
(2006) 03 MAD CK 0286

In the Madras High Court

Case No : Writ Petition No's. 8261 and 8262 of 2005, W.P.M.P. No's. 8947 and 8948 of 2005 and W.V.M.P. No. 23 of 2006

Archana Spinners Ltd.

APPELLANT

Vs

Board for Industrial and Financial Reconstruction

RESPONDENT

Date of Decision : 31-03-2006

Acts Referred:

Constitution of India, 1950 — Article 226

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(1), 13(2), 13(3), 13(4)

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 15(1), 17, 18, 19

State Financial Corporations Act, 1951 — Section 29, 46

Transfer of Property Act, 1882 — Section 69, 69A

Citation : (2009) 147 CompCas 387 : (2007) 76 SCL 280

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : H. Karthik Seshadri, for the Appellant; Jayesh Dolia and C. Ramachandran, for the Respondent

Final Decision : Dismissed

Judgement

P. Jyothimani, J.—Heard the learned Counsel appearing for the petitioner and the learned Counsel appearing for the respondents.

2. These writ petitions are filed praying for quashing the notice issued by the second respondent namely the Tamil Nadu Industrial Investment Corporation Limited dated 30-6-2005 u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and praying for a declaration that the action of the second and third respondents namely the Tamil Nadu Industrial Investment Corporation Limited, Thirunelveli and the Federal Bank Limited, Tuticorin in resiling from their position after having approved the Draft Rehabilitation Scheme dated 18-1-2005 circulated by the first respondent and consequently to direct the first respondent namely Board for Industrial and

Financial Reconstruction (BIFR), New Delhi to sanction the Draft Rehabilitation Scheme (DRS) dated 18-1-2005 respectively.

3. The case of the petitioner is that the petitioner Company was declared as sick industrial company u/s 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985 on 20-12-2002. The State Bank of India was its operating Agency to examine the viability for rehabilitation as per Section 17 of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) by the Board for Industrial and Financial Reconstruction (BIFR). A scheme was submitted for revival involving the One Time Settlement (OTS) of the dues to the second respondent and rescheduling of the dues to the third respondent as per the norms of Reserve Bank of India. The BIFR has allowed the petitioner and the respondents 2 and 3 to arrive at One Time Settlement (OTS) and submit a proposal for revival. The operating agency, by their letter dated 20-3-2004 to the BIFR stated that in the meeting held on 15-3-2004 there was consensus among second respondent for OTS and third respondent for re-phasing of dues. Based on the consensus the Draft Rehabilitation Scheme (DRS) was submitted by the operating agency as per Sections 17 and 18 of the SICA. There was some modification at the instance of BIFR. As per the said DRS the Company was to be positive in the year 2009-10 and start earning profit from the first year of implementation of DRS. Based on the said report, BIFR formulated the scheme in terms of Section 19(2) read with Section 19(1) of SIC A and circulated to all the parties for their consent by their order dated 18-1-2005.

4. As per the orders of the BIFR the DRS was published in Hindu and Dina Thanthi and even after the lapse of 60 days as mentioned in the said publication no objections were received by the operating agency or by the BIFR for the scheme and it was posted before BIFR on 7-4-2005 and for finalization of DRS. Since there was no sitting of the BIFR on 7-4-2005, the matter was adjourned to 19-7-2005. The second respondent issued a notice dated 18-4-2005 received by the petitioner on 29-4-2005 calling upon the petitioner to pay the balance of OTS amount within a period of 15 days as agreed by the petitioner and the second respondent in terms of the DRS circulated among the parties on 18-1-2005 by the BIFR. The petitioner has replied stating that they have already paid a sum of Rs. 55 lakhs towards the OTS even before the sanction and requested for further period of six months time. However, the second respondent has rejected the petitioner's request and informed him that they will proceed against the petitioner under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). The petitioner replied to that on 13-6-2005. However without even waiting for the three months' time as indicated in the second respondent letter dated 18-4-2005, the second respondent has issued the impugned notice u/s 13(2) of SARFAESI Act which is a subject-matter of dispute in W.P. No. 8261 of 2005.

5. When the matter was taken up before BIFR on 19-7-2005, the second respondent was absent and the third respondent submitted objections for

sanctioning of the DRS. The BIFR namely the first respondent without sanctioning the DRS as per Section 19(2) of the SICA has adjourned the matter directing the petitioner to pursue the matter with the 2nd respondent. The petitioner has filed W.P. No. 8262 of 2005 praying for a writ of Declaration as stated above.

6. In the counter-affidavit filed by the second respondent, it is stated that the second respondent is a Government Company incorporated under the Indian Companies Act sponsored by the State of Tamil Nadu. As per Section 46 of the State Financial Corporations Act, 1951, certain provisions are made applicable for the purpose of speedy recovery of dues to the Corporation.

7. According to the second respondent, the petitioner company which is a public limited Company has applied for a loan to start an industry to manufacture textile and the second respondent has sanctioned a term loan of Rs. 90,00,000 on 19-11-1994 and the petitioner has availed the loan in full. The second respondent has sanctioned the second loan of Rs. 57,00,000 on 28-1-1997. The petitioner has installed 3,024 spindles and later another 2,016 spindles and the petitioner was a chronic defaulter from the inception of the loan. The petitioner was allowed the facility of repaying of loan in 28 quarterly instalments and the last instalment of the first loan was on 1-4-2004 and the second loan was on 1-4-2005. The amounts were not repaid, the second respondent initiated action for recovery u/s 29 of the State Financial Corporations Act, 1951.

8. After a possession notice was issued under the aid Act, the petitioner has remitted a sum of Rs. 5.50 lakhs on 16-3-2001 and requested time for repayment of the balance loan amount. Thereafter, the petitioner approached the BIFR for relief against the second and third respondents and after the case was lapsed by time, again the petitioner approached the BIFR for rescheduling of loan with the third respondent. The case was registered as Case No. 356 of 2002.

9. While it is admitted that the State Bank of India is appointed as the operating agency, the second respondent states that by its order dated 13-2-2004 they have even accepted to waive the penal interest amounting to Rs. 1,49,57,892 and directed the petitioner to pay a sum of Rs. 1,93,62,091 from 1-12-2003 within 30 days. That was the One Time Settlement (OTS). When the petitioner failed to remit, the time was extended up to 31 -3-2005 and even then the petitioner has not settled the full amount but remitted only Rs. 5,00,000 against the OTS amount of Rs. 1,93,62,091. The cheque for Rs. 5,00,000 given by the petitioner dated 31-3-2005 was dishonoured. Therefore, the rehabilitation formula has failed.

10. It was in those circumstances, the second respondent had no other go than invoking powers u/s 13(2) of the SARFAESI Act, 2002. The petitioner has been delaying the repayment in spite of OTS arrived at in the guise of BIFR proceedings. It is admitted that the DRS was formulated by BIFR on 20-1-2005. However, the OTS amount was extended up to 31-3- 2005 based on the

proposals of the State Bank of India dated 20-3-2004. The petitioner has not complied with the repayment schedule as per the DRS. The second respondent has delayed the recovery action believing that at least DRS will be followed by the petitioner. The second respondent would submit that being the Public Financial Institution they are entitled to invoke the provisions of SARFAESI Act, 2002 for recovery and the same cannot be challenged in the writ proceedings.

11. As per the OTS, the entire amounts should have been paid within 30 days and it was at the request of the petitioner, the time was extended up to 31-3-2005 and in spite of the same, the amount was not paid. In such circumstances, the petitioner is not entitled to question the action taken u/s 13(2) of the SARFAESI Act, 2002. It is the petitioner who has not acted as per the terms of the DRS even though, the same has not been approved by the first respondent. The first respondent-BIFR has no jurisdiction to issue direction if the second respondent initiated action under the provisions of SARFAESI Act, 2002.

12. It is also the case of the second respondent that as against the impugned notice u/s 13(2) of the SARFAESI Act, 2002, it was for the petitioner to give objection which may or may not be accepted by the second respondent by passing an order with reason u/s 13(4) of the SARFAESI Act. In this case that the objection filed by the petitioner on 5-9-2005 to the impugned notice sent u/s 13(2) of the SARFAESI Act, 2002 was duly examined and rejected by the second respondent on 14-10-2005.

13. In such circumstances, the petitioner has got an alternative remedy available under the SARFAESI Act, 2002 before the Debts Recovery Tribunal. It is also the case of the second respondent that in view of the amendment effected to Section 15(1) of the SICA, 1985, any reference pending before the BIFR shall abate if the secured creditors, representing not less than 3/4th of the value of the amount outstanding against the financial assistance disbursed to the borrowers of such creditors have taken measure to recover their secured debt u/s 13(4) of SARFAESI Act, 2002.

14. It is also the case of the second respondent that the DRS will come into force only if the same is sanctioned by the BIFR namely the first respondent and the same is binding on the parties only after such sanction. In the present case, the sanction has not been effected so far and, therefore, it is not binding. The second respondent would also submit that they have not resiled from the position in the DRS dated 18-1-2005. Clause 6.4.1 in the Draft Scheme deals with the repayment of the loan and also envisages the OTS before 31-3-2005. Since the petitioner failed to adhere to the time schedule, the second respondent along with the third respondent-Bank by consent have initiated action under the SARFAESI Act, 2002. The second respondent has never gone back to its commitment under the DRS. It is also stated by the second respondent that as on 30-9-2005, the liability of the petitioner was to the extent of Rs. 4,09,14,571.80.

15. The third respondent in its counter would state that in spite of the fact that the third respondent has agreed to reschedule the loan in the year 2002-03 the petitioner stopped routing the sale proceeds through the third respondent-Bank and started dealings with other banks. The third respondent has submitted its objection before the BIFR on 19-7-2005. The second respondent has initiated proceedings u/s 13(2) of SARFAESI Act, 2002 with the consent of the third respondent. As per the DRS amount of Rs. 36.24 lakhs and 29.24 lakhs during the year 2004-05 and Rs. 39.24 lakhs during the year 2005-06 were envisaged which was not paid by the petitioner. The networth of the company cannot turn positive by the year 2009-10 and, therefore, DRS is not acceptable to the third respondent. The dragging of the matter to BIFR is only for the purpose of evading the repayment of loan. The DRS has not materialised because of the conduct of the petitioner in not making any payment. The third respondent also would state that on the second respondent initiating proceedings under the provision of SARFAESI Act of 2002, the BIFR stands abated. Since the BIFR has failed its duty there is no question of any direction to be given by this Court to the BIFR.

16. Mr. H. Karthik Seshadri appearing for M/s. Iyer and Thomas, learned Counsel for the petitioner would submit that while in the present case admittedly, the matter is pending before the first respondent-BIFR and the DRS with the consent of all the parties is pending approval before the quasi-judicial authority namely, the first respondent invoking of the coercive steps by the respondents 2 and 3 u/s 13(2) of the SARFAESI Act, 2002 is not only unwarranted but is against the basic tenets of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) read with the provisions the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). According to him, u/s 19(2) of the SICA, 1985 when the scheme is consented by every person within a period of 60 days or any further 60 days as extended by the Board there is deemed consent and thereafter the approval of the Board is only consequential, therefore, the scheme has come into operation. In the present case, admittedly the petitioner as also the second and third respondents have consented for the scheme based on which the DRS was formulated by the operating agency, the State Bank of India.

17. According to the learned Counsel in such circumstances it cannot be said that the scheme has not come into effect. He also would rely upon Section 19(3) of the SICA, 1985 to contend that when once the consent required u/s 19(2) has come into effect the scheme shall be binding to all concerned after the sanction of the scheme by the same Board. Therefore, according to him, when once the consent has been given by the parties it was the duty on the part of the BIFR, the first respondent to sanction the said DRS. The second and third respondents cannot take advantage of the delay of sanction by BIFR and presume that the scheme has become inoperative and, therefore, they can proceed with the SARFAESI Act, 2002. The learned Counsel would submit that the SICA, 1985 is an old Act whereas the SARFAESI Act, 2002 is a later one.

18. Mr. H. Karthik Seshadri, learned Counsel would also contend that after the SARFAESI Act, 2002 has come into effect, Section 15 of SICA, 1985 was amended to show that when once a reference before the BIFR was pending 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 u/s 13(4) of the Act.

19. The learned Counsel would submit that consequent to the said amendment to SICA, 1985 the Section 15 to include a proviso as stated above which was included on 21-6-2002, a corresponding schedule has been included as per Section 41 of the SARFAESI Act, 2002. By incorporating the second proviso to Section 15(1) of SICA, 1985 the makers of SARFAESI Act were very much concerned about the object of SICA, 1985. According to the learned counsel, apart from the fact that by virtue of the consent it cannot be said that it is a mere reference which is pending because the approval of the scheme was only consequential, he would also submit that Section 19(3) of the SICA, 1985 which says that the scheme shall be binding on all concerned remains unaltered.

20. Therefore, according to him, the combined reading of Section 15(1) and Section 19(3) of SICA, 1985 would show that the law makers wanted to give importance to the rehabilitation scheme, for in cases of companies like that of the petitioner which has already become sick there was absolutely no possibility for recovery by invoking Section 13(2) of SARFAESI Act, 2002 except the steps are taken for revival of the company as per the BIFR in accordance with the DRS formulated u/s 19 of the SICA, 1985. Therefore, according to the learned Counsel for the petitioner since the approval of the scheme by BIFR is only a consequential one, there is a legal duty on the part of the first respondent-BIFR to approve the scheme when it is consented by all the parties. As per the reading of the said Section 19(3) of the SICA, 1985, the second and third respondents cannot go back from the consent which they have already given for the scheme. Consequently, they have no right to invoke their powers u/s 13(2) of the SARFAESI Act, 2002. Therefore, according to the learned Counsel for the petitioner that the impugned notice issued by the second respondent dated 13-10-2005 is liable to be set aside and the second and third respondents should be directed not to go against the consent given by them u/s 19(3) of the SICA, 1985 and the first respondent shall proceed with the granting of sanction to the scheme.

21. Per contra, the learned Counsel for the second respondent-Mr. Jayesh Dolia would contend that by virtue of the judicial precedents including the judgment of the Division Bench of this Court rendered in Digvision Electronics Ltd. v. Indian Bank, represented by its Deputy General Manager Chennai 2005 CLC 978 a notice given by the creditor u/s 13(2) of the SARFAESI Act, 2002 is only a show-cause notice and it is not a due cause of action and the challenging of such notice by a writ petition is only a premature. The learned Counsel would submit

that as held by the Division Bench the procedure is that when a secured creditor invokes Section 13(2) of the SARFAESI Act, 2002 it was open to the debtor to give explanation and thereafter the secured creditor can pass orders u/s 13(4) of the said Act either accepting or rejecting such explanation submitted by the debtor. It is as against the said order the debtor has got remedy under SARFAESI Act, 2002 as per Section 17(1) by moving the Debts Recovery Tribunal and, therefore, there is an alternative remedy available to the petitioner and in view of that the writ petition deserves to be dismissed.

22. According to the learned Counsel for the second respondent since the petitioner has himself submitted his objections for the notice given u/s 13(2) of the SARFAESI Act, 2002 on 5-9-2005 and thereafter, the second respondent having duly examined the objection has passed an order on 14-10-2005 rejecting the said objections it was for the second respondent to proceed as per the Section 13(4) of the SARFAESI Act, 2002 in which event, the petitioner has got a right of appeal to Debts Recovery Tribunal u/s 17 of the said Act and therefore, applying the ratio of the Division Bench stated above, the writ petition deserves to be dismissed.

23. He also relied upon another judgment of the Division Bench in Tamil Nadu Industrial Investment Corporation Ltd. Vs. Millenium Business Solutions Pvt. Limited and Another, to show that no writ will lie for the purpose of directing one time settlement. That apart he also relied upon the later judgment of the Division Bench in Triveni Alloys Ltd. represented by its Managing Director, Ashok Goel 2005 CLC 1124 in W.P. No. 4481 of 2005, dated 19-7-2005 wherein the Division Bench consisting of the Hon"ble the Chief Justice Mr. Justice Markandey Katju and Justice D. Murugesan has clearly held about the procedures to be followed under Sections 13(2), 13(4) and 17 and not by resorting to filing of writ petition. He also relied upon another judgment of the Division Bench of this Court in G. Kailasam and Another Vs. Tamil Nadu Industrial Investment Corpn. Ltd. and Others, to show that a defaulting party cannot be given rescue under Article 226 of the Constitution of India under the concept of equity.

24. According to the learned Counsel as per the second proviso to Section 15(1) of SICA, 1985 when the second and third respondents who are the secured creditors holding more than three-fourth of the value of the amount outstanding have consented to invoke the Section 13(4) of SARFAESI Act, 2002, the reference u/s 15(1) of the SICA before BIFR is deemed to be abated and, therefore, it cannot be said as if the second and third respondents have no jurisdiction to invoke the SARFAESI Act, 2002.

25. It is the further contention of the learned Counsel that it was only after the second respondent has invoked its powers u/s 13(2) of the SARFAESI Act, 2002, which was on 30-6-2005, the first respondent-BIFR has taken up the matter on 19-7-2005. The learned Counsel would also submit that even the term consent u/s 19(2) of SICA, 1985 will mature into a scheme only after it is sanctioned and, therefore, according to him, the sanction is a statutory duty of the first

respondent-BIFR and until the statutory authority perform their functions and complete the same as per the Act, it cannot be stated as if there is a scheme. Therefore, according to him, there is absolutely no bar for the second respondent to initiate the proceedings under the SARFAESI Act, 2002.

26. Learned Counsel would also rely upon the judgment of the Apex Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, wherein while upholding the constitutional validity the SARFAESI Act, 2002 except a very few provisions especially relating to Section 17(2), has also laid down the law about the powers of the secured creditors u/s 13(2), (4) and consequential powers u/s 17 of the Act. The Supreme Court has also held that even though the effect of some of the provisions are bit harsh in the point of borrowers, on that ground it cannot be held that the Act is unconstitutional. Therefore, according to the learned counsel, inasmuch as the BIFR has not given sanction under the SICA, 1985, it remains only at the reference stage and, therefore, the reference stands abated u/s 15(1) second proviso, when the required strength of secured creditors invoked powers u/s 13(4) of the SARFAESI Act, 2002.

27. Mr. C. Ramachandran, learned Counsel appearing for the third respondent-Federal Bank Limited, which is also one of the secured creditors, while adopting the arguments of the learned Counsel for the second respondent would further submit that the conduct of the petitioner towards the third respondent is more serious in the sense that the petitioner against the consent has started to transact the business with some other banks without even transferring the amounts to the third respondent-Bank. In fact, the third respondent has made a written objection before the first respondent-BIFR even on 19-7-2005 stating that the reference before the BIFR has abated.

28. He would also submit that Section 35 of the SARFAESI Act, 2002 gives overriding effect to the said Act notwithstanding any inconsistency with any other law for the time being in force and, therefore, even assuming that the consent u/s 19(2) of the SICA, 1985 is available, by virtue of the overriding of the effect of the SARFAESI Act, 2002, the second and third respondents are entitled under the SARFAESI Act and there was no question of any sanction by the first respondent-BIFR. He would submit that having consented to the DRS it was the petitioner who has acted in utter violation of the same by opening the bank account in another Bank and siphoning the amount instead of paying it to the secured creditor like that of the third respondent and in such circumstances, the third respondent cannot be expected to be a mute spectator as if the consent has been given and it was in those circumstances the consent was rightly withdrawn.

29. While reiterating his earlier contention that the three-fourth of the secured creditors u/s 15(1) second proviso to SICA, 1985 has to be read along with Section 13(4) of the SARFAESI Act according to which the word secured creditor refer to only one creditor and it does not contemplate the secured creditor joined together to constitute the threefourth right. According to him, Section 19(3) of SICA, 1985 which states that after the consent of the parties the BIFR has no

other alternative then sanctioning the scheme and, therefore, according to him, the word "may" u/s 19(3) of SICA, 1985 has to be read as "shall". By considering the entire scheme of the Act, he would also rely upon the judgment in AIR 1979 SC 1997 (sic) to substantiate his contention that it shall be the duty of the Board to sanction the scheme when once consent has been given. According to him, Section 13(2) of the SARFAESI Act, 2002 does not contemplate any joined consent between the creditors and inasmuch as the second respondent who has invoked the powers u/s 13(2) of the SARFAESI Act, 2002 is not binding 75 per cent, it cannot be stated that the reference u/s 15(1) of SICA, 1985 will abate. He would also submit that even if an alternative remedy is available it is not a bar for the purpose of invoking powers of this Court under the Article 226 of the Constitution of India.

30. I have heard the learned Counsel for the petitioner as also the respondents and also perused the entire records.

31. At that outset, some of the provisions of the SICA, 1985 and the SARFAESI Act, 2002 are to be analysed for a harmonious construction between the two. While it is true that the SICA, 1985 is an earlier Act which contemplates a rehabilitation by way of financial assistance to sick industries with the object of "securing timely detection of sick and the potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined and for matters connected therewith or incidental thereto" as mentioned in the preamble of the SICA, 1985. The objects of the Act is no doubt to safeguard the economy of the country and protect the viable sick units by revitalising and rehabilitating the sick industries by way of framing of schemes. Therefore, the BIFR with the consent of all the parties including the debtors and the creditors and others who are connected therewith, sanction the scheme. It has to be remembered the SARFAESI Act, 2002 has come into existence, equally with an object of rapidly developing the economy of the country by creating the effective machinery and system for the purpose of fast recovery of defaulting loans and preventing the mounting up of levels of non-performing assets of banks and financial institutions.

32. While explaining the laudable objects of SARFAESI Act, 2002, the Hon'ble Apex Court in the judgment rendered in *Mardia Chemicals Ltd.*'s case (supra) dealing with the submission that the said law is not envisaged in any civilised law governed by the rule of law has observed as follows:

...As discussed earlier as well, it may be observed that though the transaction may have the 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 on the socio-economic drive of the country....(p. 355)

33. Therefore, both the Acts were enacted in public interest. In fact when an amendment was effected in SICA, 1985 to its Section 15 by including the second proviso to Section 15(1), a reference about the Section 13(4) of the SARFAESI Act, 2002 has been made stating that on the secured creditors representing not less than three-fourth in value of the amount outstanding have taken any measures to recover the debts u/s 13(4) of the said Act, a reference made u/s 15(1) of the SICA, 1985 shall abate. The provisos which came into force from 21-6-2002 runs as follows:

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.

Therefore, it is clear that the law-makers have consciously brought u/s 15(1) of the SICA, 1985 referring to the SARFAESI Act, 2002.

34. The very fact that u/s 35 of SARFAESI Act of 2002 an overriding effect has been given to SARFAESI Act to any other laws, shows that between two Acts, the SARFAESI Act is presumed to have been preferred by the law-makers. In this regard, it is relevant to extract Section 35 of the SARFAESI Act, 2002 which runs as follows:

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.

35. Even though, an attempt is made on behalf of the petitioner that the

overriding effect of the SARFAESI Act, 2002 is subjected to the situation that the terms are not inconsistent with any other laws, I am of the view that the overriding provision shows that notwithstanding with any inconsistency contained in any other law, the SARFAESI Act, 2002 will have overriding effect. That apart, there is no similar provision under SICA, 1985 except Section 32 which makes the Act or Scheme made under the said Act shall have effect notwithstanding anything inconsistent with any other law except relating to certain Acts like Foreign Exchange Regulations Act etc. In any event, the SARFAESI Act, 2002 being the later Act with a clear overriding effect u/s 35, there is absolutely no difficulty to come to the conclusion that the SARFAESI Act, 2002 is entitled to be given preference when compared to the SICA, 1985.

36. It is, in that background, when we analyse the provisions of the SICA, 1985 and SARFAESI Act, 2002 and on the basis of admitted facts one will certainly come to a conclusion that the actions taken by the second respondent is perfectly in accordance with law. In this regard, I have to state that admittedly, the second respondent has invoked its powers u/s 13(2) of SARFAESI Act, 2002 by issuing a notice on 30-6-2005. It is also admitted on fact that on the said date when the second respondent has invoked its powers under the Section 13(2) of SARFAESI Act, 2002, the DRS was not sanctioned by BIFR as required u/s 19(3) of SICA, 1985.

37. Before going into the other aspects as to whether the sanction is consequential to the consent u/s 19(2) and (3) of the SICA, 1985, it is to be noted that the second respondent has come forward with a specific stand in the counter-affidavit that pursuant to the notice given u/s 13(2) of SARFAESI Act, 2002 dated 30-6-2005, the petitioner has in fact filed an objection on 5-9-2005. It is also stated that after the objections were received, the second respondent has examined the objections and rejected the same by the letter dated 14-10-2005.

38. This fact explained in the counter-affidavit has not been denied by the petitioner. On the other hand, the petitioner has filed additional typeset of papers containing their objections dated 5-9-2005 and the order of the second respondent dated 14-10-2005. It is on the background of this admitted fact we have to refer to Section 13 of the SARFAESI Act, 2002. For the purpose of convenience I have extracted Section 13(1), (2), (3) and (4) of SARFAESI Act, 2002.

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 the 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.

(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 secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;

(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.

39. As held by the Division Bench of this Court in Digvision Electronics Ltd.'s case (supra). A notice given u/s 13 of SARFAESI Act, 2002 cannot be a cause of action for any direction under Article 226 of the Constitution of India because it was only a show-cause notice.

40. In addition to that in the present case after the show-cause notice was given u/s 13(2) of the Act as required under the said Sub-section the debtor can discharge the liability within 60 days and if the same is not discharged within the time stipulated it is for the secured creditor to take action u/s 13(4) either taking of the possession of the secured assets or by taking over management of the secured assets or appoint any person to manage the secured assets or require by the notice in writing to a person who has subsequently acquired the secured assets from the borrower to pay.

41. Now, in the present case, after the impugned notice u/s 13(2) was given, in fact the petitioner, in his reply has raised objection for Section 13(2) show-cause notice on 5-9-2005 and ultimately the second respondent passed order on 14-10-2005, after examining the objections and rejecting the same and it would amount to exercise of the powers by the second respondent u/s 13(4) of the

SARFAESI Act, 2002.

42. It is still open to the second respondent to resort to the execution of its powers u/s 13(4) as I stated above in which event, the remedy is available to the petitioner u/s 17 of the Act by filing of appeal before the Debt Recovery Tribunal.

43. In view of the said subsequent event, I am of the considered view that the show-cause notice u/s 13(2) issued by the second respondent which is impugned in W.P. No. 8261 of 2005 is no more in existence to enable the petitioner to continue to challenge the same. It is in addition to the categorical pronouncement of law by the Division Bench that the Section 13(2) notice under SARFAESI Act, 2002 cannot give a cause of action for invoking the jurisdiction of this Court under Article 226 of the Constitution of India.

44. The next submission made by the learned Counsel for the petitioner namely that u/s 19(2) of SICA, 1985, the parties are expected to give consent within 60 days and if not given the consent to the proposed scheme is deemed to be given.

45. It is admitted that the petitioner as also the respondents 2 and 3 have given consent for the DRS framed under the provisions of SICA, 1985 and the same was admittedly referred to the first respondent namely the BIFR. A reference to the order of the BIFR when the matter was heard on 19-7-2005 also would show that the Board has not yet approved the scheme. The Board has in fact elicited the stand taken by the second and third respondents that the second respondent has invoked its powers u/s 13(2) of SARFAESI Act, 2002. While admittedly, the DRS is under the reference stage, there is no question of the scheme having any statutory force even though it is argued by the learned Counsel for the petitioner that the sanctioning of the scheme by the Board is only consequential one, nevertheless the fact remains that such sanction has not yet been made by the competent authority namely the first respondent-BIFR. When the Act contemplates that a particular act to be done in a particular way, it is deemed to have been completed only when such act was done in accordance with the said Act. There can be no presumption of a scheme unless the scheme is sanctioned by the authority under SICA, 1985.

46. The reliance placed by the learned Counsel for the petitioner to the judgment of the Supreme Court in State (Delhi Admn.) Vs. I.K. Nangia and Another, to show that the word "may" has to be construed as "shall" in certain cases, relate to the Prevention of Food Adulteration Act, 1954. In that Act Section 17(1) contemplates that when any offense under the Act is committed by a company, a person who has been nominated under Sub-section (2) to be in charge of and responsible to the company etc., shall be deemed to be guilty of the offense.

47. It is consequently that u/s 17(2) contemplates as follows:

(2) Any company may, by order in writing authorise any of its directors or managers (such manager being employed mainly in a managerial or supervisory capacity) to exercise all such powers and take all such steps as may be

necessary or expedient to prevent the commission by the company of any offence under this Act and may give notice to the Local (Health) Authority, in such form and in such manner as may be prescribed, that it has nominated such director or manager as the person responsible, along with the written consent of such director or manager for being so nominated.

48. It is while construing the obligation of a company to nominate a person, for the purpose of fixing the responsibility in respect of the commission of an offence under the provisions of Prevention of Food Adulteration Act, 1954, the Hon''ble Apex Court has held that the term "may" in Section 17(2) of the Prevention of Food Adulteration Act, 1954 should be construed as "shall". There it was a legal responsibility imposed upon the company to nominate a Director.

49. However, in the present case, the framing of the scheme and sanctioning of the scheme under the SICA, 1985 is only for the purpose of an amicable settlement between the parties in order to enable the parties to pay off the debts by reviving the sick industries, such scheme which is a social measure however based on the economic situation of the country, cannot be thrust on the parties and, therefore, granting of sanction by the Board namely the first respondent is not a matter of right on the part of the debtor. It can never be said that such sanction is only a consequential. The sanction is to be passed by the Board only after taking into account all the aspects and, therefore, it is clear that the term "may" used u/s 19(3) of SICA, 1985 can never be termed as "shall". It is in this regard Section 19(4) of SICA, 1985 is also relevant, which says, that in cases where the consent has not been given by any person required by the scheme to provide financial assistance, it is open to the Board to adopt other methods like winding up of sick industries as it is deemed fit. This would strengthen the fact that the scheme will come into operation only after the same is sanctioned by the Board which is neither consequential to the consent nor a matter of right for the debtor.

50. Now coming to Section 15 of SICA, 1985 as I have stated earlier the learned Counsel would contend that for the purpose of enforcement of the rights of secured creditors u/s 13(4) of SARFAESI Act, 2002, it must be a single secured creditor who must have 3/4th in the value of the amount outstanding who alone can exercise the power under the said Section 13(4) of SARFAESI Act, 2002. This argument is also not tenable in accordance with the reading of the SARFAESI Act, 2002 along with Section 15(1) second proviso to SICA, 1985.

51. As I have elicited the second proviso to Section 15(1) of SICA, 1985 categorically states that if the secured creditors representing not less than 3/4th in value of the amount outstanding have taken steps u/s 13(4) of SARFAESI Act, 2002 the reference u/s 15(4)(1) of SICA, 1985 will abate.

52. In the present case admittedly, the second and third respondents who are the secured creditors have joined in the sense that the third respondent has admittedly given a consent to the second respondent to invoke the powers under

the SARFAESI Act, 2002 and, therefore, there is absolutely no substance in the argument that the said notice given u/s 13(2) by the second respondent should be deemed to be the notice by the second respondent alone. As I have stated earlier when once the creditors joined together for more than 3/4th of the value then the reference comes to an end.

53. As I have stated earlier by the subsequent conduct of the parties, the second respondent is resorting to proceed u/s 13(4) of the SARFAESI Act, 2002 it is not open to the petitioner to shirk its responsibility by saying that the scheme would come into existence and till then he cannot be compelled to pay the amounts admittedly outstanding towards the second and third respondents. This is in my considered view, is an attempt to thwart the very object of SARFAESI Act, 2002 which is not apparently the intention of the law-makers. Therefore, in my considered view the DRS has not come into existence and the entire proposal is in the reference stage u/s 15(1) of the Act and in such circumstances by the second and third respondents in invoking the powers u/s 13(2) and (4) of the Act the reference comes to an end and there is nothing for the first respondent-Board to give any sanction.

54. There is one other incident in this case that the wording of Section 19(2) along with Section 19(4) of the SICA, 1985 would show that it is not as if the consent given by the party especially a creditor is final and that becomes statutory in its character, it is because even the consented party can go back for valuable reasons. In the present case as stated by the second respondent even One Time Settlement (OTS), forming part of the Draft Rehabilitation Scheme (DRS) and even the amount as agreed under the said proposal has not been paid as per the consent which means that the petitioner has gone back from his commitment and in which event it cannot be said that the consent given for the scheme has become final and it is not open to the creditor to go back. On the facts and circumstances of the present case even before the first respondent the second respondent and third respondent have raised objection and, therefore, there is absolutely no question of the scheme having come into existence.

55. In view of the same, I am of the considered view that there is no question of the second and third respondents resiling from the consent.

56. One other submission made by the learned Counsel for the petitioner that even by allowing the scheme to come into existence or even in cases where consent has not been given it is not as if the second and third respondents have no remedy available in law. However, attractive this argument, in my considered view it has no substance. The mere fact that the petitioner has got valuable properties and the petitioner's apprehension that the industry may revive cannot be the apprehension on the part of the second and third respondents that the amount due to them which are very huge in nature will be repaid especially considering the conduct of the petitioner. Any other remedy available under any other law cannot deprive the second and third respondents from enforcing their powers under the SARFAESI Act, 2002, the constitutional validity of which has

been upheld by the Apex Court.

57. In view of the reasons stated above, the writ petitions fail and the same are dismissed. However, in the circumstances of the case, there will be no order as to costs. Consequently, connected W.P.M.P. and W.V.M.P. are closed.