
(2010) 08 BOM CK 0187

In the Bombay High Court

Case No : Writ Petition No. 1268 of 2010

Alpha and Omega Diagnostics India Ltd.

APPELLANT

Vs

Asset Reconstruction Company (I) Ltd. and Others

RESPONDENT

Date of Decision : 09-08-2010

Acts Referred:

Companies Act, 1956 — Section 4A
Constitution of India, 1950 — Article 226
Recovery of Debts Due to Banks and Financial Institutions (Amendment) Act, 2000 — Section 2, 3(1)
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 2
Registration Act, 1908 — Section 17
Reserve Bank of India Act, 1934 — Section 45I
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1)

Citation : (2011) 2 BC 34 : (2010) 6 BomCR 92 : (2010) 112 BOMLR 3577 : (2011) 100 CLA 493 : (2010) 160 CompCas 279 : (2011) 1 ComplJ 119

Hon'ble Judges : Mohit S. Shah, C.J.; S.C. Dharmadhikari, J

Bench : Division Bench

Advocate : P.K. Samdani, Umesh Shetty, Sharan Jagtiani, Sheetal Shah, instructed by Mehta and Girdharilal, for the Appellant; Birendra Saraf, Vinod Kothari and Saiyed, instructed by Apex Law Partners, for the Respondent

Judgement

S.C. Dharmadhikari, J.—Rule. Since a short point is involved, with the consent of the parties rule is made returnable forthwith. The learned advocate for respondents waive service.

2. By this writ petition under Article 226 of the Constitution of India the petitioners are challenging the common order passed by the learned Chairperson of the Debt Recovery Appellate Tribunal (DRAT), Mumbai in Misc. Appeal No. 127 of 2010 and Misc. Appeal No. 128 of 2010. The petitioners before us are the original appellants in this appeal whereas the respondents to this petition are the original respondents-applicants.

3. These appeals impugn the common order dated 19th May 2010 passed by the Presiding Officer of Debt Recovery Tribunal - II, for short (DRT-II), Mumbai. By

this order the DRT allowed the respondents application (Exhibit 188) for amendment in the cause title of the original Application No. 89 of 2005 whereas the petitioners' application for dismissal of this original application was rejected.

4. The respondents preferred the application Exhibit 188 for amendment to the title of the said OA on the ground that Oriental Bank of Commerce filed the above OA against the petitioners-original defendants, in the DRT at Mumbai for recovery of certain money together with further interest and for enforcement of the mortgaged/ hypothecated securities as more particularly set out in the original application. The respondents contended that the said Oriental Bank of Commerce, pursuant to assignment agreement dated 27th June 2008 assigned all the financial assistance granted by the said bank to the petitioners/ original defendants together with all underlying security, interest and all its right title in favour of the first respondent - Asset Reconstruction Company (India) Ltd. (for short Arcil). It was stated in the application for amendment that pursuant to this assignment agreement, Arcil is deemed to have acquired all rights, privileges, powers of the original applicant bank under existing contracts, arrangements, security documents etc. Such being the nature of the assignment, pending proceedings initiated by Oriental bank can be continued by Arcil. Relying upon the said agreement, the first respondent sought its impleadment and permission to amend the original application as per the schedule annexed to the Misc. Application (Exh. 188). This application was made on 28th November 2008.

5. From the record it appears that this application for amendment was allowed by an order dated 12th August 2009 passed by the DRT. However, the first respondent made another request for amendment on 22nd April 2010 and this time it contended that, that assignment in favour of Arcil is also as a sole Trustee. Therefore, leave be granted to mention that Arcil is acting in its capacity as sole Trustee of Arcil -SBPS-024-I Trust (for short Arcil Trust). It was prayed that no prejudice will be caused if Arcil is allowed to be added in the proceedings as sole Trustee in terms aforestated.

6. The record further indicates that to the earlier application for amendment on 28th November 2008, no reply was filed on behalf of petitioners but to this further application, a reply came to be filed and it was contended that interim application is for the purpose of deleting the name of M/s. Oriental Bank and substituting the same by Arcil as sole concerned Trustee of Arcil Trust. Further it was contended that Arcil is not assignee of the alleged debts of the petitioners - defendants due to the Oriental Bank. Therefore, the application is liable to be dismissed. It was contended that the alleged agreement dated 27th June 2008 referred to as the Assignment Agreement cannot be looked into as it is not registered as required u/s 17 of the Registration Act. Further, it was contended that M/s. Arcil has deliberately made the application for purpose of substituting its name for and on behalf of Oriental Bank. It was contended that in the application it was urged that Arcil has taken assignment of debt of Oriental bank. However, now it is contended that the applicant Arcil is not an assignee but

acting in its capacity as sole Trustee of the Trust. Thus, two different and inconsistent statements on oath are made and in such circumstances the application be dismissed.

7. Treating this as a substantive request for dismissal of the original application, the DRT numbered petitioner's application as Exh.185 and the request for amendment of the original application by the respondents and the application seeking its dismissal were taken up together. The learned Presiding Officer, DRT by a common order dated 19th December 2009 allowed Arcil's application for amendment to the cause title of the original application by adding it as sole Trustee at the end of its name and dismissed the application requesting dismissal of the original application.

8. Aggrieved by the said order, petitioners filed the above miscellaneous appeals. The learned Chairperson, DRAT heard the appeals and by the impugned order was pleased to dismiss them. While dismissing these appeals, the learned Chairperson held that the respondents are acting both as Trustees and Managers of the Trust. It is as a Trustee, the legal owner of the financial assets and qualified institutional buyers are beneficial owners of the same. The learned Chairperson relied upon an order dated 14th May 2009 passed in Misc. Appeals No. 34 of 2009 and 41 of 2009 (Pathare Trading Pvt. Ltd and Anr. v. Bank of Baroda and Ors.). The learned Chairperson distinguished the Judgment of this Court in the case of Krishna Filaments Ltd. Vs. Industrial Development Bank of India and Others, and other decisions on the grounds that when these Judgments were delivered, Section 2(h) of the Recovery of Debts due to Banks and Financial Institutions Act, 2004 (for short RDB Act) was not amended. The amendments came into effect from 11th November 2004. The amendments to RDB Act clearly state that the Securitisation Company or Re-construction Company is included in the definition of the term "Financial Institution", defined in Section 2(h) of the RDB Act. Further, the learned Chairperson held that the reliance placed by the petitioners on a Judgment of the Gujrat High Court in the case of Kotak Mahindra Bank v. Official Liquidator is misplaced because a SLP is pending before the Supreme Court against that Judgment and the Supreme Court has passed an interim order on 16th February 2009 in terms staying the Judgment of the Gujarat High Court. Therefore, according to the learned Chairperson, there is no substance in the appeals and they are liable to be dismissed.

9. It is this conclusion of the learned Chairperson which is challenged before us by the petitioners, who are original debtors/ borrowers/ defendants in the O.A.89 of 2005.

10. Mr. Samdani, learned Senior Counsel appearing for petitioners submitted that the DRT as also the DRAT were in error in allowing the amendments to the OA. Inviting our attention to the deed of assignment dated 27th June 2008, Mr. Samdani submits that the said assignment clearly states that the first respondent is acting in its capacity as Trustee of the Arcil - SBPS - 024 - I Trust, (hereinafter

referred to as the Arcil Trust) for the benefit of the holders of security receipts issued by the Trustee thereunder. Further inviting our attention to the Clause 2.1.1 of the deed of assignment, Mr. Samdani submits that the impleadment was as Trustee and not as a Lender or a Financial Institution intending to recover monies lent and advanced by it. Mr. Samdani relies upon the definition of the term "debt" appearing in Section 2(g) of the RDB Act. He relies upon Section 17 of the Act and submits that the DRT exercises jurisdiction, powers and authority to entertain and decide the applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions. Therefore, in the submission of Mr. Samdani, it is only when the banks and financial institutions are recovering debts due to them, that, they can approach the DRT and not otherwise. In the instant case, when the first respondent is substituting itself as a Trustee of a Trust, then, it could not have invoked the jurisdiction of the DRT. It is managing and administering the affairs as a Trustee and there being no debt due to it, which it could recover, then, the application for amendment, could not have been allowed in law. In other words, when the jurisdiction of the Tribunal could not have been exercised nor had the Tribunal any power or authority in this case, then, allowing the application for amendment would mean conferring jurisdiction on a Tribunal which it does not possess in law. Mr. Samdani submits that jurisdiction cannot be conferred by consent of parties. The court or tribunal must possess such jurisdiction in law. In the present circumstances, the jurisdiction could not have been exercised. Therefore, the impugned orders suffer from an error apparent on the face of record and are wholly illegal and erroneous. They should be quashed and set aside.

11. Mr. Samdani submits that no reliance could be placed upon the Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions 2003. Mr. Samdani submits that the guidelines do not confer any jurisdiction or power on the DRT. These are mere instructions and guidelines for the purpose of guiding the securitisation or re-construction companies registered with RBI. That is for regulating the financial system. For such regulation, it was thought necessary to issue guidelines and directions relating to registration measures of asset reconstruction function of the company, prudential norms, acquisition of financial matters and assets related thereto. These guidelines may have been issued vide powers conferred u/s 3, 9, 10 and 12 of the Securitisation and Re-construction of Financial Assets and Enforcement of Security Act 2002 (for short Securitisation Act), but the DRT cannot assume jurisdiction by taking recourse to the Securitisation Act. Mr. Samdani submits that even the Securitisation act makes it clear that the term "debt" shall have the same meaning as is assigned to it in Section 2(g) of the RDB Act, 1993. [See Section 2(ha)]. Further, the DRT is also defined as a Tribunal established u/s 3(1) of the RDB Act. Therefore, merely because the respondent No. 1 claims to be a reconstruction company and a secured creditor does not mean that it is entitled to invoke the jurisdiction of the DRT even if it is suing the petitioners in its capacity as a Trustee. The remedy of the first respondent lies not in pursuing the

original application instituted by the Oriental Bank but elsewhere. Mr. Samdani places strong reliance upon a division bench Judgment of this Court reported in 2004 (2) Mh.L.J. 823 (Krishna Filaments) (supra).

12. On the other hand Mr. Saraf learned Counsel appearing for respondents supported the impugned orders. He submitted that if the contentions of Mr. Samdani are accepted, the very object and purpose of enacting the Securitisation Act and at the same time amending the RDB Act would be frustrated and defeated. It is only with a view to over- come such technical objections that the Legislature intended that RDB Act and the remedies available thereunder should be permitted to be invoked even by a reconstruction company which is formed and registered under the Companies Act for the purpose of assets reconstruction. Inviting our attention to the term "debt" as defined in Section 2(g) of the RDB Act, the definition of the term "Securitisation" appearing in Section 2(z) and to the definition of the term "Creditor" defined in Section 2(zd) so also Sections 3, 5, 5A, 9 and 13 of the Securitisation Act, as well as the definition of the term "financial institution" as defined in Section 2(h) of the RDB Act, Mr. Saraf submits that the division bench Judgment and the law laid down therein cannot be said to be holding the field any longer. In other words, after the amendment to RDB Act and enacting of the securitisation Act, the Division Bench Judgment cannot be said to be a good law. For these reasons, he submits that the view taken by the DRT and DRAT deserves to be upheld. Consequently, the petition be dismissed.

13. With the assistance of the learned Counsel appearing for parties, we have perused the impugned orders, the relevant statutory provisions and the decisions brought to our notice.

14. At the outset it is clarified that we are not dealing with the merits of the claim against the petitioner. All that we are required to decide is whether an amendment to the original application sought by the first respondent has been granted by applying correct legal principles. In other words, whether the amendment sought is permissible in law and whether the order granting it is not vitiated as alleged by the petitioners. Therefore, we should not be taken to have expressed any opinion on the merits and liability of the parties. Ultimately, it is for the DRT to decide after oral and documentary evidence is led as to whether the OA can be allowed or not. Further, whether the respondents are entitled to recover the sums claimed therein by enforcing the securities or not is also an issue which must be answered by the Tribunal at the trial.

15. We are concerned only with the legal issue as to whether a "Reconstruction company" as contemplated by Section 2(v) of the Securitisation Act can apply for substitution as applicant in place of the original lender bank by amending the pending Original Application No. 89 of 2005. Further, whether the substitution or impleadment of the reconstruction company in its capacity as a trustee is permissible under the RDB Act or not?

16. We are concerned only with these two aspects and have, therefore, dealt

with them alone. To appreciate the rival submissions, it would be necessary to refer to the relevant statutory provisions. The RDB Act enacted on 27th August 1993 is an Act to provide for establishment of Tribunals for expeditious adjudication and recovery of debts due to the banks and financial institutions and for matters connected therewith or incidental thereto. The word "debt" is defined in Section 2(g) and reads thus:

2(g) "Debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application.

17. The word "Bank" is defined in Section 2(d) and the word "Banking Company" is defined in Section 2(e). What we are concerned in this petition is with the definition of the term "Financial Institution" appearing in Section 2(h) of the RDB Act, which prior to its amendment read thus:

2(h): "Financial institution" means:

(i) a public financial institution within the meaning of Section 4A of the Companies Act, 1956 (1 of 1956)

(ii) such other institution as the Central Government may, having regard to its business activity and the area of its operation in India by notification, specify;

After amendment, however, Section 2(h)(ia) came to be inserted by the Act 30 of 2004, which reads thus:

(ia) the securitisation company or 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 (54 of 2002)

18. The Sub-clause (ia) came to be inserted by the Act 30 of 2004 with effect from 11th November 2004. The purpose for this insertion appears to be the enactment of Securitisation and Re-construction of Financial Assets and Enforcement of Security Interest and reconstruction of Financial Assets and Enforcement of Security Interest 2002 (Act 54 of 2002). This latter Act came to be enacted on 17th December 2002 and it is to regulate Securitisation and reconstruction of Financial Assets and Enforcement of Security Interest and for matters connected therewith or incidental thereto. Incidentally the word "debt" defined in the Securitisation Act reads thus:

2(ha) "debt" shall have the meaning assigned to it in Clause (g) of Section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993(51 of

1993).

Therefore, a bare perusal of this provision would indicate that the word "debt" carries the same meaning as is assigned to it in Clause 2(g) of the RDB Act, 1993. The word "Asset Reconstruction" has been defined in Section 2(b) of the Securitisation Act. The word "Financial Institution" is defined in Section 2(m). The word "Securitisation Company" is defined in Section 2(z)(a) and reads thus:

2(za): "Securitisation company" means any company formed and registered under the Companies Act, 1956 (1 of 1945) for the purpose of securitisation.

19. Further, the word "reconstruction company" is defined in Section 2(v). The other definition that is relevant for our purpose is definition of the term "secured creditor" appearing in Section 2(zd).

2(zd): "Secured Creditor" means any bank or financial institution or any consortium or group of banks or financial institutions and includes:

- (i) debenture trustee appointed by any bank or financial institution; or
- (ii) securitisation company or reconstruction company, whether acting as such or mortgaging a trust set up by such securitisation company or reconstruction company for the securitisation, reconstruction, as the case may be; or
- (iii) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance.

20. Chapter II of the Securitisation Act is entitled as Regularisation of Securitisation and Re-construction of Financial Assets of Banks and Financial Institutions. Therein, Section 5 appears which reads as under:

5. Acquisition of rights or interest in Financial assets:(1) Notwithstanding anything contained in any agreement or any other law for the time being in force, any securitisation company or reconstruction company may acquire financial assets of any bank or financial institution:

- (a) by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating herein such terms and conditions as may be agreed upon between them; or
- (b) by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.

(2) If the bank or financial institution is a lender in relation to any financial assets acquired under Sub-section (1) by the securitisation company or the reconstruction company, such securitisation company, such securitisation company or reconstruction company shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such

company in relation to such financial assets.

(3) Unless otherwise expressly provided by this Act, all contracts, deeds, bonds, agreements, powers-of- attorney, grants of legal representation, permissions, approvals, consents or no-objections under any law or otherwise and other instruments of whatever nature which relate to the said financial asset and which are subsisting or having effect immediately before the acquisition of financial asset under Sub-section (1) and to which the concerned bank or financial institution is a party or which are in favour of such bank or financial institution shall, after the acquisition of the financial assets, be of as full force and effect against or in favour of the securitisation company or reconstruction company, as the case may be, and may be enforced or acted upon as fully and effectually as if, in the place of the said bank or financial institution, securitisation company or reconstruction company, as the case may be, had been a party thereto or as if they had been issued in favour of securitisation company or reconstruction company as the case may be.

(4) If, on the date of acquisition of financial asset under Sub-section (1) any suit, appeal, or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, save as provided in the third proviso to Sub-section (1) of Section 15 of the Sick Industrial Companies(Special Provisions) Act, 1985 (1 of 196) the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the securitisation company or reconstruction company, as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the securitisation company or reconstruction company, as the case may be.

21. The measures of assets reconstruction are set out in Section 9 of Securitisation Act. The other functions of the Securitisation Company or Reconstruction company are set out in Section 10 which reads as under:

10. Other functions of securitisation company or reconstruction company - (1) Any securitisation company or reconstruction company registered u/s 3 may -

(a) act as an agent for any bank or financial institution for the purpose of recovering their dues from the borrower on payment of such fees or charges as may be mutually agreed upon between the parties;

(b) act as a manager referred to in Clause (c) of Sub-section (4) of Section 13 on such fee as may be mutually agreed upon between the parties;

(c) act as receiver if appointed by any court or tribunal; Provided that no securitisation company or reconstruction company shall act as a manager if acting as such gives rise to any pecuniary liability.

(2) Save as otherwise provided in Sub-section (1), no securitisation company or reconstruction company which has been granted a certificate of registration under Sub-section (4) of Section 3, shall commence or carry on, without prior

approval of the Reserve Bank, any business other than that of securitisation or asset reconstruction

Provided that a securitisation company or reconstruction company which is carrying on, on or before the commencement of this Act, any business other than the business of securitisation or asset reconstruction or business referred to in Sub-section (1), shall cease to carry on any such business within one year from the date of commencement of this Act."

Explanation: For the purposes of this section, "securitisation company" or "reconstruction company" does not include its subsidiary." Section 13 falling in Chapter III of the Securitisation Act deals with "Enforcement of Security Interest".

22. It would not be out of place, if reference is made to a decision of the Supreme Court in the case of Merdia Chemicals Ltd. v. Union of India reported in 2004 AIR SCW 2541 wherein constitutional validity of Securitisation Act was considered. While referring to the object and purpose of the Act and analysing its various provisions, this is what the Supreme Court has observed in paras 34, 35, 66 and 67 as under:

34. Some facts which need 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 Debt Recovery Tribunals and appointing Presiding Officers, for a long time. Even after leaving that margin, it is to be noted that things in the concerned spheres 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 the 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 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.

35. As referred to above, the Narsimham Committee was constituted in 1991 relating to the Financial System prevailing in the country. It considered wide ranging issues relevant to the economy, banking and financing etc. Under Chapter V. of the Report under the heading "Capital Adequacy", "Accounting Policies and other Related Matters" it was opined that a proper system of income recognition and provisioning is fundamental to the preservation of the strength and stability of banking system. It was also observed that the assets are required to be classified, it also takes note of the fact that the Reserve Bank of India had classified the advances of a bank, one category of which was bad debts/ doubtful debts. It then mentions that according to the international practice, an asset is treated as non-performing when the interest is overdue for at least two quarters. Income of interest is considered as such, only when it is received and not on the accrual basis. The Committee suggested that the same should be followed by the banks and financial institutions in India and an advance is to be shown as non-performing assets where the interest remains due for more than 180 days. It was further suggested that the Reserve Bank of India should prescribe clear and objective definitions in respect of advances which may have to be treated as doubtful, standard or sub-standard, depending upon different situations. Apart from recommending to set up of Special Tribunals to deal with the recovery of dues of the Advances made by the banks, the Committee observed that impact of such steps would be felt by the banks only over a period of time, in the meanwhile, the Committee also suggested for reconstruction of assets saying "the Committee has looked at the mechanism employed under similar circumstances in certain other countries and recommends the setting up of, if necessary by special legislation, a separate institution by the Government of India to be known as "Assets Reconstruction Fund (ARF) with the express purpose of taking over such assets from banks and financial institutions and subsequently following up on the recovery of dues owed to them from the primary borrowers." While recommending for setting up of Special Tribunals, the Committee observed:

Banks and Financial institutions at present face considerable difficulties in recovery of dues from the clients and enforcement of security charged to them due to the delay in the legal processes. A significant portion of the funds of banks and financial institutions is thus blocked in unproductive assets, the values of which keep deteriorating with the passage of time. Banks also incur substantial amounts of expenditure by way of legal charges which add to their overheads. The question of speeding up the process of recovery was examined in great detail by a Committee set up by the Government under the Chairmanship of the late Shri Tiwari. The Tiwari Committee recommended, inter alia, the setting up of Special Tribunals which could expedite the recovery of process....

The Committee also suggested some legislative measures to meet the situation.

66. On behalf of the petitioners one of the contentions which has been forcefully raised is that existing rights of private parties under a contract cannot be interfered with, more particularly putting one party to an advantageous position over the other. For example, in the present case, in a matter of private contract between the borrower and the financing bank or institution through impugned legislation rights of the borrowers have been curtailed and enforcement of secured assets has been provided for without intervention of the Court and above all depriving them the remedy available under the law approaching to the Civil Court. Such a law, it is submitted, is not envisaged in any civilised society governed by rule of law. As discussed earlier as well, it may be observed that though the transaction may have a character of a private contract yet the question of great importance behind such transactions as a whole having far reaching effect on the economy of the country cannot be ignored, purely restricting it to individual transactions more particularly when financing is through banks and financial institutions utilising the money of the people in general namely, the depositors in the banks and public money at the disposal of the financial institutions. Therefore, wherever public interest to such a large extent is involved and it may become necessary to achieve an object which serves the public purposes individual rights may have to give way. Public interest has always been considered to be above the private interest. Interest of an individual may, to some extent, be affected but it cannot have the potential of taking over the public interest having an impact in the socio- economic drive of the country. The two aspects are intertwined which are difficult to be separated. There have been many instances where existing rights of the individuals have been affected by legislative measures taken in public interest. Certain decisions which have been relied on behalf of the respondents, on the point are *V. Ramaswami Ayyangar and Others Vs. T.N.V. Kailasa Thevar*, . In that case by enacting the Madras Agriculturist's Relief Act, relief was given to the debtors who were agriculturists as a class, by scaling down their debts. The validity of the Act was upheld though it affected the individual interest of creditors. In *Dahya Lal and Others Vs. Rasul Mohammed Abdul Rahim*, , the tenants under the provisions of the Bombay Tenancy Act, 1939 were given protection against eviction and they were granted the status of protected tenant, who had cultivated the land personally six years prior to the prescribed date. It was found that the legislation was with the object of improving the economic condition of the peasants and for ensuring full and efficient use of land for agricultural purpose. By a statutory provision special benefit was conferred upon the tenants in Madras City where they had put up a building for residential or non-residential purposes and were saved from eviction, it did though affect the existing rights of the landlords. See also 1963 (Supp) 1 SCR 282 , *Raval and Co. Vs. K.G. Ramachandran and Others*, . Similarly it is also to be found that in the case reported in *Kanshi Ram and Another Vs. Lachhman (Dead) through Lrs. and Others*, the law granting relief to the debtors protecting their property was

upheld. Also see *Pathumma and Others Vs. State of Kerala and Others*, *Fatehchand Himmatlal and Others Vs. State of Maharashtra*, *Ramdhandas and Another Vs. The State of Punjab*, ."

67. It is well known that in different States, Rent Control legislations were enacted providing safeguards to the sitting tenants as against the existing rights of the landlords, which before coming into force of such law were governed by contract between the private parties. Therefore, it is clear that it has always been held to be lawful, whenever it was necessary in the public interest to legislate irrespective of the fact that it may affect some individuals enjoying certain rights. In the present case we find that the unrealised dues of banking companies and financial institutions utilising public money for advances were mounting and it was considered imperative in view of recommendations of experts committees to have such law which may provide speedier remedy before any major fiscal set back occurs and for improvement of general financial flow of money necessary for the economy of the country that the impugned Act was enacted. Undoubtedly, such a legislation would be in the public interest and the individual interest shall be subservient to it. Even if a few borrowers are affected here and there, that would not impinge upon the validity of the Act which otherwise serves the larger interest.

23. In our view, considering that the Securitisation Act came to be enacted later than RDB Act and it provides for not only securitisation and reconstruction of assets (section 2(zc)) and for that purpose defining the terms and concepts of reconstruction and securitisation widely, then, the narrow interpretation of the provisions of the RDB Act as placed by Mr. Samdani cannot be accepted.

24. It must be presumed that the Legislature is aware of a prior enactment while enacting a subsequent law on the same subject. We cannot attribute to the Legislature any ignorance in this regard. It is for the Legislature, who alone is the best Judge of the needs of the people, to decide as to whether an enactment is enough or whether modifications or amendment to the same are necessary or whether another substantive enactment would be needed so as to overcome the lacunae and defects noticed in the earlier Statute. It is for the Legislature to consider and decide as to whether the RDB Act was enough or it was necessary to enact the Securitisation Act. Further, it is for the Legislature to define the concepts and legal terms. It is for the Legislature to make a provision in the RDB Act by amending it that a securitisation company or re-construction company which has obtained a certificate of registration u/s 3(4) of the Securitisation Act is a financial institution within the meaning of RDB Act 1993. Once the Legislature is of the view that in the light of the subsequent enactment i.e. the Securitisation Act, even the RDB Act needs to be amended suitably, then, all that remains for our consideration is whether the amendment to RDB Act is to be construed widely as suggested by Mr. Saraf or the restricted interpretation placed by Mr. Samdani deserves to be accepted. The Court merely interprets the law enacted by the Legislature whenever called upon to do so. There is clear

demarcation of the field inasmuch as the Legislature enacts, Executive implements and the Judiciary interprets the Statutes.

25. The RDB Act is an Act providing for establishment for expeditious adjudication and recovery of debts due to banks and financial institutions. We have already reproduced the definition of the terms "debt" and "Financial Institution" as appearing in RDB Act. In *United Bank of India v. Debt Recovery Tribunal* reported AIR 1999 S.C. 1381, the Supreme Court was called upon to consider the ambit and scope of the definition of the term "debt". It held that the word has to be given widest amplitude. It is defined to mean any liability inclusive of interest which is claimed as due from any person by a bank or financial institution or by a consortium thereof during the course of any business activity taken by the bank or financial institution under the law for the time being in force, the debt may be in cash or otherwise. It may be secured or unsecured or Assigned. It may also be payable under the decree or order of the Civil Court or any Arbitration award or otherwise or under any mortgage. All that is needed that it should be subsisting on and legally recoverable on the date of application.

26. The term "financial institution" has been defined in Section 2(m) of the Securitisation Act which reads thus:

2(m) "financial institution" means--

(i) a public financial institution within the meaning of Section 4A of the Companies Act, 1956 (1 of 1956)

(i) any institution specified by the Central Government under Sub-clause (ii) of Clause (h) of Section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)

(iii) the International Finance Corporation established under the International Finance Corporation (Status, Immunities and Privileges) Act, 1958 (42 of 1958)

(iv) any other institution or non-banking financial company as defined in Clause (f) of Section 45I of the Reserve Bank of India Act, 1934 (2 of 1934), which the Central Government may, by notification specify as financial institution for the purposes of this Act.

27. If these provisions, bearing in mind the object of the RDB Act are perused together with the relevant provisions of the Securitisation Act, then, it will not be possible to agree with Mr. Samdani that the restricted view as taken in the case of *Krishna Filaments* (supra) continues to hold the field. In our view, the amendment to the definition of the term "Financial Institution" as appearing in Section 2(h) of the RDB Act and bringing into force of the Securitisation Act is a development post Judgment of this Court in *Krishna Filaments* (supra). In fact, it is precisely to get over the narrow interpretation placed on the term "debt" by this Court that the Legislature has stepped in and amended the RDB Act 1993. If there was any doubt about a debt which is assigned by a bank or financial institution, being recovered by filing an application before DRT established u/s 3

of the RDB Act, that is cleared by insertion of Sub-section (ia) in Section 2(h) of the RDB Act. That insertion together with the wide wording of the term "debt" is enough to reach the conclusion that the securitisation company or re-construction company contemplated by the Securitisation Act can step in and proceed with the matter/ application which has been instituted by its predecessor in title/ assignee/ financial institution. If this interpretation is not placed, then, the very purpose and object of amending the definition of the word "financial institution" would be defeated. This coupled with the rights that are acquired by securitisation company or re-construction company by virtue of Section 5 of the Securitisation Act, would enable us to conclude that the narrow and restricted view no longer prevails.

28. Section 5 of the Securitisation Act has been reproduced by us precisely with this intent. Sub-section 1 thereof opens with a non obstante clause and, therefore, any agreement or law notwithstanding, the securitisation company or re-construction company may acquire financial assets of any bank or financial institutions in the manner set out therein. It is then provided that if bank is a lender in any financial assets acquired by the securitisation company or re-construction company, then, such company shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institutions shall vest in the securitisation and re-construction company in relation to such financial assets. Sub-section 3 of Section 5 deals with the all contracts, deeds, agreements etc. Sub-section 4 of Section 5 enumerates further consequences of acquisition of financial assets u/s 5(1). The consequence is that any suit, appeal or other proceedings of whatever nature relating to the financial assets, if pending by or against the bank or financial institution, the same does not abate nor is discontinued. It is in no way prejudicially affected, by reason of acquisition of financial assets by securitisation or re-construction company, as the case may be, but it shall continue and can be prosecuted and enforced by or against securitisation company or re-construction company as the case may be. Therefore, the acquisition of rights or interest in financial assets with their legal effect and consequences is provided by Section 5 of the Securitisation Act. It is with the object of giving effect to Section 5 and particularly Sub-sections 3 and 4 thereof that the definition of the term "financial institution" in Section 2(h) of the RDB Act has been amended. Therefore, while enacting Securitisation Act the Legislature made amendment to the RDB Act simultaneously as is clear from the statements of objects and reasons and the relevant provisions of the RDB Amendment Act 30 of 2004 reproduced above. It is not as if the provisions are one sided. While it is permissible for the Securitisation or Reconstruction Company to acquire rights or interest in financial assets, the Legislature has taken care that the suits or proceedings instituted by the Bank or Financial institutions would not abate. At the same time, proceedings against the bank or financial institutions will not abate and can be continued against the securitisation or re-construction company, as the case may be. If we do not give full effect to the legal provisions as noticed, then, we would be taking a narrow

and restricted view thereof, although, they are widely worded. Once, the words are plain and clear, then, there is no scope for interpretation. It would be the duty of the Court to give effect to the words when their meaning is plain, unambiguous and clear. If this wide phraseology is ignored, we would be acting contrary to the object and purpose sought to be achieved by both enactments. Considering that they are enacted in public interest and for expeditious recovery of public dues, we cannot ignore the said statutory Mandate, and are, therefore, unable to accept the narrow and restricted interpretation placed by the petitioners herein. For this very reason, we reject the contentions of Mr. Samdani to the contrary.

29. Reliance placed by the petitioners on the decision of Krishna Filaments (supra) and particularly paras 23 to 26 thereof is misconceived. Therein, the Division Bench held that the bank IDBI acted as a Trustee for the subscribers to the debentures of the appellant company. The entire claim was on behalf of the debenture holders for the amounts that they have subscribed to the debentures. The Amount claimed was not of IDBI but the dues was of the subscribers of the debentures. It is only in the light of this factual position that the division bench concluded that the debt is not that of IDBI but was due and payable to the subscribers of the debentures. It is only in the light of this factual position that the division bench concluded that the debt is not that of IDBI but it has recovered it in Trust for the debenture holders. Therefore, the suit is maintainable on the original side of this Court. In other words, the civil court's jurisdiction is not ousted by the RDB Act, is the conclusion based on this unassailable and undisputed factual position. 30. In the view that we have taken and finding that the law laid down in Krishna Filaments cannot be said to be any longer valid and good in the light of the statutory provisions that the further issue, about correctness of the conclusions recorded by Division Bench in paras 25 and 26 and the interpretation placed on the definition of the word "debt", need not be considered. Now, the bank or financial institution as an assignee can proceed under the Securitisation Act, so also under the RDB Act. The term "debt" as appearing in Section 2(g) would have to be considered in the light of the broad interpretation that we have placed on the provisions of the Securitisation Act. The distinction that is drawn by Mr. Samdani is no longer valid. Even if the bank or financial institution is acting as a Trustee as suggested, it can take recourse to the RDB Act. That is clear from a reading of the definition of the term "secured Creditor" as defined in Section 2(zd) of the Securitisation Act. That term includes debenture trustee appointed by the Bank or financial institution or securitisation company or re-construction company, where acting as such or managing a trust set up by such securitisation company or reconstruction company for securitisation or reconstruction company as the case may be or any other trustee as contemplated by Section 2(zd)(iii). The term security interest is defined in Section 2(zf) of the Securitisation Act and it means right, title and interest of any kind whatsoever of property created in favour of any secured creditor and includes any mortgage, charge, hypothecation and assignment.

Therefore, when the bank or financial institution as in the case of Krishna Filaments is acting as a debenture Trustee, then, it will not be required to approach the ordinary civil court but can take recourse to the Securitisation Act and consequently, as permissible therein, the RDB Act as well. If the arguments to the contrary are accepted that would mean ignoring and brushing aside the inclusive definitions as noticed by us. Therefore, we are of the view that in the present case, considering the definition of the term "debt" and "financial institution" appearing in the RDB Act, 1993 and the relevant provisions of Securitisation Act so also to give full effect to the same, it will have to be held that it was permissible for parties such as Arcil to apply for amendments to the Original Application No. 89 of 2005.

31. The amendment by substitution is in the light of the statutory provisions noted above and the Securitisation Act in particular.

32. The argument of Mr. Samdani that on facts, in this case, the agreements between the Oriental bank and Arcil denotes that Arcil is acting in its capacity as Trustee of Arcil Trust and, therefore, is out of the purview of the Securitisation Act and consequently RDB Act 1993 is equally unsound and untenable. The agreement dated 27th June 2008 must be read as a whole and not in parts as suggested and read by Mr. Samdani. If so read, coupled with Clause 2.1 thereof, it makes it abundantly clear that the said agreement answers the wide definition of the term "secured creditor" u/s 2(zd) of the Securitisation Act. Further, there is complete assignment and it is not that Arcil is only acting as a Trustee. Merely because it is described as originally intended purchaser or confirming party at one place does not mean that it is not an assignment of the security interest as contemplated by the securitisation act. It has acquired rights and interest in financial assets. The word "financial asset" means debt or receivables and includes the following:

2(I) "Financial asset" means debt or receivables and includes -

- (i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or
- (ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or
- (iii) a mortgage, charge, hypothecation or pledge of movable property; or
- (iv) any right or interest in the security, whether full or part underlying such debt or receivables; or
- (v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or
- (vi) any financial assistance;

If the agreement is read and construed in the backdrop of this wide definition,

then, argument of Mr. Samdani that in this case Arcil was not acting in dual capacity needs to be rejected.

33. We are of the opinion that the view taken by DRT and DRAT on facts is correct and based upon the agreement between parties and the averments in the original application .Such a view, unless demonstrated to be clearly perverse or vitiated by an error apparent on the face of the record cannot be interfered with in our extra ordinary, discretionary and equitable jurisdiction under Article 226 of the Constitution of India, more so, when the legal issue is answered against the petitioners.

34. In the result, the petition fails. Rule is discharged but without any order as to costs.