

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****SUMMONS FOR JUDGMENT NO. 32 OF 2013
IN
SUMMARY SUIT NO. 280 OF 2013**

Pramerica Asset Managers Pvt.Ltd. & Ors. ...Applicants / Plaintiffs
vs.
Deccan Chronicle Holdings Ltd. ...Defendant

WITH

**SUMMONS FOR JUDGMENT NO. 71 OF 2013
IN
SUMMARY SUIT NO. 804 OF 2013**

Pramerica Asset Managers Pvt.Ltd. ...Applicant / Plaintiff
vs.
Deccan Chronicle Holdings Ltd. ...Defendant

Mr.Rohan Rajadhyaksha with Shahen Pradhan, Ms.Khursheed Vazifdar i/b. J. Sagar Associates for Plaintiffs.
Mr.Rohan Cama with Sapana Rachure, Ashish Pyasi and Ms.Ekta Tripathi i/b. Dhir & Dhir Associates for Defendant.

CORAM : S.C. GUPTE, J.

RESERVED ON : 17 OCTOBER 2015

PRONOUNCED ON : 5 FEBRUARY 2016

ORDER :

These two summonses for judgment are taken out in two summary suits each praying for a decree in the sum of Rs.25 crores along with interest at the rate of 18% per annum. The claims arise from written contracts contained in what are known as "Series 1 Commercial Papers" and also in a letter dated 10 July 2012 issued by the Defendant in favour of Plaintiff No.1 confirming and binding itself to repay the maturity proceeds of the commercial papers as well as on dishonoured cheques.

2 During the pendency of the summary suits, the Defendant applied for a reference under the Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA"). By an order dated 24 April 2014, the Board for Industrial and Financial Reconstruction ('BIFR') declined to register the Defendant's reference. This order has been challenged by the Defendant before the Appellate Authority for Industrial and Financial Reconstruction ('AAIFR'). The appeal is pending before AAIFR. It is the case of the Defendant that by virtue of pendency of this appeal, under the provisions of Section 22 of SICA, the present suits, which are for recovery of money, ought not to be proceeded with except with the consent of AAIFR.

3 In the premises, before the summonses for judgment are taken up for hearing, the question of suspension of legal proceedings, as alleged by the Defendant, needs to be considered. The relevant facts in this behalf are noted below :

3.1 On 26 August 2013, the Defendant filed a reference before BIFR based on provisional accounts of the company for the Financial Year 2012-13, seeking registration as a sick industrial company under Section 15(1) of SICA.

3.1.2 The Registrar, in accordance with the provisions of Regulation 19 of the Board for Industrial and Financial Reconstruction Regulations, 1987 ("BIFR Regulations"), scrutinised the reference and vide his letter dated 17 September 2013 granted 'conditional' registration to the Defendant subject to submission of final accounts for the year 2012-13.

3.1.3 On further scrutiny and in view of the deficiencies found in the reference, the Registrar – BIFR, vide his letter dated 19 September 2013 withdrew the conditional registration granted to the company on 17 September 2013 and declined to grant registration under Section 15(1) of SICA.

3.1.4 On 27 September 2013, being aggrieved by the Registrar's order,

the Defendant filed an appeal before the Secretary - BIFR as per Regulation 19(8)(1) of the BIFR Regulations.

3.1.5 By an order dated 21 November 2013, the appeal was dismissed by the Secretary - BIFR declining to interfere with the Registrar's order.

3.1.6 On 29 November 2013, the Defendant preferred a second appeal before the Chairman - BIFR in accordance with Regulation 19(8)(2) of the BIFR Regulations. By his order dated 13 January 2014, the Chairman - BIFR refused to interfere with the order passed by the Secretary, BIFR and dismissed the appeal by declining the reference.

3.1.7 On 21 January 2014, the Defendant filed a writ petition, namely, Writ Petition (Civil) No.750/2014, challenging the Chairman's order before the Delhi High Court and took out a civil misc. petition therein, namely, Civil Misc.Petition No.1505/2014.

3.1.8 By its order dated 3 February 2014, a Division Bench of Delhi High Court, by consent, set aside the orders of the Registrar as well as the secretary and chairman, referred to above, and directed BIFR to consider the issue of validity of registration in the first instance.

3.1.9 The matter of registration of reference was thereafter heard by BIFR. By its order dated 24 April 2014, BIFR held that the registration of the Defendant's reference dated 17 September 2014 before BIFR was not valid.

3.1.10 The Defendant thereupon filed an appeal before AAIFR, being Appeal No.114/14, challenging the BIFR order dated 24 April 2014. That appeal has been admitted by, and is pending before, AAIFR.

4 On these facts, the question to be considered is whether, having regard to the pendency of the appeal, the present suits for recovery of money against the Defendant can be proceeded with without the consent of AAIFR.

Before I consider the facts of the Defendant's case, in the context of its submissions that its appeal, namely, Appeal No.114/2014 pending before AAIFR, is an appeal under Section 25 relating to an industrial company, which entails stay of suits within the meaning of Section 22 of SICA, let us note the relevant provisions of SICA which have a bearing on the question.

(a) SICA defines the terms, "Company", "Industrial company", "Industrial undertaking", "Scheduled industry" and 'Sick industrial company' as follows :

S.3(1)(d) "Company" means a company as defined in section 3 of the Companies Act, 1956 (1 of 1956).

S.3(1)(e) "Industrial company" means a company which owns one or more industrial undertakings.

S.3(1)(f) "Industrial undertaking" means any undertaking pertaining to a scheduled industry carried on in one or more factories by any company but does not include-

- (i) an ancillary industry undertaking as defined in clause (aa) of section 3 of the Industries (Development and Regulation) Act, 1951 (65 of 1951); and
- (ii) a small scale industrial undertaking as defined in clause (j) of the aforesaid section 3.

S.3(1)(n) "Scheduled industry" means any of the industries specified for the time being in the First Schedule to the Industries (Development and Regulation Act, 1951 (65 of 1951);

S.3(1)(o) "Sick industrial company" means an industrial company (being a company registered for not less than five years) which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth.

Explanation.- For the removal of doubts, it is hereby declared that an industrial company existing immediately before the commencement of the Sick Industrial Companies (Special Provisions) Amendment Act, 1993,

registered for not less than five years and having at the end of any financial year accumulated losses equal to or exceeding its entire net worth, shall be deemed to be a sick industrial company.

- (b) Section 15(1) of SICA makes a provision for reference to BIFR of an industrial company which has become a sick industrial company. The relevant provision is noted below :

“15. Reference to Board

(1) When an industrial company has become a sick industrial company, the Board of Directors of the company, shall, within sixty days from the date of finalisation of the duly audited accounts of the company for the financial year as at the end of which the company has become a sick industrial company, make a reference to the Board for determination of the measures which shall be adopted with respect to the company:

Provided that if the Board of Directors has sufficient reasons even before such finalisation to form the opinion that the company had become a sick industrial company, the Board of Directors shall, within sixty days after it has formed such opinion, make a reference to the Board for the determination of the measures which shall be adopted with respect to the company.

Provided further that no reference shall be made to the Board for Industrial and Financial Reconstruction after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where financial assets have been acquired by any securitisation company or reconstruction company under sub-section (1) of section 5 of that Act:

Provided also that on or after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where a reference is pending before the Board for Industrial and Financial Reconstruction, such reference shall abate if the secured creditors, representing not less than three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under sub-section (4) of section 13 of that Act.”

(2) Without prejudice to the provisions of sub-section (1), the Central Government or the Reserve Bank or a State Government or a public financial institution or a State level institution or a scheduled bank may, if it has sufficient reasons to believe that any industrial company has become, for the purposes of this Act, a sick industrial company, make a reference in respect of such company to the Board for determination of the measures which may be adopted with respect to such company:

Provided that a reference shall not be made under this sub-

section in respect of any industrial company by,-

(a) the Government of any State unless all or any of the industrial undertakings belonging to such company are situated in such State;

(b) a public financial institution or a State level institution or a scheduled bank unless it has, by reason of any financial assistance or obligation rendered by it, or undertaken by it, with respect to, such company, an interest in such company.”

(c) Section 16 of SICA makes a provision for inquiry by BIFR into the working of a sick industrial company. The relevant provisions of the Section are noted below:

“16. Inquiry into working of sick industrial companies.-

(1) The Board may make such inquiry as it may deem fit for determining whether any industrial company has become a sick industrial company-

(a) upon receipt of a reference with respect to such company under section 15; or

(b) upon information received with respect to such company or upon its own knowledge as to the financial condition of the company.

(2) The Board may, if it deems necessary or expedient so to do for the expeditious disposal of an inquiry under sub-section (1), require by order any operating agency to enquire into and make a report with respect to such matters as may be specified in the order.

(3) The Board or, as the case may be, the operating agency shall complete its inquiry as expeditiously as possible and endeavor shall be made to complete the inquiry within sixty days from the commencement of the inquiry-

Explanation: For the purposes of this sub-section, an inquiry shall be deemed to have commenced upon the receipt by the Board of any reference or information or upon its own knowledge reduced to writing by the Board.

(4) Where the Board deems it fit to make an inquiry or to cause an inquiry to be made into any industrial company under sub-section (1) or, as the case may be, under sub-section (2), it may appoint one or more persons to be a special director or special directors of the company for safeguarding the financial and other interests of the company or in the public interest.”

(d) The powers of the board, after making an inquiry under Section 16, are

provided for in Section 17 of SICA. The relevant provisions are noted below :

17. Powers of Board to make suitable order on the completion of inquiry

(1) If after making an inquiry under section 16, the Board is satisfied that a company has become a sick industrial company, the Board shall, after considering all the relevant facts and circumstances of the case, decide, as soon as may be by order in writing, whether it is practicable for the company to make its net worth exceed the accumulated losses within a reasonable time.

(2) If the Board decides under sub-section (1) that it is practicable for a sick industrial company to make its net worth exceed the accumulated losses within a reasonable time, the Board, shall, by order in writing and subject to such restrictions or conditions as may be specified in the order, give such company as it may deem fit to make its net worth exceed the accumulated losses.

(3) If the Board decides under sub-section (1) that it is not practicable for a sick industrial company to make its net worth exceed the accumulated losses within a reasonable time and that it is necessary or expedient in the public interest to adopt all or any of the measures specified in section 18 in relation to the said company it may, as soon as may be, by order in writing, direct any operating agency specified in the order to prepare, having regard to such guidelines as may be specified in the order, a scheme providing for such measures in relation to such company.

(4) The Board may-

(a) if any of the restrictions or conditions specified in an order made under sub-section (2) are not complied with by the company concerned, or if the company fails to revive in pursuance of the said order, review such order on a reference in that behalf from any agency referred to in sub-section (2) of section 15 or on its own motion and pass a fresh order in respect of such company under sub-section (3);

(b) if the operating agency specified in an order made under sub-section (3) makes a submission in that behalf, review such order and modify the order in such manner as it may deem appropriate.”

(e) Further provisions are made in SICA for preparation and sanction of schemes (Section 18), rehabilitation of sick industrial companies by giving financial assistance (Section 19), arrangements for continuing operations, etc. during inquiries towards reconstruction and rehabilitation of sick

industrial companies (Section 19A). If at the end of the inquiry, BIFR is of the opinion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time and as a result not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record and forward its opinion to the concerned High Court (Section 20), whereupon the High Court, shall on the basis of the opinion of BIFR, orders winding up of the sick industrial company in accordance with the provisions of the Companies Act, 1956.

- (f) Section 22 of SICA provides for suspension of legal proceedings, contracts, etc., the relevant provisions of which are as follows :

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

(1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.”

- (g) Section 25 of SICA makes a provision of appeal to the Appellate Authority and is in the following terms:

“25 Appeal.-

(1) Any person aggrieved by an order of the Board made under this Act may, within forty-five days from the date on which a copy of the order is issued to him, prefer an appeal to the Appellate Authority:

Provided that the Appellate Authority may entertain any appeal after the said period of forty-five days but not after sixty days from the date aforesaid if it is satisfied that the appellant was

prevented by sufficient cause from filing the appeal in time.

(2) On receipt of an appeal under sub-section (1), the Appellate Authority may, after giving an opportunity to the appellant to be heard, if he so desires, and after making such further inquiry as it deems fit, confirm, modify or set aside the order appealed against or remand the matter to the Board for fresh consideration.”

5 It is clear from even a bare reading that for suspension of legal proceedings under Section 22 of SICA, either of the following four contingencies must exist, namely,

- (i) an inquiry under Section 16 is pending; or
- (ii) a scheme referred to under Section 17 is under preparation or consideration; or
- (iii) a sanctioned scheme is under implementation; or
- (iv) an appeal under Section 25 in relation to an industrial company is pending.

The earliest of these is the first of the abovementioned contingencies, namely, pendency of an inquiry under Section 16. SICA is an enactment, which makes provisions for preventive, ameliorative, remedial and other measures for sick and potentially sick companies owning industrial undertakings and expeditious enforcement of such measures. These provisions are invoked by filing a reference before BIFR under Section 15. Any reference filed before BIFR goes through four stages before the industrial company under reference is out of the purview of SICA. The first stage is the filing of the reference under Section 15. The filing is complete only when BIFR registers the reference. SICA and BIFR Regulations make elaborate provisions in this behalf. A reference, in the first place, is made by either the Board of Directors of the company within sixty days from the date of finalisation of duly audited accounts of the company for the financial year as at the end of which the company has

become a sick industrial company (Section 15(1) of SICA), or the Central Government or Reserve Bank or a State Government or a public financial institution or a state level institution or a scheduled bank (Section 15(2) of SICA). Regulation 19 of BIFR Regulations deals with the procedural aspects of registration of a reference. A reference under Section 15(1) is required to be made in Form "A" prescribed under the Regulations, whilst a reference under Section 15(2) is made in Form 'B'. (There are other similar forms for Government Companies.) After receipt of the forms with their enclosures, the same are scrutinized by the Board's office. If the reference is found to be in order, it is duly registered by assigning a cause number and then put up before the Bench to which the case may be assigned by the Chairman of the Board in exercise of the powers conferred on him under Regulation 16. On the other hand, if a reference is defective, it is declined registration by the Secretary of the Board, or, as the case may be, by the Registrar. (In actual practice, the decision to register or decline registration is taken by the Registrar.) An appeal against the order of the Registrar declining to register a reference lies before the Secretary, whilst an appeal against the Secretary's order declining to register a reference is made before the Chairman (Regulations 19(8)(1) and (2) of the Regulations.) A reference declined to be registered is deemed not to have been made (Regulation 19(7) of the Regulations). Registration of the reference is, thus, crucial, since the next stage, namely, the inquiry under Section 16, does not commence without such registration. As held by the Supreme Court in the case of **Real Value Appliances Ltd. Vs. Canara Bank**¹, once the reference is registered after scrutiny, it is mandatory for the BIFR to conduct an inquiry and accordingly, an inquiry is treated as having commenced as soon as the registration of the reference is completed after scrutiny. It is from that time that actions against the Company's assets and suits for recovery of money against the company are stayed under Section 22. In other words, between the date of physical filing of a reference under Sections 15(1) or 15(2) and its registration, there is no question of pendency of an inquiry under Section 16(1). The proceedings before the Registrar, Secretary or Chairman of the Board, as the case may be, are all pre-registration stages. There is no application of Section

1 (1998) 5 Supreme Court Cases 554

22 at these stages.

6 It is important to note what are the matters relevant for registration, which would ordinarily form part of the scrutiny at the pre-registration stage. As the provisions of Section 15(1) and (2), noted above, indicate, a reference is competent only with respect to an industrial company, namely, a company (i.e. a company as defined in Section 3 of the Companies Act, 1956) which owns one or more industrial undertakings (i.e. undertakings pertaining to a scheduled industry carried on in one or more factories by the company). Secondly, it must qualify as a sick industrial company, namely, an industrial company, being a company registered for not less than five years, which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth, as defined in Section 3(o) of SICA. The meanings of words and expressions used but not defined in SICA are to be gathered from the Companies Act, 1956 and in default of that, from the Industries (Development and Regulation) Act, 1951 ("IDR Act"). A "factory" is defined in the IDR Act as 'any premises including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on (i) with the aid of power, provided that fifty or more workers are working or were working thereon on any day of the preceding twelve months; or (ii) without the aid of power, provided that one hundred or more workers are working or were working thereon on any day of the preceding twelve months and provided further that in no part of such premises any manufacturing process is being carried on with the aid of power.' These provisions make it clear that the pre-registration scrutiny would include the following matters :

- (a) Whether registration is sought in respect of a 'company' as defined in Section 3 of the Companies act, 1956?
- (b) Whether such 'Company' owns one or more undertakings pertaining to any industry specified for the time being in the First Schedule to IDR Act?
- (c) Whether such industry is carried on in any premises or precincts thereof, in any part of which a manufacturing process is being or is

ordinarily carried on either with aid of power with fifty or more workers working on any day in the preceding twelve months, or without aid of power with one hundred or more workers working on any day of the preceding twelve months?

(d) Whether the Company is registered for not less than five years?

(e) Whether the reference is made in a correct form? Whether all particulars required are submitted?

If these matters are found by the registering authority in the affirmative, a reference is registered and the matter then rests with the Board for making an inquiry for determining whether any industrial company has become a 'sick industrial company', under Section 16 of SICA. At this stage, as held by the Supreme Court in the case of **Real Value Appliances** (supra), Section 22 kicks in and there is a stay of proceedings against the industrial company in terms thereof.

7 These issues are ordinarily expected to be ministerial matters to be decided by the Registrar, Secretary or Chairman of the Board, as the case may be. But it is possible that these issues may sometimes be debatable or contentious, and it may not be desirable to leave them to the officials of the Board at the stage of scrutiny. At the same time, it must be reckoned that registration of a reference is an important step under SICA as protection under Section 22 of SICA is available upon such registration. Many a time unscrupulous elements take undue advantage of the provisions of Section 22 by filing frivolous references or successive references on practically the same set of facts after rejection of an earlier reference or references. Mechanically registering such references on a ministerial scrutiny by the officials of the Board is not conducive to advancement of justice. Delhi High Court, in the matter of **Alcatel-Lucent India Ltd. Vs. Usha India Ltd.**², had to grapple with one such matter, where, upon rejection of an earlier reference, a fresh reference was filed. A Division

2 W.P.(C) 12723 of 2012 dt.1.6.2012

Bench of that Court was of the view that the fresh reference ought not be entertained mechanically. This is what the Division Bench held :

“21. Thus, when the effect of submission of reference under Section 15 is that Section 22 of SICA gets triggered, appropriate steps needs to be taken to ensure that this provision is not misused. It is a matter of concern that over a period there has been rampant abuse of this provision.

22. The experience of the working of the SICA has been far from satisfactory. This enactment was formulated as an alternative to the process of recovery through civil courts, which was a very time consuming process and the winding up through the companies Act where hardly any recoveries could be made by the financial sector, while at the same time, ensuring that social and economic fallout of the said two routes of recovery could be avoided. However, unfortunately the new system set up in place of SICA met with only limited success. On the contrary it lent itself to gross misuse of some of its provisions particularly Section 22 of the Act.

23. As mentioned above, present case appears to be one where prima facie the provisions of Section 22 of the SICA are taken undue advantage of. Therefore, at least in those cases where the reference was rejected in previous years on merits by the BIFR, guidelines can be issued to ensure that fresh references in subsequent years should not be mechanically entertained.

24. Learned counsel for the respondent may be right in contending that while registering the references, the Registrar cannot act as quasi judicial authority which is the function of the Board. However, in order to ensure that such situation does not recur, at least in those cases where the reference is rejected earlier, matter can be referred to directly to the BIFR and BIFR should look into the same and to decide whether it is a case for admitting the reference. Even if BIFR decides it to admit after finding that the conditions for the same are satisfied, it can still take a decision as to whether the provisions of Section 22 should be allowed to prevail or not. Section 22 stipulates that proceedings can go on with the consent of the Board/BIFR and the Board can in such cases pass a general order giving such a consent. At that stage, in such cases, where the references were rejected previously, the BIFR can pass appropriate directions refusing to extend the benefit of

Section 22 of the SICA.

25. We, thus, dispose of this writ petition with the direction that BIFR should formulate necessary Practice Directions in the light of our aforesaid discussion within three months and issue the same for compliance”.

Later, another Division Bench of Delhi High Court in **Zenith Infotech Ltd. Vs. Union of India**³ was confronted with the question, whether the Registrar of the Board could have declined the reference of the petitioner on the ground that the petitioner company was not carrying on any manufacturing activity, whilst scrutinizing the reference in terms of Regulation 19 of the BIFR Regulations. The Division Bench noted various provisions of SICA as well as BIFR Regulations and observed as follows :

“15. Section 15 of the Act stipulates when reference should be made to the Board by the Board of Directors of a sick industrial company under sub-section (1). Under sub-section (2) to Section 15, Central Government or the Reserve Bank or a State Government or public financial institution etc. can make a reference. Section 16 relates to inquiry by the Board. It stipulates that the Board may make such inquiry, as it deems fit, for determining "whether any industrial company has become a sick industrial company" (a) upon receipt of reference in respect of such company under Section 15; or (b) upon information received in respect of such company or upon its own knowledge as to the financial condition of the company. It is not difficult to visualise that issues may arise whether a company making reference is an industrial company i.e. it owns one or more industrial undertakings; whether the activity undertaken is classifiable under the scheduled industries i.e. the industries specified for the time being under the first schedule of the Act of 1951; whether the industrial company is a sick industrial company within the meaning of Section 3(o) of the Act. These issues can be debateable and contentious. We perceive and believe that when such issues arise for consideration, the power of adjudication and decision on these vital and substantive issues must vest with the Board. The Act recognises the Board as the adjudicating authority for all disputes. The office of the Registrar, Secretary etc. are not treated and regarded as the adjudicating authorities under the Act. Any other interpretation will result in narrowing of and limit the powers and jurisdiction of the Board on such important issues. The

Board is a creation of the statute i.e. the Sick Industrial Companies (Special Provisions) Act, 1985 and has the all incidental and ancillary powers, which would include registration of reference or existence and satisfaction of jurisdictional preconditions i.e. whether or not the company which has applied for reference is a "sick industrial company" and, therefore, the reference should be accepted and enquiry should be held. In **B.Y.Narasimha Prasad Vs. M. Veerappa and Anr., (2008) 9 SCC 372**, the Supreme Court has held, the question of maintainability of proceedings could be a jurisdictional issue and the Court is legally bound to address and answer the same; whether or not any objection is raised by the other side."

The Division Bench then noted the judgment of the earlier Division Bench in **Alcatel Lucent India Ltd.** (supra) prefacing the quotation in **Alcatel** with the following words:

"21. We are conscious of the fact that upon scrutiny, the Registrar or Secretary as the case may be, may decline registration of a reference, because they are not satisfied that the company which has made reference is a sick industrial company. Registration of reference is an important step as protection under Section 22 of the Act is available upon registration of a reference."

After considering the quotation of the Division Bench in **Alcatel** (which forms part of the quotation set out above), the court held as follows :

"22. Keeping in view the aforesaid legal position, we are of the view that when the Registrar or the Secretary is of the opinion or view that the company making the reference is not a sick industrial company and therefore reference should not be registered, they need not register the reference but refer the matter to the Board. The Board, thereafter, would decide whether the reference should be registered. This would ensure that the Registrar or the Secretary do not become adjudicating authorities, but their power is restricted in terms of sub-regulation (5) to Regular 19 to scrutiny alone and not to decision making or adjudication. Right to appeal conferred under Regulation 19(8)(2) before the Chairman is limited to scrutiny. In case the Chairman finds that there is a dispute or debate whether reference should be registered, which

requires adjudication on merits, the said objection should be taken on record and the matter should be referred to the Board for appropriate decision. Similarly, if the reference is erroneously registered, contrary to the provisions of the Act, an objection can certainly be raised, whether jurisdictional pre-requisites are satisfied, which can be decided by the Board notwithstanding earlier registration by the Registrar, Secretary or the Chairman of BIFR. Therefore, as in this case, they went beyond the scope of scrutiny, we direct the matter be placed before the duly constituted Board, to decide, whether the petitioner is an industrial company, which has become Sick and therefore, reference need to be registered. The Board will not be bound by the reasons and findings recorded in the impugned orders and would independently apply their mind without being influenced by the earlier orders. We are not expressing any opinion whether, the caveator herein need to be heard at this stage. The order of the Registrar, BIFR dated August 12, 2013 and the consequential orders of the Secretary, BIFR dated September 13, 2013 and the order dated April 03, 2014 of Chairman, BIFR are set aside.”

This then appears to be the trend of the judgments of Delhi High Court. When contentious issues are raised at the stage of scrutiny of the reference before its registration, the matter is sent to BIFR for a decision as to whether the reference should at all be registered. It is important, however, to note that once the Board takes its decision on these issues in favour of the company under reference, what follows is the registration of the reference, namely, completion of the first stage referred to above. It is only after the reference is so registered, based on the decision of BIFR, that the protection under Section 22 is available to the industrial company. If one has regard to the facts of our case, it is precisely this that appears to have happened in the present case. The issues in the present case before the officials of the Board at the stage of scrutiny were,

- (a) Whether the company was a scheduled industry as per the definition given in Section 3(1)(n) of SICA, which is a precondition for registration as a sick industrial company in BIFR?
- (b) Whether the company is in the business of publication of newspaper and not in the business of printing so as to be reckoned as a scheduled industry?, and

- (c) Whether the reference filed on the basis of provisional accounts for the Financial Year 2012-13 and not on audited accounts as per Section 15 of SICA ought to be registered?

After initially granting conditional registration subject to final accounts for the year 2012-13, the Registrar - BIFR withdrew the conditional registration and declined to grant registration to the Defendant company under Section 15(1). Aggrieved by the Registrar's order, the Defendant filed an appeal before the Secretary – BIFR under Regulation 19(8)(1). After this appeal was disposed of by the Secretary – BIFR, once again declining the reference, the Defendant filed an appeal before the Chairman – BIFR, who refused to interfere with the order passed by the Secretary – BIFR and dismissed the appeal. In the writ petition filed by the Defendant challenging rejection of their appeal by Chairman – BIFR, the Division Bench of Delhi High Court passed the following order :

“ We have heard the Learned Counsel for the Petitioner as well as the Learned Counsel for the BIFR. We have also heard the Learned counsel for some of the Creditors including Canara Bank. After hearing the Counsel for the parties it has been agreed that the order dated 19.09.2013 passed by the Registrar-BIFR as also the order dated 21.11.2013 passed by the Secretary-BIFR and the order dated 13.01.2014 issued by the Chairman-BIFR in exercise of his powers under Regulation 19(8) of the BIFR Regulations, 1987 be set aside. It is ordered accordingly.

Serious issues have been raised with regard to the validity of the registration of the reference of the petitioner by virtue of the Registrar's order dated 17.09.2013. It has been agreed by learned Counsel for the parties that the issue of the validity of registration be considered by the Board. Consequently, we direct that the Board shall consider this question in the first instance. The learned counsel for the creditors submits that, they are entitled as a right to be present on the date on which the Board will hear this question. However, for better safety they shall be moving an appropriate application on or before the date on which the Board is to hear the matter and that application would be heard simultaneously with the hearing of the above mentioned question. The matter be placed before the Board

on 18.02.2014. We also hope that the Board shall endeavour to conclude the hearing and render a decision on the question as to whether the reference was correctly registered or not within a period of four weeks after hearing all the parties interested. The learned counsel for the petitioner has no objection to the creditors being heard. Since one of the orders which has been set aside by us is that of the Chairman of the BIFR, it would be appropriate if the Chairman is not a member of the Bench which hears the matter on 18.02.2014 on the issue. We may it clear that we have not expressed any opinion on the merits of the case. The writ petition stands disposed off in the above terms. All pending applications also stand disposed off.”

In other words, what Delhi High Court wanted BIFR to do was to consider the question of registration of reference. At this stage, the BIFR obviously was not conducting any inquiry under Section 16(1) of SICA, but merely considering whether the reference should, in the first place, be registered. There is no question of application of Section 22 of the Act at this stage. Just as Section 22 was not applicable to the reference when Delhi High Court was considering the Defendant’s writ petition, when the BIFR was being asked by Delhi High Court simply to consider the matter of registration of reference, namely, whether the originally granted conditional registration was valid or not, the matter could not be said to have progressed beyond the stage of Section 15(1) of SICA so as to attract the provisions of Section 22.

8 Learned Counsel for the Defendant submits that the Board, as per the orders of Delhi High Court, was not considering whether to register a reference, but whether the registration earlier granted conditionally by the Registrar was a valid registration. Semantics apart, there is no substance in this submission. The real question is whether the registration of the reference under Section 15(1) read with BIFR Regulations in the present case can be said to be complete so as to lead to commencement of an inquiry under Section 16(1). Even if it may technically seem to be arguable that there was a reference registered, though the order of registration was clearly stated to be “conditional” (and such conditions not having been complied with), the substance of the Delhi High Court order makes it clear that what the Board was expected to examine was the

validity of the reference, that is to say, the various issues, which form part of the scrutiny at the pre-registration stage. At the end of the day, if the Board were to hold that the reference ought not to be registered and therefore, decline the reference, the result is that the reference is deemed as not having been made. In other words, at the stage of this particular inquiry by the Board, namely, whether or not the reference should be registered, the relevant stage of Section 15(1) registration is certainly not complete so as to enable the Board to commence an inquiry into the sickness of the industrial company within the meaning of Section 16(1) of SICA.

9 After considering the facts of the case, in the light of major objections on the validity of registration of the Defendant company's reference before BIFR, the Board came to the conclusion that the company was not an industrial company within the meaning of Section 3(1)(o) read with Section 3(1)(e), 3(1)(f) and 3(1)(n) of SICA and that the reference of the Defendant company should not be registered. The Board, accordingly, held that the registration of the reference was not valid. The order of the Board in this behalf amounts to declining of a reference at the stage of Section 15(1) of SICA. The challenge to the Board's order before AAIFR under Section 25 of the Act, in the premises, does not amount to an appeal under Section 25 relating to an industrial company and cannot result into suspension of legal proceedings, contracts, etc. in respect of the company by reason of Section 22 of SICA. The appeal under Section 25 must relate to an industrial company, that is to say, to a company which has stood the scrutiny of registration and in respect of which an inquiry under Section 16(1) of SICA has commenced. An appeal under Section 25 is a continuation of the inquiry under Section 16. It will be preposterous to suggest that whereas at the trial stage the suspension provision of Section 22 would require an inquiry under Section 16(1) to be pending, that is to day, a registration under Section 15(1) as having been accomplished, but that at the appellate stage, a registration under Section 15(1) need not be accomplished and no inquiry under Section 16 need to be pending, but that pendency of an appeal even if it be at the pre-registration stage entails a consequence under Section 22, namely, suspension of legal proceedings, contracts, etc. in respect of the company under reference.

Section 22 clearly indicates that at the trial stage, namely, at the level of BIFR, an inquiry ought to have commenced before Section 22 comes into play. That is the earliest stage in the reference at which Section 22 is triggered. As I have indicated above, that is not the stage at which we are in the present case. Be it at the level of BIFR or at the level of AAIFR, we are still effectively at the pre-registration stage. There is no question, in the circumstances, of application of Section 22 to the facts of the present case. The suits are, thus, not required to be stayed.

10 Just before pronouncing this order, learned Counsel for the parties inform me that the appeal preferred by the Defendant before AAIFR has been dismissed by the latter. (That was after I heard the matter and reserved my order.) At this day, therefore, there is no pending appeal under Section 25 of SICA and the ground urged by the Defendant for seeking stay of these suits has been eliminated.

11 Coming now to the merits of the summonses for judgment, the suits are on written contracts contained in "Series 1 Commercial Papers" for maturity amounts equal to Rs.25 crores each. There is no dispute about execution of these commercial papers or their maturity on 25 June 2012 and 14 March 2013, respectively. Plaintiff No.2 is an assignee of these commercial papers in the secondary market. After default of the payment by the Defendant under the respective commercial papers, the commercial papers were duly transferred by Pramerica Mutual Fund (Plaintiff No.2 in Summary Suit No.280 of 2013), who was the original transferee in the secondary market to Plaintiff No.1 in Summary Suit No.280 of 2013 (and Plaintiff in the other Summary Suit) with a view to protect the interest of the former's investors. The Series 1 Commercial Papers are in de-materialised form and currently lying in the demat account of the holder. These facts are not subject matter of any serious dispute. Though the Defendant has raised defences pertaining to validity of the transfer as between the original holder of commercial paper, namely, IDFC, and Pramerica Mutual Fund and from it to the current holder, the relevant RBI Master Circular read with Operational Guidelines makes it clear that a commercial paper is an unsecured

money instrument issued in the form of a promissory note; it was introduced in India in 1990 with a view to enable highly rated corporate borrowers to diversify their sources of short-term borrowings and provide an additional instrument to the investors. The Master Circular of RBI permits OTC trades in commercial papers. Such trades have to be reported within a stipulated period to the Fixed Income Money Market and Derivatives Association of India ("FIMMDA") reporting platform. There is no dispute between the parties that the trades were so reported. The RBI has assigned FIMMDA the task of prescribing operational guidelines for smooth functioning of the commercial paper market in line with international best practices. Operational guidelines issued by FIMMDA effective from June 31, 2001 make detailed provisions regarding trading in commercial papers and the process of redemption upon maturity of the commercial papers. These guidelines lay down a procedure for secondary market transactions in a commercial paper. Nothing could be pointed out by learned Counsel for the Defendant to show that there is any breach in the present case of either the Master Circular issued by RBI or the operational guidelines issued by FIMMDA so as to question either the transfer of the commercial paper from the original holder, namely, IDFC to Plaintiff No.2 or from Plaintiff No.2 to Plaintiff No.1. In fact, the correspondence between the parties, which is uncontested, clearly indicates that the Defendant had not only acknowledged the transfer of the commercial papers in favour of Plaintiff No.1, but had addressed an unequivocal and irrevocable confirmation and acknowledgement of its liability and indebtedness to Plaintiff No.1 for the sums of Rs.25 crores each towards the payment of maturity proceeds of the subject commercial papers. The Defendant irrevocably confirmed and bound itself to repay the amounts of both commercial papers to Plaintiff No.1 and also interest on delayed payment at the rate of 18% per annum on an annual compounding basis. In these facts, there is no defence on merits as far as the suit claims are concerned.

12 The only real defence by learned Counsel for the Defendant before this court is the defence of lack of territorial jurisdiction of this court. It is submitted by the Defendant that it does not carry on business within the local limits of the jurisdiction of this court. It is submitted that issuance of cheques,

which are stated to be dishonoured, has also taken place outside the jurisdiction of this court. It is important to note in this behalf that the suits are filed in this court on the basis of accrual of a substantial and material part of the cause of action within Mumbai and after obtaining leave of the court under clause 12 of the Letters Patent. The suits are filed *inter alia* on the basis of a written contract contained in the debt confirmation letter dated 10 July 2012. The agreement to pay contained in the letter addressed by the promisor to the promisee is made at the place where the letter is addressed. The rationale of this is that the letter contains a promise to pay; and every promise is a proposal by which the proposer signifies his willingness to do or abstain to do anything, in this case to pay. The proposal becomes a promise only when it is accepted, though to create such promise it is not necessary that there should be an acceptance in writing. The promisee may simply accept the promise before the action. The communication, thus, of the promise to the promisee is complete only when the promisee receives such communication at which place alone he can be said to have signified his acceptance of the promise (at least where there is no other evidence of such acceptance). The debt confirmation letter is clearly addressed by the Defendant to Plaintiff No.1 at its office in Worli, Mumbai and is communicated at that place. A part of the cause of action can certainly be said to have arisen at Mumbai. Upon leave being granted under clause 12 of the Letters Patent, this court clearly has jurisdiction to entertain and try the present suits.

13 In the premises, there is no statable defence to the present suits. The defence, such as the one which is raised by the Defendant in its reply to the summonses for judgment, can only be described as nominal or illusory or practically moonshine. Though this court would be perfectly justified in decreeing the suits in favour of the Plaintiffs, in the facts of the case, and with a view to give an opportunity to the Defendant to try to prove defence at the trial, only as a measure of mercy, I am of the view that the Defendant be allowed to defend the suits on condition of deposit of the entire amount of the suit claims in accordance with the respective particulars of claim due upto the date of the suits in court. In the premises, the following order is passed :

- (i) The Defendant is granted leave to defend the suits subject to and on payment, respectively, of a sum of Rs.27,37,94,521/- in Suit No.280 of 2013 and a sum of Rs.25,69,04,110/- in Suit No.804 of 2013 within a period of twelve weeks from today;
- (ii) Upon the payments being made, the suits be transferred to the list of commercial causes;
- (iii) Written statements to be filed within a period of six weeks from the date of deposit of the amounts in terms of clause (i) above;
- (iv) The Prothonotary & Senior Master to invest the amounts deposited by the Defendant, if any, in fixed deposit/s of Nationalised Bank initially for a period of one year, thereafter to be renewed from time to time, so as to abide by the final orders that may be passed in the suits;
- (v) The Summonses for Judgment are disposed of accordingly.

(S.C. Gupte, J.)