
(2009) 05 AHC CK 0012
In the Allahabad High Court

Arunachalam Muthu

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 25-05-2009

Acts Referred:

Banking Regulation Act, 1949 — Section 35A
Constitution of India, 1950 — Article 14, 21, 215, 226, 309
Contract Act, 1872 — Section 141
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 2, 22(2)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 10(2), 3(4), 5
Stamp Act, 1899 — Section 33
Transfer of Property Act, 1882 — Section 130, 52, 8

Citation : (2010) 4 AWC 3289 : (2010) 7 RCR(Civil) 902

Hon'ble Judges : U.K. Dhaon, J; Satish Chandra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

U.K. Dhaon, J.—Heard Sri Prashant Chandra, senior advocate, assisted by Sri Vivek Raj Singh and Sri Manish Singh for the petitioner and Sri V.B. Upadhyaya, assisted by Sri Sandeep Singh, Sri Anil Kumar Tiwari and Sri D. K. Pathak for the opposite parties.

2. The petitioner being aggrieved by the deed of assignment dated 16.1.2006 executed by the State Bank of India in favour of Kotak Mahindra Bank Ltd. has filed the instant writ petition under Article 226 of the Constitution of India.

3. The petitioner has alleged that he is Director and Guarantor of M/s. Helios Confectionery Private Ltd. (hereinafter referred to as Helios Company), which is a small scale industrial unit situated in an industrially backward area of Sandila district Hardoi. The Helios Company was incorporated in the year 1996 and being the principal borrower availed financial facilities during the year 1996-97 from the State Bank of India for its project for the manufacture of Toffee and Candies

at its factory located at Industrial Area, Sandila, district Hardoi. The Directors and promoters themselves mobilized a substantial amount of about Rs. 5 crores for the project and the Bank funding was restricted to Rs. 2.23 crores only which was repayable in 16 instalments commencing from 31.1.1998 till 31.10.2001.

4. The petitioner has further alleged that the land was secured; the buildings were erected; the world's best experts were consulted and brand new machinery was procured by the Company and even the customers for the products were identified and due to problems of minor nature, such as power curtailment etc. arose which in turn were overcome. The petitioner has also alleged that the Company made a request to the State Bank of India to restructure the repayment schedule and the Credit Appraisal Cell of the State Bank of India in its note to the General Manager, Commercial Banking had mentioned that the promoters are having satisfactory track record; the flag-ship company, M/s. Saf Yeast Company. Private Limited having one of its units at Sandila has fully repaid Rs. 100 lakhs term loan as per the repayment schedule and is presently enjoying Rs. 175 lakhs limit from the Napean sea Road Branch, Mumbai.

5. The petitioner has also alleged that the Directors of the Helios Company have invested more in the project than the State Bank of India and due to mala fide actions of the "State Bank of India the entire investment made by the Helios Company and its Directors has been lost."

6. The petitioner has further alleged that in the year 2000, the State Bank of India has filed a suit for recovery of its dues before the Debt Recovery Tribunal, Jabalpur which was later on transferred to Debt Recovery Tribunal, Lucknow and is registered as T.A. Case No. 263 of 2002. The Valuers of the State Bank of India had visited the factory premises of the Helios Company as late as October, 2002 and as per their valuation report submitted with the State Bank of India the cost of the unit was about Rs. 3.5 crores and accordingly the petitioner on behalf of Helios Company moved an application before the State Bank of India on 23.12.2002 for one time settlement stating, inter alia, that in a final attempt to buy peace and fully conclude the litigation we are making this final offer to the Bank that we are prepared to surrender the unit in its entirety to the Bank alongwith the land, buildings and machinery as is where is and in addition to the above, Helios Company is willing to pay a further sum of Rs. 40 lakhs inclusive of all the legal expenses stamp duties, registration charges etc. on the transfer of the property in your favour, against all the claims made by the bank against the Company and its Directors and the Bank will withdraw the suit pending at the Debt Recovery Tribunal and also discharge the guarantors, both corporate and individual of their" guarantee obligations to the Bank and in pursuance of the one time settlement proposal, the State Bank of India vide letter dated 18.1.2003 asked the Helios Company to deposit a sum of Rs. 40 lakhs in a "No Lien Account" and thereafter a cheque dated 21.1.2003 of Rs. 40 lakhs was deposited with the State Bank of India in a "No Lien Account" by the Helios Company.

7. The Helios Company thereafter on. 10.1.2004 submitted a revised one time

settlement proposal to the State Bank of India and offered to pay Rs. 190 lakhs as full and final settlement and a further sum of Rs. 7.5 lakhs was deposited by the Helios Company with the State Bank of India in its "No Lien Account". Thus, the total deposit with the State Bank of India was Rs. 47.5 lakhs which is 25 per cent of the final settlement amount of Rs. 190 lakhs. The petitioner has also alleged that thereafter vide letter dated 22.3.2004 sent to State Bank of India the Helios Company had increased their offer from Rs. 190 lakhs to Rs. 195 lakhs and informed the State Bank of India that as soon as the acceptance is received with respect to the revised one time settlement proposal the Helios Company would deposit the balance amount in one single instalment but no effort was made by the State Bank of India to help in the revival of the Company and guidelines issued by the Reserve Bank of India were not followed.

8. The State Bank of India on 16.1.2006 executed a deed of assignment and assigned the assets of the Helios Company in favour of M/s. Kotak Mahindra Bank Ltd. The petitioner has further alleged that in spite of holding on the deposit of 47.5 lakhs from the Helios Company since 2003, opposite parties 1 to 3 have sold the rights/assets of the Helios Company to the opposite party No. 4 for a meagre amount of Rs. 39.63 lakhs which is even less than the Company's deposit of Rs. 47.50 lakhs with the State Bank of India. The debts amounting to Rs. 167.49 crores (being the principal amount of loan of 48 borrowers) have been sold by the State Bank of India in favour of Kotak Mahindra Bank Ltd. for Rs. 29.76 crores which is merely 17.77% of the value of principal loan amount of each Non-Performing Assets.

9. The petitioner has also alleged that on 7.7.2006, the Helios Company has also filed a counter claim against the State Bank of India before the Debt Recovery Tribunal for the losses suffered by the Helios Company due to the mala fide and illegal action of the State Bank of India which has been registered as T.A. Case No. 6 of 2006.

10. The petitioner has also alleged that in T.A. Case No. 263 of 2002 pending before the Debts Recovery Tribunal, Lucknow an application dated 31.5.2006 was filed by Kotak Mahindra Bank Limited stating, inter alia, that the State Bank of India has assigned all its rights, title, interests and benefit in respect of the present claim against the defendant-appellant company together with security interest therein to Kotak Mahindra Bank Ltd. who has agreed to take over the said claim and vide Board's resolution dated 29.4.2006. it has authorised the officials of Asset Reconstruction Division of Kotak Mahindra Bank Ltd. to do all acts in furtherance of the assignment and a prayer was made that in the title of the original application, the name and the details of Original Applicant, i.e., State Bank of India be deleted and in its place "Kotak Mahindra Bank Ltd.", a Banking Company within the meaning of the Banking Regulation Act, 1949 and registered under the Companies Act, 1956 and having its registered office at 36-38A, Nariman Bhawan, 227, Nariman Point, Mumbai be permitted to be incorporated.

11. The petitioner has also alleged that the Helios Company filed its objections to

the application filed by Kotak Mahindra Bank Ltd. and opposed the application on the ground that the petitioner has filed a counter claim against the State Bank of India and in case the application filed by Kotak Mahindra Bank Ltd. is allowed and they are permitted to be substituted in place of State Bank of India, then the counter claim filed by the Helios Company against the State Bank of India would render infructuous and the Helios Company would suffer irreparable loss.

12. The petitioner has further alleged that in a most arbitrary and illegal manner, the Debts Recovery Tribunal, Lucknow vide order dated 7.7.2006 allowed the application filed by Kotak Mahindra Bank Ltd. and permitted substitution of Kotak Mahindra Bank Ltd. in place of State Bank of India in T.A. Case No. 263 of 2002. The petitioner has also alleged that the Helios Company filed an application u/s 22(2)(e) of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 for review/recall of the order dated 7.7.2006 and also moved an application u/s 22(2)(b) of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 for production of documents by Kotak Mahindra Bank Ltd. By a composite order dated 12.12.2006, the Presiding Officer of the Debt Recovery Tribunal rejected the applications for production of documents and the application for review/recall was partly allowed and a direction was issued to Kotak Mahindra Bank Ltd. to incorporate the State Bank of India in the array of defendants and thereafter the Helios Company challenged the order dated 7.7.2006 and 12.12.2006, passed by the Debt Recovery Tribunal before this Hon"ble Court by way of a writ petition which was registered as Writ Petition No. 6017 (M/S) of 2006, which was disposed of by the order dated 12.1.2007 with a direction that the Helios Company may file an appeal before the Debts Recovery Appellate Tribunal alongwith an application for interim relief and till the application for interim relief is decided by the appellate Tribunal, the further proceedings in T.A. Case No. 263 of 2002 shall remain in abeyance.

13. The petitioner has further alleged that the Helios Company filed two appeals before the Debts Recovery Tribunal, Allahabad challenging the orders dated 7.7.2006 and 12.12.2006 which were registered as Appeal Nos. 759 of 2007 and 774 of 2007 which are still pending.

14. Learned Counsel for the petitioner submitted that the petitioner is the Director and Guarantor of M/s. Helios Confectionery Private Ltd. which had availed financial assistance of Rs. 223 lakhs during the years 1996-97 from the State Bank of India which is the largest public sector bank of the country and the Directors and the promoters of the Helios Company themselves invested Rs. 5 crores for the project and the loan was repayable in instalments commencing from 31.1.1998 till 31.10.2001 and up to December, 1997, an amount of Rs. 47.68 lakhs was duly paid to the State Bank of India.

15. He further submitted that the Helios Company was facing intense competition because of cheap imports of confectionery products at the relevant time and the entire candy and toffee industry in India was going through a difficult phase and abruptly the State Electricity Board also disconnected their power supply and in

the compelling circumstances the Helios Company requested the State Bank of India through letter dated 10.3.1999 for revival of the Company which had become sick for reasons beyond the Company's control but no effort was made by the State Bank of India to help in the revival of the company which is located in an industrial backward area of the State of U.P. and the guidelines issued by the Reserve Bank of India were also not followed; otherwise the company would not have been in the position that it is now facing.

16. He further submitted that being an instrumentality of the State, it was the duty of the State Bank of India to revive the Helios Company which was the only source of income for a number of workmen in the State but in an illegal manner, in the year 2000, the State Bank of India filed a suit for recovery of dues before the Debt Recovery Tribunal, Jabalpur by raising a claim of Rs. 2.7 crores being the principal amount alongwith interest which was later on transferred to the Debt Recovery Tribunal, Lucknow and during the pendency of suit the Helios Company moved an application before the State Bank of India for one time settlement and on the direction of the State Bank of India, a sum of Rs. 40 lakhs was deposited by the Helios Company in a "No Lien Account" through cheque dated 20.1.2003 and thereafter the Helios Company also submitted a revised proposal and offered to pay Rs. 190 lakhs as full and final settlement and further a sum of Rs. 7.5 lakhs was also deposited with the State Bank of India giving the total amount of deposit made against the one time settlement to Rs. 47.5 lakhs which is 25 per cent of the one time settlement offer but no effort was made by the State Bank of India although the offer for one time settlement was in accordance with the guidelines issued by the Reserve Bank of India.

17. He further submitted that the Helios Company by letter dated 22.3.2004 increased the amount of one time settlement from Rs. 190 lakhs to 195 lakhs and offered to pay Rs. 150 lakhs in one single instalment preferably before 31.3.2004 as Rs. 47.5 lakhs was already lying with the State Bank of India in "No Lien Account" and in spite of holding on the Company's deposit of 47.5 lakhs for three years, the State Bank of India on 16.1.2006, sold off the debts of the Helios Company in favour of Kotak Mahindra Bank Ltd. without any notice to the Helios Company for about Rs. 39.63 lakhs which is even less than the Company's deposit of Rs. 47.50 lakhs with the State Bank of India.

18. He further submitted that the State Bank of India in their counter-affidavit has stated that their own valuers had assessed the distress sale value of collateral security owned by the Helios Company to Rs. 141 lakhs which valuation was done in 2002 and in spite of the offer of Rs. 195 lakhs made by the company which was more than the distress sale value of Rs. 141 lakhs, the State Bank of India in an arbitrary manner sold the company's loan to Kotak Mahindra Bank for a meagre amount of Rs. 39.63 lakhs only.

19. He further submitted that an application under the Rights to Information Act, 2005 was filed by the petitioner with the Reserve Bank of India and it was informed by the Reserve Bank of India that Kotak Mahindra Bank Ltd. has not

been granted a licence u/s 3(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and Kotak Mahindra Bank has also not been granted approval u/s 10(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 to carry on any business other than banking business and a fraud was committed by Kotak Mahindra Bank Ltd. while getting the deed of assignment dated 16.1.2006 registered with the Collector of Stamps, Alibaug, Maharashtra by making a false statement in the affidavit dated 2.5.2006 claiming it as an Asset Reconstruction Company (India) Limited and that the agreement is executed for assigning the debt as per the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and these false statements were deliberately made to evade stamp duty payable for getting the deed of assignment registered as per the notification dated 6.5.2002.

20. He further submitted that u/s 5 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 only a Securitisation and Asset Reconstruction Company may acquire financial assets of Banks and Financial Institutions and Kotak Mahindra Bank Ltd. does not have a licence under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

21. He further submitted that the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 does not permit assignment and since the suit filed by the State Bank of India against the Helios Company and its Guarantors was pending before the Debt Recovery Tribunal and leave of the Debt Recovery Tribunal was not taken prior to the execution of assignment deed, as such, the assignment is not permissible u/s 52 of the Transfer of Property Act. He has relied upon the decision of Hon"ble the Supreme Court in Sanjay Verma v. Manik Roy and Ors. 2007 (25) LCD 313 : 2007 (1) AWC 462 (SC).

22. He further submitted that alongwith the deed of assignment, a not arised affidavit was filed by the opposite party No. 4 before the Collector of Stamps, Allbaug; in the said not arised affidavit it has been stated : "We M/s. Kotak Mahindra Bank Ltd. of Asset Reconstruction Company (India) Limited" and since the deed assignment has been registered on the basis of a false statement made in the affidavit, the whole document, i.e., the deed of assignment obtained by playing fraud is void and deserves to be set aside. He has relied upon the decisions of Hon"ble the Supreme Court in Hamza Haji Vs. State of Kerala and Another, and K.D. Sharma v. Steel Authority of India Ltd. and Ors. 2008 (5) Supreme 287.

23. He further submitted that in the proceedings initiated by the Stamp Authorities in Uttar Pradesh u/s 33 of the Stamps Act against Kotak Mahindra Ltd., and State Bank of India, the Additional District Magistrate (Finance and Revenue), Lucknow has passed an order dated 26.3.2009 u/s 33 of the Stamps Act and the said deed of assignment has been rightly impounded as it was

insufficiently stamped. He has relied upon the decisions of Hon''ble the Supreme Court in Government of Andhra Pradesh and Ors. v. Smt. P. Laxmi Devi 2009 (27) LCD 23 and Avinash Kumar Chauhan Vs. Vijay Krishna Mishra,

24. He further submitted that the Reserve Bank of India cannot issue any guidelines contrary to the two enactments under which the Parliament has permitted the Banks to recover their dues, i.e., Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 which are complete enactments made by the Parliament and as the proceedings initiated by the State Bank of India under Recovery of Debts Due to Banks and Financial Institutions Act, 1993, were pending before the Debt Recovery Tribunal, the State Bank of India has sold the assets of the Helios Company to Kotak Mahindra Bank Ltd. in a most arbitrary and illegal manner. He has relied upon the decision of Hon''ble the Supreme Court in S.L. Sachdev and Another Vs. Union of India (UOI) and Others,

25. He further submitted that the deed of assignment is illegal as the State Bank of India did not issue notice to the petitioner or to the Helios Company prior to execution of the assignment deed and both the Banks were aware of Section 8 of the Transfer of Property Act, 1882 which permits transfer of only the principal amount and not the arrears of interest, the principal loan amount of 48 borrowers amounting to Rs. 167.49 crores was transferred by the deed of assignment dated 16.1.2006 in favour of opposite party No. 4 and the State Bank of India cannot be permitted to accept Rs. 39.77 lakhs from a private Bank when admittedly one time settlement offer of the customer of Rs. 195 lakhs was already there and 25 per cent of the said offer, i.e., 47.5 lakhs was already deposited by the Helios Company with the State Bank of India, which is the country''s biggest public sector bank.

26. Learned Counsel for the petitioner relying upon Section 141 of the Indian Contract Act, 1872 submitted that position of a guarantor is co-extensive with that of the principal borrower subject to the operation of law and in case the initial agreement of loan in furtherance whereof the guarantee taken is amended, the surety is automatically discharged and in case the deed of assignment dated 16.1.2006 is allowed to subsist, the assignee would have no legal right to proceed against the guarantors including the petitioner and since the State Bank of India has parted with the security given by the petitioner/guarantor without the petitioner''s consent, the petitioner stands discharged of his liability.

27. Sri D. K. Pathak, learned Counsel for the opposite parties No. 1 to 3 submitted that the writ petition is not maintainable as the controversy raised by the petitioner in the instant writ petition is purely contractual of civil nature. He has relied upon the decisions of Hon''ble the Supreme Court in Radhakrishna Agarwal and Others Vs. State of Bihar and Others, and State of Bihar and Others Vs. Jain Plastics and Chemicals Ltd.,

28. He further submitted that the petitioner is already contesting the matter before the Debt Recovery Tribunal, Lucknow where a suit preferred by the answering opposite parties under the provisions of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is pending and as such the petitioner cannot invoke the writ Jurisdiction under Article 226 of the Constitution of India and the writ petition being not maintainable, deserves to be dismissed. He has relied upon the decision of Hon"ble the Supreme Court in Punjab National Bank Vs. O.C. Krishnan and Others,

29. He further submitted that the Reserve Bank of India on 13.7.2005 issued the guidelines for purchase and sale of Non-Performing Assets where Securitisation and Reconstruction companies are not involved and thereafter the opposite party No. 1 circulated the detailed guidelines in facilitating the sale of Non-Performing Assets and accordingly a contract by way of deed of assignment dated 16.1.2006 was executed between the opposite party No. 1 and opposite party No. 4, which is a Banking Company within the meaning of Banking Regulation Act, 1949. He further submitted that in spite of various opportunities given to the petitioner and to Helios Company, the amount of the State Bank of India was not paid and in the interest of the Bank, the opposite party No. 1 has sold the Non-Performing Assets of Helios Company to the opposite party No. 4 on port-folio basis in accordance with the guidelines dated 13.7.2005 issued by the Reserve Bank of India.

30. Sri V.B. Upadhyaya, senior advocate, appearing on behalf of opposite party No. 4 submitted that the opposite party No. 4 on the basis of the deed of assignment dated 16.1.2006 has purchased the debts from the State Bank of India which are approximately Rs. 167.49 crores, the details of which are more fully described in Schedule B to the deed of assignment and in the deed of assignment, it is clearly mentioned that the opposite party No. 4 is a Bank and nowhere in the deed of assignment it is mentioned that the opposite party No. 4 is a Securitisation Company or Asset Reconstruction Company under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. He further submitted that the Bank as a secured creditor/mortgagee/hypothecatee is the owner of the debt which is payable by borrower to the Bank and the Bank is entitled to deal with such asset as an absolute owner; is entitled to assign such debt and such assignment will not affect the right and interest of the mortgagor in the property. Learned Counsel for the opposite party No. 4 has relied upon the decisions of Hon"ble the Supreme Court in Indu Kakkar Vs. Haryana State Industrial Development Corporation Ltd. and Another, Khardah Company Limited v. Raymond and Co. (India) Private Limited AIR 1962 SC 1810 and Salim Akbarali Nanji Vs. Union of India (UOI) and Others,

31. He further submitted that the Reserve Bank of India is entitled to issue directions u/s 35A of the Banking Regulation Act, 1949 to banking companies from time to time in public interest and in the interest of banking policy and accordingly on 13.7.2005, the Reserve Bank of India issued guidelines on

purchase/sale of Non-Performing Assets between Banks and as per the policy of the Reserve Bank of India, the State Bank of India by the deed of assignment dated 16.1.2006 has assigned the debts with underlying security to the opposite party No. 4. He has relied upon the decision of the Delhi High Court in Haryana Steel Alloys Limited v. I.F.C.I. Limited and Anr. AIR 2007 Del 65 and the decision of Hon''ble the Supreme Court in Central Bank of India Vs. Ravindra and Others,

32. He further submitted that the petitioner who is the guarantor cannot question about the validity of the deed of assignment on the ground of inadequacy of consideration as the borrower is a third party to such agreement. He has relied upon the decisions in Narain Food Products Ltd. Vs. Tikam Chand and Others, Ram Chandra Singh (deceased by L. Rs.) Vs. Basdeo Singh and Another, Devji Shivji Vs. Karsandas Ramji and Another, Vijay Minerals Pvt. Ltd. Vs. Bikash Chandra Deb, and Sudhakar Sahu Vs. Achutananda Patel and Others,

33. He further submitted that notice of the assignment to debtor is not necessary and Section 130 of the Transfer of Property Act, which relates to transfer of actionable claim, does not require issuance of notice of assignment for completion of transfer of title to the debt but only provides for protection to the debtor in case of his dealings with the original creditor after the transfer. He has relied upon the decisions in N. Subramania Ayyar v. V.S.R.S. Ramasubba Ayyar AIR 1935 Mad 103; Balthazar and Sons Ltd. v. Official Assignee AIR 1938 Rang 426 and Mulkerrins v. Price Waterhouse Coolers 2003 (1) WLR 1937.

He further submitted that by moving an application for one time settlement, the petitioner or Helios Company cannot say that transfer by way of assignment is invalid and that the assignee is entitled to recover from the security or otherwise the full claim irrespective of the consideration as the assignee acquires the absolute interest in the debt and the underlying security. He has relied upon the decision in Core Healthcare Limited v. Nirma Limited (2007) 138 Comp. Cos. 204.

34. He further submitted that no borrower has a right for one time settlement and it can be done only at the discretion of the bank as granting of one time settlement is nothing but varying the contract between the parties which cannot be done by the Court. He has relied upon the decisions in Maria Plasto Pack (P) Ltd. Vs. Managing Director, U.P. Financial Corporation and Others, and Haryana Steel and Alloy Ltd. v. I.F.C.I. Ltd. and Anr. AIR 2007 Del 65.

35. He further submitted that the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 does not restrain the Bank from assigning debts with underlying securities to another Bank and as such the argument of the learned Counsel for the petitioner that no permission was taken by the State Bank of India from the Debt Recovery Tribunal before transferring the debts with underlying securities to the opposite party No. 4 through a deed of assignment is devoid of any merit. Learned Counsel for the opposite party No. 4 has referred to Section 2(g) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

36. He further submitted that Section 52 of the Transfer of Property Act is not attracted as alleged by the learned Counsel for the petitioner as the right of the borrower/mortgagor/petitioner in the immovable property has remained intact which is not affected by the deed of assignment which transfers only the right of the mortgagee and not of the mortgagor and the right to immovable property is not directly or specifically in question.

37. We further submitted that Chapter II of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 does not bar a banking company from assigning or purchasing debts with underlying security and it only provides that a non-banking company, if it wants to carry on the business of securitization or reconstruction will have to obtain the certificate of registration.

38. He further submitted that one of the object of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is to empower banks and financial institutions and also securitization companies to take possession of the securities and to sell them without the intervention of the Court and under Chapter HI the right to enforce security interest has been conferred on banks and financial institutions and also on securitization or asset reconstruction company and the contention of the petitioner that the opposite party No. 4 is not entitled to arrears of interest accrued before the deed of assignment in light of Section 8 of the Transfer of Property Act, 1882 is devoid of any merit as from a bare perusal of Section 8 it is clear that if a different intention is expressed in the contract then the proviso to Section 8 would not apply and in the instant case in the deed of assignment dated 16.1.2006, there is a specific provision with regard to transfer of interest which is due and payable by the borrower.

39. He further submitted that no false statement was ever made by the opposite party No. 4 while getting the deed of assignment registered before the Collector of Stamps, Alibaug, Maharashtra and the contention of the learned Counsel for the petitioner that a false statement/affidavit has been made by the opposite party No. 4 is without any basis as in the deed of assignment, it is clearly mentioned that the opposite party No. 4 is a bank and nowhere it is mentioned that the opposite party No. 4 is a securitization company or asset reconstruction company under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and in the affidavit dated 2.5.2006 filed by the opposite party No. 4, it was inadvertently mentioned that the assignment has been taken place as per the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and as soon as the error was brought to the notice of the opposite party No. 4 the same was immediately corrected. He further submitted that by the affidavit dated 2.5.2006, no benefit has been taken by the opposite party No. 4 either in respect of stamp duty or registration in the State of Maharashtra as the stamp duty for a securitisation company or a bank for assignment of debt is the

same in the State of Maharashtra. He further submitted that nowhere in the counter-affidavit dated 28.4.2009 it has been stated by the deponent that the opposite party No. 4 is a securitisation company or asset reconstruction company and one of the departments of the opposite party No. 4 is dealing with sale/purchase of non-performing assets for which the nomenclature is given as "Asset Reconstruction Division" and by giving the nomenclature it cannot be said that it is an asset reconstruction company or securitisation company under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and no fraud has been committed by the opposite party No. 4 as alleged in the writ petition.

40. He further submitted that a writ is not the proper remedy in contractual matters and the instant writ petition filed by the petitioner for declaration of the assignment deed as null and void is not maintainable and as the petitioner has not come with clean hands, the writ petition deserves to be dismissed.

41. We have considered the submissions made by the learned Counsel for the parties and gone through the record.

42. It is the admitted case of the parties that the petitioner is Director and Guarantor of M/s. Helios Confectionery Private Ltd. which is a small scale industrial unit situated at G-18, U.P.S.I.D.C. Industrial Area, Sandila District Hardoi. The Helios Company being the principal borrower availed financial facilities during the year 1996-97 from the State Bank of India for its unit at Sandila, district Hardoi. The Directors and promoters themselves mobilized a substantial amount of about Rs. 5 crores for the project and the Bank funding was restricted to Rs. 2.23 crores only out of which term loan of Rs. 1.93 crores was repayable in 16 quarterly installments commencing from 31.1.1998 till 31.10.2001. The land was secured; the buildings were erected; and brand new machinery was procured by the company and due to problems of minor nature, such as power curtailment etc. arose which in turn were overcome. In the year 1999 the Helios Company made a request to the State Bank of India for re-schedulement of the loan on account of grave recession through which the confectionery industry was passing and the Credit Appraisal Cell of the State Bank of India in its note to the General Manager, Commercial Banking had mentioned that the promoters are having satisfactory track record. The Helios Company prior to the request of reschedulement having been made, had deposited Rs. 47.68 lakhs with the State Bank of India towards interest. It is admitted case of the parties that in the year 2000, the State Bank of India has filed a suit for recovery of its dues before the Debt Recovery Tribunal, Jabalpur which was later on transferred to Debt Recovery Tribunal Lucknow and is registered as T.A. Case No. 263 of 2002. It is also not disputed that the Valuers of the State Bank of India had visited the factory premises of the Helios Company as late as October, 2002 and as per their valuation report submitted with the State Bank of India the cost of the unit was about Rs. 3.5 crores and accordingly the petitioner on behalf of Helios Company moved an application

before the State Bank of India on 23.12.2002 for one time settlement in accordance with the guidelines of Reserve Bank of India stating, inter alia, that in a final attempt to buy peace and fully conclude the litigation we are making this final offer to the Bank that we are prepared to surrender the unit in its entirety to the Bank alongwith the land, buildings and machinery as is where is and in addition to the above, Helios Company is willing to pay a further sum of Rs. 40 lakhs inclusive of all the legal expenses, stamp duties, registration charges etc. on the transfer of the property in your favour, against all the claims made by the bank against the Company and its Directors and the Bank will withdraw the suit pending at the Debt Recovery Tribunal and also discharge the guarantors, both corporate and individual of their guarantee obligations to the Bank and in pursuance of the one time settlement proposal, the State Bank of India vide letter dated 18.1.2003 asked the Helios Company to deposit a sum of Rs. 40 lakhs in a "No Lien Account" and thereafter a cheque dated 21.1.2003 of Rs. 40 lakhs was deposited with the State Bank of India in a "No Lien Account" by the Helios Company. The State Bank of India insisted for submission of revised offer for one time settlement and the Helios Company thereafter on 10.1.2004 submitted a revised one time settlement proposal to the State Bank of India and offered to pay Rs. 190 lakhs as full and final settlement and a further sum of Rs. 7.5 lakhs was deposited by the Helios Company with the State Bank of India in its "No Lien Account". Thus the total deposit with the State Bank of India was Rs. 47.5 lakhs which is 25 per cent of Rs. 190 lakhs. It is also not disputed that by letter dated 22.3.2004 sent to State Bank of India the Helios Company had increased their offer from Rs. 190 lakhs to Rs. 195 lakhs on further insistence of the State Bank of India and requested that as soon as the acceptance is received with respect to the revised one time settlement proposal the Helios Company would deposit the balance amount in one single instalment. The State Bank of India instead of taking any decision of the offer of one time settlement, kept the matter pending.

43. On 13.7.2005, the Reserve Bank of India had issued a Circular/guidelines in respect of purchase/sale of non-performing assets. Thereafter, the opposite party No. 1 circulated the detailed guidelines for facilitating the sale of non-performing asset.

44. The State Bank of India on 16.1.2006 executed a deed of assignment in favour of M/s. Kotak Mahindra Bank Ltd., opposite party No. 4. Through the said assignment deed, the debts amounting to Rs. 167.49 crores being the principal loan alongwith interest and other amounts of 48 borrowers including the Helios Company were assigned by the State Bank of India in favour of M/s. Kotak Mahindra Bank Ltd. for Rs. 29.76 crores, which is merely 17.77% of the value of the principal loan amount of each non-performing asset. It is also relevant to mention here that against the one time settlement proposal submitted by the Helios Company a sum of Rs. 47.50 lakhs of the Helios Company was with the State Bank of India in "No Lien Account" and the opposite parties 1 to 3 have sold the rights/assets/debts of the Helios Company to the opposite party No. 4

for a meagre amount of Rs. 39.63 lakhs which is even less than the company's deposit of Rs. 47.50 lakhs that was lying with the State Bank of India in "No Lien Account".

45. It is also not disputed that during the pendency of the instant writ petition, the Additional District Magistrate (Finance and Revenue), Lucknow in proceedings u/s 33 of the Stamp Act has passed an order by which the opposite party No. 4 is directed to pay Rs. 4,74,10,160 being the deficiency of stamp duty and also penalty of like amount, i.e., Rs. 4,74,10,160 plus interest at the rate of 1.5 per cent per month from 16.1.2006 till the date of actual payment.

46. During the course of the hearing, on 4.5.2009 learned Counsel for the opposite parties suggested that the offer of the Helios Company for one time settlement was not bona fide and consequently the State Bank of India was within its rights to assign the debt to Kotak Mahindra Bank Ltd. Sri Prashant Chandra, senior advocate, appearing for the petitioner immediately submitted that the petitioner who is Director and Guarantor of M/s. Helios Confectionery Private Limited is still ready to deposit a sum of Rs. 195 lakhs before respondent No. 2 within 48 hours on behalf of M/s. Helios Confectionery Private Limited against the one time settlement offer and to judge the bona fide and seriousness of the petitioner and keeping in view the fact that the approved valuers of the State Bank., of India had assessed the value of the assets of M/s. Helios Confectionery Private Limited at Rs. 141 lakhs, and through the deed of assignment the State Bank of India has sold the assets of the Helios Company for Rs. 39.63 lakhs which is even less than the Helios Company's deposit of Rs. 47.50 lakhs with the State Bank of India at the relevant time and also keeping in view the fact that the deed of assignment dated 16.1.2006 has been impounded by the Additional District Magistrate by the order dated 26.3.2009 and in the interest of the State Exchequer, the petitioner was directed to deposit a sum of Rs. 195 lakhs before respondent No. 2 against the one time settlement within three days. In compliance of the said order dated 4.5.2009 a sum of Rs. 195 lakhs vide demand draft No. 072759 dated 5.5.2009 drawn on Axis Bank, Lucknow was deposited by the petitioner within the time specified by this Court with the State Bank of India.

47. The said order dated 4.5.2009 was passed by this Court in exercise of the equity jurisdiction under Article 226 of the Constitution of India to do justice and to prevent injustice between the parties.

48. Hon''ble the Supreme Court in Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., of report has observed as under:

71. ... Whatever be the position, however, it cannot be denied that the financial institutions, namely, the lenders owe a duty to act fairly and in good faith. There has to be a fair dealing between the parties and the financing companies/institutions are not free to ignore performance of their part of the obligation as a party to the contract. They cannot be free from it. Irrespective of the fact as to

whatever may have been held in decisions of some American courts, in view of the facts and circumstances and the terms of the contract and other details relating to those matters, that may or may not strictly apply, nonetheless, even in absence of any such decisions or legislation, it is incumbent upon such financial institutions to act fairly and in good faith complying with their part of obligations under the contract. This is also the basic principle of the concept of lender's liability. It cannot be a one sided affair shutting out all possible and reasonable remedies to the other party, namely, borrowers and assume all drastic powers for speedier recovery of N.P.As. Possessing more drastic powers calls for exercise of higher degree of good faith and fair play. The borrowers cannot be left remediless in case they have been wronged against or subjected to unfair treatment violating the terms and conditions of the contract. They can always plead in defence deficiencies on the part of the banks and financial institutions.

49. When the deed of assignment was executed on 16.1.2006, admittedly, an offer of the Helios Company for Rs. 195 lakhs was pending with the State Bank of India and by letter dated 22.3.2004. sent to the State Bank of India, the Helios Company had informed that it is ready to deposit ,Rs. 150 lakhs in one single instalment preferably before 31.3.2004 as Rs. 47.5 lakhs was already lying with the State Bank of India in No Lien Account". The one time settlement proposal on 23.12.2002 was moved by the petitioner on behalf of Helios Company being Director and Guarantor. The position of guarantor is co-extensive with that of the principal borrower subject to operation of law. By the deed of assignment dated 16.1.2006, the State Bank of India has transferred both movable and immovable property of the Helios Company. The State Bank of India was not fair in its dealing with the Helios Company as no decision was taken on the one time settlement proposal of the principal borrower, who had deposited 25% (Rs. 47.5 lakhs) of the offered amount with the State Bank of India who is a custodian of public money and the debts of the Helios Company were transferred for a meagre amount of Rs. 39.63 lakhs to Kotak Mahindra Bank Ltd. The contention of the learned Counsel for the opposite parties that the writ petition is not maintainable has no force. The decision relied upon by the learned Counsel for the opposite parties are not applicable to the facts of the present case. The writ petition is maintainable and it was rightly entertained by this Court.

50. It is also admitted case of the parties that in T.A. Case No. 263 of 2002 pending before the Debts Recovery Tribunal, Lucknow an application dated 31.5.2006 was filed by Kotak Mahindra Bank Limited stating, inter alia, that the State Bank of India has assigned all its rights, title, interests and benefit in respect of the present claim against the defendant and a prayer was made that in the title of the original application, the name and the details of Original Applicant, i.e., State Bank of India be deleted and in its place "Kotak Mahindra Bank Ltd." be permitted to be incorporated. It is also the admitted case of the parties that the Helios Company has also filed a counter claim against the State Bank of India before the Debt Recovery Tribunal for the losses suffered by the

Helios Company due to the alleged mala fide and illegal action of the State Bank of India which has been registered as T.A. Case No. 6 of 2006, which is pending before the Debts Recovery Tribunal, Lucknow.

51. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was enacted by Parliament to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected thereto. The Act enables the banks and financial institutions to realise long-term assets, manage problems of liquidity, asset liability mis-match and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. The Act further provides for setting up of asset reconstruction companies which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured assets and take over the management of the business of the borrower. It is admitted case of the opposite parties that Kotak Mahindra Bank Ltd. is not an Asset Reconstruction Company or Securitisation Company. According to Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, a securitisation company or reconstruction company can acquire the financial assets like shares, debentures etc. from any Bank or financial institutions and the asset reconstruction companies are competent to take possession of secured assets of the borrower and have been given power to transfer by way of the deed of assignment.

52. It is thus clear that the opposite parties 1 to 3, in a most arbitrary and illegal manner, has executed the deed of assignment in favour of opposite party No. 4 for a meagre amount of Rs. 39.63 lakhs although a sum of Rs. 47.50 lakhs of the Helios Company was already lying with the State Bank of India in a "No Lien Account" and an offer of Rs. 195 lakhs against one time settlement made by the Helios Company was already pending with the State Bank of India, who is the custodian of the public money.

53. The contention of the petitioner is that the deed of assignment dated 16.1.2006 was obtained by Kotak Mahindra Bank Ltd. by misrepresentation and by playing fraud as in the affidavit filed before the Collector of Stamps, Alibaug, Maharashtra by Mr. Chandrashekhar B. Chavan on behalf of Kotak Mahindra Bank Ltd., it has been stated that Kotak Mahindra Bank Ltd. is an Asset Reconstruction Company (India) Ltd. and the deed of assignment is executed by and between Kotak Mahindra Bank Ltd. and State Bank of India for assigning the debt as per the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

54. The Reserve Bank of India on a query made by the petitioner under the Right to Information Act, 2005 informed the following through letter dated 9.1.2007:

Shri A. Muthu 1, Hermes House Worli Sea Face Mumbai 400 025

Dear Sir,

The Right to Information Act, 2005-Query

Our Ref No. : R.I.A. 8312006-07

Please refer to your letter dated 12.12.2006 in this connection we advise as under:

----- S. No. Query Our
Reply ----- (a)
"Whether Kotak Mahindra Bank Limited No. has been granted Certificate of Registration by Reserve Bank of India, permitting it to commence or carry on the business of securitisation or asset reconstruction, as contemplated under Section 3(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002?"
----- (b) "Whether, while permitting Kotak As stated above Kotak Mahindra Bank Limited to carry on the Mahindra Bank Limited business of securitisation or asset has not been granted reconstruction, the Reserve Bank of Certificate of India has given approval in favour of Registration by Kotak Mahindra Bank Limited to carry Reserve Bank of on the business other than that of India. securitisation or asset reconstruction, as contemplated under Section 10(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002? -----

...

55. During the pendency of the writ petition, Kotak Mahindra Bank Ltd. has filed an affidavit in the office of the Collector of Stamps, Alibaug, Maharashtra which is as under:

Affidavit

I, Mr. Chandrashekhar B. Chavan having my address at A-1/13, Sahyadri Nagar, Charkop, Kandivati (West), Mumbai-400067 do hereby state and declare as under:

1. That I have submitted an affidavit towards adjudication of the Deed of Assignment dated 16.1.2006 executed by Kotak Mahindra Bank Ltd. on one part and State Bank of India on the other part before the Office of the Collector of Stamps, Alibaug;

2. That in the Original Affidavit submitted before the Office of the Collector of Stamps, Alibaug for the above said adjudication of the Deed of Assignment, it was inadvertently mentioned by me as:

(a) Kotak Mahindra Bank Ltd. is an Asset Reconstruction Company (India) Limited and that;

(b) The said Deed of Assignment is executed by and between Kotak Mahindra Bank Ltd. and State Bank of India for assigning the debt as per the provisions of

the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(c) That the total consideration as per agreement is Rs. 167.49 crores.

3. I say that an application was filed by Kotak Mahindra Bank Limited before the Collector of Stamps, Raigad-Alibaug on 13.2.2008 thereby pointing out the various points as listed above which were erroneously mentioned in an Affidavit filed by me and also informing the actual facts to the Office of the Collector of Stamps, Alibaug;

4. I say and submit that after perusing the said application the Office of The Collector of Stamps, Raigad Alibaug has passed an Order dated 27.2.2008 inter alia conforming the payment of stamp duty made by Kotak Mahindra Bank Limited as proper and also directing to file necessary affidavit in support of the application for rectification;

5. In view of the said directions, I hereby would like to declare, state and clarify that the contents in the Original Affidavit filed by me would be replaced as under:

(a) That Kotak Mahindra Bank Ltd. is a public limited company incorporated under the Companies Act, 1956 and a "Bank" within the meaning of The Banking Regulation Act, 1949;

(b) That the said Deed of Assignment is executed by and between Kotak Mahindra Bank Ltd. and State Bank of India for assigning the debt as per the provisions of the N.P.A. guidelines of Reserve Bank of India dated 13.7.2005;

(c) That Rs. 167.49 crores as mentioned in the affidavit is not the total consideration but approximately an aggregate of principal alongwith interest and other amount/s outstanding.

I hereby state that the above facts are true and correct and request the Office of the Collector to take the present Affidavit on record in support of an Application filed by Kotak Mahindra Bank Limited on 13.2.2008.

Solemnly affirmed at Mumbai on this 26.5.2008.

Sd/- Deponent

56. The affidavit which was filed by M/s. Kotak Mahindra Bank Ltd. on 2.5.2006 before the Collector of Stamps, Alibaug for adjudication of the assignment agreement is as follows:

Affidavit

We, M/s. Kotak Mahindra Bank Ltd., of Asset Reconstruction Company (India) Limited, having registered office at 36-38-A, Nariman Bhavan, 227, Nariman Point, Mumbai-400021, have submitted an Assignment Agreement for Adjudication and in that respect do hereby state and declare as under:

That the agreement is executed for assigning the debt as per the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

That the agreement is executed on 16.1.2006.

That the total Consideration as per agreement is Rs. 167.49 crores (rupees).

That the agreement is stamped as per Article 25(a) read with Notification of Bombay Stamp Act, 1958, dated. 6.5.2002, Notification No.

MUDRANK/2002/875/CR/173-M-1, dated 6.5.2002.

I hereby state that the above facts are true and correct. Solemnly affirmed at Mumbai this 2.5.2006.

Deponent

57. The contents of the above two affidavits establishes that the deed of assignment dated 16.1.2006 was obtained by Kotak Mahindra Bank claiming that it is an Asset Reconstruction Company (India) Ltd. and that the agreement is executed for assigning the debt as per the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 although in the counter affidavit they have admitted that Kotak Mahindra Bank is neither a securitisation company nor asset reconstruction company and as such the deed of assignment dated 16.1.2006 is an out come of fraud.

58. Hon''ble the Supreme Court in K.D. Sharma v. Steel Authority of India Ltd. and Ors. (supra) has held in paragraph 17 as under:

17. The Court defined fraud as an act of deliberate deception with the design of securing something by taking unfair advantage of another. In fraud one gains at the loss and cost of another. Even the most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam.

59. Hon''ble the Supreme Court in Hamza Haji v. State of Kerala and Anr. (supra) affirmed the order of the High Court by which the High Court by invoking Article 215 of the Constitution of India set at naught the decision obtained by the appellant by playing fraud on the Tribunal. Hon''ble the Supreme Court also held that the Court in exercise of its jurisdiction under Article 215 has the power to undo a decision that has been obtained by playing fraud on the Court. Similarly in the present writ petition the fraud committed by Kotak Mahindra Bank Ltd. before the Collector of Stamps, Alibaug, Maharashtra by claiming themselves to be an Asset Reconstruction Company (India) Ltd. and thereafter the false statement made in the affidavit that the assignment is under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and that the consideration is Rs. 167.49 crores, are all false and as such, the deed of assignment is liable to be set aside.

60. Hon"ble the Supreme Court in S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, has held that a Judgment or decree obtained by playing fraud on the Court is a nullity and non est in the eye of the law. Such a judgment/decreed-by the first court or by the highest court-has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.

61. The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 are the two enactments under which the Parliament has permitted the Banks to recover their dues. The deed of assignment was executed by the State Bank of India in favour of M/s. Kotak Mahindra Bank Ltd. on the basis of the Circular issued by the Reserve Bank of India on 13.7.2005. Kotak Mahindra Bank Ltd. has not been granted the licence by the Reserve Bank of India to trade in debts or to run the business of asset reconstruction. Hon"ble the Supreme Court in Oriental Bank of Commerce Vs. Sunder Lal Jain and Another, has held as under:

10. It is important to note that the revised guidelines issued by Reserve Bank of India on 29.1.2003 are only in the nature of internal guidelines for the banks and financial institutions. They are purely executive instructions and have no statutory force. They do not create any right in favour of the borrowers. In order to avail relief under the guidelines, the eligibility criteria must be strictly fulfilled and one of them is that the account must be an N.P.A. as on 31.3.2000. What the respondents want is that a writ of mandamus be issued commanding the appellant Bank to declare the respondents' account as N.P.A. from 31.3.2000 and apply the R.B.I. guidelines to their case whereby their liability towards the appellant Bank will be considerably reduced by way of one-time, settlement.

62. The Circular/guidelines issued by the Reserve Bank of India dated 13.7.2005 under which the assets/debt of the Company have been sold by State Bank of India in favour of Kotak Mahindra Bank are not statutory and are merely executive directions. When the Legislature has provided two separate enactments, viz., the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, there was no occasion for the State Bank of India to make its recovery under the guidelines issued by the Reserve Bank of India, especially when it had already proceeded with its recovery under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, which has been enacted by the Parliament for the purpose of recoveries to be made by the Banks and Financial Institutions.

63. Hon"ble the Supreme Court in S.L. Sachdev and Anr. v. Union of India and Ors. (supra) in paragraph 13 of the report has held as under:

13. Apart from this consideration, we are unable to understand how the Director General could issue any directive which is inconsistent with the Recruitment

Rules of 1969 framed by the President in the exercise of his powers under Article 309 of the Constitution. Those Rules do not provide for the kind of classification which is made by the Director General by his letters to the Heads of respective Circles of the new Organisation. It may be recalled that the Recruitment Rules only provide for a classification on the basis of the length of service in the new Organisation. Any directive which goes beyond it and superimposes a new criterion on the Rules will be bad as lacking in jurisdiction. No one can issue a direction which, in substance and effect, amounts to an amendment of the Rules made by the President under Article 309. That is elementary. We are unable to accept the learned Attorney-General's submission that the directive of the Director General is aimed at further and better implementation of the Recruitment Rules. Clearly, it introduces an amendment to the Rules by prescribing one more test for determining whether U.D.Cs. drawn from the Audit offices are eligible for promotion the Selection Grade/Head Clerks Cadre.

64. The Reserve Bank of India cannot issue a guideline contrary to the two enactments under which the Parliament has permitted the Banks to recover their dues. Hon''ble the Supreme Court in *Union of India (UOI) and Others Vs. Arun Kumar Roy*, has held that a notification cannot override rules statutorily made and as such the guidelines issued by the Reserve Bank of India cannot override the provisions of the two enactments, i.e., *Recovery of Debts Due to Banks and Financial Institutions Act, 1993* and *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002*.

65. *Kotak Mahindra Bank Ltd.* is a private Bank and it cannot be permitted to earn profit at the cost of Government. The State Bank of India which is the premier bank of the country is a custodian of public funds. The deed of assignment dated 16.1.2006 which was insufficiently stamped was impounded by the Additional District Magistrate (Finance and Revenue), Lucknow vide order dated 26.3.2009. Hon''ble the Supreme Court in *Government of Andhra Pradesh and Ors. v. Smt. P. Laxmi Devi (supra)* has held that an insufficiently stamped document is not to be returned but it must be impounded. The deed of assignment dated 16.1.2006 being insufficiently stamped cannot be read in evidence and it cannot be used for any collateral purposes even in proceedings pending before the Debt Recovery Tribunal, Lucknow.

66. Hon''ble the Supreme Court in *LIC of India and Another Vs. Consumer Education and Research center and Others*, has held as under:

In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined in a manner that is fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest end it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the

public authority or those under public duty or obligation must be informed by reason and guided by the public interest. It is the exercise of the public power or action hedged by public element that becomes open to challenge. If it is shown that the exercise of power is arbitrary, unjust and unfair, it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens simpliciter do in the field of private law. Its actions must be based on some rational and relevant principles. It must not be guided by irrational or irrelevant considerations. Every administrative decision must be hedged by reasons.

67. Hon''ble the Supreme Court in the case of Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation, has held in paragraph 14 as under:

The public property owned by the State or by any instrumentality of the State should be generally sold by public auction or by inviting tenders. This Court has been insisting upon that rule, not only to get the highest price for the property but also to ensure fairness in the activities of the State and public authorities. They should undoubtedly act fairly. Their actions should be legitimate. Their dealings should be aboveboard. Their transactions should be without aversion or affection. Nothing should be suggestive of discrimination. Nothing should be done by them which gives an impression of bias, favoritism or nepotism. Ordinarily these factors would be absent if the matter is brought to public auction or sale by tenders.

68. Learned Counsel for the opposite party No. 4 has relied upon the decision of this Court in Narain Food Products Limited v. Tikam Chand and Ors. (supra). In the said decision private parties had entered into an agreement whereas in the instant case it is the State Bank of India which is a public financial institution which has entered into an agreement with M/s. Kotak Mahindra Bank Ltd. during the pendency of suit filed before the Debt Recovery Tribunal without seeking permission of the Tribunal.

69. In Vijaya Minerals Private Limited v. Bikash Chandra Deb (supra) the suit was filed for specific performance of contract between the private parties. In the instant case the State Bank of India did not accept the offer of Rs. 195 lakhs under the one time settlement proposal of the principal borrower and had accepted Rs. 39.63 lakhs from Kotak Mahindra Bank Ltd. for same debt through assignment deed which is under challenge. The petitioner, therefore, is not entitled for protection u/s 141 of the Contract Act.

70. In Sudhakar Sahu v. Achutananda Patel and Ors. (supra) the suit was filed for specific performance of contract between private parties. The said Judgment passed by a single Judge of Orissa High Court, it has been held that a rank trespasser and a total stranger cannot question non-passing of consideration but in the instant case the petitioner is the Director and Guarantor of the Helios

Company. The State Bank of India has sold the Helios Company's debt at a much lesser price of Rs. 39.63 lakhs which is Rs. 155.37 lakhs lower than what was offered by the Helios Company under the one time settlement.

71. The decisions in *Indu Kakkar v. Haryana State Industrial Development Corporation Limited* (supra) and *Khardah Company Limited v. Raymond and Co. (India) Private Limited* (supra) relied upon by the learned Counsel for the opposite party No. 4 are of no help to the petitioner as the opposite party No. 4 has purchased the litigation from the State Bank of India during the pendency of the case before the Debt Recovery Tribunal, Lucknow. The State Bank of India had not sought any prior permission from the Debt Recovery Tribunal and had assigned the Asset of Helios Company in favour of Kotak Mahindra Bank Ltd. which is hit by Section 52 of the Transfer of Property Act.

72. The law laid down by the Delhi High Court in *Haryana Steel Alloys Limited v. I.F.C.I. Limited and Anr.* (supra) is also not applicable to the facts of the present case as in the said case the borrower did not pay the amount demanded by the I.F.C.I. Limited to settle the matter by way of the one time settlement. In the instant case the Helios Company had been requesting the State Bank of India to settle the matter and several one time settlement proposals were given since the year 2002 and as per direction of the State Bank of India 25% (Rs. 47.5 lakhs) against the one time settlement offered was also deposited by the State Bank of India which was lying with them when the deed of assignment was executed.

73. None of the case law relied upon by the learned Counsel for the opposite parties pertain to deed of assignment having been executed by a nationalized bank and having the elements of public money.

74. Since during the course of the instant writ petition the deed of assignment dated 16.1.2006, which was insufficiently stamped, has been impounded by the Additional District Magistrate (Finance and Revenue), Lucknow by his order dated 26.3.2009, the said deed of assignment dated 16.1.2006, by which the debts of M/s. Helios Confectionery Private Ltd. were transferred in favour of Kotak Mahindra Bank Ltd., is an invalid document.

75. The action of the opposite parties 1 to 3 in executing the deed of assignment in respect of the assets of the Helios Company of which the petitioner is the Director and Guarantor during the pendency of the suit in the Debt Recovery Tribunal is mala fide and illegal. The position of a guarantor is co-extensive with that of the principal borrower subject to operation of law, and in case the initial agreement, in furtherance whereof the guarantee has been taken, is amended, the surety is automatically discharged. The petitioner being guarantor is absolved of his liabilities in view Section 141 of the Indian Contract Act as sale of debt of the Helios Company has been made for a meagre amount of Rs. 39.63 lakhs, through the assignment deed dated 16.1.2006, ignoring the offer of Rs. 195 lakhs made by the Helios Company towards one time settlement.

76. Now the question comes as to what relief this Court can give to M/s. Helios

Confectionery Private Ltd. which has deposited Rs. 195 lakhs in compliance of the order dated 4.5.2009.

77. The Helios Company who is the principal borrower availed financial facilities during the year 1996-97 from the State Bank of India. The Directors and promoters themselves mobilized about Rs. 5 crores for the project and the Bank funding was restricted to Rs. 2.23 crores only which was repayable in 16 instalments commencing from 31.1.1998. The Helios Company in the year 1999 made a request for the re-schedulement of the loan on account of grave recession in the confectionery industry. The Helios Company also deposited Rs. 47.68 lakhs with the State Bank of India towards interest alone. The State Bank of India did not grant re-schedulement and instead approached the Debt Recovery Tribunal and filed a suit for recovery. During the pendency of the suit the Helios Company approached the State Bank of India and, pursuant to the guidelines of the Reserve Bank of India, made an offer for one time settlement on 23.12.2002. The said offer was submitted by the petitioner who is Director and Guarantor of the Helios Company. The State Bank of India requested the Helios Company to deposit Rs. 40 lakhs in "No Lien Account" which was promptly done on 21.1.2003. The State Bank of India thereafter insisted for submission of revised offer and the Helios Company submitted a revised one time Settlement and offered Rs. 190 lakhs as full and final settlement vide its offer dated 10.1.2004. The Company also deposited a sum of Rs. 7.5 lakhs with the State Bank of India, thus increasing the initial deposit to a total sum of Rs. 47.5 lakhs, being 25% of the offer of one time settlement. On further insistence of State Bank of India the said one time settlement offer was increased from Rs. 190 lakhs to Rs. 195 lakhs and it was indicated that the balance amount shall be deposited by the Helios Company in one instalment. The State Bank of India did not take decision and instead kept the matter pending and suddenly a deed of assignment was executed on 16.1.2006 in favour of Kotak Mahindra Bank Ltd. during the pendency of the recovery suit pending in Debt Recovery Tribunal for Rs. 39.63 lakhs which is even less than the Helios Company's deposit of Rs. 47.50 lakhs with the State Bank of India which was returned to the company after execution of the assignment deed. The opposite parties 1 to 3 have admitted that the valuers of State Bank of India had assessed the value of the assets of Helios Company at Rs. 141 lakhs.

78. The State Bank of India is a custodian of public money and by the deed of assignment which is under challenge the debts amounting to Rs. 167.49 crores being the principal loan alongwith interest of 48 borrowers including the Helios Company were assigned in favour of Kotak Mahindra Bank Ltd. for Rs. 29.76 crores which is 17.77% of the value of principal loan amount of each Non-performing Asset.

79. In pursuance of the order dated 4.5.2009, the Helios Company of which the petitioner is the Director and Guarantor has deposited a sum of Rs. 195 lakhs with the State Bank of India on 5.5.2009. The order dated 4.5.2009 was passed

by this Court in exercise of the equity Jurisdiction of this Court under Article 226 of the Constitution of India.

80. We have already held that the deed of assignment dated 16.1.2006 is an outcome of fraud as Kotak Mahindra Bank Ltd. is neither an Asset Reconstruction Company or Securitisation Company as defined under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the deed of assignment has been declared as insufficiently stamped by the Additional District Magistrate (Finance and Revenue), Lucknow.

81. Hon"ble the Supreme Court in the case of Jammigumpula Sivaiah v. A.P. State Financial Corporation and Ors. (2004) 13 SCC 653, has affirmed the judgment passed by the Andhra Pradesh High Court by which the sale made by A. P. State Financial Corporation was set aside on the ground that the procedure followed was neither transparent nor fair. Hon"ble the Supreme Court has also held that the lessee who was put in possession, pending litigation, will have no right and will have to vacate forthwith.

82. Since the Helios Company has deposited Rs. 195 lakhs which amount was the offer of one time settlement made by it, on the insistence of the State Bank of India, the one time settlement offer of Rs. 195 lakhs shall be final and binding between the parties. The amount of Rs. 195 lakhs deposited by the Helios Company pursuant to the order dated 4.5.2009 shall be accepted and adjusted by the State Bank of India towards one time settlement.

83. It is relevant to mention here that initially, Sri D. K. Pathak, advocate, was appearing on behalf of the State Bank of India, opposite parties 1 to 3 and subsequently he also filed his vakalatnama on behalf of Kotak Mahindra Bank Ltd., opposite party No. 4, thus, State Bank of India and Kotak Mahindra Bank Ltd. have jointly contested the matter before this Court.

84. In the result, the writ petition succeeds and is hereby allowed. The deed of assignment dated 16.1.2006, a copy of which is annexed as Annexure-1 to the writ petition, so far as it relates to transfer of the assets of M/s. Helios Confectionery Private Ltd. by the State Bank of India in favour of Kotak Mahindra Bank Ltd. is hereby quashed. A writ of mandamus is issued directing the opposite parties 1 to 3 to accept and adjust the amount of Rs. 195 lakhs deposited by M/s. Helios Confectionery Private Ltd. with the State Bank of India on 5.5.2009 towards one time settlement offer of M/s. Helios Confectionery Private Ltd. and the State Bank of India shall release the charge on the property of M/s. Helios Confectionery Private Ltd.

85. Under the circumstance, there shall be no order as to costs.