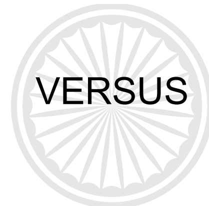
**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NOS._614-615 OF 2016**
**(ARISING OUT OF SLP(CIVIL) NOS. 26170-26171 OF 2008)**

M/S MADRAS PETROCHEM LTD.
& ANR. … APPELLANTS



VERSUS

BIFR & ORS. … RESPONDENTS

**J U D G M E N T**

**R.F. Nariman, J.**

1. Leave granted.

2. The present appeals raise interesting questions on the interplay between the Sick Industrial Companies (Special Provisions) Act, 1985 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The facts in appeals arising out of Special Leave Petition (Civil) Nos.26170-26171 of 2008 are as follows.

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3. The net worth of the Appellant No.1 Company, having eroded completely, the appellant No.1 company filed a reference under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 before the BIFR, which was registered as BIFR Case No.115 of 1989. On 13.12.1989, after making an inquiry under Section 16(1) of the Sick Industrial Companies (Special Provisions) Act, 1985, the Appellant company was declared sick and ICICI was appointed as the Operating Agency to formulate a rehabilitation scheme. On 3.7.1991, the first rehabilitation scheme prepared by the Operating Agency was sanctioned, which envisaged the takeover of the appellant company by one Mahavir Plantation Limited - i.e. appellant No.2. The first scheme was finally declared a failure, and the Appellant No.1 company, on 17.1.1995, was directed to submit a fresh, comprehensive, revised rehabilitation scheme which was duly circulated. Objections to the said scheme were heard by the BIFR and the scheme finally sanctioned was in the form of a change of management of the appellant no.1 company subject to various modifications to be carried out. After the Appellant No.1

company's management changed hands, the second scheme, after being reviewed from time to time, was declared as failed on 16.5.2000. Despite efforts by the Operating Agency to attempt to revive the company, all such efforts failed, and ultimately, on 30.4.2001, BIFR, on the basis of the recommendation of the Operating Agency, formed a *prima facie* opinion that the appellant No.1 company should be wound up under Section 20(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. On 27.7.2001, the BIFR confirmed its *prima facie* opinion after noting that the appellant No.1 company had been enjoying protection under the Sick Industrial Companies (Special Provisions) Act, 1985 for the last 12 years. There being no acceptable viable rehabilitation proposal after the failure of two schemes, the appellant no.1 company was not likely to make its net worth exceed its accumulated losses, and therefore BIFR recommended to the High Court of Bombay that the said company be wound up. On 4.2.2002, appellant No.1's challenge to the BIFR order was dismissed by the AAIFR.

4. While matters stood thus, ICICI issued a notice dated 20.11.2002 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 to the appellant No.1 company and followed it up with a possession notice dated 9.5.2003. On 8.8.2003, ICICI issued a sale notice for and on behalf of all the secured creditors of the appellant No.1 company. Meanwhile, appellant Nos. 1 & 2 filed a writ petition before the Delhi High Court being Writ Petition Nos.48-49 of 2004 challenging the AAIFR order dated 4.2.2002 and the BIFR order dated 25.7.2001. On 7.1.2004, the Delhi High Court stayed both the orders, which stay continued until 24.7.2008, when, by the impugned judgment, the Writ Petition was dismissed.

5. Meanwhile, the sale notice of 8.8.2003 was challenged before the DRT by the appellants. The said challenge was unsuccessful, as a result of which an appeal was filed before the DRAT, which, by its order dated 30.6.2005, upset the DRT order and set aside the sale notice. However, by a judgment of the Madras High Court, in a challenge to the aforesaid order dated 30.6.2005, the Madras High Court set aside the DRAT

order. The sale of movable assets for a sum of Rs.4.65 crores was also confirmed by the Madras High Court in favour of one M/s Rahamath Steel. Vide the said order the Madras High Court also permitted the creditors of the Company to proceed with the sale of its immovable property subject to a minimum reserve price of Rs.25 crores. This order was never challenged and has attained finality.

6. Meanwhile, based on a winding up proceeding by M/s BHEL, an unsecured creditor, and another winding up proceeding based on the opinion of the BIFR under Section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985, the Bombay High Court wound up the appellant No.1 company.

7. While matters stood thus, the Delhi High Court passed the impugned order on 24.7.2008, as has been stated hereinabove, in which it was of the view that Section 15(1) proviso 3 of the Sick Industrial Companies (Special Provisions) Act, 1985, when construed to include all proceedings under the Sick Industrial Companies (Special Provisions) Act, 1985, would make the present proceedings under the Sick Industrial Companies

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(Special Provisions) Act, 1985, abate on the facts of this case. Ultimately, in this view of the matter, and differing with a judgment of the Orissa High Court, the Delhi High Court disposed of the appellants' writ petition as having become infructuous.

8. Appeals have been filed against the said order by the present appellants which appeals, as has been stated hereinabove, raise interesting questions of law on the interplay of the Sick Industrial Companies (Special Provisions) Act, 1985 with the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

9. A few subsequent events also need to be stated for the sake of completion. On 20.11.2008, the Bombay High Court modified its order dated 30.8.2007 and restrained the Official Liquidator from taking possession of the secured assets of the company, and permitted the creditors to pursue their remedies under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. M/s. Alchemist ARC Ltd. issued a sale notice on behalf of all the creditors of

the appellant No.1 company for a sum of Rs.222.59 crores on 6.4.2013. Appellant No.2, being the corporate guarantor of the appellant no.1 company, filed an appeal challenging the sale notice of 6.4.2013. On 13.5.2013, DRT Chennai dismissed this petition. Vide an order dated 19.3.2014, the DRAT, Chennai, in an appeal made to it, directed, by way of an interim order, that appellant No.2 pay a sum of Rs.53.77 crores within the time stated therein. This DRAT order was challenged before the Madras High Court which, by its order dated 21.4.2014, refused to interfere with the said order dated 19.3.2014, and granted some additional time to appellant No.2 to pay the said amount of Rs.53.77 crores. We have been informed that the said amount has not been paid till date. The appellant No.2 has challenged this order of 21.4.2014 before this Court. However, the said SLP is lying in defect as on date despite the expiry of more than one and a half years.

10. Mr. C.N. Sreekumar, learned counsel appearing on behalf of the appellant No.1 company, submitted before us that the effect of the interim order of 7.1.2004 of the Delhi High Court is that the reference made by the appellant No.1 company gets

revived. He further submitted that no winding up order could be made in view of such revival, and that such orders are therefore *non est*, and the present appeals cannot be regarded as infructuous. He added that Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 would automatically come into play to protect the assets of the appellant No.1 company. He also submitted before us, that in any case, regard being had to the object of the Sick Industrial Companies (Special Provisions) Act, 1985, it would override the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. For this purpose, he relied on a judgment by this Court in **KSL & Industries Ltd. v. Arihant Threads Ltd.,** (2015) 1 SCC 166, which held that the Sick Industrial Companies (Special Provisions) Act, 1985 has overridden the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993. The said Act, being a predecessor to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, and dealing with the same subject matter as the Securitisation and Reconstruction of Financial Assets and

Enforcement of Security Interest Act, 2002 – namely, recovery of debts due to banks and financial institutions, would lead to the conclusion that the 2002 Act is also overridden. He further contended that Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 expressly refers to the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993, and since Section 34(2) of the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993, refers to the Sick Industrial Companies (Special Provisions) Act, 1985, Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 should also be construed so as to include a reference to the Sick Industrial Companies (Special Provisions) Act, 1985. His further contention is that on a true construction of Section 15(1) proviso 3 of the Sick Industrial Companies (Special Provisions) Act, 1985, the Orissa High Court is correct and that since the expression "reference" would only include the initial stage of filing and registration of a reference before the BIFR, such

stage having gone long ago, the proceedings before BIFR are very much alive and have not abated.

11. Shri C.A. Sundaram, learned senior counsel, appearing on behalf of M/s Alchemist Asset Reconstruction Company Limited, which is substituted in place of respondent Nos.2,3,4,6 and 9, has submitted that the effect of the interim order dated 7.1.2004 does not revive the reference of the appellant No.1 company before BIFR. For this purpose he relied upon **Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn.,** (1992) 3 SCC 1. He also submitted that in any event the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 would override the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, so that even if the stay order dated 7.1.2004 had the effect of reviving the reference, that in itself would not restrain the secured creditors from proceeding under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, nor would it render the winding up order passed by Bombay High Court *non est*. He also submitted that a large number of judgments of various High

Courts have taken the view which is taken in the impugned judgment, and that the expression "reference" would include all stages of a proceeding under the Sick Industrial Companies (Special Provisions) Act, 1985 including the stage of operation of a scheme. For this purpose, in particular, he relied heavily on a full bench decision of the Madras High Court in **M/s. Salem Textiles Limited** v. **The Authorized Officer and Ors.**, reported in AIR 2013 Madras 229. He also argued that since the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 expressly named the Sick Industrial Companies (Special Provisions) Act, 1985 in Section 34(2), the Sick Industrial Companies (Special Provisions) Act, 1985 obviously overrode that Act. What is significant is that the corresponding section, namely, Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, expressly omits any reference to the Sick Industrial Companies (Special Provisions) Act, 1985, making it clear that the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 would prevail over the Sick Industrial Companies (Special Provisions)

Act, 1985. That being the case, he argued that this Court's judgment in **KSL & Industries Ltd. Vs. Arihant Threads Ltd.,** (2015) 1 SCC 166, is, therefore, clearly distinguishable. He also argued that at the end of the day, since the movable property of the appellant No.1 company had been sold off, and since various High Courts – including Bombay and Madras – have passed a number of orders, both winding up the company and dismissing petitions challenging the action of his client in proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, all that remains is sale of the immovable property of the appellant No.1 Company and that, therefore, nothing really remains in these appeals, which have become infructuous.

**Discussion**:-

12. The arguments of counsel have been wide ranging, but at the end of the day various Sections of three statutes have to be interpreted by this Court. Before embarking on a consideration of the arguments and the interpretation of these provisions, it will be important to first set them out.

**THE SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985**

**"Section 15. Reference to Board**

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

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

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

Provided also that on or after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where a reference is pending before the Board for Industrial and Financial Reconstruction, such reference shall abate if the secured creditors, representing not less than three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors,

have taken any measures to recover their secured debt under sub-section (4) of section 13 of that Act.

**Section 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.

(2) Where the management of the sick industrial company is taken over or changed in pursuance of any scheme sanctioned under section 18 notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or in the memorandum and articles of association of such company or any instrument having effect under the said Act or other law

a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;

b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.

(3) where an inquiry under section 16 is pending or any scheme referred to in section 17 is under preparation or during the period] of consideration of any scheme under section 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurance of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adoptions and in such manner as may be specified by the Board.

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year, at a time so, however, that the total period shall not exceed seven years in the aggregate.

(4) Any declaration made under sub-section (3) with respect to a sick industrial company shall have effect notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law, the memorandum and articles of association of the company or any instrument having effect under the said Act, or other law or any agreement or any decree or order of a court, tribunal, officer or other authority or of any submission, settlement or standing order and accordingly,-

(a) any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration, and all proceedings relating thereto pending before any court, tribunal, officer or other authority shall remain stayed or be continued subject to such declaration; and

(b) on the declaration ceasing to have effect-

(i) any right, privilege, obligation or liability so remaining suspended or modified shall become revived and enforceable as if the declaration had never been made; and

(ii) any proceeding so remaining stayed shall be proceeded with, subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded.

**Section 32. Effect of the Act on other laws**

(1) The provisions of this Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976) for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act.

(2) Where there has been under any scheme under this Act an amalgamation of a sick industrial company with another company, the provisions of

section 72A of the Income-tax Act, 1961 (43 of 1961), shall, subject to the modifications that the power of the Central Government under that section may be exercised by the Board without the Central Government under that section may be exercised by the Board without any recommendation by the specified authority referred to in that section, apply in relation to such amalgamation as they apply in relation to the amalgamation of a company owning an industrial undertaking with another company.

**The Recovery Of Debts Due To Banks And Financial Institutions Act, 1993**

**Section 17. Jurisdiction, powers and authority of Tribunals.**

(1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.

(2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act.

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**Section 18. Bar of Jurisdiction.**

On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to the matters specified in section 17.

**34. Act to have over-riding effect.—**

(1) Save as provided under sub- section (2), the provisions of this Act shall have effect

notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

(2) The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the Unit Trust of India Act, 1963 (52 of 1963), the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984), the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and the Small Industries Development Bank of India Act, 1989 (39 of 1989).

**The Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002**

**Section 13. Enforcement of security interest**

(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to

exercise all or any of the rights under sub- section (4).

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower: PROVIDED that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset: PROVIDED that the right to transfer by way of lease, assignment or sale shall be exercised only

where the substantial part of the business of the borrower is held as security for the debt: PROVIDED FURTHER that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is

due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(5A) Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorised by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.

(5B) Where the secured creditor, referred to in sub-section (5A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of

security interest is taken by the secured creditor, under sub-section (4) of section 13.

(5C) The provisions of section 9 of the Banking Regulation Act, 1949(10 of 1949) shall, as far as may be, apply to the immovable property acquired by secured creditor under sub-section (5A).]

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured

creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

PROVIDED that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956):

PROVIDED FURTHER that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act:

PROVIDED ALSO that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

PROVIDED ALSO that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of

the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

PROVIDED ALSO that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation: For the purposes of this sub-section,-- (a) "record date" means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date; (b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary

course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.

**Section 35. The provisions of this Act to override other laws**

The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

**Section 37. Application of other laws not barred**

The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.

**Section 41. Amendments of certain enactments**

The enactments specified in the Schedule shall be amended in the manner specified therein."

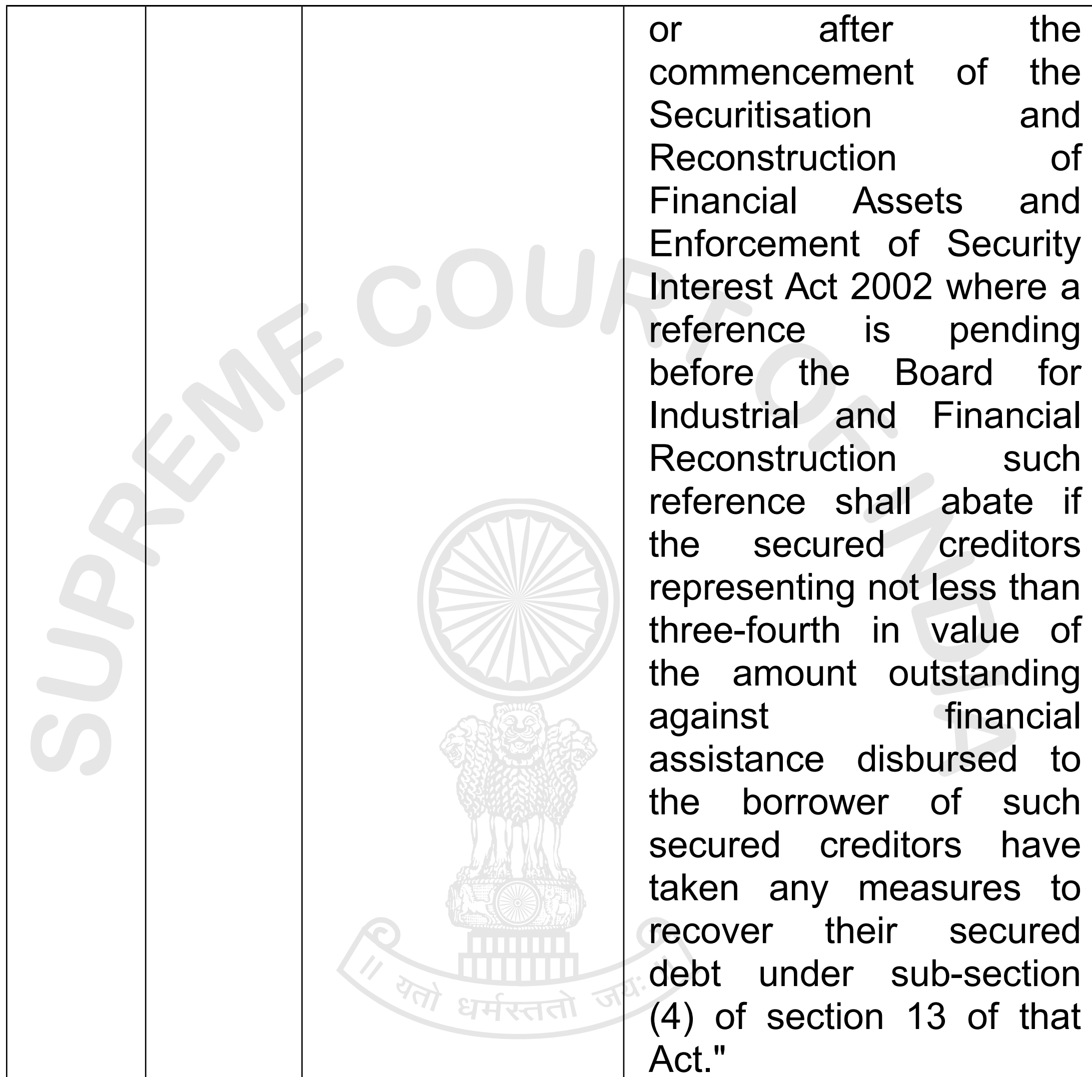
JUDGMENT

**THE SCHEDULE**

**(Section 41)**

| Year | Act No. | Short title | Amendment |
|---|---|---|---|
| 1956 | 1 | The Companies Act 1956 | In section 4A in sub-section (1) after clause (vi) insert the following:-- "(vii) the securitisation company or the reconstruction company which has obtained a certificate of |

| | | | registration under sub-section (4) of section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002". |
|---|---|---|---|
| 1956 | 42 | The Securities Contracts (Regulation) Act 1956 | In section 2 in clause (h) after sub-clause (ib) insert the following:-- " (ic) security receipt as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002". |
| 1986 | 1 | The Sick Industrial Companies (Special Provisions) Act 1985 | In section 15 in sub-section (1) after the proviso insert the following:-- "PROVIDED FURTHER that no reference shall be made to the Board for Industrial and Financial Reconstruction after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 where financial assets have been acquired by any securitisation company or reconstruction company under sub-section (1) of section 5 of that Act:<br>PROVIDED ALSO that on |



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

13. It is important at this stage to refer to the genesis of these three legislations. Each of them deals with different aspects of recovery of debts due to banks and financial institutions. Two of them refer to creditors' interests and how best to deal with recovery of outstanding loans and advances made by them on the one hand, whereas the Sick Industrial Companies (Special Provisions) Act, 1985, on the other hand, deals with certain

debtors which are sick industrial companies (i.e. companies running industries named in the schedule to the Industries (Development and Regulation) Act, 1951) and whether such "debtors" having become "sick", are to be rehabilitated. The question, therefore, is whether the public interest in recovering debts due to banks and financial institutions is to give way to the public interest in rehabilitation of sick industrial companies, regard being had to the present economic scenario in the country, as reflected in Parliamentary Legislation.

14. We begin, first, with the Sick Industrial Companies (Special Provisions) Act, 1985. The Statement of Objects and Reasons for this Act reads as under:

**"THE SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985**

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**STATEMENT OF OBJECTS AND REASONS**

> The ill effects of sickness in industrial companies such as loss of production, loss of employment, loss of revenue to the Central and State Governments and locking up of investible funds and financial institutions are of serious concern to the Government and the society at large. The concern of the Government is accentuated by the alarming increase in the incidence of sickness in industrial companies. It has been recognized that in order to fully utilize the productive industrial assets,

afford maximum protection of employment and optimize the use of the funds of the banks and financial institutions, it would be imperative to revive and rehabilitate the potentially viable sick industrial companies as quickly as possible. It would also be equally imperative to salvage the productive assets and realize the amounts due to the banks and financial institutions, to the extent possible, from the non-viable sick industrial companies through liquidation of those companies.

It has been the experience that the existing institutional arrangements and procedures for revival and rehabilitation of potentially viable sick industrial companies are both inadequate and time-consuming. A multiplicity of laws and agencies makes the adoption of coordinated approach for dealing with sick industrial companies difficult. A need has, therefore, been felt to enact in public interest a legislation to provide for timely determination by a body of experts of the preventive, ameliorative, remedial and other measures that would need to be adopted with respect to such companies and for enforcement of the measures considered appropriate with utmost practicable despatch.

The salient features of the Bill are-

(i) application of the legislation to the industries specified in the First Schedule to the Industries (Development and Regulation) Act, 1951, with the initial exception of the scheduled industry relating to ships and other vessels drawn by power, which may however be brought within the ambit of the legislation in due course;

(ii) Identification of sickness in an industrial company, registered for not less than seven years, on the basis of the symptomatic indices of cash losses for two consecutive financial years and accumulated losses equalling or exceeding the net

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worth of the company as at the end of the second financial year;

(iii) the onus of reporting sickness and impending sickness at the stage of erosion of fifty per cent. or more of the net worth of an industrial company is being laid on the Board of Directors of such company; where the Central Government or the Reserve Bank is satisfied that an industrial company has become sick, it may make a reference to the Board, likewise if any State Government, scheduled bank or public financial institution having an interest in an industrial company is satisfied that the industrial company has become sick, it may also make a reference to the Board;

(iv) establishment of Board consisting of experts in various relevant fields with powers to enquire into and determine the incidence of sickness in industrial companies and devise suitable remedial measures through appropriate schemes or other proposals and for proper implementation thereof;

(v) constitution of an Appellate Authority consisting of persons who are or have been Supreme Court Judges, senior High Court Judges and Secretaries to the Government of India, etc., for hearing appeals against the order of the Board."

15. A cursory reading of the Act shows that a Board for Industrial and Financial Reconstruction is set up by the Act, before which references are made. Such references can be made under Section 15 of the Act, not only by an industrial company as defined, which, as has been stated above, is a

company which runs any of the industries specified in the first schedule to the Industries (Development and Regulation) Act, 1951, but also by the Central or State Government, or public financial institution, or State level institution, or a scheduled bank, as the case may be. Such reference can only be made if the company concerned has turned sick i.e. it has to be a company running an industry mentioned in the first schedule to the Industries (Development and Regulation) Act, 1951, and must be a company registered for not less than 5 years, which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth. An inquiry into the working of such "sick industrial company" is to be made by the said Board on receipt of a reference or upon application or *suo motu*. If the Board is satisfied that the Company has indeed become a sick industrial company, the Board shall decide as to whether it is practicable for the Company to make its net worth positive within a reasonable time. This it may do under Section 17 of the Act, by order under sub-section (2) of Section 17. If this is not possible, then the Board may appoint an Operating Agency who will prepare a

scheme for rehabilitation mentioned in Section 18 which the Board may then sanction. The scheme may provide for all or any of the things mentioned in the said Section, and finally, the scheme may work successfully, resulting in the Company's net worth turning positive, or may be unsuccessful. In the event of it being unsuccessful, the Board may modify such scheme or ask for the preparation of a new scheme. If, at the end of the day, the first scheme or any successive schemes ultimately fail, the Board has then to be of the opinion that such Company is not likely to make its net worth positive, and that therefore it is to forward its opinion under Section 20 of the Act to the concerned High Court to proceed with the winding up of the said company. Section 22, which is of crucial importance in the working of the Act, suspends various legal proceedings, contracts etc., while a reference before the Board is pending, for the duration of the inquiry to be made and/or scheme prepared and finally sanctioned, and for the entire period of the working of the said scheme. Both Section 22(1) and (4) contain *non obstante* clauses overriding *inter alia* the Companies Act and any other law. In order to better implement the provisions

of this Act, Section 32 also contains a *non obstante* clause overriding all other laws including Memoranda and Articles of Association of the industrial company or any other instrument having effect by virtue of any other law, except the Foreign Exchange Regulation Act of 1973 and The Urban Land (Ceiling and Regulation) Act, 1976.

16. While this Act had worked for a period of about 7 years, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was brought into force, pursuant to various Committee reports. The Statement of Objects and Reasons for this Act reads as follows:-

> **"STATEMENT OF OBJECTS AND REASONS OF THE RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993**
>
> Banks and financial institutions at present experience considerable difficulties in recovering loans and enforcement of securities charged with them. The existing procedure for recovery of debts due to the banks and financial institutions has blocked a significant portion of their funds in unproductive assets, the value of which deteriorates with the passage of time. The Committee on the Financial System headed by Shri M. Narasimham has considered the setting up of the Special Tribunals with special powers for adjudication of such matters and speedy recovery as critical to the successful implementation of the financial sector

reforms. An urgent need was, therefore, felt to work out a suitable mechanism through which the dues to the banks and financial institutions could be realized without delay. In 1981, a Committee under the Chairmanship of Shri T. Tiwari had examined the legal and other difficulties faced by banks and financial institutions and suggested remedial measures including changes in law. The Tiwari Committee had also suggested setting up of Special Tribunals for recovery of dues of the banks and financial institutions by following a summary procedure. The setting up of Special Tribunals will not only fulfill a long-felt need, but also will be an important step in the implementation of the Report of Narasimham Committee. Whereas on 30th September, 1990 more than fifteen lakhs of cases filed by the public sector banks and about 304 cases filed by the financial institutions were pending in various courts, recovery of debts involved more than Rs.5622 crores in dues of Public Sector Banks and about Rs.391 crores of dues of the financial institutions. The locking up of such huge amount of public money in litigation prevents proper utilisation and recycling of the funds for the development of the country.

The Bill seeks to provide for the establishment of Tribunal and Appellate Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions. Notes on clauses explain in detail the provisions of the Bill."

17. The Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 took away the jurisdiction of the courts and vested this jurisdiction in tribunals established by the Act so as to ensure speedy recovery of debts due to the banks and

financial institutions mentioned therein. This Act also included one appeal to the Appellate Tribunal, and transfer of all suits or other proceedings pending before any court to tribunals set up under the Act. The Act contained a *non obstante* clause in Section 34 stating that its provisions will have effect notwithstanding anything inconsistent contained in any other law for the time being in force or in any instrument having effect by virtue of any other law. In the year 2000, this Act was amended so as to incorporate a new sub-section (2) in Section 34 together with a saving provision in sub-section (1). It is of some interest to note that this Act was to be in addition to and not in derogation of various Financial Corporation Acts and the Sick Industrial Companies (Special Provisions) Act, 1985. Clearly, therefore, the object of the 2000 amendment to the Recovery of Debts due to Banks and Financial Institutions Act, 1993 was to make The Sick Industrial Companies (Special Provisions) Act, 1985 prevail over it.

18. Regard being had to the poor working of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and

Enforcement of Security Interest Act, 2002 was brought into force in the year 2002. The statement of objects and reasons for this Act reads as under:-

> **"STATEMENT OF OBJECTS AND REASONS OF THE SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002**
>
> The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with the international prudential norms and accounting practices, there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of nonperforming assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These Committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the

securities and to sell them without the intervention of the court. Acting on these suggestions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitisition and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realise long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce nonperforming assets by adopting measures for recovery or reconstruction.

2. It is now proposed to replace the Ordinance by a Bill, which, inter alia, contains provisions of the Ordinance to provide for—

(a) registration and regulation of securitisation companies or reconstruction companies by the Reserve Bank of India;

(b) facilitating securitisation of financial assets of banks and financial institutions with or without the benefit of underlying securities;

(c) facilitating easy transferability of financial assets by the securitisation company or reconstruction company to acquire financial assets of banks and financial institutions by issue of debentures or bonds or any other security in the nature of a debenture;

(d) empowering securitisation companies' or reconstruction companies to raise funds by issue of security receipts to qualified institutional buyers;

(e) facilitating reconstruction of financial assets acquired by exercising powers of enforcement of

securities or change of management or other powers which are proposed to be conferred on the banks and financial institutions;

(f) declaration of any securitisation company or reconstruction company registered with the Reserve Bank of India as a public financial institution for the purpose of section 4A of the Companies Act, 1956;

(g) defining 'security interest' as any type of security including mortgage and change on immovable properties given for due repayment of any financial assistance given by any bank or financial institution;

(h) empowering banks and financial institutions to take possession of securities given for financial assistance and sell or lease the same or take over management in the event of default, i.e. classification of the borrower's account as non-performing asset in accordance with the directions given or under guidelines issued by the Reserve Bank of India from time to time;

(i) the rights of a secured creditor to be exercised by one or more of its officers authorised in this behalf in accordance with the rules made by the Central Government;

(j) an appeal against the action of any bank or financial institution to the concerned Debts Recovery Tribunal and a second appeal to the Appellate Debts Recovery Tribunal;

(k) setting up or causing to be set up a Central Registry by the Central Government for the purpose of registration of transactions relating to securitisation, asset reconstruction and creation of security interest;

(l) application of the proposed legislation initially to banks and financial institutions and empowerment of the Central Government to extend the application

of the proposed legislation to non-banking financial companies and other entities;

(m) non-application of the proposed legislation to security interests in agricultural lands, loans not exceeding rupees one lakh and cases where eighty per cent, of the loans are repaid by the borrower.

3. The Bill seeks to achieve the above objects."

19. This Act was brought into force as a result of two committee reports which opined that recovery of debts due to banks and financial institutions was not moving as speedily as expected, and that, therefore, certain other measures would have to be put in place in order that these banks and financial institutions would better be able to recover debts owing to them.

20. In a challenge made to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in **Mardia Chemicals Ltd. Etc. v. Union of India (UOI) and Ors. Etc. Etc.,** (2004) 4 SCC 311, this Court went into the circumstances under which the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was enacted, as follows:-

"Some facts which need to be taken note of are that the banks and the financial institutions have

heavily financed the petitioners and other industries. It is also a fact that a large sum of amount remains unrecovered. Normal process of recovery of debts through courts is lengthy and time taken is not suited for recovery of such dues. For financial assistance rendered to the industries by the financial institutions, financial liquidity is essential failing which there is a blockade of large sums of amounts creating circumstances which retard the economic progress followed by a large number of other consequential ill effects. Considering all these circumstances, the Recovery of Debts Due to Banks and Financial Institutions Act was enacted in 1993 but as the figures show it also did not bring the desired results. Though it is submitted on behalf of the petitioners that it so happened due to inaction on the part of the Governments in creating Debts Recovery Tribunals and appointing presiding officers, for a long time. Even after leaving that margin, it is to be noted that things in the spheres concerned are desired to move faster. In the present-day global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues. Hence, in our view, it cannot be said that a step taken towards securitisation of the debts and to evolve means for faster recovery of NPAs was not called for or that it was superimposition of undesired law since one legislation was already operating in the field, namely, the Recovery of Debts Due to Banks and Financial Institutions Act. It is also to be noted that the idea has not erupted abruptly to resort to such a legislation. It appears that a thought was given to the problems and the Narasimham Committee was constituted which recommended for such a legislation keeping in view the changing times and economic situation whereafter yet another Expert Committee was constituted, then alone the impugned law was enacted. Liquidity of finances and flow of money is essential for any healthy and

growth-oriented economy. But certainly, what must be kept in mind is that the law should not be in derogation of the rights which are guaranteed to the people under the Constitution. The procedure should also be fair, reasonable and valid, though it may vary looking to the different situations needed to be tackled and object sought to be achieved.

In its Second Report, the Narasimham Committee observed that NPAs in 1992 were uncomfortably high for most of the public sector banks. In Chapter VIII of the Second Report the Narasimham Committee deals about legal and legislative framework and observed:

"*8.1*. A legal framework that clearly defines the rights and liabilities of parties to contracts and provides for speedy resolution of disputes is a sine qua non for efficient trade and commerce, especially for financial intermediation. In our system, the evolution of the legal framework has not kept pace with changing commercial practice and with the financial sector reforms. As a result, the economy has not been able to reap the full benefits of the reforms process. As an illustration, we could look at the scheme of mortgage in the Transfer of Property Act, which is critical to the work of financial intermediaries…."

One of the measures recommended in the circumstances was to vest the financial institutions through special statutes, the power of sale of the assets without intervention of the court and for reconstruction of assets. It is thus to be seen that the question of non-recoverable or delayed recovery of debts advanced by the banks or financial institutions has been attracting attention and the matter was considered in depth by the Committees specially constituted consisting of the experts in the field. In the prevalent situation where the amounts of dues are huge and hope of early recovery is less,

it cannot be said that a more effective legislation for the purpose was uncalled for or that it could not be resorted to. It is again to be noted that after the Report of the Narasimham Committee, yet another Committee was constituted headed by Mr. Andhyarujina for bringing about the needed steps within the legal framework. We are therefore, unable to find much substance in the submission made on behalf of the petitioners that while the Recovery of Debts Due to Banks and Financial Institutions Act was in operation it was uncalled for to have yet another legislation for the recovery of the mounting dues. Considering the totality of circumstances and the financial climate world over, if it was thought as a matter of policy to have yet speedier legal method to recover the dues, such a policy decision cannot be faulted with nor is it a matter to be gone into by the courts to test the legitimacy of such a measure relating to financial policy.

We may now consider the main enforcing provision which is pivotal to the whole controversy, namely, Section 13 in Chapter III of the Act. It provides that a secured creditor may enforce any security interest without intervention of the court or tribunal irrespective of Section 69 or Section 69-A of the Transfer of Property Act where according to sub-section (2) of Section 13, the borrower is a defaulter in repayment of the secured debt or any instalment of repayment and further the debt standing against him has been classified as a non-performing asset by the secured creditor. Sub-section (2) of Section 13 further provides that before taking any steps in the direction of realizing the dues, the secured creditor must serve a notice in writing to the borrower requiring him to discharge the liabilities within a period of 60 days failing which the secured creditor would be entitled to take any of the measures as provided in sub-section (4) of

> Section 13. It may also be noted that as per sub-section (3) of Section 13 a notice given to the borrower must contain the details of the amounts payable and the secured assets against which the secured creditor proposes to proceed in the event of non-compliance with the notice given under sub-section (2) of Section 13." [at para 34,36 and 38]

21. The "pivotal" provision namely Section 13 of the said Act makes it clear that banks and financial institutions would now no longer have to wait for a Tribunal judgment under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 to be able to recover debts owing to them. They could, by following the procedure laid down in Section 13, take direct action against the debtors by taking possession of secured assets and selling them; they could also take over the management of the business of the borrower. They could also appoint any person to manage the secured assets possession of which has been taken over by them, and could require, at any time by notice in writing to any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due from the borrower, to

pay the secured creditor so much of the money as is sufficient to pay the secured debt.

22. In order to further the objects of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Act contains a *non obstante* clause in Section 35 and also contains various Acts in Section 37 which are to be in addition to and not in derogation of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Three of these Acts, namely, the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992, relate to securities generally, whereas the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 relates to recovery of debts due to banks and financial institutions. Significantly, under Section 41 of this Act, three Acts are, by the schedule to this Act, amended. We are concerned with the third of such Acts, namely, the Sick Industrial Companies (Special Provisions) Act, 1985, in Section 15(1) of which two provisos have been added.

It is the correct interpretation of the second of these provisos on which the fate of these appeals ultimately hangs.

23. It is in this background that we need to embark on the next step, namely, to consider the following two questions which arise on the facts of this case:

(1) Whether the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 prevails over the Sick Industrial Companies (Special Provisions) Act, 1985; and

(2) Whether the expression "where a reference is pending" in Section 15 (1) proviso 3 of the Sick Industrial Companies (Special Provisions) Act, 1985 would include all proceedings before the BIFR or only proceedings at the initial reference stage.

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24. The occasion for answering question no. 1 is Shri Sreekumar's argument that the effect of the Delhi High Court's stay order dated 7.1.2004 is that the reference before the BIFR springs back into life, and with it Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. It is also

occasioned by a further argument that the winding up order passed by the Bombay High Court dated 30.8.2007 being in the teeth of the stay order and Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, is *non est* and therefore the appeals before this Court have not become infructuous. If Shri C.N. Sreekumar is right, then after enactment of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, because of the presence of Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985, none of the measures taken by the secured creditors under Section 13 of Securitisation Act can be proceeded with because of the bar contained in Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. Hence, we have first to determine whether the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 overrides Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 as such overriding is only to the extent of the inconsistency between the two enactments. Such inconsistency is found in Section 22(1) of the Sick Industrial

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Companies (Special Provisions) Act, 1985, by which any action taken to realize debts owing to the secured creditors of sick industrial companies cannot be proceeded with under the 2002 Act unless the BIFR accords permission under Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985.

25. It is now necessary to undertake a survey of the case law laid down by this court in relation to the Sick Industrial Companies (Special Provisions) Act, 1985 and its relation with other enactments. In an early judgment, namely, **Maharashtra Tubes Ltd. v. State Industrial And Investment,** (1993) 2 SCC 144, this Court had to deal with the Sick Industrial Companies (Special Provisions) Act, 1985, vis-à-vis the State Financial Corporations Act, 1951. In paragraph 9 of the judgment it was held that both Acts were special Acts, the 1951 Act dealing with the recovery of debts of a company pre-sickness and the 1985 Act dealing with such recovery post-sickness. Since both the Acts contained *non obstante* clauses, it was held that the 1985 Act, being later in point of time, would prevail over the 1951 Act.

26. On the other hand, in **Solidaire India Ltd. v. Fairgrowth Financial Services Ltd. and Ors.**, (2001) 3 SCC 71, it was the Special Courts (Trial of Offences Relating to Transactions in Securities), Act, 1992 which came up for consideration vis-à-vis the Sick Industrial Companies (Special Provisions) Act, 1985. In paragraphs 9 and 10 of this Court's judgment, this Court noted that both Acts were special Acts. In a significant extract from a Special Court judgment, which was approved by this Court, it was stated that The Special Courts Act, 1992, being a later enactment and also containing a *non obstante* clause, would prevail over the Sick Industrial Companies (Special Provisions) Act, 1985. Had the legislature wanted to exclude the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, from the ambit of the said Act, the legislature would specifically have so provided (Emphasis ours). The fact that the legislature did not specifically so provide necessarily means that the legislature intended that the provisions of the said Act were to prevail over the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. In short, when property of notified persons under the Special

Courts Act, 1992 stands attached, it is only the Special Court which can give directions to the custodian under the said Act as to disposal of such property of a notified party. The legislature expressly overrode Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 and permitted the custodian to give directions under Section 11 of the Special Courts Act, 1979, notwithstanding Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985.

27. In **Jay Engineering Works Ltd. v. Industry Facilitation Council and Anr.**, (2006) 8 SCC 677, this time this Court had to deal with the Interest on Delayed Payment to Small Scale and Ancillary Industrial Undertakings Act, 1993 vis-à-vis the Sick Industrial Companies (Special Provisions) Act, 1985. Both Acts contained *non obstante* clauses. This Court referred to the 1994 amendment to the Sick Industrial Companies (Special Provisions) Act, 1985 and stated that the amending Act being later than the 1993 Act, the Sick Industrial Companies (Special Provisions) Act, 1985 would, therefore, prevail. (See paragraph 27).

28. Similarly, in **Morgan Securities and Credit Pvt. Ltd. v. Modi Rubber Ltd.**, (2006) 12 SCC 642, the Arbitration and Conciliation Act, 1996 contained a *non obstante* clause in Section 5 thereof. Despite this being a later Act, vis-à-vis the Sick Industrial Companies (Special Provisions) Act, 1985, this Court held that the Sick Industrial Companies (Special Provisions) Act, 1985 would prevail, inasmuch as the *non obstante* clause contained in the Arbitration and Conciliation Act, 1996 had only a limited application - it applied only insofar as the extent of judicial intervention in arbitration proceedings is concerned. (See paragraph nos. 66 and 68).

29. In an interesting concurring judgment, Balasubramanyan,J., in paragraph 76 held:

> "Occasions are not infrequent when not so scrupulous debtors approach B.I.F.R. to stall the proceedings and to keep their creditors at bay. The delay before the B.I.F.R. is sought to be taken advantage of. The Parliament has apparently taken note of this and has repealed SICA by the Sick Industrial Companies (Special Provisions) Repeal Act, 2003. The vacuum, thus created has been filled by an amendment to the Companies Act. But, so far, the provisions of the Amending Act and the Companies Act introduced, have not been brought

> into force. It appears to be time to consider whether these enactments should not be notified."

30. Similarly, in **Tata Motors Ltd. v. Pharmaceutical Products of India Ltd. and Anr.**, (2008) 7 SCC 619, it was held, following the judgment in **NFEF Ltd. v. Chandra Developers (P) Ltd.,** (2005) 8 SCC 219, that the Companies Act being a general enactment would have to give way to the Sick Industrial Companies (Special Provisions) Act, 1985 which is a later and special enactment. (see paragraphs 22 to 24).

31. And in **Raheja Universal Limited** v. **NRC Limited and Ors.,** (2012) 4 SCC 148, the Transfer of Property Act,1882 had to yield to the Sick Industrial Companies (Special Provisions) Act, 1985 being a general Act, as against the Sick Industrial Companies (Special Provisions) Act, 1985 which was a special Act, together with a reading of the *non obstante* clause contained in the Sick Industrial Companies (Special Provisions) Act, 1985 (see paragraphs 91 to 93).

32. In **KSL & Industries Ltd.** v. **Arihant Threads Ltd.,** (2015) 1 SCC 166, it was the turn of the Recovery Of Debts

Due To Banks And Financial Institutions Act, 1993 vis-à-vis the Sick Industrial Companies (Special Provisions) Act, 1985. This Court in resolving the controversy in favour of the Sick Industrial Companies (Special Provisions) Act, 1985 held:-

> "Sub-section (2) was added to Section 34 of the RDDB Act w.e.f. 17-1-2000 by Act 1 of 2000. There is no doubt that when an Act provides, as here, that its provisions shall be in addition to and not in derogation of another law or laws, it means that the legislature intends that such an enactment shall coexist along with the other Acts. It is clearly not the intention of the legislature, in such a case, to annul or detract from the provisions of other laws. The term "*in derogation of*" means "*in abrogation or repeal of*". *The Black's Law Dictionary* sets forth the following meaning for "derogation":
>
> "*derogation*.—The partial repeal or abrogation of a law by a later Act that limits its scope or impairs its utility and force."
>
> It is clear that sub-section (1) contains a *non obstante* clause, which gives the overriding effect to the RDDB Act. Sub-section (2) acts in the nature of an exception to such an overriding effect. It states that this overriding effect is in relation to certain laws and that the RDDB Act shall be in addition to and not in abrogation of, such laws. SICA is undoubtedly one such law.
>
> There is no doubt that both are special laws. SICA is a special law, which deals with the reconstruction of sick companies and matters incidental thereto, though it is general as regards other matters such as recovery of debts. The RDDB Act is also a special law, which deals with the recovery of money

due to banks or financial institutions, through a special procedure, though it may be general as regards other matters such as the reconstruction of sick companies which it does not even specifically deal with. Thus the purpose of the two laws is different.

Parliament must be deemed to have had knowledge of the earlier law i.e. SICA, enacted in 1985, while enacting the RDDB Act, 1993. It is with a view to prevent a clash of procedure, and the possibility of contradictory orders in regard to the same entity and its properties, and in particular, to preserve the steps already taken for reconstruction of a sick company in relation to the properties of such sick company, which may be charged as security with the banks or financial institutions, that Parliament has specifically enacted sub-section (2). SICA had been enacted in respect of specified and limited companies i.e. those which owned industrial undertakings specified in the Schedule to the IDR Act, as mentioned earlier, whereas the RDDB Act deals with all persons, who may have taken a loan from a bank or a financial institution in cash or otherwise, whether secured or unsecured, etc.

In view of the observations of this Court in the decisions referred to and relied on by the learned counsel for the parties we find that, the purpose of the two enactments is entirely different. As observed earlier, the purpose of one is to provide ameliorative measures for reconstruction of sick companies, and the purpose of the other is to provide for speedy recovery of debts of banks and financial institutions. Both the Acts are "special" in this sense. However, with reference to the specific purpose of reconstruction of sick companies, SICA must be held to be a special law, though it may be considered to be a general law in relation to the recovery of debts. Whereas, the RDDB Act may be

considered to be a special law in relation to the recovery of debts and SICA may be considered to be a general law in this regard. For this purpose we rely on the decision in *LIC* v. *Vijay Bahadur* [(1981) 1 SCC 315 : 1981 SCC (L&S) 111] . Normally the latter of the two would prevail on the principle that the legislature was aware that it had enacted the earlier Act and yet chose to enact the subsequent Act with a *non obstante* clause. In this case, however, the express intendment of Parliament in the *non obstante* clause of the RDDB Act does not permit us to take that view. Though the RDDB Act is the later enactment, sub-section (2) of Section 34 thereof specifically provides that the provisions of the Act or the Rules made thereunder shall be in addition to, and not in derogation of, the other laws mentioned therein including SICA." [at paras 36, 39, 40, and 48]

33. A conspectus of the aforesaid decisions shows that the Sick Industrial Companies (Special Provisions) Act, 1985 prevails in all situations where there are earlier enactments with *non obstante* clauses similar to the Sick Industrial Companies (Special Provisions) Act, 1985. Where there are later enactments with similar *non obstante* clauses, the Sick Industrial Companies (Special Provisions) Act, 1985 has been held to prevail only in a situation where the reach of the *non obstante* clause in the later Act is limited – such as in the case of the Arbitration and Conciliation Act, 1996 – or in the case of

the later Act expressly yielding to the Sick Industrial Companies (Special Provisions) Act, 1985, as in the case of the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993. Where such is not the case, as in the case of Special Courts Act, 1992, it is the Special Courts Act, 1992 which was held to prevail over the Sick Industrial Companies (Special Provisions) Act, 1985.

34. We have now to undertake an analysis of the Acts in question. The first thing to be noticed is the difference between Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and Section 34 of the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993. Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 does not include the Sick Industrial Companies (Special Provisions) Act, 1985 unlike Section 34(2) of the Recovery of Debts Due To Banks and Financial Institutions Act, 1993. Section 37 of the Securities and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 states that the said Act shall be in addition to

and not in derogation of four Acts, namely, the Companies Act, the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992 and the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993. It is clear that the first three Acts deal with securities generally and the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 deals with recovery of debts due to banks and financial institutions. Interestingly, Section 41 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 makes amendments in three Acts – the Companies Act, the Securities Contracts (Regulation) Act, 1956, and the Sick Industrial Companies (Special Provisions) Act, 1985. It is of great significance that only the first two Acts are included in Section 37 and not the third i.e. the Sick Industrial Companies (Special Provisions) Act, 1985. This is for the obvious reason that the framers of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 intended that the Sick Industrial Companies (Special Provisions) Act, 1985 be covered by the *non obstante* clause contained in Section 35,

and not by the exception thereto carved out by Section 37. Further, whereas the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is expressly mentioned in Section 37, the Sick Industrial Companies (Special Provisions) Act, 1985 is not, making the above position further clear. And this is in stark contrast, as has been stated above, to Section 34(2) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, which expressly included the Sick Industrial Companies (Special Provisions) Act, 1985. The new legislative scheme *qua* recovery of debts contained in the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 has therefore to be given precedence over the Sick Industrial Companies (Special Provisions) Act, 1985, unlike the old scheme for recovery of debts contained in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

35. Another interesting pointer to the same conclusion is the fact that Section 35 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is not made subject to Section 37 of the said Act. This statutory

scheme is at complete variance with the statutory scheme contained in Section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 in which sub-section (1) of Section 34 containing the *non obstante* clause is expressly made subject to sub-section (2) (containing the Sick Industrial Companies (Special Provisions) Act, 1985) by the expression "save as provided under sub-section (2)".

36. This is what then brings us to the doctrine of harmonious construction, which is one of the paramount doctrines that is applied in interpreting all statutes. Since neither Section 35 nor Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is subject to the other, we think it is necessary to interpret the expression "or any other law for the time being in force" in Section 37. If a literal meaning is given to the said expression, Section 35 will become completely otiose as all other laws will then be in addition to and not in derogation of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Obviously this could not have been the Parliamentary intendment, after providing in Section 35 that

the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 will prevail over all other laws that are inconsistent therewith. A middle ground has therefore necessarily to be taken. According to us, the two apparently conflicting Sections can best be harmonized by giving meaning to both. This can only be done by limiting the scope of the expression "or any other law for the time being in force" contained in Section 37. This expression will therefore have to be held to mean other laws having relation to the securities market only, as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is the only other special law, apart from the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, dealing with recovery of debts due to banks and financial institutions. On this interpretation also, the Sick Industrial Companies (Special Provisions) Act, 1985 will not be included for the obvious reason that its primary objective is to rehabilitate sick industrial companies and not to deal with the securities market.

37. An interesting pointer to the direction Parliament has taken after enactment of the Securitisation and Reconstruction

of Financial Assets and Enforcement of Security Interest Act, 2002 is also of some relevance in this context. The Eradi Committee Report relating to insolvency and winding up of companies dated 31.7.2000, observed that out of 3068 cases referred to the BIFR from 1987 to 2000 all but 1062 cases have been disposed of. Out of the cases disposed of, 264 cases were revived, 375 cases were under negotiation for revival process, 741 cases were recommended for winding up, and 626 cases were dismissed as not maintainable. These facts and figures speak for themselves and place a big question mark on the utility of the Sick Industrial Companies (Special Provisions) Act, 1985. The Committee further pointed out that effectiveness of the Sick Industrial Companies (Special Provisions) Act, 1985 as has been pointed out earlier, has been severely undermined by reason of the enormous delays involved in the disposal of cases by the BIFR. (See paragraphs 5.8, 5.9 and 5.15 of the Report). Consequently, the Committee recommended that the Sick Industrial Companies (Special Provisions) Act, 1985 be repealed and the provisions

thereunder for revival and rehabilitation should be telescoped into the structure of the Companies Act, 1956 itself.

38. Pursuant to the Eradi Committee report, the Companies Act was amended in 2002 by providing for the constitution of a National Company Law Tribunal as a substitute for the Company Law Board, the High Court, the BIFR and the AAIFR. The Eradi Committee Report was further given effect to by inserting Sections 424A to 424H into the Companies Act, 1956 which, with a few changes, mirrored the provisions of Sections 15 to 21 of the Sick Industrial Companies (Special Provisions) Act, 1985. Interestingly, the Companies Amendment Act of 2002 omitted a provision similar to Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. Consequently, creditors were given liberty to file suits or initiate other proceedings for recovery of dues despite pendency of proceedings for the revival or rehabilitation of sick companies before the National Company Law Tribunal.

39. This Amendment Act came under challenge, which challenge culminated in the Constitution Bench decision in

**Union of India** v. **R, Gandhi, President, Madras Bar Association**, (2010) 11 SCC 10 by which the amendments were upheld, with certain changes recommended by the Constitution Bench of this Court.

40. Close on the heels of the amendment made to the Companies Act came The Sick Industrial Companies (Special Provisions) Repeal Act, 2003. This particular Act was meant to repeal the Sick Industrial Companies (Special Provisions) Act, 1985 consequent to some of its provisions being telescoped into the Companies Act. Thus, the Companies Amendment Act of 2002 and the SICA Repeal Act formed part of one legislative scheme, and neither has yet been brought into force. In fact, even the Companies Act, 2013, which repeals the Companies Act, 1956, contains Chapter 19 consisting of Sections 253 to 269 dealing with revival and rehabilitation of sick companies along the lines of Sections 424A to 424H of the amended Companies Act, 1956. Conspicuous by its absence is a provision akin to Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 in the 2013 Act. However, this Chapter is also yet to be brought into force. These statutory

provisions, though not yet brought into force, are also an important pointer to the fact that Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 has been statutorily sought to be excluded, Parliament veering around from wanting to protect sick industrial companies and rehabilitate them to giving credence to the public interest contained in the recovery of public monies owing to banks and financial institutions. These provisions also show that the aforesaid construction of the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 vis-à-vis the Sick Industrial Companies (Special Provisions) Act, 1985, leans in favour of creditors being able to realize their debts outside the court process over sick industrial companies being revived or rehabilitated. In fact, another interesting document is the Report on Trend and Progress of Banking in India 2011-2012 for the year ended 30.6.2012 submitted by the Reserve Bank of India to the Central Government in terms of Section 36(2) of the Banking Regulation Act, 1949. In table IV.14 the report provides statistics regarding trends in Non-performing Assets

bank-wise, group-wise. As per the said table, the opening balance of Non-performing Assets in public sector banks for the year 2011-2012 was Rs.746 billion but the closing balance for 2011-2012 was Rs.1,172 billion only. The total amount recovered through the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 during 2011-2012 registered a decline compared to the previous year, but, even then, the amounts recovered under the said Act constituted 70 percent of the total amount recovered. The amounts recovered under the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 constituted only 28 per cent. All this would go to show that the amounts that public sector banks and financial institutions have to recover are in staggering figures and at long last at least one statutory measure has proved to be of some efficacy. This Court would be loathe to give such an interpretation as would thwart the recovery process under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 which Act alone seems to have worked to some extent at least.

41. It will thus be seen that notwithstanding the *non obstante* clauses in Section 22(1) and (4), read with Section 32, Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 will have to give way to the measures taken under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 more particularly referred to in Section 13 of the said Act, and that this being the case, the sale notices issued both in 2003 and 2013 could continue without in any manner being thwarted by Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985.

42. It remains to consider one argument of Shri C.N. Sreekumar. Learned counsel argued that Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 refers to the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 which in turn contains Section 34(2) which makes the Sick Industrial Companies (Special Provisions) Act, 1985 prevail over the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. It was therefore argued that since Section 37 refers to the Recovery of Debts Due to Banks and

Financial Institutions Act, 1993 and since Section 34(2) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 refers to the Sick Industrial Companies (Special Provisions) Act, 1985, Section 37 should also be construed so as to include a reference to the Sick Industrial Companies (Special Provisions) Act, 1985. Quite apart from driving a coach-and-four through the object sought to be achieved by the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, this argument does not commend itself to us for the obvious reason that Section 34(2) refers to the Sick Industrial Companies (Special Provisions) Act, 1985 only for the purpose of the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 and for no other purpose. This is quite apart from the fact that, as has been noted hereinabove, the non-reference to the Sick Industrial Companies (Special Provisions) Act, 1985 in Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was deliberate, as has been held by us hereinabove.

43. Shri Sundaram is also correct when he refers to the judgment of this Court in **Shree Chamundi Mopeds** v. **Church of South India Trust Association**, (1992) 3 SCC 1. In the said judgment, this Court has held:

> "In the instant case, the proceedings before the Board under Sections 15 and 16 of the Act had been terminated by order of the Board dated April 26, 1990 whereby the Board, upon consideration of the facts and material before it, found that the appellant-company had become economically and commercially non-viable due to its huge accumulated losses and liabilities and should be wound up. The appeal filed by the appellant-company under Section 25 of the Act against said order of the Board was dismissed by the Appellate Authority by order dated January 7, 1991. As a result of these orders, no proceedings under the Act was pending either before the Board or before the Appellate Authority on February 21, 1991 when the Delhi High Court passed the interim order staying the operation of the Appellate Authority dated January 7, 1991. The said stay order of the High Court cannot have the effect of reviving the proceedings which had been disposed of by the Appellate Authority by its order dated January 7, 1991. While considering the effect of an interim order staying the operation of the order under-challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be

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operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. This means that if an order passed by the Appellate Authority is quashed and the matter is remanded, the result would be that the appeal which had been disposed of by the said order of the Appellate Authority would be restored and it can be said to be pending before the Appellate Authority after the quashing of the order of the Appellate Authority. The same cannot be said with regard to an order staying the operation of the order of the Appellate Authority because in spite of the said order, the order of the Appellate Authority continues to exist in law and so long as it exists, it cannot be said that the appeal which has been disposed of by the said order has not been disposed of and is still pending. We are, therefore, of the opinion that the passing of the interim order dated February 21,1991 by the Delhi High Court staying the operation of the order of the Appellate Authority dated January 7,1991 does not have the effect of reviving the appeal which had been dismissed by the Appellate authority by its order dated January 7, 1991 and it cannot be said that after February 21, 1991, the said appeal stood revived and was pending before the Appellate Authority. In that view of the matter, it cannot be said that any proceedings under the Act were pending before the Board or the Appellate Authority on the date of the passing of the order dated August 14, 1991 by the learned Single Judge of the Karnataka High Court for winding up of the company or on November 6, 1991 when the Division Bench passed the order dismissing O.S.A.No. 16 of 1991 filed by the appellant company against the order of the learned Single Judge dated August 14, 1991. Section 22(1) of the Act could not, therefore, be invoked and there was no impediment in the High Court dealing with the

winding up petition filed by the respondents….." [at para 10]

44. A reading of the said judgment also shows that the order of stay of the BIFR's opinion to wind up the company and the dismissal of the appeal therefrom by the AAIFR would not in any manner revive the reference under Section 15 of the Appellant No. 1 Company. For this reason also, it is clear that after the orders of the BIFR and AAIFR have been upheld by dismissal of the writ petition filed before the Delhi High Court by the impugned judgment, there can be said to be no revival of reference proceedings before the BIFR.

45. However, Shri Sreekumar referred to three judgments in support of the proposition that interim orders preserve the status quo and that, therefore, the interim order of stay has to be obeyed during the pendency of the Writ Petition. For this purpose, he cited **Kihoto Hollohan v. Zachillhu & Ors.**, (1992) Supp. (2) SCC 651, **Ravi S. Naik v. Union of India & Ors.**, (1994) Supp. (2) SCC 641 and **BPL Ltd. & Ors. v. R. Sudhakar & Ors.**, (2004) 7 SCC 219. Each of these judgments was delivered in different contexts. The first

judgment of **Kihoto Hollohan** was delivered in the context of landslide changes that would have taken place had a stay order not been passed in the context of the 10th Schedule to the Constitution of India, which was enacted to remedy the evil of defection. The second judgment, namely, **Ravi S. Naik** was also delivered in the same context and the third judgment was delivered in the context of Section 33(2)(b) of the Industrial Disputes Act, 1947. None of these judgments has any direct bearing on the facts before us, which can be said to be covered directly by the judgment in **Shree Chamundi Mopeds Ltd.** (supra).

46. Question No.2 arises on the facts of this case because of a conflict between the High Courts on the interpretation of Section 15(1) proviso 3. A large number of High Courts have, in judgments differing in detail only, taken the broad view that the expression "where a reference is pending" under Section 15(1) proviso 3 would include all proceedings before the BIFR right till the stage of the successful culmination of a scheme for reconstruction or the recommendation for winding up of the sick industrial company. These High Courts are Madras,

Delhi, Bombay, Kerala, Punjab, Gujarat and Calcutta. All these judgments are referred to in an exhaustive full bench decision of the Madras High Court in **M/s. Salem Textiles Limited** v. **The Authorized Officer and Ors.**, reported in AIR 2013 Madras 229. The only dissenting voice is that of the Orissa High Court in a judgment reported in **Noble Aqua Pvt. Ltd. v. State Bank of India,** AIR 2008 Orissa 103, which has held that the expression "reference" would only refer to the initial stage of filing a reference before the BIFR and not to subsequent stages thereof, namely inquiry, preparation and sanction of schemes. It has to be determined as to which of these two sets of judgments is a correct exposition of the law.

47. It is clear that a purely literal interpretation of the expression "where a reference is pending" can yield the result that the Orissa High Court reached. In fact, Chapter III of the Sick Industrial Companies (Special Provisions) Act, 1985 specifically refers, in the Chapter heading, to references, inquiries and schemes. While Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 deals with references, Section 16 deals with inquiries into the working of

Sick Industrial Companies. Section 18 then deals with preparation and sanction of schemes.

48. What has to be examined is whether this purely literal rendering of the expression “where a reference is pending” is correct or not. First and foremost, it is important to note that the third proviso to Section 15(1) uses the words “is pending”. A reference has been held to be pending the moment it is received by the Board. In **Real Value Appliances Ltd. v. Canara Bank & Ors.**, (1998) 5 SCC 554, this Court had to decide whether the mere registration of a reference by the BIFR would result in the automatic cessation of all proceedings which are pending in civil courts and the company court against its assets. It was argued that in order that Section 22 of the Act can come into operation, the BIFR must, subsequent to the registration of the reference under Section 15, apply its mind and consider whether it is necessary under Section 16 to make an inquiry. Unless an inquiry is pending, the provisions of Section 22 of the Act do not get attracted. It was held that once the reference is registered after a preliminary scrutiny, it is mandatory for the BIFR to conduct an inquiry. This being so, it

is in furtherance of the legislative intention to see that no proceedings against the assets are taken before the BIFR decides, after the inquiry, to continue with the reference. It was thus held, having particular regard to Section 16(3) explanation, that an inquiry shall be deemed to have commenced upon the receipt by the Board of any reference or information or upon its knowledge reduced to writing by the Board. This being the case, this Court held that once the reference is registered and once it is mandatory to simultaneously call for information/documents from the informant, then an inquiry under Section 16 must be deemed to have commenced. In that view of the matter, Section 22 would immediately come into play. It is clear, therefore, that if a literal meaning were to be applied to the expression "where a reference is pending", the third proviso to Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 would be rendered otiose and the purpose for which it was inserted would completely fail. On a literal reading of the provision, such reference shall abate on steps being taken by the secured creditors to recover their secured debts under Section 13(4) of the Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the moment a reference is registered. And this Court has held that the moment the reference is registered, an inquiry as contemplated by Section 16 shall be deemed to commence. If that is so, then a reference can never be said to be pending after an inquiry commences, if learned counsel for the Appellants is correct. This can never be the case. It is clear, therefore, that the expression "where a reference is pending" would necessarily include the inquiry stage before the Board under Section 16 of the Act. If this be the case, then the reference can be said to be pending not only when an inquiry is instituted, but also after preparation and sanction of a scheme right till the stage the scheme has worked out successfully or till the BIFR gives its opinion to wind up the company.

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49. The expression "reference" used in Section 15(1) proviso 3 is used in contra distinction to the expression "proceedings" in Section 22. "Proceedings" under Section 22 are actions taken against the sick company, whereas "references" are actions initiated by a sick company – it is perhaps for this reason that

the third proviso to Section 15(1) uses the expression "reference" instead of the expression "proceedings".

50. Another important aspect as to the construction of the third proviso to Section 15(1) is the meaning of the expression "such reference shall abate". One of the meanings of the expression "abate" is "to put an end to; to curtail; to come to naught". (See Ramanatha Aiyar's Law Lexicon). A reference can be said to abate in one or several ways. One obvious way that a reference abates is where the Board, after inquiry, rejects the reference for the reason that the Board is satisfied that the Company is not a sick industrial company as defined under the Act. Another way in which a reference can abate is where a scheme is implemented successfully, and the sick industrial company is taken out of the woods successfully. A third manner in which a reference can abate is when a scheme or schemes have failed in respect of the sick industrial company, and in the opinion of the BIFR, the said Company ought to be wound up. A fourth instance of abatement is provided by the third proviso to Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. And that is that a reference which is

pending in the sense understood hereinabove shall abate if the secured creditors of not less than 3/4th in value of the amount outstanding against the financial assistance disbursed to the borrower, have taken measures to recover secured debts under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. It is clear that the third proviso to Section 15(1) seeks to strike a balance between getting a sick industrial company out of the woods and secured creditors being able to recover the debt owed to them by such company. The legislature has thought it fit to annul all proceedings before the BIFR only when at least 3/4th of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors have taken the measures listed in Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The balance is therefore struck by the figure of "not less than 3/4th". The legislature has inserted this provision so that, if 3/4th or more of the secured creditors get together to take measures under Section 13(4) of the Securitisation and Reconstruction of

Financial Assets and Enforcement of Security Interest Act, 2002, they will not be thwarted by the provisions of Section 22 of Sick Industrial Companies (Special Provisions) Act, 1985, and it will not be necessary for them to obtain BIFR permission before taking any such measures. This construction of the third proviso to Section 15(1) is in keeping with the march of events post 2002, when the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 came to be enacted pursuant to various committee reports, and for the reasons outlined hereinabove.

51. A recent judgment of this Court in **Pegasus Assets Reconstruction P. Ltd. v. M/s. Haryana Concast Limited & Anr.**, (Civil Appeal No. 3646 of 2011), has held, agreeing with a judgment of the Delhi High Court, and disapproving a judgment of the Punjab and Haryana High Court, that a Company Court exercising jurisdiction under the Companies Act, has no control in respect of sale of a secured asset by a secured creditor in exercise of powers available to such creditor under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Some of the

observations made by this Court are interesting in that this Court has held that the Securitisation Act is a complete code in itself, and that earlier judgments rendered in the context of the State Financial Corporation Act, 1951 or the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 cannot be held applicable to the Securitisation Act. Further, the very incorporation of certain provisions of the Companies Act in the Securitisation Act themselves harmonise the latter Act with the Companies Act in respect of workers debts under Section 529A of the Companies Act. In a significant paragraph, this Court has held:

> "The aforesaid view commends itself to us also because of clear intention of the Parliament expressed in Section 13 of the SARFAESI Act that a secured creditor has the right to enforce its security interest without the intervention of the court or tribunal. At the same time, this Act takes care that in case of grievance, the borrower, which in the case of a company under liquidation would mean the liquidator, will have the right of seeking redressal under Sections 17 and 18 of the SARFAESI Act." (At para 25)

52. The matter can be viewed from a slightly different angle also. There are many situations in which Section 22 of the Sick

Industrial Companies (Special Provisions) Act, 1985 will not apply. One such situation is a situation where an eviction petition is filed under a State Rent Act for eviction on the ground of non-payment of rent. Such eviction petitions have been held not to be suits for recovery of money. Consequently, Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 has been held not to apply - See **Gujarat Steel Tube Co. Ltd.** v. **Virchandbhai B. Shah,** (1999) 8 SCC P.11 (paragraphs 9 and 10).

53. Similarly, in **Kailash Nath Agarwal** v. **Pradeshiya Industrial & Investment Corpn. of U.P. Ltd.**, (2003) 4 SCC 305, the U.P. Act under which recovery proceedings initiated against guarantors at a post-decree stage were held to be outside the purview of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985. (see paragraph 35).

54. The resultant position may be stated thus:

1. Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 will continue to apply in the case of

unsecured creditors seeking to recover their debts from a sick industrial company. This is for the reason that the Sick Industrial Companies (Special Provisions) Act, 1985 overrides the provisions of the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993.

2. Where a secured creditor of a sick industrial company seeks to recover its debt in the manner provided by Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, such secured creditor may realise such secured debt under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, notwithstanding the provisions of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985.

3. In a situation where there are more than one secured creditor of a sick industrial company or it has been jointly financed by secured creditors, and at least 60 per cent of such secured creditors in value of the amount outstanding

as on a record date do not agree upon exercise of the right to realise their security under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 will continue to have full play.

4. Where, under Section 13(9) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, in the case of a sick industrial company having more than one secured creditor or being jointly financed by secured creditors representing 60 per cent or more in value of the amount outstanding as on a record date wish to exercise their rights to enforce their security under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, being inconsistent with the exercise of such rights, will have no play.



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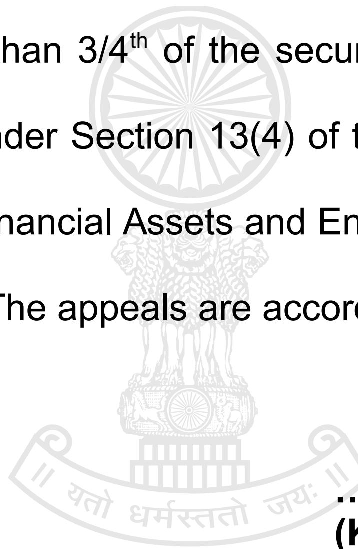
5. Where secured creditors representing not less than 75 per cent in value of the amount outstanding against financial assistance decide to enforce their security under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, any reference pending under the Sick Industrial Companies (Special Provisions) Act, 1985 cannot be proceeded with further – the proceedings under the Sick Industrial Companies (Special Provisions) Act, 1985 will abate.

55. In conclusion, it is held that the interim order dated 17.1.2004 by the Delhi High Court would not have the effect of reviving the reference so as to thwart taking of any steps by the respondent creditors in this case under Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. This is because the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 prevails over the Sick Industrial Companies (Special Provisions) Act, 1985 to the extent of inconsistency therewith. Section 15(1) proviso 3 covers all references pending before the BIFR, no matter

whether such reference is at the inquiry stage, scheme stage, or winding up stage. The Orissa High Court is not correct in its conclusion on the interpretation of Section 15(1) proviso 3 of the Sick Industrial Companies (Special Provisions) Act, 1985. This being so, it is clear that in any case the present reference under Section 15(1) of the Appellant No. 1 company has abated inasmuch as more than 3/4th of the secured creditors involved have taken steps under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The appeals are accordingly dismissed.



**……………………J.**
**(Kurian Joseph)**

JUDGMENT

**……………………J.**
**(R.F. Nariman)**

**New Delhi;**
**January 29, 2016.**