

In Re: Gontermann-piepers (India) Ltd.

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Court : Himachal Pradesh

Decided On : Jun-10-2004

Reported in : [2005]57SCL225(HP)

Judge : Lokeshwar Singh Panta, J.

Acts : Sick Industrial Companies (Special Provisions) Act, 1985 - Sections 15, 22, 22(1) and 81(1A); ;[Companies Act, 1956](#) - Sections 100 to 103 and 391 to 394

Appeal No. : Company Petition No. 13 of 2003

Appellant : In Re: Gontermann-piepers (India) Ltd.

Advocate for Pet/Ap. : Sidharth Shankar Ray,; Gautam Mitra,; Ranjan Deb,;

Judgement :

Lokeshwar Singh Panta, J.

1. This petition under Sections 391 to 394 read with Section 81 (1 A) and Sections 100 to 103 of the [Companies Act, 1956](#) has been filed by Gontermann-Piepers (India) Limited with its registered office at Bharatgarh Road, Nalagarh, District Solan, Himachal Pradesh (hereinafter referred to 1st petitioner-Company; and G.P.I. Textiles Limited with its registered office at Bharatgarh Road, Nalagarh, District Solan (hereinafter referred to 2nd petitioner-company) praying for the sanction of the modified Scheme of Arrangement filed with the petition as Exhibit-

'A' to be binding with effect from the 1st day of January, 2003 on both secured and unsecured creditors.

2. 1st and 2nd petitioners-Companies had earlier filed Company Petition No. 12 of 2003 in this Court under section 391(3) of the [Companies Act, 1956](#) praying for convening the meeting of the shareholders of both Companies for consideration and approval of the Scheme of Arrangement between 1st petitioner-Company and 2nd petitioner-Company as also for consideration of other ancillary matters. The purpose and object of the Scheme was to enable the 2nd petitioner-company to undertake the business of the established undertaking and result in independent and optimum growth and development of the spinning mill business and iron and steel rolling division through two separate Companies which will ultimately benefit the Companies, their shareholders, employees, creditors and other concerned. The scheme will facilitate the rationalization of the financial structure. The two projects would be thus implemented effectively and adequately. The management of the two projects by two separate companies would be convenient and advantageous with independent management set up and great focus on specialization. The demerger of the Companies would result in better administration, operational organization and efficiency with optimum utilization of various resources.

3. Taking into consideration various averments made in the proposed Scheme of Arrangement, the learned Judge of this Court directed to hold the meaning of secured and unsecured creditors and shareholders on 16th November, 2003 at the registered office of 1st petitioner-company at Bharatgarh Road, Nalagarh, District Solan for consideration of the Scheme of Arrangement as proposed by the Company.

4. Mr. Naresh Sood, Advocate-Chairman, Mr. Sunil Mohan Goel, Advocate-Alternate Chairman, Ms. Devyani Sharma, Advocate-Chairperson, Mr. Neeraj Gupta, Advocate-Chairman, Mr. Anish Garg, Advocate-Alternate Chairman, Mr. Ankush Dass Sood, Advocate-Chairman, Mr. Jyotika, Advocate-Alternate Chairman and Mr. Raman Sethi, Advocate-Alternate Chairman were appointed by this Court vide order dated 17-10-2003 to hold a meeting of the creditors and

submit their respective reports to the Court alongwith the result. of the meeting within seven days of the conclusion of the meeting. The reports were ordered to be duly supported by the respective affidavits of the Chairmen. Alternative Chairmen. The respective Chairmen held the meetings and submitted their reports to the Court. As per the report submitted by Mr. Naresh Kumar Sood, Advocate-Chairman, as many as 62 (sixty two) creditors of 1st petitioner-company including secured creditors, namely, IDBI, IFCI, ICICI, Exim Bank, West Bengal Industrial Development Corporation (for short WBTC), State Bank, Indore, Allahabad Bank and other unsecured creditors voted in favour of proposed modifications being adopted and carried into effect to the Scheme of Arrangement. However, State Bank of India (for short 'SBI') and Industrial Investment Bank of India (hereinafter referred to 'IIBI') secured creditors have opposed the modified Scheme of Arrangement. The modified Scheme of Arrangement was prepared adopted and carried into effect by more than 3/4 (three-fourth) majority. Thereafter the modified Scheme dated 16th November, 2003 was submitted in the Court. The 1st and 2nd petitioners-companies have filed the present petition for final sanction of the modified Scheme.

5. This Court on 19-11 -2003 directed Mr. K.D. Sood, learned counsel for the petitioners-companies to ensure publication of the notices in the newspaper with a clear notice of ten days and also service of Central Government through its Regional Director, Department of Company Affairs. Mr. K.D. Sood, Advocate got the notices published in the news-paper. When the matter came up before the Court on 10-12-2003. SBI had filed its objections to the Scheme of demerging the 1st and 2nd Companies. The petitioners-Companies filed reply to the said objections. Affidavit of the Regional Director Northern Region, Department of Company Affairs has also been filed. Subsequently, 'IIBI' had also filed their objections. Thereafter the matter was heard in part on 24-3-2004, 25-3-2004 and 31-3-2004 by the learned Company Judge. Order dated 2-4-2004 of the leaned Judge reveals that 1st petitioner-company has made a reference to the Board for Industrial and Financial Reconstruction (BIFR) under the Sick Industrial Companies (Special Provisions) Act, 1985 (for short 'the SICA') and the said reference was subsequently registered. The learned Single Judge adjourned the matter for 22nd April, 2004 to consider the effect of Section 22 of 'the SICA'

consequent upon the registration of the inquiry against 1st petitioner-company. It appears from the record that the petitioners-Companies carried the order dated 2-4-2004 of the learned Single Judge by way of Company Appeal No. 2 of 2004 before the Division Bench. The Division Bench disposed of the appeal on 7-4-2004 holding that the lone and tenor of the impugned order dated 2-4-2004 would suggest that the learned Single Judge had in fact not taken any view, this way or the other, with respect to the issues involved in the case and that he had made only passing reference to section 16 and Section 22 of 'the SICA'. Further, it was observed that whether Section 22 of 'the SICA' in fact has any applicability to the issues involved for adjudication in Company Petition No. 13 of 2003 is a question which was and continues to remain wide open and shall be so considered by the learned Single Judge, undoubtedly, when Company Petition No. 13 of 2003 would be taken up for hearing and final disposal. In these circumstances, the Company Petition has been listed before this Bench for final disposal.

6. The preamble of the Scheme of Arrangement provides that 1st petitioner-company is presently engaged in the business of manufacturing and dealing in iron and steel based rolls and other allied products for more than three decades and has grown in size and operation and diversified into the textile business. As a result of global recession in textile industries, it has become necessary for the 1st petitioner-Company to concentrate on its core business, i.e., manufacturing and dealing in iron and steel based rolls and other allied products and Demerge the Textile Division as a going concern to the Resulting Company.

7. SBI-objector has challenged modified Scheme of Arrangement, inter alia, on the following grounds :-

(a) Because the Scheme of arrangement does not protect and safeguard the interest of the objector inasmuch as it specifically results in diluting the charge created in favour of the objector. Whereof by way of equitable mortgage charge has been created on properties of first applicant and second applicant companies towards properties situated at Village Ranguwall, Radhiyalli and Rajpura, Taluka Nalagarh, Distt. Solan wherein Textile Division is based and at Mouzabhasa, Chowk Rajumulla S.R. and P.S. Bishnupur, Distt. 24 Pargana, West Bengal,

where the Roll Division is based. As per the scheme of arrangement the properties at the Roll Division shall be segregated and the said Rolls Division shall stand only as Corporate Guarantor towards the limits so availed, thus, the same shall result in diluting the charge over the property at the Roll Division as the property is charged on first charge basis in favour of the objector bank for its Foreign Currency Loan Facility.

(b) Because the scheme of arrangement is lopsided in favour of the first applicant-company, i.e., post demerger the Roll Division which in fact is the profit-making division, inasmuch as all the liability post-demerger are fastened upon the textile division which in fact is running into losses. By the proposed Scheme of Arrangement the roll Division will be cleared of a substantial portion of the liabilities and the charges of all nature.

(c) Because in terms of para A2(b) page 29 of the loan agreements on Form C-1, executed by the first applicant company, i.e., the borrower, agreed that it shall not during the subsistence of its liability to the objector bank under or in respect of any of the aforesaid credit facilities without the written consent of the bank, affect any scheme of Amalgamation or Reconstitution, however, the first applicant-company did not obtain the written consent of the objector bank nor did the first applicant-company discharge its liability in full towards the objector bank before affecting the Scheme of Arrangement. The first applicant-company is required to first obtain the written consent of the objector or discharge its liability towards the objector bank before affecting any Scheme of Reconstitution or Arrangement.

(d) Because the meeting of creditors has failed to take note of the cases wherein notices have been issued to the company under the provisions of the Income-tax Act and Sales Tax Act, but the assessment has not been completed and/or the proceedings are still pending. No such list has been provided for and taken into account while calculating the majority.

(e) Because in terms of the security documents, the applicant-company was to secure all Cash Flow which shall include from income, from sales and profits generated, from the predemerger company, i.e., GPIL, through the accounts of the objector bank in order to discharge the debts and liabilities outstanding against the

applicant- company. However, post-demerger the objector bank shall be deprived of the cash flows, i.e., profits generated by the Roll Division which is the profit-making division and shall be burdened with the loss-making Textile Division.

(f) Because the segregation of the Rolls division shall result in diluting the charge of the objector bank whereby the total outstanding of the objector to the tune of Rs. 45 crores shall stand transferred to the second applicant-company and post-demerger the net worth of the second applicant-company, i.e., Textile Division will be completely eroded as all the accumulated losses of the first applicant-company shall be transferred to the second applicant-company.

(g) Because the modifications to the Scheme of Arrangement were put to the objector and other creditors only in the meeting of the creditors on 16-11-2003 and no prior notice of the proposed amendment was given to the objector. The modifications to the Scheme could not be put to vote in the meeting itself for no sufficient opportunity to examine the same were granted to the objector as secured creditor of the first applicant-company.

(h) Because the modification to the Scheme of Arrangement are bad for they had to be first and foremost put to the shareholders of the company before being brought and taken up at the meeting of creditors and put to poll before the unsecured creditors. Prior approval of the shareholders is a condition precedent before modifications could be put to the unsecured creditors of the applicant-company.

(i) and (j)** **

(k) Because the loan was given on the basis of the major promoter of the first applicant company Sh. Pramod Mittal, presently the Chairman and Managing Director, having 7,49,520 shares and Sh. V.K.. Mittal, presently Joint Managing Director, who had 7,38,297 shares and in the second applicant-company after the demerger the major promoter of the company Sh. Promod Mittal has ceased to be even a shareholder. Moreover Sh. Pramod Mittal has also stood as guarantor of the loan facilities granted to the first applicant-company. Thus security cover as provided for to the objector bank by the promoters of the company has been

eroded.

(i) Because the segregation of the Roll Division and the Textile Division into two separate companies shall paramount result in segregation of the cash flows to different accounts which is contrary to the very foundation of the agreement and the security documents entered between the objector and the applicant-company.

(m) and (n)** **

(o) Because the whole process of drawing up of the Scheme of Arrange- merit is mala fide for the directors have failed to disclose their interest in the Scheme and in the post merger companies which shall be formed. The directors under the provisions of section 391 of the Companies Act arc required to disclose their interests direct or indirect in the Scheme of Arrangement. The statutory provisions have not been complied with and the proposed arrangement is such that the relevant factors have remained unnoticed and the proposed arrangement lacks bona fides.

8. In reply to the objections, Sh. Rajesh Gupta, Company Secretary and Senior Manager (Accounts) of the 1st petitioner-company has stated that SBI being the objector has provided the financial assistance to the 1st petitioner-company against its Textile Project only. None of the financial assistance provided by the SBI is in any way related to the Roll Division of the 1st petitioner-company. After the implementation of the proposed modified Scheme of Arrangement the Roll Division of the 1st petitioner-company will provide corporate guarantee to the objector. The first petitioner-company has repaid to SBI Rs. 75.22 crores upto October, 2003. The retention by SBI dried up working capital funds of the 1st petitioner-company it was put to work under intense fund pressure. The 1st petitioner-company has approached Financial Institutions for restructuring of its debts under CDR Mechanism. IDBI being the lead Institution sponsored the Scheme to CDR Cell. However, the same did not materialize as SBI had put objections to the same. SBI is yet to undertake processing of request for reschedulement of F.C. loan and interest thereon. Out of total PBIDT of Rs. 81.41 crores of Textile Unit during the period of 39 months, a sum of Rs. 75.22 crores have gone to SBI till 31st October, 2003. The company has also paid Rs. 1,396

lakhs to other Financial Institutions out of its pressing internal accruals. In the joint meeting of lenders held in June, 2002, SBI agreed in principle to carve out the debited amount of FCL instalments into a separate term loan. It is imperative that SBI having recovered a substantial portion of amount also participates in such restructuring. Further, since all Financial Institutions and Banks having more than 90% of total financial exposure amounting to Rs. 605 crores have agreed and agreeable, it is logical to expect that SBI having less than 6% share should also fall in line.

9. In reply to para 8-A of the objections, petitioners-companies justified the modified scheme of arrangement, on the ground that the liabilities and accumulated losses in respect of the Textile Division of 1st petitioner-company only are being transferred to the Resultant Company and all liabilities relating to Roll Division of the 1st petitioner-company are left with the Roll Division only. The Roll Division of the 1st petitioner-company was not performing well in view of global recession in Iron and Steel Industry coupled with Anti Dumping Duty by America and other Euro-Asian Countries as well as increase in costs of inputs. The Roll Division of the 1st petitioner-company incurred a net loss of Rs. 16.66 crores for the period ended 31st December, 2002 whereas the same had incurred a net loss of Rs. 4.59 crores only for the 18th month period ended on 30th September, 2001. The business losses and other financial charges of both the Divisions of the company are resulting in negative growth of the 1st petitioner-company as a whole and also obstructing the future growth of both the Roll and Textile Divisions. The Chief Manager and Assistant General Manager of SBI attended the meeting held on 21st April, 2003 at 1st petitioner-company Textile Unit at Nalagarh in which various financial proposals including the Long Term Restructuring proposal. Demerger/ Hiving off of the Textile Division were considered and approved by 62 (sixty two) creditors. The Modified Scheme of Arrangement has been passed by required statutory majority of creditors and shareholders irrespective of Classes of both the petitioners-Companies under the supervision of appointed Chairperson by the High Court. At present neither Sh. Pramod Mittal is the Managing Director nor Sh. V.K. Mittal is the Joint Managing Director of the 1st petitioner-Company and both of them would continue to remain shareholder as well as promoters of both the petitioners-Companies even after the implementation of the modified Scheme

of Arrangement. The proposed modified Scheme of Arrangement between 1st Petitioner and 2nd petitioner-Companies will not jeopardise the interest of any creditors including SBI or shareholders of both the petitioners-Companies. The modified scheme is beneficial and for the best interest of both petitioner-Companies and their shareholders and all concerned. On the above premises, the petitioner-Companies prayed for the dismissal of the objections.

10. Shri U.C. Nahta, Regional Director, Northern Region, Department of Company Affairs in his affidavit has stated that the Authorized Capital of the Resulting Company is not sufficient to allot shares to the shareholders of the demerged Company. As such the Resulting Company may be directed to increase its Authorized Capital after following the procedure prescribed under the relevant provisions of the Companies Act and clause 5.4 of the Scheme of Arrangement should not be allowed by the Court.

11. In its replication filed by SBI objector to the reply filed by the petitioners-Companies, again it is reiterated and reasserted that the Scheme of Arrangement would adversely affect the financial viability and the debit burden of the Textile Division would increase thus adversely affecting the interest of the objector Bank. The objector-bank is only demanding the repayment of the overdue dues towards the loan facilities extended to the 1st petitioner-Company as per the terms and conditions agreed therein and the said demand cannot be termed as illegal and unwarranted. 1st petitioner-Company has not mentioned the circumstances under which the drawing power was reduced to nil. In fact, the petitioner-Company siphoned-off the objector Bank's funds and diverted towards meeting losses, whereas the funds were meant for meeting working capital requirements. The repayments in instalments was a proposal mooted by the 1st petitioner-company in lieu of the objector-bank not proceeding against the company under process of law as available to the objector-bank to recover the outstanding loan. The modification to the Scheme was never put to the objector-bank prior to the meeting of the secured creditors, thus the petitioners-companies were in no manner interested in safe guarding the rights of the objector bank and on this short grounds the Scheme is liable to be discarded. The change of management of the 1st petitioner-company has never been duly intimated to the objector bank and the

same shall also adversely affect the rights of the objector bank as it has resulted in diluting the securities and interest of the promoters of the 1st petitioner-company in the day-to-day running and business activities of the company.

12. In reply to the replication of SBI, the petitioners-companies have stated that SBI has no locus standi to oppose the present petition and the said replication has been filed with ulterior motives and the same is vexatious in nature. The SBI had never expressed their objections about the hive-off of Textile Division into a separate company either at the meeting with other lenders or at any meeting with executives of the company and their reservation about financial restructuring package/relief to the company has been withdrawn from the Scheme of Arrangement by way of modifications to the original scheme earlier circulated to all shareholders and creditors and the modifications to the scheme at the meeting of shareholders and creditors was proposed by the IDBI and seconded by IFCI, ICICI and others and carried through vast majority at the respective meetings. The Roll Division would provide guarantee in favour of lenders of Textile Division. The promoters share holding in both GPITL and residual GPIL would be pledged with voting rights with the lenders of Textile Division. The modified Scheme of Arrangement is not contrary to any public policy nor did it violate any provisions of law. The main raw material for textile project is cotton, which is totally dependent on the nature, and the crop of cotton has not been good in the country in recent past and this has resulted in manifold increase in cost of cotton and synthetics. The business recession faced by the GPIL has resulted in huge cash loss for the company. The losses suffered by the GPIL, have resultant in erosion of its net worth by more than 100 per cent. The company is required to make a reference under the provisions of SICA to Board for Industrial Finance and Reconstruction by 21st February, 2004, i.e., within 60 (sixty) days from the adoption of audited accounts by the share-holders, which was done on 22nd December, 2003. The necessary reference to BIFR will put the GPIL under acute financial crisis since various institutions and Banks have expressed their reservation for this reference and they may withhold further financial accommodation in any form and more so, they will press for repayment of their earlier outstanding amount. Any further delay in implementing the Scheme will jeopardize the future growth of 1st petitioner-company and may force the GPIL to shut down its operations which may ultimately

result in retrenchment of services of various employees and officers of the 1st petitioner-company.

13. HBI objector to the Scheme of Arrangement of demerger of 1st and 2nd petitioners-companies, in their objection has stated that 1st petitioner-company in 1996 undertook a diversification scheme in its existing divisions (first being the Rolls division at Pailan, West Bengal and the second being the Textile Division at Nalagarh, HP) by setting up production facilities in its first division for manufacture of forged Roll with an installed capacity of 3300 tpa. The estimated cost of Rs. 4,180 lakhs was appraised by IFCI. As per the demerger proposed by the company, Textile Division with IDBI as lead Bank will be hived off into GPI Textile Ltd. (2nd petitioner) and the Roll division will remain with 1st petitioner. At the request of 1st petitioner-company, IIBI on 4-8-1995 sanctioned an EFS loan of Rs. 888 lakhs, out of which Rs. 885.24 lakhs was duly disbursed by the objector. 1st petitioner-company thereafter failed to adhere to the repayment schedule as agreed in the terms and conditions of the agreement. Consequently, the objector Bank cancelled the disbursement of the balance loan amount and further at the request of 1st petitioner-company restructured its outstanding loan of Rs. 607.70 lakhs by converting overdue principal of Rs. 473.51 lakhs into 16 per cent NCD and the balance Rs. 143.19 lakhs was contained to be EFS loan. The modified Scheme of Arrangement with two conditions imposed by IDBI the lead Bank of 2nd petitioner-company is bad mainly on the grounds that 2nd petitioner-company is admittedly incurring huge losses and the debt of the division is huge (Rs. 451 crores against the debt of the 1st petitioner-company being 33 crores based on the audited balance sheet as on 30-9-2001). The amended scheme of arrangement does not take into consideration the financial health of both the companies, and therefore, fails to safeguard the interest of the creditors of the companies. The amended scheme in its effect to strengthen the loss-making company is in fact leading to dilute the already acquired strength of the profit-making company and the segregation of the 1st petitioner-company shall result in diluting the charge of the objector bank whereby the total amount outstanding of the objector shall stand transferred to the 2nd petitioner-company and post demerger the net worth of the 2nd petitioner-company will be completely eroded and, therefore, would result in invoking the guarantees of the 1st petitioner-company thereby making it

impossible for the lenders of the 1st petitioner-company to realise their dues. The IIBI opposed the Modified Scheme of Arrangement on the abovestated objections.

14. In reply to the objections of IIBI, 1st petitioner-company stated that total outstanding amount of IIBI as on the date of the meeting of creditors held on 16-11-2003 to approve the scheme was Rs. 7,58,26,267 (Rupees seven crores fifty eight lakhs twenty six thousands two hundred sixty seven) only against the total outstanding amount of Rs. 6,37,30,93,037 (Rupees six hundred thirty seven crores thirty lakhs ninety three thousands thirty seven) and their outstanding amount constitutes to only 1.19 per cent of the total outstanding amount as on that date. Thus, the objector has an insignificant outstanding amount as a creditor in the 1st petitioner- company .The modified scheme does not in any manner affect the interest of IIBI as a creditor in respect of amount lent by them for acquisition and installation of a particular imported machinery which is at present with the Roll Division of the 1st petitioner-company even after the implementation of the scheme. There is no arrangement or compromise with any of the creditors of the GPIL and the rights and the liabilities of all the bona fide creditors including IIBI will continue to remain intact. RBI has appointed its nominee on the Board of Directors of 1st petitioner-company as Director and their nominee will continue to act as Director of 1st petitioner-company and will be able to safeguard the interest of the ITBI in times to come. The modifications which have been proved at the shareholders and creditors meeting of 1st petitioner-company was proposed by IDBI and seconded by other Financial Institution including EXIM Bank, WBIDC, Allahabad Bank and State Bank, Indore who have provided financial assistance in respect of only Roll Division of 1st petitioner-company and none of them objected to the modifications and modified scheme of arrangement. The modifications and modified scheme of arrangement was approved at the creditors meeting of 1st petitioner-company by the creditors which constitutes 91.45 per cent in terms of value against 8.55 per cent and in terms of number 62 creditors equivalent to 97.87 per cent voted in favour of modifications and modified scheme of arrangement against 2.13 per cent.

15. During the course of hearing of this company petition, preliminary objection was raised by Mr. R.M. Suri, Sr. Advocate on behalf of SBI-objector and by Mr.

B.C. Negi, Advocate for IIBI-objector that as 1st petitioner-company has already registered its name before the BIFR under section 15 of 'the SICA', these proceedings are to be suspended in view of the bar under Section 22 therein.

16. On the other hand, the learned senior counsel appearing for the petitioners-companies has submitted that the provision of Section 22 of 'the SICA' would apply only to the proceedings initiated against the sick company and not to proceedings filed by the sick company or the Company claiming to be so. He next contended that the jurisdiction of this Court under Companies Act is not precluded to proceed further in the matter as the objects and purpose of both the statutes are primarily to safeguard the economy of the Country and in the process to provide measures for salvaging and securing the public money to afford adequate protection to employment and rehabilitate the sick industries. Reliance is placed on the decision of the Supreme Court in *Kailash Nath Agarwal v. Pradeshia Industrial & Investment Corpn. of U.P. Ltd.* [2003] 4 SCC 305, 42 SCL 689 and in cases of *Duke Offshore Ltd. v. Burns Standard Co. Ltd.* Mh.LJ.[1999] 1 Mah. LJ 428 (Bom.) and *Kirloskar Electric Co. Ltd., In re:* [2003] 116 Comp. Cas. 413, 43 SCL 186 (Kar.).

17. Mr.B.C. Negi, learned counsel appearing on behalf of IIBI objector also raised identical preliminary objection. The learned senior counsel for either side have made elaborate submissions in support of their claim and counter claims involved in the present proceedings, Mr. Deepak Gupta, learned counsel for the IFCI has supported the proposal for approval of the Modified Scheme of Arrangement

18. I shall first examine the preliminary objection posed before me as to whether Section 22 of 'the SICA' applies to the present proceedings ; initiated by the petitioners' Companies under Sections 391 to 394 of the Companies Act or not.

Section 22(1) of the SICA reads as under :

'Suspension of legal proceedings, contracts, etc. - 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.'

19. The term 'Board' is defined in section 3(b) of the SICA to mean the Board for Industrial and Financial Reconstruction established under section 4. The expression 'industrial company' is specified in section 3(e) to mean a company which owns one or more industrial undertakings and the expression 'sick industrial company' has been defined in section 3(o) to mean an 'industrial company' being a company registered for not less E than five years which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth.

20. Section 22(1) is to be found in Chapter III of the SICA. The said Chapter relates to 'References, Inquiries and Schemes' and it comprises sections 15 to 22A. Section 15 thereunder relates to reference to Board. Interms of section 15(1) when an industrial company becomes a sick industrial company, such company has to make a reference to the Board within the period prescribed thereunder. Even otherwise the Central Government or' the State Government as well as the Reserve Bank and other public financial institutions or Scheduled banks are also entitled to make a reference under section 15(2). Inquiry into the working of the sick industrial companies is contemplated under section 16. On completion of such inquiry, section 18 provides for preparation and sanction of schemes under the SICA. The provisions relating to rehabilitation by giving financial assistance are to be found in section 19. The provisions for winding up of the sick industrial company after the inquiry under section 16 and on consideration of relevant facts and the circumstances have been made under section 20. The matters relating to

preparation of complete inventory by operating agency of sick industries arc dealt with under section 21. These provisions are followed by the provisions relating to suspension of legal proceedings, contracts, etc. The legal proceedings include the proceedings relating to winding up of such company as well as proceedings relating to properties, assets and liabilities of such company, including suits for recovery of money from and for enforcement of any security or of any guarantee in respect of loans or advance granted to such companies. Section 22A, which is the last section in Chapter III, empowers the Board to issue directions not to dispose of the assets of such company during the preparation or consideration of scheme under section 18 or during the investigation relating to winding up under section 20 of the SICA.

21. The preamble of the SICA reads that 'An Act to make in the public interest, special provisions with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measure so determined and for matters connected therewith or incidental thereto.' Even the Notes on the Clauses appended to the Statements of Objects and Reasons speak of suspension of legal proceedings with respect to such industrial companies, in relation to the provisions contained in Section 22 of 'the SICA' without any reservation or exclusion of the proceedings continued by such company against an order passed in the matter originated from the proceedings instituted by others against the E company.

22. The Hon'ble Supreme Court in the case of Maharashtra Tubes Ltd. v. State Industrial & Investment Corpn. of Maharashtra Ltd. [1993]78 Comp. Cas. 803 held :

'.. .Section 22(1) provides that during the pendency of (i) an inquiry under section 16, or (n) preparation or consideration of a scheme under section 17, or (iii) an appeal under section 25, no proceedings for winding up of ' the concerned industrial company or for execution, distress or the like shall lie or be proceeded within relation to the properties of that concern unless BIFR/appellate authority has

consented thereto. The underlying idea is that every such action should be frozen unless expressly permitted by the specified authority until the investigation for the revival of the industrial undertaking is finally determined. . .' (p. 813).

The observation 'every such action should be frozen' clearly relate to the continuation of any such proceedings without exclusion of the proceedings instituted by the industrial company.

23. The Apex Court in *Patheja Bros. Forgings & Stamping v. ICICI Ltd.* AIR 2000 SC 2553, [2000] 102 Comp. Cas. 21, 26 SCL 404 at 25, while disapproving the decision of the Division Bench of Bombay High Court in *Madalsa International Ltd. v. Central Bank of India* AIR 1998 Bom. 247 held that:

'We have analysed the relevant words in Section 22 and found that they are clear and unambiguous and that they provide that no suit for the enforcement of a guarantee in respect of any loan or advance granted to the concerned industrial company will be or can be proceeded with without the consent of the Board or the appellate authority. When the words of a legislation are clear, the court must give effect to them as they stand and cannot demur on the ground that the Legislature must have intended otherwise.' (p. 25)

24. Further it is clearly said :

'It is not possible to read the relevant words in Section 22 as meaning that only a suit against the industrial company will not lie without such consent. There is no requirement in Section 22, as analysed above, that, to be covered thereby, a suit for the enforcement of a guarantee in respect of a loan or advance to the industrial company should be against the industrial company.' (p. 24)

25. The above settled law read with the decision in *Maharashtra Tubes Ltd.* 's case (supra) clearly reveals that the expressions 'legal proceedings' and 'be proceeded with further' should be given wider interpretation so as to include all the proceedings wherein the issue relates to the monetary claim or enforcement of guarantee or security pertaining to loans or advance to the industrial company and the same is made against such company. Section 22 nowhere specifically

provides that the restrictions imposed upon such proceedings are applicable only in cases where such proceedings are originated consequent to initiation thereof by or at the instance of a party or person other than the industrial company, nor it specifies that the proceedings initiated or continued by the industrial company in relation to monetary claim or the matters relating to its properties or assets against such industrial company do not attract the said provision of law. Therefore, the provision, as it stands, merely prescribes embargo over the proceedings relating to monetary claim and pertaining to the properties and assets against such industrial companies without the consent of the Board or the appellate authority, as the case may be.

26. In *Real Value Appliances Ltd. v. Canara Bank* [1998] 16 SCL 445 (SC), their Lordships observed that inquiry under section 16 of the SICA must be treated as having commenced as soon as the registration of the reference is completed after scrutiny and that from that time, action against the Company's assets must remain stayed as stated in Section 22 till final decisions are taken by the BIFR. The ratio of the decision in *Industrial Finance Corpn. of India v. Maharashtra Steels Ltd.* [1990] 67 Comp. Cas. 412 (All), the High Court of Himachal Pradesh in *Orissa Sponge Iron Ltd. v. Rishabh Ispaat Ltd.* [1993] 78 Comp. Cas. 264, holding that the inquiry must be treated as having commenced as soon as the registration of the reference is completed is held to be a correct proposition of law.

27. Again in the case of *Gram Panchayat v. Shree Vallabh Glass Works Ltd.* [1991] 71 Comp. Cas. 169 (SC), their Lordships observed that as soon as enquiry under section 16 of the SICA is ordered by the Board, the various proceedings set out under sub-section (1) of Section 22 would be deemed to have been suspended. In the light of the steps taken by the Board under sections 16 and 17 of the Act no proceedings for execution, distress or the like against any of the properties of the company lay or could be proceeded with further except with the consent of the Board.

28. In *Kailash Nath Agarwal's case* (supra), relied upon by the learned senior counsel appearing on behalf of the petitioners-Companies, the point in issue before their Lordships was in respect to the interpretation of the word 'suit' and

'proceedings' as used in U.P. Public Moneys (Recovery of Dues) Act, 1972 and sections 22(1) (as amended in 1994), 3(1)(o) and 17(3) of the SICA. Their Lordships have held that there is an apparent distinction between the expressions 'proceedings' and 'suit' used in Section 22(1) of the SICA. Although two different words may be used in the same statutes 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 those different words as carrying different meanings. The words 'suit' and 'proceeding' had not been used interchangeably in SICA. The ratio of the said decision of the Apex Court in the peculiar facts and circumstances of the present case will be of no help or assistance to the petitioners-Companies.

29. In Duke Offshore Ltd.'s case (supra), the Industrial Company was seeking to enforce the Bank guarantee given by the third party the petitioner in that case. In other words, the petitioner therein was seeking to restrain the industrial company from initiating the proceedings at the original stage. The decision in that case was delivered on September 2, 1998, i.e., prior to the decision of the Apex Court in Patheja Bros. Forgings & Stamping's case (supra).

30. In Kirloskar Electric Co. Ltd.'s case (supra), the learned Single Judge had approved the scheme envisaging transfer of trade marks and brand names used by company to transferee holding that the objections of one creditor was not of much weight. A reference under section 15(1) of the SICA was considering by BIFR at the hearing held on 21-10-2002. While declaring the company as sick, the Board had noted that the Company had already filed a restructuring proposal before the High Court of Karnataka. After the decision of the Company petition the learned Single Judge of the Karnataka High Court, BIFR passed the following order on 27-3-2003 :

'The Board considered the relevant documents leading to the approval of the scheme of arrangement under sections 391 and 394 of the [Companies Act, 1956](#) by the Hon'ble High Court of Karnataka vide their order dated 13-2-2003 and also the audited balance sheet for the year ending 30-9-2001 pursuant to the sanction of scheme. The Board has noted that with the approval of the scheme of

arrangement by the High Court of Karnataka, net worth of the company has become positive. Accordingly, Kirloskar Electric Co. Ltd. is no more a sick industrial company under the purview of the Act. Hence, the company stands discharged from the purview of the Act with immediate effect.'

31. It appears from the record of that case that no objection in regard to the applicability of Section 22 of the SICA was raised before the learned Single Judge of the Karnataka High Court during the pendency of the proceedings under Sections 391 to 394 of the Companies Act and in the facts and circumstances of the case, the learned Single Judge had approved the Scheme of Arrangement. The ratio of the case of Kirloskar Electric Co. Ltd. (supra), thus, does not support the arguments of the learned senior counsel appearing on behalf of the petitioners-companies on the question of applicability of Section 22 of the SICA. The contention of the petitioners-companies that the provision relating to bar under Section 22 of the SICA for 'proceedings' or 'suits' against the industrial Company applied to those initiated by other and would not apply to those initiated by the Industrial Company itself, does not merit acceptance. Section 22(1) of the SICA bars not only the proceedings for winding up the industrial company or for execution, distress but also the like proceedings against any properties of the industrial company, etc., etc. In the present case, the Modified Scheme of Arrangement applied for sanction of this Court under Sections 391 to 394 of the Companies Act by the petitioners-companies for demerger of the Textile Division of 1st petitioner-company to 2nd petitioner-company would amount to transferring the properties, assets, liabilities and all rights and claims whatsoever of the objectors SBI and IIBI who are respective secured creditors of Textile and Roll Divisions of the 1st petitioner-company.

32. In the facts and circumstances of the case narrated above and in the light of the settled position of law discussed hereinabove, I am of the view that the present proceedings filed by the petitioners-companies under Sections 391 to 394 seeking sanction of the modified scheme of arrangement. between two companies shall not. be lie or proceed with further in view of the provision of Section 22 of the SICA. The arguments of the learned senior Advocate for the petitioners-companies that the relief sought for in the present proceedings under Sections 391

to 394 of the Companies Act are not instituted for the winding up of the industrial company or for execution, distress do not merit acceptance. The embargo imposed under Section 22 of the SICA includes other proceedings by the petitioners-companies' themselves or initiated by other against them,

33. The decisions in Maruti Udhog Ltd. v. Instrumentation Ltd. [1995] 82 Comp. Cas. 455 (Raj.); M.V. Damoda ran v. Registrar of Co-operative Societies [1999] 95 Comp. Cas. 116 (Mad.); Space Capital Service v. Prakash Industries Ltd. [2000] 101 Comp. Cas. 437, 30 SCL 420 (Delhi); Essorpe Mills Ltd. v. Central Provident Fund Commissioner [2001] 104 Comp. Cas. 588 (Mad.), cited at the Bar by the learned senior counsel for objector SBI are noticed,

34. As noticed hereinabove 1st petitioner-company has already made a reference to the BIFR which has been subsequently registered, therefore, the present proceedings deserve to be suspended till further orders. As the present proceedings are kept in abeyance, I do not consider, it. necessary or expedient to record any finding on the, merits of the modified scheme of arrangement proposed to be approved by means of this Company Petition as well as the objections filed by the SBI and IIBI objectors to the said scheme, though lengthy arguments were addressed by the learned senior counsel and other counsel appearing for the petitioners' companies and objectors during hearing of this petition.

35. For the above stated reasons, it is ordered that the proceedings of Company Petition No. 13 of 2003, shall remain in abeyance till the BIFR decides the reference made by the 1st petitioner-company under section 15 of the SICA.