

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

% **Judgment reserved on: 10th August, 2016**
Judgment pronounced on: 29th August, 2016

+ **Arb.A.No. 41/2015**

GOYAL MG GASES PVT. LTD. Appellant
Through Mr.Harish Malhotra, Sr.Adv. with
Mr. Simran Mehta, Mr. Anil
Upadhyay & Ms. Swati R.K., Advs.

versus

SBQ STEELS LTD. Respondent
Through Mr. S.Santanam Swaminadhan,
Adv. with Mr. Nishtha Khurana &
Mr. Harshal Tholia, Advs.

+ **Arb.A.No. 42/2015**

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CORAM:

HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By way of this common order, I propose to decide the above mentioned three appeals filed by the appellant, Goyal MG Gases Pvt. Ltd.

2. In the two appeals i.e. Arb.A.Nos. 41/2015 and 42/2015 under Section 37(2)(a) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") impugned common order dated 20th June, 2015 was passed by the Arbitral Tribunal whereby jurisdictional objection of the respondent under Section 16 of the Act, was upheld and the arbitral proceedings were suspended on the ground that the same are hit by Section 22(1) of the Sick Industrial Companies Act, 1985 (hereinafter referred to as the "SICA").

3. In the appeal being Arb.A.No. 43/2015 under Section 37(2)(b) of the Act impugned common order dated 20th June, 2015 was passed by the Arbitral Tribunal, whereby the Arbitral Tribunal had declined to grant the interim measures sought by the appellant in its application under Section 17 of the Act only on the ground that the respondent had got itself registered with BIFR, under SICA and the proceedings were suspended, the same cannot be considered on merit.

4. Brief facts of the case as per the pleadings are that the parties entered into a contract dated 7th August, 2008 for the supply of

oxygen and nitrogen gases by the appellant to the respondent; by the installation of a 100TPD Air Separation Plant. Disputes arose between the parties and the matter came up for arbitration by way of 2 separate references comprising of three Arbitrators titled as GMG-1 and GMG-2. The appeal being Arb.A.No.41 /2015 pertains to GMG-2 and the appeals being Arb.A.Nos. 42/2015 and 43/2015 pertains to GMG-1.

Under the said contract, the appellant had to set up an Air Separation Unit [ASU] for the manufacture of industrial gases for the steel plant of the respondent. Due to various breaches of the contract committed by the respondent, the contract dated 7th August, 2008 was terminated by the appellant and both the parties are suing each other for damages.

5. It is the case of the appellant that under the contract dated 7th August, 2008, the ASU is and will always remain the property of the appellant, removable at the will of the appellant, after default by the respondent or upon expiry of the contract, by efflux of time or early termination.

The appellant submits that there is no subsisting contractual arrangement between the parties, for the operation of the ASU. Neither the party is suing for the specific performance of the contracts dated 7th August, 2008 and 17th April, 2013. The claims of the parties, as pending before the Arbitrators, are only for money claims. The appellant's claim is that the respondent is not the owner of the ASU.

6. During the hearing, counsel for the appellant had pointed out that in several communications exchanged between the parties, the respondent had acknowledged the appellant's ownership of the ASU

and had expressed its consent for the removal of the same from the site of the respondent.

7. As the steel plant of the respondent is not operating since August, 2011, there is no possibility of reconciling the differences between the parties and operationalising the ASU, at the site of the respondent, thus the appellant is insisting to remove ASU from the site of the respondent, for its maintenance and upkeep. The contention of the appellant in the application under Section 17 of the Act before the Arbitral Tribunal was that the interim measure is necessary for the preservation of the cryogenic ASU, as the same is not in use and is not put by the respondent in proper atmospheric conditions at the site.

8. The respondent during the arbitration proceedings filed a Memo dated 17th March, 2015 before the Arbitral Tribunal, alleging that it has been registered with BIFR under SICA; and during the pendency of the proceedings before BIFR, the arbitral proceedings be suspended. The appellant had filed the reply dated 21st April, 2015 to the said memo and had also filed the detailed the written arguments dated 30th April, 2015, opposing the suspension of arbitral proceedings. The case of the appellant is that in fact at the instance of the respondent itself, the appellant had moved the application under Section 17 of the Act, before the Arbitral Tribunal in GMG-I for the said prupose.

9. After hearing the arguments of the parties, the Arbitral Tribunal had reserved orders on the application for suspension of proceedings on 28th May, 2015.

10. In the common order dated 20th June, 2015, the Arbitral Tribunal had proceeded to dispose of the appellant's application under Section 17 of the Act, declining the interim measure as sought and

instead relegating the appellant to BIFR, for seeking removal of the ASU. The impugned common order pertains to the jurisdiction of the Arbitral Tribunal to continue further proceedings which is the subject matter of two separate and substantive appeals in GMG-1 and GMG-2, respectively.

11. The case of the appellant before this Court is that the appellant is not required to approach BIFR for removing the ASU from the site of the respondent, as admittedly the said ASU is not the property of the respondent-Company. The prayer for interim measures sought by the appellant does not pertain to proceed against the properties of the respondent-Company, thus, the impugned order is contrary to the law laid down in **Kotak Mahendra Finance Ltd. v. Deve Paints Ltd.** AIR 1997 Bom. 401 (para 7) wherein it was held as under:-

"7.....The answerable question, therefore, is whether the properties which are not owned by the sick industrial undertaking, are covered under Section 22(1) of the Act of 1985? If the finance company resorts to recovery of its properties viz. its vehicles which have been given on lease to the lessee company, it cannot be said that it is property of the lessee company (sick industrial undertaking) or it is covered under Section 22(1) or such recourse can be equated with the kind of proceedings contemplated under Section 22(1). The expression 'against the properties' occurring in Section 22(1) is not without significance because it implies that an action of winding up or for execution, distress or such like proceeding must be against the property of the sick industrial company."

10. Applying the aforesaid ratio of the Apex Court, I have no hesitation in holding that the contention of the lessee company that Section 22(1) of the Act of 1985 is attracted is wholly misconceived. The finance company cannot be asked to approach BIFR Board for the recovery of its properties viz. vehicles in the present case from the

lessee company when the said vehicles are not the properties of the sick industrial company (lessee company) and are not covered under Section 22(1) of the Act of 1985."

12. With regard to the removing of ASU from the site of the respondent, it is stated by the appellant that the same is contrary to the law laid down by this Court in **National Small Industries Corporation Ltd. v. ADL International Ltd. & Ors.** (2005) 116 DLT 107 (para 8) wherein it was held as under:-

"8. In the present case Defendants 2 to 8 are alleged guarantors. In *Patheja Bros. Forgings & Stamping and Anr. v. ICICI and Ors.*, (2000) 6 SCC 545 the Court had favoured the view that if the legal action is for the enforcement of a guarantee in respect of a loan granted to the sick industrial company, Section 22 would be attracted. When the order of the Court amounts only to returning the property in possession of the sick industrial company to the property's rightful owner Section 22 is obviously not attracted. This view has also found favour with a learned Single Judge of the Bombay High Court in *Jetu Jacques Taru Lalvani v. Solestrap Industries Pvt. Ltd. and Ors.*, [2002] 110 Comp Cas. 831 where the Defendant was found liable on a Bill of Exchange under Section 30 of the Negotiable Instruments Act, even though the second Defendant had become a sick industrial company."

13. Short reply on behalf of the respondent to the appeal has been filed wherein it is stated that the arbitral proceedings are liable to be stayed under Section 22(1) of SICA for the following reasons:-

- a) The present arbitral proceedings are in the nature of a "money suit" as has been admitted by the appellant.
- b) Section 22(1) of SICA includes arbitration proceedings of the present nature, as has been held by the Supreme Court and this Court.

- c) "Money suit" falls under the second part of Section 22(1) SICA namely that " ... and no suit for the recovery of money ... shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority".

14. Learned counsel for the respondent argued that admittedly the claims of the appellant are for recovery of the amount. The arbitration proceedings are covered under the money suit which falls under the second part of Section 22(1) of SICA thus, no suit for recovery lies to be proceeded further. The arbitration proceedings are rightly stayed by the Arbitral Tribunal. The appeals are liable to be dismissed.

It is also submitted by the counsel for the respondent that earlier the appellant had filed an appeal under Section 25 of SICA against the BIFR order dated 30th January, 2015. The contentions of the appellant were not accepted. In the impugned order, the Arbitral Tribunal had granted the appellant the liberty to move before BIFR, which is the appropriate authority for both, the appellant in case of any grievance as well as the third party i.e. Goyal Gasses Pvt. Ltd. who is claiming itself to be the owner of the ASU. It is also argued that as separate agreements have been executed between the parties, the respondent's petition under Section 11 of the Act for invoking the arbitration proceedings is pending in Madras High Court against Goyal Gasses Pvt. Ltd. As the subject matter, ASU is sub-judice before another High Court where the appellant is not a party and the appellant is also not a party to the said Agreement. If Goyal Gasses Pvt. Ltd. is a sister concern or it is owned by the appellant, in that case also it is an independent company and the question of removing ASU by the present appellant does not arise. Even otherwise, ASU is now a part of

BIFR proceedings and the relief sought by the appellant under Section 17 of the Act for removal of ASU is rightly not allowed. The suggestion is made by the counsel that the appellant should take the approval from BIFR and only then the appellant should proceed with the arbitration proceedings as per the law.

15. The Arbitral Tribunal by exercising its power under Section 16(2) of the Act suspended the arbitral proceedings, which are at the stage of final arguments mainly due to the reason that since respondent has got itself registered with BIFR under SICA, it cannot proceed further.

16. The reasons for suspending the arbitration proceedings have been given in para 13 to 21 of the impugned common order dated 20th June, 2015. The same have been reproduced herein below:-

"13. In *Kailash Nath Agarwal vs. Pradeshia Industrial and Investment Corporation* (2003 (4) SCC 322), while considering the nature of the proceedings initiated against a guarantor under the UP Public Money (Recovery of dues) Act 1972, a bench of two learned Judges observed that the word "suit" in Section 22 of the SICA, 1985 would not include the recovery proceedings under the above UP Act and that the words "Suit and "Proceedings" have not been used to have or bear the same meaning, overlappingly.

14. In *Paramjeet Singh Patheja vs. ICDS Ltd* [2006 (13)5CC 322], yet another bench of two learned judges has held as follows in para 43(vii):

"(vii): It is a well established rule that a provision must to be construed in a manner which would give the effect to its purpose and to cure the mischief in the light of which it was enacted. The object of S.22 in protecting guarantors from legal proceedings pending a reference to BIFR of the principal debtor, is to ensure that a scheme for rehabilitation would not be defeated by isolated proceedings adopted against the guarantors of a

sick company. To achieve the purpose it is imperative that the expression "Suit" in S.22 be given its plain meaning, namely any proceedings adopted for realization of a right in a party by law. This would clearly include Arbitral proceedings" (Emphasis ours)

15. The submission of the learned counsel for the Claimant that, since in Paramjit Singh Patheja's case, there was no such question as to whether the expression "Suit" includes 'Arbitral Proceedings' involved, therefore, the finding that "the expression "Suit" in Section 22" would clearly include Arbitral proceedings could be ignored, does not impress us. The Tribunal is not justified to ignore the categorical declaration made in Paramjit Singh Patheja's case that the expression "Suit" in Section 22 would clearly include "Arbitral Proceedings". The Tribunal is also not persuaded to agree with learned counsel for the Claimant that as in Paramjit Singh Patheja's case, the findings about "Arbitral Proceedings" cannot be treated as the ratio decidendi of that decision, therefore, the same can be overlooked. Keeping in view the conclusion recorded by the Bench in Paramjit Singh Patheja's, case in para 43 (viii), by which the Tribunal is bound, we hold, as the law stands at present, that the expression "Suit" in Section 22 (1) of the SICA includes "Arbitral Proceedings".

16. Another submission made by the learned counsel for the claimant as to whether the pre award stage in the Arbitral Proceedings would also fall within the scope of Section 22(1) or that the said section would get attracted only at the stage when an award is passed an Arbitral Tribunal and becomes executable as envisaged in Section 36 of the Arbitration Act does not detain us. In our view the decision of the Supreme Court reported in Morgan Securities and Credit (P) Ltd. vs. Modi Rubber Ltd, [2006 (12) SCC 642] directly answers this question while dealing with the scope and effect of Section 22(1) in contrast to Section 22(3) of the SICA Act. In paras 47, 48 and 49 it is observed as follows:

"47. Sub-section (1) of Section 22 itself provides for a non-obstante clause. It not only refers to the provisions of the Companies Act or the Memorandum or Articles of Association of an industrial company or any other instrument in force under the said Act, but also of other laws.

48. SICA furthermore was enacted to give effect to a larger public interest so as to secure the principles specified in Article 39 of the Constitution of India. Sub-section (1) of Section 22 must be construed having regard to the aforementioned principles in mind. It seeks to restrain the Court from entertaining and/or proceeding with any court proceeding if the lis is before it.

49. The provisions contained in sub-section (1) of Section 22, however, appear to be clear and unambiguous. Sub-section (3) of Section 22, on the other hand, does not speak of automatic suspension of the proceedings or bar the jurisdiction of the Court in entertaining any application....."

17. *In Grampanchayat and another vs. Shree Vallbh Glass Works Ltd and others*, [1990(2) SCC 440], yet another bench of the Supreme Court held, that as soon as the enquiry under Section 16 is ordered by the BIFR, various proceedings set out under Sub-section(1) of Section 22 would be deemed to have been suspended.

18. Learned counsel for the claimant placed strong reliance on *Raheja Universal Ltd vs. NRC Ltd*, (2012(4) SCC 148) and others(particularly on paras 78 to 80) wherein, a Bench of three Learned Judges of the Supreme Court, observed in para 80:

"80. It is difficult to state with precision the principle that would uniformly apply to all the proceedings/suits falling under Section 22(1) 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”.

19. Once the position that the word "Suit" will include the Arbitration proceedings becomes acceptable, S.22 of the SICA, 1985 which has been held to be very significant and of wide ramification and application, having regard to its non obstante clauses would get attracted and no proceedings which fall within the scope of S.22 (1), can be either allowed to be taken out or continued, without the consent of BIFR or AAIFR, as the case may be.

20. *In KSL and Industries Ltd vs Arihant Threads Ltd and others*, [2015(1) SCC 166] yet another Bench of three learned judges of the Supreme Court had an occasion to consider the scope and impact of S.22 of SICA. In dealing with the overriding effect of the provisions of SICA, the object of S.22 and the scope of powers vested with BIFR under Sections.16, 17 and 18 of the SICA, the court specifically observed in para 26, as to at what stage of the proceedings instituted/ or instituted and pending gets attracted to and becomes suspended under S.22 , as here under:

"26.The submission is that Section 22 lays down that only proceeding for winding up or execution, distress or the like shall not lie or be proceeded with where an enquiry is pending or a scheme is under preparation or consideration or a sanction scheme is under implementation etc.; whereas a proceeding for recovery of a debt may proceed. To put it another way, that a proceeding for recovery shall lie against a sick company but an order made in it could not be executed against any of the properties of the industrial company, the effect being that the proceedings may continue without any consequence. Thus there cannot be any execution or distraint against the properties of the company but creditors may continue to apply for recovery before the DRT. We do not think that such an anomalous purpose can be attributed to Parliament in the present legislative scheme. Though there is no doubt that Parliament may

expressly bring about such a situation if it considers it desirable. Even otherwise, it appears that the legislative purpose for reconstruction of companies could be thwarted if creditors are allowed to encumber the properties of the company with decrees of the DRT while the BIFR is engaged in reviving the company, if necessary, by leasing or selling the properties of the company for which there is an express power.

Proceeding further the Bench observed that,

".....But as is apparent, the immunity is not absolute. Such proceeding which a creditor may wish to institute, may be instituted or continued with the consent of the Board or the appellate authority. "

21. From the above discussion it inevitably follows that the provisions of Section 22 (1) of SICA would get immediately "attracted to Arbitral Proceedings pending before the Arbitral Tribunal". The Arbitral Tribunal would be left with no choice but to proceed till the Award is made or pronounced. Infact learned counsel for the Claimant impressed upon this procedure to be followed."

17. The following issues are involved in the facts and circumstances in the present appeals:

- i) Whether the arbitration proceedings are covered under the money suit and would fall within the meaning of second part of Section 22 (1) of SICA?
- ii) Whether the order for suspension of arbitration proceedings is a valid order when the award is yet to be published?
- iii) Under which stage an award can be treated as a decree?
- iv) Whether in pending arbitration proceedings i.e. pre-award stage, the issue of SICA is entertainable or it could only be

raised if permissible at the stage of enforcement of award (once it become a decree)?

18. All the above referred issues are to be decided in the present appeals. Let me now deal with the rival submissions of the parties.

19. The appellant submits that it is not necessary to seek the consent of BIFR, for continuing with the arbitral proceedings as the bar of Section 22(1) of SICA is not attracted to the present case and the Arbitral Tribunal has erred in holding so.

20. The provisions of Section 22 (1) of SICA reads as under:-

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

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

21. A three Judges Bench of the Supreme Court in ***Raheja Universal Ltd. v. NRC Ltd.***, (2012) 4 SCC 148 has discussed the said provisions in great details and held as under:-

"78. 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 SICA 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.

79. 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 SICA 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 BIFR. In other words, a suit for recovery and/or for the stated kind of reliefs cannot lie or be proceeded with further without the leave of BIFR. Again, the intention is to protect the properties/assets of the sick industrial company, which is the subject-matter of the scheme.

80. It is difficult to state with precision the principle that would uniformly apply to all the proceedings/suits falling under Section 22(1) of SICA 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, finalisation or implementation of the scheme."

22. The applicability of embargo contained in Section 22(1) of SICA requires the cumulative and conjoint satisfaction of two conditions; namely; a) the proceeding sought to be suspended should clearly satisfy the ingredients of Section 22(1) and fall within one or more of

the categories of proceedings indicated in the said provision and b) additionally, the continuance of the proceeding should have the impact of interfering with the formulation of the scheme.

23. The Supreme Court has also made it clear that the applicability of the embargo contained in Section 22(1) of SICA depends on the facts and circumstances of each individual case; and no principle of universal application can be laid down in all such matters.

The use of the expressions "*Firstly*" and "*Secondly*", in para 80 of ***Raheja Universal Ltd.*** (supra) would make it clear that both the conditions given in the judgment have to be satisfied cumulatively. Even if the suit/proceeding is of the category contemplated in Section 22(1), that by itself will not attract the bar contained in the said provision, unless it additionally has the impact of "*interfering with the formulation, consideration, finalisation or implementation of the scheme.*"

24. The law laid down in ***Raheja Universal Ltd.*** (supra.) has been applied in various cases decided by this Court, in which it has been that the proceedings in a suit for recovery of money will not be held in abeyance in all cases merely because a scheme is pending under consideration before BIFR; and that the mere continuance of the proceedings for determination and adjudication of liability does not interfere with such a scheme. The appellant has placed reliance on the following judgments, rendered by co-ordinate Benches of this Court:

- ***Apollo International Ltd. v. Supriya Pharmaceuticals,*** (2012) 195 DLT 288 (paras 2-5)
- ***Kusum Products Ltd. v. Hitkari Industries Ltd.*** (2014) 214 DLT 594 (para 4).

- **FMI Investment P. Ltd. v. Montari Industries Ltd. Anr.,** (2012) 194 DLT 687 (para 6).
- **Ralson Industries Ltd. v. Adhunik Transport Organization Ltd.** in Review Appl. No. 1/2013 in CM(M) No. 1010/2012 decided on 4th January, 2013 (para 4).

25. Counsel for the appellant argued that the bar in Section 22(1) of SICA is applicable only to dues which are admitted and form part of the scheme before BIFR. Reliance is placed on the following judgments:-

- **Saketh India Limited v. W. Diamond India Limited** 2010 (119) DRJ 190 (paras 6-11) [DB].
- **Haryana Steel & Alloys Limited v. Transport Corporation of India** (2012) 193 DLT 312 (paras 11-15).
- **Sunil Mittal v. LML Ltd.** (2011) 180 DLT 389.

26. The Supreme Court has interpreted Section 22(1) of SICA and the stage of its applicability while holding that Section 22(1) of SICA is only attracted to arbitral proceedings when an award becomes a decree, enforceable in a Court of law, as held by a two Judge bench of the Supreme Court in **Morgan Securities & Credit (P) Ltd. v. Modi Rubber Ltd.** (2006) 12 SCC 642, in the following words :

"45. However, sub-section (1) of Section 22 would be attracted only when an award becomes a decree and, thus, enforceable in a court of law, albeit in the event a proceeding is initiated therefor. In this case, an objection to the award has been filed. It is, therefore, yet to become a decree.

67. The Board, however, has not passed an order under sub-section (3) of Section 22 of SICA. The court, therefore, must proceed with the objection filed by the respondent

under Section 34 of the 1996 Act. However, if the objection filed by the respondent is rejected, the question of its enforceability would come into being. Once the arbitral award having the force of a decree is put into execution, sub-section (1) of Section 22 of SICA would come in its way from being enforced.....”

The same observations of the Supreme Court are also made in para 18 of **Jay Engineering Works Ltd. v. Industry Facilitation Council & Anr.** (2006) 8 SCC 677 and in para 30 of **Raheja Universal Ltd.** (supra).

27. He argued that the ASU (Gas plant) is owned by the appellant even as admitted by the respondent in its communications and is not a part of the scheme, thus where is the question of going to the BIFR to seek the approval to continue the arbitration proceedings. The communication exchanged between the parties speak for itself that ASU is owned by the appellant. Besides the communication issued by the respondent would also speak that the respondent has no objection if it is removed by the appellant.

28. The Supreme Court in **San-A Tradubg Co. Ltd. v. I.C. Textiles Ltd.** (2012) 7 SCC 192 held that an arbitral proceeding is not a “suit” within the meaning of Section 22(1) of SICA. From reading of paras 7, 11 & 12 of the said judgment, it is evident that the issue which fell for the consideration of the Supreme Court in the said matter was the same, as is being urged for the consideration of this Court, in the present appeals i.e. whether a reference to BIFR would debar arbitral proceedings under the Act.

29. It was further held by the Supreme Court that the arbitration proceedings were not covered by Section 22(1) of SICA and a

reference to BIFR would not bar continuance of such proceedings. The said para has been reproduced here as under:-

"26. Section 22 further prohibits taking up of the proceedings of the nature which would be coercive for recovery of money against a sick undertaking. Proceeding in arbitration is neither a suit under sub-section (1) of Section 22 of SICA nor the proceedings thereunder and, therefore, there is no prohibition under Section 22 of SICA to take up the arbitration proceedings to adjudicate the liability of the parties to the arbitration proceedings. In my view, Section 22 of SICA does not debar the arbitration proceedings under the Arbitration and Conciliation Act, 1996. The objections to the arbitration proceedings raised by the respondent fail for the aforesaid reasons and are rejected. Mr Manabu Nonoguchi was appointed as an arbitrator by the parties."

30. The above said judgment has been considered by various High Courts to hold that the reference under SICA does not bar proceedings under the Act. In this regard, the appellant has placed reliance on the following judgments:-

- i) ***Tata Capital Financial Services Ltd. v. Ramasarup Industries Ltd.*** (2013) 6 Bom. CR 230

"34. Supreme Court in case of San-A Tradubg Co. Ltd. (supra) after adverting to Supreme court in case of Maharashtra Tubes Ltd (supra), Shree Chamundi Mopeds Ltd. v. Church of South India AIR 1992 SC 1439 and Kailash Nath Agarwal (supra) held that proceedings in arbitration is neither a suit under sub-section (1) of section 22 of SICA nor the proceedings thereunder, and, therefore, there is no prohibition under section 22 of SICA to take up the arbitration proceedings to adjudicate the liability of the parties to the arbitration proceedings. It is held that section 22 of SICA does not debar the arbitration

proceedings under the Arbitration and Conciliation Act, 1996.”

- ii) The Madras High Court in **India Cements Capital Ltd. v. Auto Pins (India) Ltd.** 2013 (2) CTC 705, speaking through the then Acting Chief Justice R.K. Agarwal had held as under:-

“9. The Hon'ble Supreme Court in the case of San-A Tradubg Co. Ltd. v. I. C Textiles Ltd., 2006 (3) CTC 59 (SC) (supra), has held that a proceeding in arbitration is neither a Suit under sub-section (2) of Section 22 of the SICA nor the proceedings thereunder and, therefore, there is no prohibition under Section 22 of SICA to take up the Arbitration proceedings to adjudicate the liability of the parties to the Arbitration proceedings. A similar view has been taken by the Hon'ble Supreme Court in the case of Jay Engineering Works Ltd. v. Industry Facilitation Council, 2006 (3) Arb LR 594 (SC) and Morgan Securities & Credit Pvt. Ltd. v. Modi Rubber Ltd., 2006 (4) Arb LR 394 (SC) (supra). In view of the principles laid down by the Hon'ble Supreme Court in the aforementioned cases, the objection raised by the learned Counsel for the Respondent, that the Petition for enforcing the Arbitration clause and seeking appointment of an Arbitrator is not maintainable in view of the fact that the proceedings under the SICA are pending before the BIFR, cannot be accepted.”

31. The said aspect of the matter has not been considered by the Arbitral Tribunal who has also not considered that the bar in Section 22(1) of SICA is applicable only to those dues which are admitted fully or at least substantially (i.e. to the extent of the principal amount) by the respondent; and which thus require no adjudication, as held by the Division Bench of this Court in **Saketh India Limited v. W. Diamond India Limited** 2010 (119) DRJ 190 (paras 6-11). The Arbitral

Tribunal did not deal with the said judgments, even a bare reading of the abovementioned judgments, of this Court, shows that the same were rendered after considering Supreme Court judgments on the subject, including, inter alia, ***Raheja Universal Ltd.*** (supra) and ***Deputy Commissioner Tax Officer v. Coromandel Pharmaceuticals*** (1997) 10 SCC 649 .

32. The Arbitral Tribunal had passed the impugned order mainly by following the decision in the case of ***Paramjeet Singh Patheja v. ICDS Ltd.*** (2006) 13 SCC 322 and held that the expression "suit" in Section 22(1) of SICA would include arbitration proceedings. Arbitral Tribunal at the same time did not follow the principles laid down in other judgments of the Supreme Court. If the ratio of ***CIT v. Sun Engineering Works (P) Ltd.*** (1992) 4 SCC 363 is applied to the facts of the present case, the findings would have been otherwise. In the case of ***Paramjeet Singh Patheja*** (supra), the only questions which fell for consideration of the Court were set out in para 12 of the judgment were as under:-

"12. The substantial questions of law of paramount importance to be decided by this Court are:

(i) Whether an arbitration award is a "decree" for the purpose of Section 9 of the Presidency Towns Insolvency Act, 1909?

(ii) Whether an insolvency notice can be issued under Section 9(2) of the Presidency Towns Insolvency Act, 1909 on the basis of an arbitration award?"

33. The said questions arose in the context of the facts set out in paras 5 & 6 of the above said judgment i.e. the guarantor of a sick company was issued a notice under Section 9(2) of the Presidential

Towns Insolvency Act, 1909 [hereinafter "PTIA"] on the basis of an arbitral award. It was the case of the appellant before the Supreme Court that an arbitral award is not a decree within the meaning of Section 9(2) of the PTIA and hence, the notice was without jurisdiction. This issue was decided squarely in favour of the appellant by the Court in para 44 of the above said judgment by holding that the notice under Section 9(2) of the PTIA cannot be sustained on the basis of an arbitral award. On coming to this conclusion, the Supreme Court held that in no uncertain terms that a "suit" tried by a civil court, which resulted in the passing of a decree was an entirely different specie of proceeding from an arbitral proceeding. This clearly supports the case of the appellant.

In para 21 & 23 of the above said judgment the Court held as under:-

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

23. The words "decision" and "civil court" unambiguously rule out an award by arbitrators."

The same effect are the observations of the Court in para 43 (iv) and (v) of the above said judgment where, while drawing a distinction between an arbitral award and a decree, the Court had held that "the suit must start with a plaint and culminate in a decree" [para 43 (iv) (b)]. Further, in the same sub-para the Court had held that "*An award does not satisfy any of the requirements of a decree. It is not rendered in a suit nor is an arbitral proceeding commenced by the institution of*

a plaint.” Therefore, the Court has drawn a clear distinction between a “suit” and an “arbitral proceeding”.

34. As a matter of fact, the issue as to whether Section 22(1) of SICA is a jurisdictional bar to the continuance of arbitral proceedings, on the ground that expression “suit” as used in Section 22(1) includes arbitral proceedings was not in question before the Court and it was not required to be decided. There was thus no issue or question to be decided by the Court in the case of **Paramjit Singh Patheja** (supra) to go into the issue of whether the arbitration proceedings and the resulting award were null and void in view of the embargo contained in SICA and the same has been specifically stated by the Court in para 45(b) of the said judgment.

35. The Division Bench of this Court in **Om Prakash Parasrampuria v. UOI** (2016) 228 DLT 452 (DB) has, after extracting relevant portions of the judgment in **Patheja’s** case held in para 13 that “.....*the judgment of the Supreme Court in Paramjit Singh Patheja's case (supra) cannot be interpreted to conclude that each and every kind of action is contemplated to be included in the term 'suit' because the Supreme Court was dealing with a specific issue i.e. whether an award was a decree or an order within the meaning of Section 9(2) of the Insolvency Act.*”

The Division Bench in the above said judgment has further held in para 21 that:

“21. Thus, it was held that having regard to the law laid down in the various judgments, the word 'suit' cannot be understood in its broad and generic sense to include any action before a legal forum involving an adjudicatory process. If that were so, the legislature which is deemed to have knowledge of existing statute would have made

the necessary provision, like it did, in inserting in the first limb of Section 22 of SICA, where the expression proceedings for winding up of an industrial company or execution, distress, etc. is followed by the expression or 'the like' against the properties of the industrial company. There is no such broad suffix placed alongside the term 'suit'. The term suit would thus have to be confined, in the context of sub-Section (1) of Section 22 of SICA, to those actions which are dealt with under the Code and not in the comprehensive or overarching sense so as to apply to any original proceedings before any legal forum as was sought to be contended before us. The term, 'suit' would therefore apply only to proceedings in a civil court and not actions for recovery proceedings filed by banks and financial institutions before a Tribunal, such as, the 'DRT'."

36. Actually the Division Bench of this Court in **Om Prakash Parasrampuria** (supra), after considering **Patheja** (supra), held in clear terms that the expression "suit" would only include proceedings in a civil court and that too under the Code i.e. CPC and not any and every proceeding before a legal forum involving an adjudicatory process. It is undisputed that an arbitral proceeding is not a proceeding under the CPC and proceedings before the Arbitrator are not proceedings before a civil court. In fact, this is precisely what **Patheja** (supra) also holds.

In para 43 of **Patheja** (supra) it was held that *"To achieve that purpose, it is imperative that the expression "suit" in Section 22 be given its plain meaning, namely, any proceedings adopted for realization of a right vested in party by law. This would clearly include arbitration proceedings.* The said findings to be read in the context of the questions before the Court and preceding paras of judgment, which are to the effect that a notice under Section 9(2) of the PTIA Act, 1909 could not be issued on the basis of an arbitral award, as an

arbitral award is not a decree and an Arbitrator is not a civil Court. When seen in this context, the aforesaid observation means that arbitral proceedings will also fall within the ambit of Section 22(1) of SICA, when the same culminate and mature into a vested right i.e. post the Section 34 stage, when the arbitral award becomes a decree of the civil Court, executable under CPC. This reading of **Patheja** (supra) would also be consonant and harmonious with the law laid down in paras 45 and 67 of **Morgan Securities** (supra).

The counsel for the appellant has submitted that the referral order dated 10th January, 2008 would show that the correctness of **Patheja** (supra) was doubted by the referral Court on the question of the enforceability of an arbitral award vis-à-vis the provisions of the PTIA Act, 1909. The scope and amplitude of Section 22(1) of SICA was neither referred nor the law on this aspect was considered by the three Judges Bench. Thus, there is no force in the submission of the counsel for the respondent that the three Judges Bench have held that an arbitral proceeding at the pre-award stage is a "suit" within the meaning of Section 22(1) of SICA. At the best, if the award attains the finality and becomes decree, at the time of enforcement of award arising from the arbitration proceeding, **Patheja** (supra) can be relied upon by raising the plea of Section 22 of SICA.

37. From the entire gamut of the present case, it appears to the Court that the **Patheja** (supra) case has been rightly interpreted by the Division Bench of this Court in **Om. Prakash Parasrampur** (supra) to hold that "*the judgment of the Supreme Court in **Paramjit Singh Patheja's** case (supra) cannot be interpreted to conclude that each and every kind of action is contemplated to be included in the term 'suit' because the Supreme Court was dealing with a specific*

issue i.e. whether an award was a decree or an order within the meaning of Section 9(2) of the Insolvency Act.”

38. Even otherwise, the **Patheja** (supra) was dealing with a post award scenario, in the context of whether an award was a decree within the meaning of Section 9(2) of the PTIA Act, 1909. The pre-award stage of determining liability, which is the subject matter of present appeals, was not an issue in **Patheja** (supra) as that stage had already been crossed by the parties. At the best, the reliance can be placed by the respondent, if applied to the facts and circumstances of the present case, at the stage of enforcement of decree and not at the pre-award stage.

39. Another judgment referred in the case of **KSL and Industries Limited v. Arihant Threads Limited & Others** (2015) 1 SCC 166, which has been relied upon by the Arbitral Tribunal and the respondent, is also not applicable to the facts of the present case, as in **KSL and Industries Limited** (supra) the “proceedings for recovery”, which were sought to be interdicted by resort to Section 22(1) of SICA, were proceedings for realization of the decretal amount and auction of the assets of the sick company, instituted by a secured creditor, holding a confirmed DRT decree, in its favour. This is evident from bare reading of paras 4 & 5 of the said judgment.

The Supreme Court in fact in para 31 had clarified in its expression “application for recovery” and held that the proceedings in that case had “in fact resulted in the execution and distress against the property of the Company and is therefore liable to be construed as a proceeding for the execution, distress or the like against any of the properties of the industrial company.”

40. In the present matters, both the conditions prescribed in para 80 of ***Raheja Universal*** (supra) stood satisfied in the case of ***KSL and Industries Limited*** (supra). The Supreme Court had rightly held in para 31 that *"We are of the view that such a construction would be within the intendment of Parliament wherever the proceedings for recovery of a debt which has been secured by a mortgage or pledge of the property of the borrower are instituted."*

41. Admittedly, in the present case, the parties are at a pre-award stage. Let alone a confirmed decree, even an arbitral award has not come into existence. The appellant is an unsecured creditor who has no charge on the assets. The continuance of proceedings do not entail any likelihood of distress or execution against the assets of the sick company, at this stage, thereby resulting in any interference with the BIFR scheme. The observations in paras 26 and 27 of ***KSL and Industries Limited*** (supra), which have been relied upon by the respondent have to be read in this context. It would clear the legal issue with the law laid down in ***Raheja Universal*** (supra) and other judgments including the judgment of this Court cited above as also with the position of law laid down in ***Morgan Securities*** (supra) and ***San Tradubg*** (supra). In fact, the said judgments are directly applicable to the facts of the present case.

42. The respondent has also relied upon the Judgment of the Supreme Court in ***Ghanshyam Sarda v. Shiv Shankar Trading Co. & Ors.*** (2015) 1 SCC 298. From a reading of para 3, it is evident that in the facts of the said case, the reference to BIFR was made in the year 1994. The suits were filed in the year 2013, seeking a declaration that the defendant company had ceased to be sick. It is evident that no prayer for recovery of money was made. It is recorded

in para 10 in the said judgment that the sick company in its written statement denied the liability to pay any money.

In para 31, the Supreme Court rightly held that the declaration prayed for could not be granted in a civil suit and that the issue could only be decided by BIFR. This finding has no bearing on the facts of the present case, as the appellant is not seeking a declaration with regard to the jurisdiction of BIFR, but is only seeking recovery of money.

With regard to the issue of recovery of money, had the same was filed, the Court would observe hypothetically while passing the judgment that such a suit would be barred without prior permission of BIFR. This is because in the facts of the said case, the reference was already pending at the time of filing the suit and essential jurisdictional requirement of prior permission was not satisfied for institution of the suit, making the civil court *coram non judice*.

43. In the present case, however, the institution of the arbitral proceedings required no prior permission of BIFR as at that stage no reference was pending. The Arbitral proceedings are thus not vitiated by any inherent lack of jurisdiction of the vice of *coram non judice*. With regard to the continuance of the proceedings in the present case, the same is to be governed by the law laid down in the Larger Bench judgment of ***Raheja Universal Ltd.*** (supra), which prescribes the additional requirement of “interfering with the formulation, consideration, finalisation or implementation of the scheme.”

44. The judgment in ***Ghanshayam Sarda*** (supra) was rendered in the context of a suit in a civil court. As already mentioned in earlier part of my judgment by referring the case of Supreme Court that the

expression "suit" will not include a pre-award arbitral proceeding in its ambit.

45. The respondent has also relied upon a judgment of a learned Single Judge of this Court in **Ankur Drugs & Pharma Ltd. v. S.E. Investment Ltd.** 217 (2015) DLT 781, for the proposition that for the purposes of Section 22(1) of SICA a "suit" will include arbitral proceedings.

It is submitted by Mr. Harish Malhotra, learned Senior counsel for the appellant that the said judgment was rendered in an appeal which was not maintainable. This Court in **Aravali Infrapower Ltd. v. Michigan Engineers Pvt. Ltd.** reported in 227 (2016) DLT 606 has after considering **Ankur Drugs** (supra) and the outcome of the SLP against it held in paras 10-15 that an appeal against suspension of proceedings by the Arbitral Tribunal is not maintainable as the Court has no jurisdiction under Section 37 to entertain such an appeal. It is argued by the learned Senior counsel that the judgment in **Ankur Pharma** (supra) has been rendered in a proceeding in which the Court was suffering from an inherent lack of jurisdiction and thus cannot be relied upon.

He also argued that the judgments of Larger Benches of this Court as also the Supreme Court in the cases of **Raheja Universal** (supra), **San Tradubg** (supra) & **Morgan Securities** (supra) were not brought to the notice of the Learned Single Judge in **Ankur Pharma** (supra) and thus not considered by that Court. The judgment passed in **Ankur Pharma** (supra) is thus per incuriam as it has failed to take into account binding precedents of Co-ordinate and Larger Benches of the same Court and of the Supreme Court. He argued that the dismissal of an SLP at a pre civil appeal stage does not attract the

doctrine of merger as held in **Kunhayammed v. State of Kerala** (2000) 6 SCC 359. The Supreme court's order dated 5th May, 2015, dismissing the SLP against **Ankur Pharma** (supra) does not advance the case of the appellant. The said order has anyway been considered by this Court in **Aravali Infrapower** (supra) and this Court in **Aravali Infrapower** (supra) has declined to agree with **Ankur Pharma** (supra).

46. The said decision was then followed by the observation of the Division Bench in para 21 to the effect that the expression "suit" would only include proceedings in a civil court and that too under the Code i.e. CPC and not any and every proceeding before a legal forum involving an adjudicatory process. It is undisputed that an arbitral proceeding is not a proceeding under the CPC and proceedings before the Arbitrator are not proceedings before a civil court. In fact, this is precisely what **Patheja** (supra) also holds.

Even the reliance and affirmation of **Patheja** by the three Judges Bench in **Sundaram Finance**, vide order dated 23rd April, 2015, does not help the case of the respondent in any manner.

47. For the reasons stated above and facts and circumstances in the present case, the reliance of **Ankur Pharma** (supra) does not help the case of the respondent once the main judgment of **Patheja** (supra) referred in the said order has been distinguished. Even otherwise, the issue as to the stage of the plea of Section 22(1) of SICA is applicable in which stage has not been argued and decided by the said Bench.

48. Counsel for the respondent has also relied upon an order of AAIFR by which an appeal filed by the appellant was dismissed. It is submitted by the appellant's counsel that the said appeal was filed

against the order of BIFR, entertaining the reference, on the ground that the reference itself had abated in the light of the second proviso to Section 15(1) of SICA read with Section 5(1) of SARFAESI Act. The said appeal was dismissed by AAIFR on the ground that the remedy lays before the Chairman of BIFR.

There is a force in the submission of the learned counsel for the appellant that the present appeal proceeding has nothing to do with the continuance of the arbitral proceedings, which are subject matter of the present appeal. The appellant has never acquiesced in the jurisdiction of BIFR as it firmly believes that Section 22(1) does not come in the way of continuance of the arbitral proceedings, for the reasons stated above. Accordingly, the submission is rejected.

49. From the entire gamut of matters and settled law on the subject, I am of the view that pre-arbitration proceedings were not covered by Section 22(1) of SICA and such proceedings cannot be treated as a suit. The award which is yet to attain finality cannot be called as decree. The plea of Section 22(1) of SICA can only be raised in arbitration matters once the award becomes a decree and the same could only be raised at the stage of enforcement of a decree.

50. Both the appeals, being Arb.A. No.41/2015 and Arb.A. No.42/2015, are allowed. The impugned order dated 20th June, 2015 is accordingly set aside.

Arb.A. No.43/2015

51. Now, I shall consider the third appeal, being Arb.A. No.43/2015, which arises out of the common order dated 20th June, 2015 passed by the Arbitral Tribunal, whereby the Tribunal had suspended arbitral proceedings and also did not proceed to give relief sought by the

appellant under Section 17 of the Act, for removal of the ASU. It is held by the Arbitral Tribunal that *"having regard to the pendency of proceedings before BIFR, which has been held as an expert body vested with power of wide implications, it would be impermissible for the Tribunal to make any order on the said application filed by the Claimant pending final order in reference no. 17/2015, pending before the BIFR."*

With this observation, the appellant has been relegated to the remedy of seeking permission of BIFR for removal of its ASU.

52. It appears that the Arbitral Tribunal has declined to entertain the prayer for removal of the ASU, on the ground of suspension of the Arbitral proceedings, and in view of pendency of the reference under SICA.

53. Once this Court in appeals, being Arb.A. No.41/2015 and Arb.A. No.42/2015, has held that at pre-award stage, the plea of Section 22(1) of SICA has no application, the Arbitral Tribunal is empowered to decide the said application.

54. The learned counsel for the appellant submits that this Court may also decide the present appeal on merit. I am of the view that while passing the common order, the Arbitral Tribunal has not decided the application under Section 17 of the Act on merit. The jurisdiction lies with the Arbitral Tribunal. Had the Arbitral Tribunal decided the application on merit, this Court would have considered the appeal on merit after hearing.

55. Thus, it is not proper to decide the appeal once nothing has been decided on merit by the Arbitral Tribunal. Thus, the appeal being Arb.A. No.43/2015 is disposed of with the request to the Arbitral

Tribunal that after passing of the judgment in appeals, being Arb.A. No.41/2015 and Arb.A. No.42/2015, let the application of the appellant under Section 17 of the Act be decided on merit after hearing both the parties. Parties to appear before the Arbitral Tribunal on 19th September, 2016 on this aspect.

56. The said appeal is accordingly disposed of.

57. No costs.

(MANMOHAN SINGH)
JUDGE

AUGUST 29, 2016