking a summary decree against the Decree Holder and the applicant.

4. Learned counsel for the Plaintiff/Decree Holder strongly opposes the application and submits that the Judgment Debtor/Defendant was all throughout aware of the present proceedings and after appearing in the suit on few dates, it deliberately chose to stay away from the proceedings. He further submits that the negligence of the counsel cannot be a ground for seeking setting aside the judgment decree. Regarding the plea of Section 22 of SICA, he controverted the contentions of the Applicant by relying upon the judgments of this Court in ***Saketh India Limited v W. Diamond India Limited*** 2010 SCC OnLine Del 1786 and ***M/s Ralson Industries Ltd (now Known as Da Rubber Industries Ltd.) v. M/s Adhunik Transport Organisation Ltd*** 2013 SCC OnLine Del 28 and argued that a suit for recovery, like the present one is not covered by the said provision.

5. A perusal of the record reveals that pursuant to order passed in I.A. No. 22/2000, the Defendant was served with the summons by way of publication. The Defendant appeared before the court through counsel on 28th November, 2000 and 15th February, 2001 and thereafter stopped appearing. Ultimately, vide order dated 28th January, 2002, Defendant was proceeded ex parte. Defendant also failed to file the written statement and pertinently, it did not inform the Court about registration of the reference or the pendency of proceedings before the BIFR. This callous attitude of the Defendant is glaring and cannot go unnoticed.

6. Be that as it may, the main plank of the Applicant's argument is based on the consequence of the registration of the reference under the provisions of SICA. Though the defendant company is presently out of the purview of the

said Act, the moot question that requires deliberation is whether on the date of filing of the present suit, the registration of Judgment Debtor under the provisions of the said Act, would render the present proceedings as non-est. On this proposition, the decision of the Division Bench of this Court in ***Saketh India Limited*** (supra) is relevant. In the said case, the court analysed whether the provisions of SICA were attracted to a suit that is essentially for recovery of money. The Court conceived this question and held as under;

“2. It appears from a perusal of the records that Summons in Form 4 under Order XXXVII of the CPC were served on Defendant No.1 by affixation at Hosur, Karnataka on 22.8.2005 and on Defendant No.2 on 30.8.2005 at Bangalore. The aforementioned Applications filed on behalf of the Defendants are dated 25.1.2006 and were filed on that very day; they have been supported by Affidavits of Defendant No.2 who is the Managing Director of Defendant No.1. On 7.11.2008, the learned Single Judge directed the Defendants to file, within four weeks, an affidavit stating whether or not the monies claimed by the Plaintiff have been admitted by the Defendant and have been reflected in the documents filed by the Defendant before the Board for Industrial and Financial Reconstruction („BIFR“ for short). On 16.3.2009, the learned Single Judge granted a last opportunity to file the said Affidavit. On the next date of hearing, viz., 19.5.2009, the submission made on behalf of the Plaintiff to the effect that the Defendant was not before BIFR was recorded. In response, the Defendant stated that proceedings were pending before Appellate Authority for Industrial and Financial Reconstruction („AAIFR“ for short). Yet another opportunity to file the aforementioned Affidavit was granted to the Defendant, subject to payment of costs of Rupees 5,000/-. Since the directions were not complied with, costs were increased to Rupees 10,000/- and another chance for filing the said Affidavit before 24.8.2009

was permitted.

3. On 24.8.2009, the Court, keeping in perspective the plentitude of opportunities granted but not availed of by the Defendants to file the required Affidavit, as well as the Defendants failure to pay costs, dismissed both the Applications. The Court took into consideration that delay in entering appearance had not been condoned and, therefore, opined that all the averments in the Plaint were deemed to have been admitted, and decreed the Suit. This Appeal arises before us in these circumstances.

4. **We are not persuaded by the arguments of learned counsel for the Appellant that the provisions of SICA should be applied to the facts of the present case. Assuming that there is a prohibition placed, and not just a moratorium, placed by Section 22 of SICA on legal proceedings against a company coming within the pale of that statute, it remained the legal duty of the Appellant to substantiate that it had qualified for that protection. For discharging this obligation, the Defendant should have complied with the Orders passed by the learned Single Judge and made good the submission that the proceedings under SICA with relation to the Appellant were pending in a manner such that the benefit of Section 22 of SICA would enure to the Appellant.** Secondly, the Appellant should have paid costs imposed upon it; it has, without demur, paid Rupees 33,000/- as Court Fee in this Appeal. Thirdly, the Appellant should have disclosed that at least the principal amount claimed by the Plaintiff in the Summary Suit had been shown and disclosed in the Scheme formulated and laid before the BIFR. Having failed to do so, we are in complete agreement with the learned Single Judge that the averments made in the Plaint would, in the absence of a Written Statement, have to be presumed to be correct. The CPC now mandates that the Written Statement must be filed within

thirty days and in exceptional circumstances not later than ninety days of service. The rigours of this provision are not circumvented by preferring an application under Order VII Rule 11 of the CPC. We, therefore, conclude that the Appeal, inasmuch as it challenges the impugned Judgment, is bereft of merit.

5. We think it appropriate, however, to consider the provision of SICA and analyse what it endeavors to achieve. We must immediately take note of the fact that SICA has been repealed by Sick Industrial Companies (Special Provisions) Repeal Act, 2003. While it is yet to be notified, it is significant that provisions akin to Section 22 are conspicuous by their absence in the new Scheme of revival of sick companies inserted in form of Part VIA, namely, "Revival and Rehabilitation of Sick Industrial Comapnies". Obviously, empirical analysis discloses that more often than not companies which have sought shelter of SICA have done so to procrastinate, delay and defer clearing its liability, with the obvious intention of coercing creditors into unfair settlements rather than implementing projected schemes supposed to assist in their reconstruction. When the statute is notified, amendments to the Companies Act, 1956 will become effective and all proceedings pending before BIFR will stand abated. To some extent, therefore, the present controversy has been rendered academic.

6. Courts, however, have always been alive to the possible mischief that invocation of SICA can lead to. In a nutshell, where the net worth of a company is reduced to a negative, and the amelioration that is sought is for reviving the company rather than winding it up, the recourse to the Act would be legitimate. There is no justifiable reason, therefore, for all legal proceedings to be immediately even held in abeyance, if not dismissed. **We are mindful of the fact that Parliament has incorporated an amendment in**

the Section with effect from 1.2.1994 in these words - "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". It appears to us that the phrase "recovery of money" must be construed ejusdem generis and accordingly recovery proceedings in the nature of execution or any other coercive enforcement that has been ordained to be not maintainable. We do not find any logic in holding legal proceedings to be not maintainable, or to be liable to be halted unless, even if the debt sought to be proved in the Plaint has not been admitted. Given the delays presently endemic in the justice delivery system if a creditor is disallowed even from proving the indebtedness of a recalcitrant debtor SICA company, it would cause unjustified hardship. Whichever way we look at the matter, there can be no logic in denying legal recourse to a party for proving its debt. In the event that at least the principal amount, or a substantial part of it stands admitted, either in the suit or by means of a mention in the Scheme placed before the BIFR, the aggrieved party must be permitted to prove its claim. In holding so, the only prejudice that we can conceive of is incurring expenditure in legal fees. When this is weighed against the interests of a person claiming that the company is indebted to it, the balance tilts in favour of the latter. A holistic reading of Section 22(1) of SICA makes it manifestly clear that Parliament's intention was to insulate sick companies only against proceedings for winding-up or for execution, or distress or the like or for enforcement of any security or guarantee. In the case in hand, despite several opportunities granted to the Appellant, it has miserably and perhaps deliberately failed to substantiate that the claim mentioned in the Suit has been reflected in the Scheme placed before the BIFR but even more poignantly, that a scheme was, in

fact, pending before BIFR. If an Appeal is pending, has BIFR failed to grant or has withdrawn registration under SICA. We see the conduct of the Appellant as nothing more than an abuse of SICA.”

7. Similar view has been taken by this Court, in *M/s Ralson Industries Ltd* (supra). The relevant portion read as under;

“3. Having heard the learned counsel for the petitioner, I do not see any reason or merit in the instant review application. The law as to the continuation of a suit filed against a sick company is no longer res integra, and is well laid by the Division Bench of this court in *Saketh India Ltd. Vs. W. Diamond India Ltd.*, 2010 (119) DRJ 190 as also by the Supreme Court in *Raheja Universal Ltd. Vs. NRC Ltd.*, (2012) 4 SCC 148. The ratio of the judgment in *Saketh India Ltd.* (supra) is that unless the dues are admitted by the sick company in a sanctioned scheme or is admitted before the court where the same suit is filed, no permission is required under Section 22 of SICA. It was held that before Section 22 could be invoked, the proceedings against the company are necessarily to be of the nature of 'execution, distress or the like'. Paras 6 and 14 of the said judgment being relevant are reproduced here-in-under:

"6. Courts, however, have always been alive to the possible mischief that invocation of SICA can lead to. In a nutshell, where the net worth of a company is reduced to a negative, and the amelioration that is sought is for reviving the company rather than winding it up, the recourse to the Act would be legitimate. There is no justifiable reason, therefore, for all legal proceedings to be immediately even held in abeyance, if not dismissed. We are mindful of the fact that Parliament has incorporated an amendment in the Section with effect from 1.2.1994 in these words - "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". It appears to us that the phrase "recovery of money" must be construed ejusdem generis and accordingly recovery proceedings in the nature of execution or any other coercive enforcement that has been ordained to be not maintainable. We do not find any logic in holding legal proceedings to be not maintainable, or to be liable to be halted unless, even if the debt sought to be proved in the Plaint has not been admitted. Given the delays presently endemic in the justice delivery system if a creditor is disallowed even from proving the indebtedness of a recalcitrant debtor SICA company, it would cause unjustified hardship. Whichever way we look at the matter, there can be no logic in denying legal recourse to a party for proving its debt. In the event that at least the principal amount, or a substantial part of it stands admitted, either in the suit or by means of a mention in the Scheme placed before the BIFR, the aggrieved party must be permitted to prove its claim. In holding so, the only prejudice that we can conceive of is incurring expenditure in legal fees. When this is weighed against the interests of a person claiming that the company is indebted to it, the balance tilts in favour of the latter. A holistic reading of Section 22(1) of SICA makes it manifestly clear that Parliament's intention was to insulate sick companies only against proceedings for winding-up or for execution, or distress or the like or for enforcement of any security or guarantee. In the case in hand, despite several opportunities granted to the Appellant, it has miserably and perhaps deliberately failed to substantiate that the claim mentioned in the Suit has been reflected in the Scheme placed before the BIFR but even more poignantly, that a scheme was, in fact, pending before BIFR. If an Appeal is pending, has BIFR failed to grant or has withdrawn registration under SICA. We see the conduct of the Appellant as nothing more than an abuse of SICA.

14. The discussion contained above leads to the thesis that

as soon as a claim stands admitted, either because it has been reflected in the Scheme, or because it stands favourably adjudicated in a Court of law, the protection of Section 22 of SICA would automatically have to be implemented. This is the watershed between the present and the preceding case. Having obtained a decree, further proceedings fall within the protective mantle of Section 22 of SCIA as they cannot but be in the nature of "execution, distress or the like". A plain reading of the provision cannot but lead to any other conclusion. If there are unique circumstances, which would justify the execution of the decree, even in the face of the registration of a Scheme under SICA, the proper recourse possible would be to obtain the permission or consent of the Board or the Appellate Authority as the case may be. Any other interpretation would completely annihilate and defeat the intendment of Parliament".

4. There being no credible admission by the petitioner of the amount in the present suit, in view of the aforesaid decision in Saketh India Ltd. (supra), no permission is required under Section 22 of SICA to continue the present suit. The ratio of the decision of the Supreme Court in the case of Raheja Universal Ltd. (supra) is that the proceedings, which are affected by Section 22 (1) of the SICA are the proceedings in the nature of execution, distress or the like, and that it was to depend upon the facts of each case as to whether the suit was hit by Section 22. In other words, all suits including that of recovery are not hit by Section 22 (1) of the SICA, but, only those suits which have the effect of execution, distress or like action against the properties of sick company, which would be hit by this provision. In a simple suit for recovery of money where the properties of sick company are not threatened by the proceedings including the interim ones such as appointment of receiver, execution, distress or the like, such suits could continue without the permission under Section 22. In the present suit for recovery, it cannot be said that the suit is of a nature

which has the impact of or threat to the properties of the petitioner to affect the scheme of its revival. Thus, the present suit being the simple suit of recovery under Order 37 CPC, would not be hit by the provision of Section 22 of the SICA. There is no cogent reason warranting review of the said order. The review application along with the miscellaneous applications stand dismissed.”

8. The decision of the Supreme Court in ***Raheja Universal Limited vs NRC Limited and ors*** (2012) 4 SCC 148 is also significant wherein the court held as under:

“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-à-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 under Section 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 reliefs 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”

9. From the reading of the aforesaid judgments, it emerges that the suit for recovery against a company which is registered under the Provisions of SICA, would not ipso facto be rendered as not maintainable. The prohibition as contemplated under Section 22 of the SICA, would not be applicable to the present suit which is essentially for recovery and proving the debt. The proceedings that come within the purview of Section 22(1) of SICA are proceedings in nature of execution, distress or the like. It would depend on the facts of each case that whether the suit is hit by Section 22 of the Act. Concededly, the present suit is for recovery and is not one which has the effect of execution, distress or like action against the properties of the Sick Company and therefore it would not be hit by Section 22 (1) of the SICA.

Significantly, there is no denial to the averments made in the Plaint, the contents of the Plaint have to be presumed to be correct. The final decision of the Court is only determinative of the indebtedness of the Applicant. The suit even without the permission of BIFR was maintainable on the date of filing.

10. The Defendant/ Judgment Debtor finally came out of the purview of the said Act on 18th September, 2014. There is no explanation or reason offered by the Defendant that would justify the delay in approaching this court from the said date till the filing of the present application. The only argument that is forthcoming is that the Applicant became aware of the present proceedings on receiving the show cause notice dated 17th November, 2018. Defendants/Judgment Debtor has indulged in blame game by levying allegations against the counsel, shifting the burden on him. This Court in ***Moddus Media Pvt Ltd. vs M/s. Scone Exhibition Pvt. Ltd.***, 2017 SCC OnLine Del 8491 has held as under:

“12. In these presents, the allegation of the appellant/defendant company is that their lawyer has stopped appearing after 10.11.2014. It is also alleged that after the impugned judgment and decree dated 31.08.2015, their lawyer told them that the suit of the respondent/plaintiff company has been dismissed and they requested to supply them copies of order and decree. These allegations are not found mentioned in the complaint lodged with the Bar Council of India. If their lawyer stopped appearing from 10.11.2014, the appellant/defendant company should have contacted their lawyer or engaged some other one in the matter or at least they should have started appearing in person but they did not bother to inquire

from their previous counsel as to why he stopped appearing w.e.f. 10.11.2014. If they were informed by their counsel after the decision in the suit and copy of order was not supplied, they should have gone to lawyer personally or to court to obtain copies of orders or should have taken assistance of other lawyer. But they were not serious at all.

13. The litigant owes a duty to be vigilant of his rights and is also expected to be equally vigilant about the judicial proceedings pending in the court of law against him or initiated at his instance. The litigant cannot be permitted to cast the entire blame on the Advocate. It appears that the blame is being attributed on the Advocate with a view to get the delay condoned and to avoid the decree. After filing the civil suit or written statement, the litigant cannot go off to sleep and wake up from a deep slumber after passing a long time as if the court is storage of the suits filed by such negligent litigants. Putting the entire blame upon the advocate and trying to make it out as if they were totally unaware of the nature or significance of the proceedings is a theory put forth by the appellant/applicant/defendant company, which cannot be accepted and ought not to have been accepted. The appellant is not a simple or rustic illiterate person but a Private Limited Company managed by educated businessmen, who know very well where their interest lies. The litigant is to be vigilant and pursue his case diligently on all the hearings. If the litigant does not appear in the court and leaves the case at the mercy of his counsel without caring as to what different frivolous pleas/defences being taken by his counsel for adjournments is bound to suffer. If the litigant does not turn up to obtain the copies of judgment and orders of the court so as to find out what orders are passed by the court is liable to bear the consequences.”

11. The litigant owes a duty to be vigilant of his rights and is also expected to be equally vigilant about the judicial proceedings pending in the court of

law against him or initiated at his instance. The litigant cannot be permitted to cast the entire blame on the counsel and has to bear the consequences for the disregard shown towards court proceedings. In the aforementioned case, there was also a complaint lodged against the counsel with the Bar Council of India, yet the court disregarded the plea of counsel's negligence. However, in the present case the allegations are bald, unspecific and vague and no action has been initiated by the Judgment Debtor against the counsel. Thus the purported cause of delay attributed against the counsel is a sham plea and the same is rejected.

12. It is further significant to note that Plaintiff on becoming aware of the reference before BIFR, filed an application before BIFR on 23rd July, 2012, seeking its permission to execute the decree. The Defendant was provided an opportunity to file a reply to the said application, however, the same was not filed. Plaintiff was impleaded in the said proceedings before BIFR on 12th December, 2012. Defendant came out of purview of the Act on 18th September, 2014. This clearly shows the Judgment Debtor was aware of the decree passed by this court since 2012. After coming out of the purview of SICA, from 2014 to 2019 the Judgment Debtor remained silent. The conduct of the Defendant is completely laid-back and lackadaisical. The explanation offered by it for seeking setting aside of ex part decree smacks of gross negligence on the part of the Judgment Debtor. Thus, there is no merit in the application. The same is dismissed with cost of Rs. 25,000/- to be deposited with the Delhi High Court Staff Welfare Fund.

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13. In view of the foregoing reasons, there is no ground for interference. Application is dismissed. The order dated 01st May 2019 granting stay of execution proceedings is vacated.

SANJEEV NARULA, J

AUGUST 08, 2019

Pallavi