

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO.622 OF 2009
WITH
CIVIL APPLICATION NO.720 OF 2009
IN
APPEAL FROM ORDER NO.622 OF 2009**

1. Gaiomurd Pedder Son of
Shri Nadir Pedder

2. Smt. Priscilla Pedder wife of
Gaiomurd Pedder

...Appellants

Versus

1. SICOM Limited, a limited
Company.

2. Pedder and Pedder Titles Limited

...Respondents

.....

Mr. Girish Godbole with Mr. Mehul Shah with Ms Bina Jariwala i/b.
M/s. Auroma Law for the Appellants.

Mr. Hemant Prabhulkar with Mr. Yogesh Bhange for the Respondent
No.1.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

JUDGMENT RESERVED ON : 30th JANUARY, 2019.

JUDGMENT PRONOUNCED ON: 26th FEBRUARY, 2019.

JUDGMENT:-

The Appellants herein have challenged the judgment dated 19th September, 2007 in Miscellaneous Civil Petition No.859 of 2006. By the impugned judgment the learned Ad-hoc District Judge, Pune has granted the Application filed by the Respondent No.1 under

Section 31(1) (aa) of the State Financial Corporation Act, 1951 (for short 'the SFC Act') and thus directed the Appellants /Guarantors to pay jointly and severally a sum of Rs.10,92,63,025/- alongwith interest specified in the loan agreement w.e.f. 1st October, 2006 till the date of payment.

2. The brief facts necessary to decide this appeal are as under:-

The Respondent No.1 is a deemed State Financial Corporation within the meaning of Section 46 of the State Financial Corporation Act, 1951. The Respondent No.2 is a limited Company registered under the provisions of the Companies Act, having its registered office at Koregaon Park, South Main Road, Pune. The Appellants are the directors and shareholders of the Respondent No.2-Company.

3. The Respondent No.1-Corporation had sanctioned and disbursed a term loan of Rs.650,000,000/-to the Respondent No.2-Company on the terms and conditions mentioned in the sanction letter dated 7th December, 1999. The Respondent No.2-Company executed the loan agreement and deed of hypothecation both dated 20/4/2000.

The Respondent No.2-Company mortgaged and hypothecated its immovable and movable properties/assets, furniture, fixture etc. at plot No.297/1 and plot No.297/2, Nandur Industrial area village Nandur, Taluka-Daund, District-Pune. The Respondent No.2-Company agreed to repay the loan in 21 quarterly installments commencing at the end of 24 months from the date of disbursement of the loan.

4. The Appellants executed a separate Deed of Personal Guarantee dated 20th April, 2000 in favour of the Respondent No.1-Corporation whereunder they secured the financial assistance extended to the Respondent No.2-Company. They guaranteed that in the event of default being committed by the Respondent No.2-Company in payment of the loan, they would jointly and severally repay the amount demanded by the Respondent No.1-Corporation.

5. The Respondent No.2-Company did not repay the installments of loan as per the schedule of repayment agreed to in the loan agreement dated 20/4/2000. At the request of the Respondent No.2-Company, the Respondent No.1-Corporation re-scheduled the repayment of the outstanding loan on the terms and stipulation in the letters dated 2/8/2001 and 10/9/2001. The Respondent No.2

-Company also executed modification to loan agreement dated 10th September, 2001. The Respondent No.2-Company failed to repay the loan installments as per re-scheduled installments. The Respondent No.1-Corporation therefore issued a demand notice to the Respondent No.2-Company demanding the payment of defaulted amount.

6. The Respondent No.2-Company, despite opportunities given, failed and neglected to clear the outstanding dues. The Respondent No.1-Corporation therefore, vide notice dated 10th October, 2002 recalled the entire dues under the term loan and called upon the Respondent No.2-Company to repay the entire outstanding amount together with interest. The copy of the said notice was also sent to the Appellants for information and necessary action. In response to the recall notice, the Respondent No.2-Company vide its letter dated 24/11/2002 once again requested for some more time stating that they would come forward with a concrete proposal for adjustment of the dues. The Respondent No.2-Company continued to make default in repayment of loan. Hence, by notice dated 27th October, 2004 the Respondent No.1-Corporation informed the Appellants about the default committed by the Respondent No.2-Company in repayment of the loan and invoked the personal guarantee

executed by the Appellants. The Appellants were informed that as on 25th October, 2004 an amount of Rs.11,88,36,529/- was due and payable and they were called upon to make the payment by 22nd November, 2004, failing which the Respondent No.1-Corporation would be constrained to initiate recovery proceedings under the provisions of the SFC Act. The Appellants failed to make the payment as demanded in the notice. The Respondent No.1-Corporation therefore filed an application under Section 31(1)(aa) of the SFC Act.

7. The Appellants did not dispute disbursement of the loan amount of Rs.6,50,00,000/- to the Respondent No.2-Company of which they were the shareholders and Directors. They also did not dispute having executed a deed of personal guarantee dated 20th April, 2000. The Appellants contested the application mainly on three grounds viz. (i) that as per clause 18 of the agreement, the parties had agreed that for enforcing the guarantee only the court at Mumbai would have exclusive jurisdiction. In view of this clause, the jurisdiction of the District Judge at Pune was excluded. (ii) The application under Section 31(1) (aa) of the Act was filed beyond the statutory period of limitation. (iii) The guarantee agreement stood revoked in view of execution of subsequent modification to the loan

agreement dated 10th September, 2001 without their consent.

8. The learned District Judge, Pune held that the industrial unit of the Company was carrying on the business within the limits of jurisdiction of Pune District Court. Hence, the Respondent No.1-Corporation was competent to file the application under Section 31(1) (aa) of the Act before the District Court, Pune. The learned Judge held that an application under Section 31 of the Act is not a plaint. Such proceedings are akin to execution proceedings, which can be filed within a period of 12 years. The learned Judge therefore held that the proceedings were filed within the prescribed period of limitation. The learned Judge further held that by executing the guarantee agreement dated 20th April, 2000, the Appellants have agreed and guaranteed repayment of the loan in the event the Respondent No.2-Company commits default in repayment. The agreement of guarantee is continuing and irrevocable and is joint, severe, and coextensive with the liability of the Respondent No.2-Company. On the question of discharge of guarantee, the District Judge considered the terms of the deed of guarantee and observed that the Appellants have agreed that the Respondent No.1-Corporation would have full authority and liberty to revise, modify, or extend the schedule of repayment of loan or to

postpone realisation of the interest, etc. without affecting the guarantee given by the sureties. The sureties have waived rights conferred on them by Sections 133 to 135, 139 and 141 of the Indian Contract Act and as a result the modification of original loan agreement did not affect the liability of the guarantors. The learned Judge held that the Respondent No.2-Company had failed to repay the loan amount and as such the Appellants, being the sureties are liable to repay the loan amount alongwith the interest. In view of above, the learned Judge allowed the application under Section 31(1) (aa) of the Act. Being aggrieved by this order, the Appellants have preferred this appeal.

9. On the issue of jurisdiction, Shri. Godbole, the learned counsel for the Appellants submits that the parties to a contract can agree to submit to the jurisdiction of any one of the competent courts. He has relied upon the decision of the Apex Court in ***A.B.C. Laminart Pvt. Ltd. and Anr. Vs. A.P. Agencies, Salem (1989) 2 SCC 163***, wherein the Apex Court has held thus:

"16. So long as the parties to a contract do not oust the jurisdiction of all the courts which would otherwise have jurisdiction to decide the cause of action under the law it cannot be said that the parties have by their contract ousted the jurisdiction of the court. If under

the law several courts would have jurisdiction and the parties have agreed to submit to one of the these jurisdictions and not to other or others of them it cannot be said that there is total ouster of jurisdiction. In other words, where the parties to a contract agreed to submit the disputes arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law their agreement to the extent they agreed not to submit to other jurisdictions cannot be said to be void as against public policy. If on the other hand the jurisdiction they agreed to submit to would not otherwise be proper jurisdiction to decide disputes arising out of the contract it must be declared void being against public policy."

10. It is thus well settled that the parties to a contract can agree to submit to the jurisdiction of one of the Courts, provided such court has otherwise jurisdiction to decide the cause of action under the law. In the present case, the parties had agreed to submit to the jurisdiction of the Court at Mumbai. Hence, the question, which arises for consideration is whether the Court at Mumbai had jurisdiction to entertain and decide the application under Section 31(1) (aa) of the SFC Act.

11. The learned counsel for the Appellants submits that the Appellants are the residents of Bandra, Mumbai and are carrying on business for gain outside the territorial jurisdiction of Pune District Court and as such the City Civil Court at Mumbai has jurisdiction to

entertain and decide the application under Section 31(1) (aa) of the SFC Act. He further submits that clause 18 of the agreement clearly indicates that the parties have agreed that only the court at Mumbai would have exclusive jurisdiction to enforce the guarantee. The parties having agreed to confer exclusive jurisdiction to the Court at Mumbai, the jurisdiction of Pune Court stood ousted and consequently, the District Judge at Pune would have no jurisdiction to decide the application. In support of this contention he has relied upon the decision of a Single Judge of this Court in ***SICOM Limited Vs. Co-Nick Alloys (India) Ltd. and Ors .2005(4) ALL M.R. 244.***

12. Shri Prabhulkar, the learned counsel for the Respondent No.1-Corporation has placed on record judgment dated 16/11/2011 in ***Co-Nick Alloys (India) Limited and Ors. Vs. SICOM Ltd. Appeal No.5 of 2011.*** A perusal of the said judgment reveals that the decision in ***SICOM Limited (supra)*** was challenged before the Division Bench in ***Co-Nick Alloys (India) Limited (supra)*** (Appeal No.5 of 2011). The Division Bench of this Court held that the learned Single Judge had not considered the principle questions required to be considered for deciding the jurisdictional issue and hence remitted the petition for de novo consideration and decision in accordance with law. This being the

fact position, no reliance can be placed on the decision in SICOM (supra).

13. Mr. Prabhulkar, the learned counsel for the Respondent No.1-Corporation submits that manufacturing unit of the Respondent No.2-Company is at Nandur, Pune. The industrial concern carries on its business within the jurisdiction of District Court of Pune. Hence, in terms of Section 31 of the Act, only the District Judge at Pune would have jurisdiction to enforce the guarantee under Section 31(1) (aa) of the Act. He has relied upon the decision of the Apex Court in *Karnataka State Industrial Investment and Development corporation Ltd. Vs. SKK Kulkarni and ORs. (2009) 2 SCC 236* and the decisions of the Division Bench of this Court in *Warij A. Kasliwal and Anr. in Vs. Madhya Pradesh State Industrial Development Corpo Ltd. in Appeal No.1042 of 2010*.

14. In *Karnataka State Industrial Investment and Development (supra)*, the Apex Court has confirmed the decision of a Division Bench of the Karnataka High Court in *SKK Kulkarni Vs. Karnataka State Industrial Investment Development Corporation in Misc. First Appeal, 1441 of 2001 decided on 5/8/2006*. In the

case of **SKK Kulkarni** (supra) an application for enforcement of the liability of the guarantor was filed at Bangalore on the basis that the head office of the Company was at Bangalore. The Karnataka High Court held that the court at Bangalore had no jurisdiction and that the application under Section 31(1) (aa) ought to have been filed at Belgaon, where the Respondent No.2-Company was carrying on its business activity. While confirming this decision, the Apex Court has observed thus:-

"6.The right of a State Financial Corporation ("SFC" for short) recognized under Section 29 of the 1951 Act is different from the right which the SFC can enforce under Section 31. Section 31 enables SFC, without having recourse to the provisions of Section 31 of the 1951 Act or Section 69 of the Transfer of Property Act, to have its right emanating from the agreement, enforced by initiating proceedings contemplated thereunder, namely, applying to the District Judge within the limits of whose jurisdiction the industrial concern carries on its business. Section 31 is one mode of recovery. Therefore, the power under Section and Section 32 are in addition to the power of realization of money under the Transfer of Property Act or any other law. It is within the discretion of SFC to choose the forum under a particular Act. Once there is a default in the payment of loan, it is for the Corporation to decide as to whether it shall proceed under Section 29 for sale of the property mortgaged or whether it shall take any recourse under Section 31 of the 1951 Act.

7. Section 31 of the Act had been enacted to enable the corporation to obtain quicker remedies from the highest Court of Original Civil Jurisdiction in the locality. Where the SFC takes recourse to the provisions of Section 31 of

the Act and obtains an order from the Court, it shall ordinarily seek its enforcement in the manner provided for by Section 31 of the 1951 Act, which section is aimed to act in aid of the orders passed under Section 31 of the Act. Where the SFC takes recourse to Section 31 and obtains an order from the Court, it shall seek its enforcement in the manner provided for by Section 32 of the Act, therefore, Section 31 makes a provision for enforcement of claims. It is primarily procedural in nature.

8. The remedy provided for under Section 31 is not in derogation of any other mode of recovery which is available to the SFC under any other law for the enforcement of its claims. The remedy under Section 31 is not the sole or exclusive remedy available to the SFC. It is only an additional remedy which is conferred upon the SFC. The substantive relief in an application under Section 31(1) is not a plaint. This is clear from the form of the application, the nature of the relief, the compulsion to make interim order, the limited enquiry contemplated by Section 32(6) , the nature of the relief that can be granted and the method of execution. The proceedings under Section 32 of the 1951 Act are, therefore, nothing but execution proceedings. A combined reading of Section 31 and Section 32 of the 1951 Act indicates that an investigation has to be made to find out the terms and conditions on which loan was given by SFC to the industrial concern and whether SFC was entitled to the relief under Section 31(1) on account of the breach of the terms of agreement.

9. Having discussed the nature of the proceedings under Section 31(1) of the 1951 Act we are of the view that Section 31 read with Section 32 constitutes a Code by itself. It is a special provision. It is a mode of recovery. It does not prevent or exclude the SFC from invoking any other remedy open to it in law. However, once the SFC invokes Section 31(1), it has to proceed in accordance with the procedure prescribed in Section 32.

10. Under Section 31(1), which is invoked by the SFC in this case, an application to obtain quicker remedy has to

be made to the District Judge within whose jurisdiction the industrial concern is located. This is the mandate of Section 31(1). It is so mandated because wide powers are given to the District Judge under Sections 31 and 32 to attach, sell and recover outstanding dues of SFCs in the shortest possible time. In fact, sub-section (aa) stood inserted in Section 31(1) for enforcing the liability of any surety. This sub-section is in addition to the power given to the District Judge to order sale of the property pledged, mortgaged, hypothecated or assigned to the SFC as security for loan or advance. An application under Section 31 can be filed even before the exercise of power under Section 29 of the 1951 Act or Section 69 of the Transfer of Property Act.

11. Under the circumstances, the High Court was right in coming to the conclusion that the VI Additional City Civil Judge, Bangalore, had no territorial jurisdiction to hear Misc. Case No. 109/1993 in view of Section 31 of the 1951 Act. The High Court was right in observing that the Corporation ought to have instituted the said case before the District Judge, Belgaum, within whose jurisdiction the industrial concern is located."

15. As noted above, Section 31(1) of the SFC Act, which is a special provision, mandates that all the applications thereunder shall be made to District Judge within the limits of whose jurisdiction the industrial concern carries on its business. It is not in dispute that the manufacturing unit of the Respondent No.2 Company is situated at Nandur, Industrial Area Pune. The Respondent No.2-Company carries on business activity within the jurisdiction of the District Court, Pune. Hence, District Court Pune had exclusive jurisdiction to entertain and

decide the application under Section 31(1) (aa) of the Act. Since the Respondent No.2-Company is not carrying on any business either whole, part or substantial, within the jurisdiction of Mumbai Court, the City Civil Court, Mumbai had no jurisdiction under Section 31(1) (aa) of the Act. Consequently, it was not open to the parties to confer jurisdiction on a Court when the statute itself does not confer such jurisdiction.

16. On the issue of limitation, Mr. Godbole, the learned counsel for the Appellants contends that the claim of the Respondent No.1-Corporation is barred by the law of limitation. Relying upon the decisions of the Apex Court in *Maharashtra State Financial Corporation v/s. Ashok Agarwal and Ors. 2006(9) SCC 617* and *Deepak Bhandari vs. Himachal Pradesh State Industrial Development Corporation 2015(5) SCC 518*, he contends that the proceedings under section 31(1) (aa) of the Act are governed by Article 137 of the Limitation Act. He submits that first notice was issued to the principal borrower on 22.7.2002. He further contends that by notice dated 10.10.2002 the Respondent No.1-Corporation had recalled the entire outstanding principal amount together with interest thereon. Copy of the said notice was also marked to these Appellants.

He contends that the limitation would commence from the date of recall notice dated 10.10.2002. The learned counsel for the Appellants submits that the application under Section 31(1) (aa) was filed in the year 2006 and hence barred by law of limitation.

17. The learned counsel for the Respondent No.1-Corporation contends that under Article 137 of the Limitation Act, the period of limitation is of three years and this period commences from the date the right to apply accrues. He submits that the Respondent No.2-Company having failed to repay the loan, the Respondent No.1-Corporation by notice dated 27/10/2004 invoked the guarantee. The application was filed within three years from the date of invocation of guarantee and hence the same is within the period of limitation. He has relied upon the decision of the division bench of this Court in *Vikram Saboo and Ors. vs. SICOM Appeal No.31 of 2009* and the decision of a Single Judge in *SICOM vs. Balkrishnhimmatraka and Ors. 2005 (3) Bom C.R. 562*.

18. In *Ashok Agarwal* (supra), the issue was whether the application under Section 31 of the Act was governed by the provision under Article 136 or Article 137 of the Limitation Act. The Apex Court

has observed thus :-

“5. Section 31 of the Act contains special provisions for enforcement of claims by State Financial Corporations. It is by way of a legal fiction that the procedure akin to execution of decrees under the Code of Civil Procedure has been permitted to be invoked. But one cannot lose sight of the fact that there is no decree or order of a civil court when we are dealing with applications under [Section 31](#) of the Act. The legal fiction at best refers to a procedure to be followed. It does not mean that a decree or order of a civil court is being executed, which is a sine qua non for invoking Article 136. The proposition set out in the case of Gujarat State Financial Corporation (*supra*) found support in [M/s. Everest Industrial Corporation and Others v. Gujarat State Financial Corporation](#) 1987 (3) SCC 597. Again in *Maganlal etc. vs. Jaiswal Industries Neemach & Ors.* 1989 (3) SCR 696 this court noticed that an order under [Section 32](#) is not a decree *stricto sensu* as defined in Section 2(2) of the Code of Civil Procedure, the financial Corporation could not be said to be a decree holder. This makes it clear that while dealing with an application under [Sections 31](#) and [32](#) of the Act there is no decree or order of a civil court being executed. It was only on the basis of a legal fiction that the proceedings under [Section 31](#) are treated as akin to execution proceedings. In fact this Court has observed that there is no decree to be executed nor there is any decree holder or judgment debtor and therefore in a strict sense it cannot be said to be a case of execution of a decree. [Article 136](#) of the [Limitation Act](#) has no application in the facts of the present case. [Article 136](#) specifically uses the words "decree or order of any civil court". The application under [Sections 31](#) and [32](#) of the State Financial Corporation Act is not by way of execution of a decree or order of any civil court.

6. Article 137 of the Limitation Act applies in the facts of the present case.”

19. It is thus well settled that the proceedings under Section 31(1) of SFC Act are governed by Article 137 of the Limitation Act. The application is therefore required to be filed within 3 years from the date of accrual of cause of action and not within 12 years as it has been held by the learned District Judge.

20. The next question is of the starting point of limitation to file an application under Section 31(1)(aa) of the Act. In **Deepak Bhandari** (supra), the Apex Court has clearly observed that in **Ashok Agarwal** (supra), the issue was as to whether in the proceedings under Section 31 of the Act, the limitation period would be of 3 years as per Article 137 of the Limitation Act or it would be 12 years as provided under Article 136 of the Limitation Act. The Apex Court has observed that the question as to which would be the starting date for counting the period of limitation, was neither raised nor dealt with in **Ashok Agarwal** (supra). It is thus clear that the decision in **Ashok Agarwal** would not be an authority on the issue relating to the starting point of the limitation.

21. The issue relating to the starting point of limitation period has been considered by the Apex Court in **Deepak Bhandari** (supra). In this case, the Corporation had issued a recall notice to the Company and subsequently sold the mortgaged/hypothecated assets of the Company by taking recourse to Section 29 of SFC Act. The question that was raised was whether the limitation period to file an application under Section 31(1) (aa) of the SFC Act would start from the date of recall notice or whether the starting point would be on the date when the assets of the Company were sold and the balance amount payable was ascertained. The Apex Court while refuting the contention that the period of limitation starts from the date of issuance of recall notice, held: -

"21.We thus hold that when the Corporation takes steps for recovery of the amount by resorting to provisions of Section 29 of the Act, the limitation period for recovery of the balance amount would start only after adjusting the proceeds from the sale of assets of the industrial concern. As the Corporation would be in a position to know as to whether there is a short fall or there is a excess amount realized, only after sale of the mortgaged / hypothecated assets. This is clear from the language of sub-section 1 of section 29 which makes the position abundantly clear. ...

22.It is thus clear that merely because the Corporation acted under Section 29 of the State Financial Corporation Act did not mean that the Contract of Indemnity came to an end. Section 29 merely enabled the Corporation to take

possession and sell the assets for recovery of the dues under the main contract. It may be that on the Corporation taking action under Section 29 and on their taking possession they became deemed owners. The mortgage may have come to an end, but the contract of indemnity, which was an independent contract did not. The right to claim for the balance arose, under the contract of indemnity, only when the sale proceeds were found to be insufficient. The right to sue on the contract of indemnity arose after the assets were sold."

22. In the instant case, the Respondent No.2-Company having defaulted in repaying the loan, the respondent No.1 issued a recall notice dated 10/10/2002 and called upon the Respondent No.2-Company to repay the entire outstanding dues. The Respondent No.1-Corporation had forwarded a copy of the said recall notice to the Appellants, without raising any demand against the Appellants. As it has been held by the Division Bench of this Court in **Mr. Vikram Saboo & Ors v/s SICOM (Appeal No. 31 of 2009)**, making demand from the principal borrower is only a first step. The amount can be demanded from the guarantor only if the principal borrower commits default in payment of the amount. The liability of the guarantor to pay the amount commences once the amount is demanded and the cause of action accrues only when the guarantor fails to make the payment. In the instant case, as on the date of issuance of recall notice, the Respondent No.1-Corporation had not raised a demand on the

Appellants and neither had the Appellants disputed its liability to repay the amount. Hence no cause of action had accrued as against the Appellants as on the date of issuance of recall notice to the principal borrower.

23. The records reveal that the Respondent No.2-Company had not disputed its liability to repay the loan. On the contrary, in response to the said recall notice, the Respondent No.2-Company requested some more time to come forward with a concrete proposal for adjustment of dues. The Respondent No.2 - Company having failed to repay the loan despite restructuring of the loan schedule, the Respondent No.1-Corporation took recourse to Section 31 of the Act and chose to proceed against the guarantors under section 31(1) (aa) of the SFC Act.

24. It is not in dispute that the Appellants, who are the guarantors, had executed a Deed of Guarantee dated 20/4/2000. A perusal of the terms of the Deed of Guarantee indicate that the Appellants had agreed and accepted inter alia that they shall on demand jointly and severally pay to the respondent No1.- Corporation the principal sum together with interest, expenses, charges, costs, etc.

which shall be due to the Respondent No.1-Corporation by reason of default on the part of the Respondent No.2-Company. The Appellants have further accepted that the guarantee is irrevocable, absolute, and independent of any rights and remedies, which the Respondent No.1-Corporation may have against the Respondent No.2-Company.

25. The liability of the surety being co-extensive with that of the principal borrower and the guarantee being a continuing one, the Respondent No.1-Corporation, in exercise of powers under Section 31(1) (aa) of the SFC Act, was entitled to enforce the liability of the surety, without prejudice to its rights under section 29 or without exhausting other remedies against the principal borrower. Hence, by notice dated 27/10/2004, the Respondent No.1-Corporation brought to the notice of the Appellants that the Respondent No.2-Company had defaulted in repaying the loan amount and called upon the Appellants to clear the dues on or before 27/11/2004. The Respondent No.1-Corporation having made such demand, the Appellants were liable to repay the outstanding loan/dues within the stipulated time. The records indicate that the Appellants neither replied to the notice nor paid the dues. The breach on the part of the Appellants i.e. failure to repay the loan within the stipulated period gave right to the

Respondent No.1-Corporation to sue or to apply to the District Judge to enforce the liability of the surety. The Respondent No.1-Corporation therefore filed an application under Section 31(1)(aa) of the SFC Act. The said application was filed within three years from the date of accrual of cause of action and as such the same was not barred by the law of limitation.

26. It is not in dispute that subsequent to the execution of original loan agreement and the Deed of Guarantee, the Respondent No.1-Corporation at the request of the Respondent No.2-Company rescheduled the repayment of the term loan. Accordingly the Respondent No.1-Corporation and the Respondent No.2-Company executed a Modification to the Loan Agreement dated 10.9.2001. Under the said Modification to the Loan Agreement, the Respondent No.1-Corporation restructured/rescheduled repayment of loan and thus extended the time to repay the loan.

27. It is not in dispute that the Appellants were not the parties to the said Modification to the Loan Agreement. The contention of the learned Counsel for the Appellants is that the modification of repayment schedule amounts to variance of the original terms of the

loan agreement. Hence, in terms of Section 133 of the Contract Act, the Appellants are entitled to claim a discharge from their liabilities as guarantors. He contends that the statutory right of the surety under the provisions of Contract Act cannot be affected by consent given in advance to variance in the terms of the contract. In support of this contention he has relied upon the decision of the Division Bench of the Bombay High Court in *Central Bank of India Vs. Ali Mohamed and Anr.* 1993 Mh.L.J. 1092.

28. It is to be noted that in *Mukesh Gupta vs. SICOM Ltd.* AIR 2004 BOM 104 the Division Bench of this Court after considering the decision of privy council in *Hodges v/s Delhi & London Bank Ltd.* 1900 27 Ind-App 168 and decisions of the other high courts, including the decision of the Karnataka High Court in *T. Raju Setty* AIR 1992 Karnataka 108, has concluded that the right conferred on a guarantor under Sections 133, 135 or 141 of the Contract Act could be waived by specific agreement in a deed of guarantee and as a matter of fact such an agreement would amount to consent within the meaning of the aforesaid sections of the Act. The Division Bench of this Court has held that the decision of the Single Judge in *Central Bank vs. Ali Mohamed* (supra) that the sureties consent to variation has to be

simultaneously with novation does not lay down the correct law. It was held that the view expressed in the said case runs counter to the decision of the privy council in *Hodges Vs. Delhi (supra)*. In the light of above, the learned Counsel for the Appellants was not justified in relying upon the decision of the single Judge of this Court in *Central Bank vs. Ali Mohd (supra)*

29. Be that as it may, the issue regards waiver is no longer res-integra as in *H.R. Basavraj vs. Canara Bank and ors, 2010) 12 SCC 458* the Apex court has approved the view taken by the Karnataka High Court in *T. Raju Setty (supra)* wherein it was held that in surety agreements, the surety can waive his rights available to him under the various provisions of Chapter 8 of the Contract Act. The Apex Court has observed that the said view is in line with long established precedents that anyone has a right to waive the advantages offered by law provided they have been made for the sole benefit of an individual in his private capacity and does not infringe upon the public rights or public policies.

30. In view of this settled position, it would be imperative to examine whether the Appellants had agreed to waive their rights under

Section 133 of the Contract Act. This question will have to be examined in context of the terms contained in the deed of guarantee. A perusal of the Guarantee Agreement clearly indicates that the Appellants herein agreed that their liability is irrevocable, joint and several with the liability of the Company. They have agreed that the Respondent No.1-Corporation had full authority and liberty to agree to any revision, modification or extension of the schedule of repayment of the loan or to postponement of the realisation of the interest, etc. without affecting the guarantee given by the surety. The Appellants /sureties also waived all their rights conferred on them by Sections 133 to 135, 139 and 141 of the Indian Contract Act. The aforesaid covenants clearly indicate that the Appellants had waived all their rights to seek discharge on the ground of variance as contemplated under Section 133 of the Contract Act.

31. The rescheduling of repayment of loan was for the benefit of the Respondent No.2-Company of which the Appellants were the directors and shareholders. Furthermore, the extension of time to repay the loan was not detrimental to the interest of the guarantors. The Appellants having agreed for modification or extension of schedule of repayment and further having waived the benefits available under the

Contract Act, cannot now seek discharge on the ground of variance of the terms without their consent.

32. Shri Godbole, the learned counsel for the Appellants contends that the learned District Judge has also failed to consider that the reference of the principal borrower under Section 15(1) was already registered under the Sick Industrial Companies (Special Provision) Act, 1985 with the board of Industrial and Financial Reconstruction on 6th April, 2005 and that by order dated 17th January, 2007 the Board of Industrial and Financial Reconstruction declared the Respondent No.2 as a Sick industrial company and appointed IDBI as operating agency. The learned counsel for the Appellants therefore contends that in terms of Section 22 of Sick Industrial Companies (Special Provision) Act, 1985 no proceedings under the State Financial Corporation Act could have been filed except with the consent of the Board of Industrial and Financial Reconstruction. In support of this contention he has relied upon the decisions of the Apex Court in *Maharashtra Tubes Ltd vs. State Industrial and Investment Corporation of Maharashtra Ltd. And Anr. (1993) 2 SCC 144*, *Paramjeet Singh Patheja v/s. ICDS Ltd. (2006) 13 SCC 322* and *Patheja Bros. Forging & Stamping and Anr. V/s. ICICI Ltd. And Ors.*

(2000) 6 SCC 545.

33. Mr. Prabhulkar, the learned counsel for the Respondent No.1-Corporation contends that the question about the applicability of Section 22(1) of SICA Act being a mixed question of fact of law is required to be pleaded and proved. He submits that in the absence of pleading and proof the issue regarding bar of Section 22(1) cannot be raised at this stage. He further submits that reference before Board for Industrial and Financial Reconstruction (BIFR) had already abated before filing of the appeal and the Appellants has not disclosed this fact in the appeal. He further submits that the bar of Section 22(1) of SICA is applicable only to 'suit' and not to proceedings under Section 31(1) (aa) of the Act. He therefore contends that Bar of Section 22(1) is not applicable to the proceedings filed against the Appellants. He has relied upon the decision of the Apex Court in *Kailash Nath Agarwal and Ors. V/s. Pradeshiya Industries and Investment Corporation of U.P. AIR 2003 SC 1886* and the decision of the Division Bench of this Court in *Vinod Kumar M. Gadia and Anr. V/s. SICOM Limited. (O.S.) Appeal No.205 of 2006* and *SICOM v/s. Marvel Industries Ltd., (O.S.) Misc. Petition No.2 of 2007* submits that the bar of Section 22 of SICA Act is not applicable to the proceedings under

Section 31(1) (aa) of the SFC Act.

34. It is not in dispute that the Appellants had not raised the issue of Bar of Section 22(1) of the SICA Act before the District Judge, Pune. The additional affidavit of S.A. Waghmare, the authorised person of the Respondent No.1-Corporation has stated in the affidavit that on 28/4/2008 ARCI and the Respondent No.1-Corporation being secured creditors took action under Section 13(4) of SARFAESI Act and sold the secured assets on the public auction held on 14/7/2008. He has stated that in pursuant to the said action taken by the secured creditors under Section 13(4) of the SARFAESI Act the reference pending before BIFR stood abated. The Appellants have not filed counter affidavit denying the aforestated statement made on behalf of the Respondent No.1-Corporation.

35. As regards applicability of Section 22(1) to the proceedings under Section 31(1) (aa) of the SFC Act in ***Kailash Agarwal (supra)*** the Apex Court has held thus:-

"20. There is an apparent distinction between the expressions 'proceeding' and 'suit' used in [Section 22\(1\)](#). While it is true that two different words may be used in the same statute to convey the same meaning, that is the exception rather than the rule. The general rule is that when two different words are used by the same statute, prima facie one has to construe these different

words as carrying different meanings. In *Kanhaiyalal Vishnidas Gidwani (supra)* this Court found that words 'subscribed' and 'signed' had been used in the [Representation of People Act, 1951](#) interchangeably and, therefore, in that context the Court came to the conclusion that when the Legislature used the word 'subscribed' it did not intend anything more than 'signing'. The words 'suit' and 'proceeding' have not been used interchangeably in *SICA*. Therefore, the reasons which persuaded this Court to give the same meaning to two different words in a statute cannot be applied here.

21. In none of the decisions cited before us, has the word 'suit' been defined in a context similar to that of *SICA*. The decisions cited by the appellants do not relate to the same or similar statutes nor do they seek to define the word 'suit' in contradistinction to the word 'proceeding'. The decision in [Ghantesher Ghose V. Madan Mohan Ghose \(supra\)](#) was given in the context of the [Partition Act](#) where a distinction between 'filing a suit for partition' and 'suing for partition' has been drawn. It was held that 'suing for partition' was a wider phrase than the phrase 'suit for partition' without defining what a suit meant.
22. The decision in [Assistant Collector of Central Excise V. Ramdev Tobacco Company \(supra\)](#) related to the construction of the bar of suit section in the Central Excise and [Salt Act, 1944](#). The section as it stood at the relevant time provided that "no suit, prosecution or other legal proceedings shall be instituted for anything done or ordered to be done under the Act." . The Court held "There can be no doubt that 'suit' or 'prosecution' are those judicial or legal proceedings which are lodged in a court of law and not before any executive authority, even if a statutory one.
23. A definition of the word 'suit' has been given in [Pandurang R. Mandlik V. Shantibai R. Ghatge \(supra\)](#) but in the context of Section 11 of the Code of Civil Procedure. This is what the Court said:

"In its comprehensive sense the word 'suit' is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceedings may be various but that if a right is litigated between parties in a court of justice the proceeding by which the decision of the court is sought may be a suit".
24. According to these decisions, a suit is an action taken in a Court of law.

25. *Having regard to the judicial interpretation of the word 'suit', it is difficult to accede to the submission of the appellants that the word 'suit' in Section 22 (1) of the Act means anything other than some form of curial process."*

36. An identical issue was raised in ***SICOM vs. Marvel Industries*** (supra). The learned single Judge of this Court (Coram: S.C. Dharmadhikari, J.), after considering the decision of the Apex Court in ***Kailash Agarwal***, has observed that the view taken is that the recovery proceedings do not partake the character of nor can be termed as a 'suit' within the meaning of Section 22 (1) of the SICA hence the bar under Section 22(1), if any, would not apply to the proceedings against the guarantors. Referring to the decision in ***Zenith Steel Tubes and Industries Ltd.and Anr. V/s. SICOM Civil Appeal 5347 of 2007*** the learned Single Judge has endorsed that the binding judgment of the supreme Court directly dealing with the controversy cannot be brushed aside or diluted merely because it is referred to a larger Bench or is being reconsidered and the proceedings in that behalf are pending. The decision of the Apex Court in ***Kailashnath Agarwal*** as well as the decisions of this Court clearly holds that the bar of Section 22(1) is not applicable to the proceedings under Section 31(1)(aa) of the Act.

37. Relying upon yet another overruled decision in Division Bench of this Court in *Maharashtra State Financial Corporation vs. Jaycee Drugs and Pharmaceuticals Pvt. Ltd. and Ors.* 1991 AIR (BOM) 96, Mr. Godbole, has extensively argued that Section 31(1) (aa) of the Act does not contemplate enforcing personal guarantee. He contends that the liability of the surety under Section 31(1) (aa) r/w Section 32(7) (da) can be enforced only by attachment or sale of the property furnished by the surety in the manner prescribed by Sub Section 8 of Section 32 of the Act.

38. The above submissions are only recorded to be rejected outright in view of the decision of the Apex Court in *Maharashtra State Financial Corporation vs. Jaycee Drugs Pharmaceuticals and Pvt. Ltd. and Ors.* (1991) 2 SCC 637. The Apex Court whilst setting aside the judgment of the Division Bench has held that clause (aa) inserted in Sub Section 1 of Section 31 uses the word 'any surety'. On its plain grammatical meaning, there can be no doubt that the terms 'any surety' will include not only a surety who has given some security but also one who has given a personal guarantee. The Apex Court having set the controversy at rest, it was unbecoming of the learned counsel for the Appellants to have relied upon an overruled decision to

substantiate an unsustainable claim.

39. To sum up, the Respondent No.1-Corporation has been able to establish that the Respondent No.2-Company had defaulted in repaying the loan. The Appellant-Guarantors, who had executed the deed of guarantee towards the due discharge of the loan had failed to discharge the obligation despite the demand. Hence, the Respondent No.1-Corporation was entitled to seek the relief under Section 31(1) (aa) of the SFC Act against the Appellants. There being no merits in any of the contentions urged by the learned counsel for the Appellants, the appeal is liable to be dismissed.

40. In the result, the appeal from order filed by the Appellants stands dismissed. Civil Application is disposed of in view of dismissal of the appeal.

41. At this stage, the learned counsel for the Appellants submits that interim relief has been operating in favour of the Appellants from 16th February, 2010. Said interim relief shall continue to operate for a period of six weeks from the date of uploading of the order, to enable the Appellants to challenge the order.

(SMT. ANUJA PRABHUDESSAI, J.)