

(2010) 11 KL CK 0015

In the High Court Of Kerala

Case No : Writ Petition (C) No. 25000 of 2010

BPL and PSP Workers Union

APPELLANT

Vs

BPL Ltd. and Others

RESPONDENT

Date of Decision : 22-11-2010

Acts Referred:

Banking Regulation Act, 1949 — Section 5, 5(2), 5(b), 6, 6(1)(n)
Companies Act, 1956 — Section 391, 392, 393, 394
Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 23
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 2(g)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 10, 13, 13(2), 13(4), 13(9)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15
Transfer of Property Act, 1882 — Section 69, 69A

Citation : (2011) 1 KLJ 569

Hon'ble Judges : C.K. Abdul Rehim, J

Bench : Single Bench

Advocate : P.K. Suresh Kumar; Santhosh Mathew; Sathish Ninan; Arun Thomas; Jennis Stephen and A.M. Shaffique, for the Appellant; E.K. Nandakumar ; A.K. Jayasankar Nambiar ; K. John Mathai ; P. Benny Thomas ; P. Gopinath Menon ; V. Chitambaresh (Sr.); H. Ramanan ; Manu George Kuruvilla ; Pravin Samadani (Sr.); George Thomas (Sr.); Susheel Joseph Cyriac ; M. Pathrose Matthai (Sr.); Saji Varghese and Mariam Mathai, for the Respondent

Final Decision : Dismissed

Judgement

C.K. Abdul Rehim, J.—The petitioner in WP(C).No. 27021/2010 is a Public Limited Company incorporated under the provisions of the Companies Act 1956, carries on business inter alia in manufacturing medical equipments in the field of cardiology, patient monitoring, imaging etc (hereinafter referred to as the petitioner company). They are also manufactures of Printed Circuit Boards and alkaline Batteries. The company claims to be providing employment to about 1200 persons, directly and indirectly. The factory of the petitioner company is located at Palakkad in Kerala. The petitioner in WP(C).No. 25000/2010 is a trade

union registered under the provisions of the Trade Unions Act 1926, representing workers of the petitioner company. The challenge in these writ petitions is against proceedings initiated u/s 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI Act) by M/s. Pegasus Assets Reconstruction Private Limited (respondent No. 1 in WPC. 27921/2010 and respondent No. 3 in WPC. No. 25000/2010) against the assets of the petitioner company.

2. Parties in both these writ petitions are one and the same. The pleadings on facts and grounds, as well as exhibits produced are more or less the same in both these cases. For the sake of convenience, the order of the parties as well as the order of exhibits is referred hereinafter as in its order in WP(C). No. 27021/2010.

3. A brief history on the facts of the case is as follows. With respect to liquidating debts of the petitioner company, an arrangement with its secured creditors and preferential share holders were evolved in the form of a scheme, which was filed before this court under the provisions of section 391 to 394 of the Companies Act. The scheme was approved with effect from 31.3.2003, through Ext. P1 judgment in C.P. No. 13/2005. By virtue of the scheme, the debts of the petitioner company as on 31.3.2003 along with underlying securities were restructured and the rights and liabilities between the petitioner and its secured creditors and preferential share holders were settled. The scheme in question is produced as Ext. P2.

4. An Assets Reconstruction Company, viz. M/s. Assets Reconstruction Company of India Limited (ARCIL) had acquired debts and secured assets of the petitioner company from its various secured creditors (Banks and other financial institutions) by virtue of separate agreements. M/s. ARCIL, through agreements dated 5.4.2008 and 7.4.2008 had assigned their rights along with the underlying securities, which constitute 55% of the total debts of the petitioner company, in favour of the 2nd respondent, which is a banking company constituted under the provisions of the Banking Regulation Act 1949 (BR Act). Exts. P3 and P4 are the agreements executed between ARCIL and the 2nd respondent. The 2nd respondent in turn assigned the above debts and underlying securities in favour of the 1st respondent, which again is another asset reconstruction company, by virtue of Ext. P5 agreement.

5. According to the petitioner company, they were negotiating with the 2nd respondent Bank for settlement of the liabilities. But pursuant to Ext. P5 agreement the 1st respondent caused Ext. P7 legal notice calling upon the petitioner company to make payment of outstanding balance of Rs. 275,47,28,329.14 (Rupees Two Hundred and Seventy Five crores, Forty Seven lakhs, Twenty Eight Thousand, Three Hundred and Twenty Nine and paise Fourteen only). The petitioner company had caused Ext. P8 reply requesting the 1st respondent not to precipitate the issue since negotiations with the 2nd respondent was at close to finalisation of settlement. The 1st respondent was

requested to wait till finalisation of the proposed settlement. But the 1st Respondent issued demand notice u/s 13(2) of the SARFAESI Act as per Ext. P9. Eventhough the petitioner company had addressed the 2nd respondent Bank to permit settlement of the liabilities in terms of the "one time settlement" arrived upon, the 2nd respondent, through Ext. P11 letter, had denied of having any such settlement. The petitioner company thereupon caused reply to the demand u/s 13(2), which was considered and rejected by the 1st respondent through Ext. P13. Subsequently the 1st respondent had issued Ext. P14 series notices under the Security Interest (Enforcement) Rules 2002 intimating steps taken as contemplated u/s 13(4) of the SARFAESI Act. The publication of possession notice was effected through Ext. P15.

6. In both these writ petitions the proceedings initiated u/s 13 of the SARFAESI Act is challenged more or less on the same grounds. Specific contention is that, the acquisition of financial assets by a securitization/reconstruction company from another securitization/reconstruction company is not permissible under the provisions of the SARFAESI Act as clarified by Reserve Bank of India in its Master Circular dated 1.7.2010 (Ext. P16). It was also contended that Section 5 of the SARFAESI Act which permits acquisition of any financial assets of a bank or a financial institution by any securitisation or reconstruction company, does not contemplates a further transfer of such financial assets to any other Bank or a financial institution or a transfer by one securitisation or reconstruction company to another securitisation or reconstruction company. In other words, the provisions does not contemplate transfer of a financial asset already acquired by a securitisation company or a reconstruction company to any other Bank, or to any other securitization/reconstruction company. The contention is that the provision contemplates only one transfer and not any subsequent transfers. There is no provision enabling an Asset Reconstruction Company (ARC) or a securitisation company for a subsequent transfer of the secured assets and for that reason subsequent transfers if any effected is without jurisdiction and illegal. The powers conferred on a Securitisation/ARC u/s 13 of the Act is only to proceed against the borrower, notwithstanding anything contained in section 69 or 69A of the Transfer of Property Act, in order to enforce a security without intervention of the court or Tribunal, and such power can only be exercised in the manner prescribed under the provisions contained in the Act, and any deviation from the same cannot be permitted, is the contention.

7. In view of the above proposition canvassed, contention of the petitioner is that; the transfer of the debts and underlying securities of the petitioner company by M/s. ARCIL to the 2nd respondent and the subsequent transfer by the 2nd respondent to the 1st respondent are illegal and invalid, and therefore the 1st respondent is not entitled to invoke section 13 of the SARFAESI Act. According to the petitioner, the contents of Ext. P13 letter to the effect that the petitioner had already accepted and acquiesced the transaction, could not be of no avail, because the agreement between ARCIL and the 2nd respondent or between the 2nd respondent and the 1st respondent does not indicate any

transfer of the rights to initiate proceedings under the SARFAESI Act. When a statute does not permit certain transfers, mere waiver or acquiescence will not amount to legalising such illegal transfer. Since the transfers are void ab initio, the question of consent or acquiescence does not arise, is the contention.

8. It is further contended that the 2nd respondent is a banking company under the BR Act and its activity is strictly confined to that of "Banking" as defined u/s 5 (b) of the BR Act. Being a Bank, the 2nd respondent is restrained from undertaking any activity not permitted u/s 6 of the BR Act. u/s 8 of the BR Act the Banks are prohibited from engaging in any trading or buying and selling, subject to certain exceptions set out therein. Therefore, the acquisition of debts by respondent No. 2 from ARCIL is not an activity coming within the purview of the BR Act. The agreement between ARCIL and the 2nd respondent is in the nature of a speculative trading activity which is prohibited under the provisions of the BR Act. It is also contended that such an activity is prohibited under the provisions of the SARFAESI Act since section 5 of that Act permits only securitization/reconstruction companies to acquire financial assets. Since the 2nd respondent had never validly acquired any title to the debts of the petitioner, any subsequent transfer made by the 2nd respondent is void ab initio. The alleged acquisition by way of agreement between respondents 1 and 2 is a "non est" in the eye of law and it will not confer any right on the 1st respondent, is the contention.

9. According to the petitioner the entire transaction of assignment of debts of petitioner Company by ARCIL to the 2nd respondent and the further transaction of assignment by the 2nd respondent to the 1st respondent were done only to circumvent the provisions of law restricting such transfers. Therefore it is contended that the transactions are colourable and carried out in order to defeat the legal restrictions. It is contended that such transactions were done only with an unlawful intention of circumventing provisions of the SARFAESI Act and such contract is therefore void ab initio under the provisions of Section 23 of the Indian Contract Act 1872. Further contention is that since the 2nd respondent held the debts only for a short period of less than three months, it is evident that the said respondent was trading in debts, circumventing the guidelines and the norms prescribed by Reserve Bank of India. Therefore the petitioner is seeking to quash the proceedings initiated under the SARFAESI Act.

10. In the counter affidavit filed by respondents 1 and 2, maintainability of these writ petitions were challenged on the basis of availability of efficacious remedies provided under the SARFAESI Act. Various legal precedents were pointed out in which the Hon'ble Supreme Court had deprecated the practice followed by some of the High Courts in interfering with steps initiated under the SARFAESI Act, exercising power under Article 226 of the Constitution of India. The restrictions imposed u/s 34 of the SARFAESI Act barring interference of the civil courts, was also pointed out. Further contention is that the petitioner company had accepted the 1st respondent as the ultimate assignee of its debts and also made

repayments to the 1st respondent. On the basis of such acceptance and acquiescence the petitioner company could not challenge the transfer of debts and assets in favour of the 1st respondent, is the contention. The petitioner company was also accused with suppression of material facts from this court, like filing of WP(C).No. 25000/2010 by the trade union seeking identical reliefs on the very same grounds.

11. According to respondents there was a clear attempt of misleading, which had resulted in multiplicity of proceedings and abuse of the process of law. Impleading of the 2nd respondent and the non impleading of ARCIL were pointed out in order to contend that there is mis-joinder as well as non-joinder of necessary parties. It is further contended that, the acquisition of debts of the petitioner company was done after obtaining sanction from the 3rd respondent, the Reserve Bank of India. Copy of the request made by the 1st respondent in this regard and the sanction issued by the 3rd respondent are produced along with the counter affidavit of the 1st respondent as Exts. R1(B) and R1(C) respectively. It is further contended that subsequent to the transfer of assets, the petitioner company had effected part repayments to the 1 Respondent, to the tune of a sum of Rs. 30,01,55,000/-. Ext. R1(E) series letters are produced to show that the petitioner company had confirmed/acknowledged the debt due to the 1st respondent and also acknowledged the amounts outstanding, as on 30.11.2009. It is further pointed out that the petitioner company, in its annual report for the financial year 2008-09, had recognised the first respondent as its creditor and in the auditors report it is admitted that the petitioner company had defaulted repayments of amounts due to the consortium lenders comprised of the first respondent. The first respondent also points out that replies issued by the petitioner to the statutory notices, Ext. R1(G) and R1(H) will indicate acknowledgment of the outstanding liability due to the first respondent.

12. According to the 1st Respondent, acquisition of any debt by a Bank and/or a subsequent assignment thereof is only an act incidental/conducive to advancement of business of banking, which is permitted u/s 6(1)(n) of the BR Act. The assignment of security is a legally accepted right when the debt is sold or purchased among banks. The sale and purchase of debt/non performing debt is not an independent activity carried out by the Banks, but it is a banking activity arising out of and closely related to banking business, is the contention. Since respondent No. 3 had approved the assignment in favour of respondent No. 1, through Ext. R1(C), the petitioner can hardly contend that the assignment is violative of the BR Act. It is stated that, the BR Act does not prohibit in any manner a banking company from dealing on its debts. On the other hand, section 8 of the BR Act specifically permits such dealing, and therefore the argument of the petitioner that the banking company is not permitted to deal with debts under the BR Act, is highly misconceived and untenable, is the contention.

13. It is further contended that the provisions of the SARFAESI Act does not prohibit a banking company from acquiring or otherwise dealing in securities. A

financial asset within the meaning of the SARFAESI Act includes a debt with underlying security. Therefore contention of the 1st Respondent that the SARFAESI Act does not envisage dealing in debt by a Bank, is incomprehensible. Section 13 of the Act provides enforcement of a security interest by any secured creditor including a banking company or an asset reconstruction company, and the same does not draw a distinction between the powers of a banking company and an asset reconstruction company, as far as enforcement of the securities held by them. Therefore the contentions attempting any such distinction is not legally tenable, is the argument.

14. The contentions of the petitioner that, section 5 will prohibit acquisition of any financial asset by a Bank or a financial institution from an asset reconstruction company, is refuted. It is also refuted that section 5(2) does not contemplate transfer of financial assets in between securitisation company or reconstruction company or bank or financial institution inter se. According to the respondents, it is well settled law that unless the Act expressly prohibit such transfers, they are deemed to be permitted. The SARFAESI Act does not restrict in any manner any number of transfers, is the contention.

15. According to the 1st respondent the proceedings initiated u/s 13 of the SARFAESI Act is perfectly legal and valid, because the transfers and acquisitions through which the debts and the underlying securities were assigned to the 1st Respondent is legal and valid. The allegations of the petitioner describing the assignment as a colourable transaction is stoutly denied and the further allegations that such transfer was carried out in order to defeat the legal restrictions on assignments of debts, is also denied. The allegation that such transactions were initiated only for circumventing the provisions, norms etc. are totally baseless. The further allegation that the assignment agreements were executed with an unlawful object is denied. The contentions that such agreements are hit by the provisions of section 23 of the Indian Contract Act is also refuted. The allegation that the assignment is non est and it is a sham transaction was stoutly denied. There is no basis for the contention that such assignments will not confer any valid rights on respondent No. 1, is the argument. The contentions based on alleged violation of section 13(9) of the SARFAESI Act was also denied by the 1st respondent.

16. Heard Mr. A.M. Shaffique, senior counsel appearing for the petitioner in WP(C).No. 27021/10 and Mr. P.K. Suresh Kumar, counsel appearing for the petitioner in WP(C). No. 25000/10. On behalf of the 1st Respondent, Mr. Pravin Samdani, senior counsel addressed elaborate arguments. M/s. ICICI Bank Limited, who got themselves impleaded as additional respondents in both these cases was represented by Mr. Pathrose Mathai, Senior Advocate. The 2nd respondent Bank was represented through Mr. V Chithambaresh, Senior Advocate.

17. I am inclined to consider the question regarding maintainability of these writ petitions as a foremost issue. Mr. Samdani raised a contention that, challenge

against the proceedings u/s 13 of the SARFAESI Act could not be entertained under Article 226 of the Constitution of India, in view of Section 17(1) of the said Act. It is provided u/s 17(1) that any person including the borrower if aggrieved by any of the measures referred to in sub-section 4 of Section 13, is at liberty to approach the Debts Recovery Tribunal making an application in the matter, within 45 days from the date on which such measures are taken. Placing reliance on *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, learned counsel contended that the proceedings u/s 17 of the Act, is not an appellate in nature. The Hon"ble Supreme Court observed that it seems to be a misnomer and in fact it is the initial action which is brought before a forum as prescribed under the Act. It is the stage of initial proceedings like filing of a suit in civil court. The Hon"ble Supreme Court observed that, as a matter of fact, a proceedings u/s 17 of the Act are in lieu of a civil suit, which remedy is ordinarily available, but for the bar u/s 34 of the Act. It is pointed out that, the Hon"ble Supreme Court had struck down the provisions contained u/s 17(2) (which then existed) insisting a pre-condition for payment of 75% of the amount. Further, amendments brought in, with effect from 11.11.2004, had relieved the borrower from, the burden of making any pre-deposit. Therefore it is contended that invoking remedy u/s 17(1) is more efficacious. In a very recent decision of the Hon"ble Supreme Court in *United Bank of India Vs. Satyawati Tondon and Others*, it was held that the remedy provided u/s 17 is equally efficacious. It is found that sub-section 2 of Section 17 casts a duty on the Tribunal to consider whether the measures taken by the secured creditor for enforcement of security interest are in accordance with the provisions of the Act and the Rules. If the Tribunal comes to the conclusion that the measures taken by the secured creditor are not in consonance with sub-section (4) of Section 13, then it can direct the secured creditor to restore management of the business or possession of the secured assets to the borrower. The apex court held that the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debts Recovery Tribunal. The effect of some of the provisions may be a bit harsh for some of the borrowers, but on that ground the impugned provisions of the Act cannot be said to be unconstitutional, in view of the fact that the object of the Act is to achieve speedier recovery of dues declared as "NPAs" and to achieve better availability of capital liquidity and resources to help in growth in economy of the country and welfare of the people in general, which would subserve the public interest. In the said decision, the Hon"ble apex court opined that the High Courts while exercising its extra ordinary jurisdiction under Article 226 is duty-bound to take all the relevant facts and circumstances into consideration. Pointing out to the availability of effective alternate remedies the Hon"ble apex court expressed serious concern that, despite repeated pronouncements, the High Courts continue to ignore the availability of statutory remedies under DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of Banks and other financial institutions for recover their dues. The Hon"ble apex court also observed that they hope and trust that in future the High Courts will

exercise their discretion in such matters with greater caution, care and circumspection.

18. Per contra, Mr. Shaffique put forth arguments contending that the proceedings now initiated by the 1st respondent is wholly without jurisdiction and in such case availability of alternate remedy is not a bar for the High Courts to exercise jurisdiction under Article 226. He relied on the decision of the Hon''ble Supreme Court in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, in support of the above proposition. It is held therein that having regard to the facts of each case the High Court has a discretion to entertain a writ petition. But the High Court has to impose upon restrictions, one of which is that, if an effective and efficacious remedy is available the High Court would not normally exercise its jurisdiction. But it is held that the alternative remedy will not operate as a bar in at least three contingencies, namely, where the writ petition has been filed for enforcement of any of the Fundamental Rights or where there has been a violation of principle of natural justice or where the order or proceedings are wholly without jurisdiction or when the vires of an Act is challenged. A legal proposition somewhat identical in nature was reiterated by the Hon''ble Supreme Court in Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, , following the dictum laid in Whirlpool Corporation's case (cited supra). According to Mr. Shaffique, the observations contained in the United Bank of India's case (cited supra) are subject to propositions laid in the above two decisions, and the exemptions mentioned therein are still available, which comes within the absolute discretion of the High Courts to exercise writ jurisdiction under Article 226.

19. While considering the rival submissions, it is pertinent to take note of certain observations made by the Hon''ble Supreme Court in United Bank of India's case.

It is thus evident that the remedies available to both expeditious and effective. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rig our in matters involving recovery of taxes, cess, fees, other types public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person

or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, : Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, and Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order.

20. Considering the dictum laid as above, which directly deals with the question regarding exercise of writ jurisdiction when the remedy provided under the SARFAESI Act is efficacious, I am of the view that the petitioners have not been able to make out any strong circumstances which warrants exercise of the discretionary jurisdiction, despite availability of the effective alternate remedy, which will squarely fall within any of the contingencies enumerated in Whirlpool's case which was reiterated in Harbanslal Sahnia's case. Hence I am of the view that the writ petitions need not be entertained based on the challenges raised, and the petitioners herein can be given liberty to invoke remedies available u/s 17(1).

21. However, since a basic legal question is raised regarding the validity of the transfer of debts and underlying securities, and since elaborate arguments were advanced from both sides on that issue, I am constrained to consider those aspects. One of the main contentions raised is that Section 5(1) of the SARFAESI Act will not enable any Bank or financial institution to acquire the financial assets of any other Banks or financial institutions. It is contended that no Bank or

financial institution is empowered to conduct trading on assets. Further contention is that no securitisation company or reconstruction company is entitled to transfer the financial assets acquired by such company to any other securitisation/reconstruction company or to any other Bank/financial institution. In order to have a better appreciation it will be beneficial to examine the relevant provisions of the SARFAESI Act. Section 5(1) to (4) deals with acquisition of rights or interests in financial assets, which reads as follows:-

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

(a) by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the Bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them; or

(b) by entering into an agreement with such Bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as maybe agreed upon between them.

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

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

(4) If, on the date of acquisition of financial asset under sub-section (1), any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, save as provided in the third proviso to sub-section (1) of section 15 of the Sick Industrial

Companies (Special Provisions) Act, 1985 (1 of 1986) the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the securitisation company or reconstruction company, as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the securitisation company or reconstruction company, as the case maybe.

Section 9 of the SARFAESI Act deals with measures for assets reconstruction, which reads as follows :-

9. Measures for assets reconstruction-

Without prejudice to the provisions contained in any other law for the time being- in force, a securitisation company or reconstruction company may, for the purposes of asset reconstruction, having regard to the guidelines framed by the Reserve Bank in this behalf, provide for any one or more of the following measures, namely-

- (a) the proper management of the business of the borrower, by change in, or take over of, the management of the business of the borrower;
- (b) the sale or lease of a part or whole of the business of the borrower;
- (c) rescheduling of payment of debts payable by the borrower;
- (d) enforcement of security interest in accordance with the provisions of this Act;
- (e) settlement of dues payable by the borrower;
- (f) taking possession of secured assets in accordance with the provisions of this Act.

Section 10 enumerates other functions of the securitisation company or reconstruction company which reads as follows:-

10. Other functions of securitization company or reconstruction company-

- (1) Any securitisation company or reconstruction company registered u/s 3 may-
 - a) act as an agent for any bank or financial institution for the purpose of recovering their dues from the borrower on payment of such fee or charges as may be mutually agreed upon between the parties;
 - (b) act as a manager referred to in clause (c) of sub-section (4) of section 13 on such fee as may be mutually agreed upon between the parties;
 - (c) act as receiver if appointed by any court or tribunal - Provided that no securitisation company or reconstruction company shall act as a manager if acting as such gives rise to any pecuniary liability.

(2) Save as otherwise provided in sub-section

- (1), no securitisation company or reconstruction company which has been

granted a certificate of registration under subsection (4) of section 3, shall commence or carry on, without prior approval of the Reserve Bank, any business other than that of securitisation or asset reconstruction:

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

22. Based on the above provisions, contention of the petitioner is that since a trading on assets or a transfer of the assets acquired by a securitization/reconstruction company to any other securitization/reconstruction company or to any other Bank/financial institution is not provided under the statute, such an act on the part of any securitization/reconstruction company will be beyond the powers vested on it, and in doing so they will be exceeding its realm of activities which is permitted under law. According to learned senior counsel for petitioner, merely because there is no express prohibition in doing any such act, the 1st respondent could not contend that such a transfer was also contemplated under the Act. Any assignment which is not within the scope of acquisition of rights or interest in financial assets, could not be justified by attempting any broader interpretations to the provisions, is the contention.

23. Learned counsel placed reliance on a decision of the apex court in *State of Uttar Pradesh v. Singhara Singh and others* (AIR 1964 SC 358) to canvass the proposition that, if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits doing of the act in any other manner than what has been prescribed. The principle behind the rule is that, if this were not so the statutory provisions might as well not have been enacted similarly. In *The Gujarat Electricity Board v. Girdharlal Motilal and another* (AIR 1969 SC 267) it is observed that if the legislature has prescribed a mode for exercising of any power, that power can be exercised only in that manner and in no other manner. So also, in *K.L. Gupte v. Corporation, Greater Bombay* (AIR 1968 SC 303) the Hon'ble Supreme Court observed that, where large powers are given to certain authorities, the exercise whereof may make serious inroads into the rights of property of private individuals, we have to see whether there is any guidance to be collected from the Act itself, its object and its provisions, in the light of the surrounding circumstances which made the legislation necessary, taken in conjunction with well known facts of which the court might take judicial notice. Learned counsel also placed reliance on a decision of this court in *A. Padmanabhan v. District Collector, Trivandrum* (AIR 1982 KERALA 177). A learned Single Judge of this court, referring to provisions contained in Section 65 of the Kerala Revenue Recovery Act, observed that unless it is possible to locate specific conferment of power to continue the recovery proceedings, even by resort to Section 65, arrest in such cases has to be faulted.

24. Attempt of Mr. Samdani, learned senior counsel, on the other hand, is to illustrate that Section 5(1) and (2) of the SARFAESI Act will take within its scope and ambit any acquisition of rights or interests in any financial assets from any bank or financial institution or from any securitisation company or reconstruction company, as the case may be. He pointed out the wordings in Section 5(1), "may acquire financial assets of any bank or financial institution ".He specifically points out that the wording is "of any bank "and not "from any bank ". Referring to sub-section (2) of Section 5 it is also pointed out that the securitisation company or reconstruction company on acquisition of the financial assets will be deemed to be the lender having all rights of such bank or financial institution vested on it. That means the securitisation company or reconstruction company will be vested with the right to transfer the financial assets also, as a right which the bank or financial institution is vested with, being a lender. The counsel further draws attention to the definition of "financial asset" u/s (2)(1)(1) of the SARFAESI Act which includes any debt And beneficial interests in such debt [Section 2(1)(1)(ii) & 2(1)(1) (v)]. The definition of debt u/s 2(1)(ha) in the SARFAESI Act is as assigned in Section (2)(g) of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDB Act). The debt defined u/s 2(g) of the RDB Act will take in the assigned debt also. Therefore it is contended that a debt assigned by a bank or a financial institution in favour of a securitisation/reconstruction company will also become a financial asset which is assignable u/s 5(1) of the SARFAESI Act. He further points out that by virtue of amendments brought to the RDB Act in the year 2004 in Section 2(h)(ia), the definition of "financial institutions" is expanded to include securitisation companies or reconstruction companies registered under the SARFAESI Act. Therefore it is contended that any debt which is a financial asset, which has been acquired by any financial institution, which includes a securitisation/reconstruction company, is assignable u/s 5(1) of the SARFAESI Act. Learned counsel further pointed out definition of "secured creditor" u/s 2(1)(zd) of SARFAESI Act. By virtue of amendments brought in the year 2004 securitisation company or reconstruction company as the case may be are also included along with bank or financial institutions. Therefore it is contended that on the basis of acquisition of rights or interests in any financial asset of a bank or a financial institution or securitisation/reconstruction company will automatically be placed in the status of a secured creditor and therefore all rights for transfer or for reconstruction or securitisation can be exercised by such a company in par with exercise of such rights by the bank or financial institution.

25. Mr. Samdani further points out that the measures for asset reconstruction provided u/s 9 is without prejudice to provisions contained in any other law for the time being in force. He also points out that Section 37 of the SARFAESI Act makes it clear that the provisions contained therein shall be in addition to and not in derogation of various other statutes, including the RDB Act. Therefore, considering the definition of various terms and other provisions contained in the RDB Act the power of the reconstruction/securitisation company is more wide,

clear and evident is the contention.

26. While analysing the rival contentions, I notice that the term "security interest" is defined u/s 2(1)(zf) to mean a right, title and interest of any kind created upon a property in favour of a secured creditor by virtue of a mortgage, charge, hypothecation or assignment, other than those specified in section 31 of the Act. Section 2(1)(ze) defines "secured creditor", which includes among others any securitisation company/reconstruction company also. Definition of "secured debt" in Section 2(1)(ze) when read with the definition of "secured creditor" would indicate that the term "secured creditor" has been assigned with a meaning under the SARFAESI Act, other than what is understood in common parlance. Sub-section (1) of Section 13 confers right on a "secured creditor" to enforce "security interest" without intervention of any court. The right which a secured creditor can enforce is a "security interest", which according to its definition in the SARFAESI Act includes a right created even by assignment. Since the definition of "secured creditor" includes the securitisation/reconstruction companies, such institutions are conferred with powers for enforcement of security interest. When a securitisation or reconstruction company acquires an asset, it becomes a "secured creditor", who is fully entitled to enforce the rights u/s 13. Going by the definition of "financial institutions" as illustrated above, it is evident that any Bank or financial institutions as well as any securitisation or reconstruction companies is entitled to acquire "security interest" as contemplated u/s 5(1) of the SARFAESI Act. The contention that such acquisition of rights or interest in financial assets can only be carried out by a securitisation company or a reconstruction company alone and not by any Bank or financial institutions, is in my view, contrary to the scheme of the SARFAESI Act, especially in view of the amendments brought into definitions of various terms under the SARFAESI Act as well as under the RDB Act.

27. The further question to be considered is as to whether the 2nd respondent was restrained from acquiring any financial assets in view of any of the provisions contained in the Banking Regulation Act. As discussed above, since acquisition of financial asset is a matter governed by provisions contained in the SARFAESI Act, which enable any banking company to do such transactions, I am of the view that unless the provisions in the BR Act contains any specific restrictions, the 2nd respondent could not be prevented from engaging in any such activity. Yet another contention is that the provisions contained in the BR Act expressly prohibits from engaging any trading or buying and selling. In view of the findings arrived as above, I am not agreeable with the contention that the acquisition of the financial assets through transfer by itself will come within the purview of, trading or buying or selling, as contemplated u/s 8 of the BR Act. Therefore I hold that the transfer of secured assets of the petitioner company by ARCIL to the 2nd respondent and the subsequent transfer by the 2nd respondent to the 1st respondent are not in any manner prohibited and it is not contrary to any of the provisions contained under the SARFAESI Act or under the RDB Act or under the BR Act.

28. Further controversy exist as to whether the guidelines issued by the Reserve Bank of India (RBI) is in any way preventing the subsequent assignments of financial assets. It is evident that the acquisition of the debts and the underlying securities of the petitioner company was done after obtaining sanction from the RBI. The documents produced as Ext. R1(B) and R1(C) will clearly prove this aspect. Learned senior counsel for the petitioner company placed reliance on clause (10) of the RBI Guidelines, which was introduced on 22.4.2009. But it is evident that the transfer of assets in the case at hand, from ARCIL to the 2nd respondent and from the 2nd respondent to the 1st respondent, took place during the year 2008, which is well before introduction of the above said guidelines. Therefore, in view of the specific sanction obtained from RBI, such question does not arise for consideration. Hence I hold that the impugned transfers with respect to the debts and securities of the petitioner company is legal and valid, and such transactions were done perfectly within the powers vested on respondents 1 & 2.

29. Incidentally it is worth mentioning that WP(C). 25000/2010 was filed by a Trade Union representing workers of the petitioner company. The Trade Union is also challenging the very same actions which are initiated u/s 13 of the SARFAESI Act. The 1st respondent had questioned maintainability of the writ petition on the ground of "locus standi" of the petitioner. Mr. P.K. Suresh Kumar, learned counsel appearing for the petitioner therein contended that the workers of the company, being persons affected by taking over of management of the company by the secured creditor (1st respondent herein), are persons aggrieved by such actions and hence they are entitled to challenge the validity of such actions. Referring to a judgment of the Hon'ble Supreme Court reported in AIR 1983 SC 75, the counsel pointed out that the apex court held that the workers of a company can even resist a proceedings initiated for winding up of the company. In view of the fact that I am upholding validity of the assignments of debt and securities of the petitioner company, in between respondents 1 to 3, I am of the view that the question regarding maintainability of the said writ petition need not be adjudicated upon. However, it is made clear that, if the petitioner in WP(C). 25000/2010 is further pursuing the challenges, the respondents are at liberty to raise challenges on the question of maintainability, and all the contentions raised in that respect is left open for agitation.

30. The additional 4th respondent, M/s. ICICI Bank Ltd., is sailing together with the petitioner company in its contentions on merits of the grounds raised in these writ petitions. The additional respondent claims to be a share holder of the petitioner company allotted with considerable shares. Here also, the 1st respondent is raising strong objections regarding "locus standi" of the share holder to raise challenges against the proceedings initiated under the SARFAESI Act. But, for the very same reasons as stated above, I am not entering upon any findings with respect to the question regarding "locus standi" of the additional 4th respondent. Those questions are also left open for agitation to all the parties concerned.

31. Senior Advocate Mr. V. Chithambaresh appearing for the 2nd respondent Bank raised strong contentions in support of the 1st Respondent. It is alleged that the 2nd respondent was unnecessarily dragged on to these litigations by suppression of material facts, with an attempt to mislead the court and therefore they are entitled to be awarded with compensatory costs. He also emphasized the contentions put forth by the 1st Respondent to the effect that there was material suppressions and the petitioners have not approached this court with clean hands. He placed reliance on various reported decisions of this court as well as the Hon"ble Supreme Court to canvass the position that if the petitioner is approaching the court with unclean hands suppressing material facts, then such litigations are liable to be dismissed with compensatory costs. However, in view of the fact that these writ petitions were entertained and elaborate considerations on various legal questions were attempted, I am not inclined to dismiss any one of the writ petitions, solely on the premise of the alleged suppressions or misleadings. In that respect alone I am not inclined to throw out the writ petitions at the threshold. Considering the challenges raised, I do not find force in the contention that the 2nd respondent is a total stranger and a totally unnecessary party to be impleaded.

32. It is pertinent to take note of the contentions of the 1st respondent regarding the acknowledgment of debt by way of part payments made by the petitioner company to the 1st Respondent. The 1st Respondent had produced Ext. R1 (E) series letters to show that the petitioner company had confirmed/acknowledged the debt due to the 1st respondent and also the amounts outstanding. It is further pointed out that the annual report of the petitioner company contains such acknowledgements. The contention of the 1st respondent is that the petitioner company is prevented from raising any dispute in view of the acquiescence. Per contra, contentions of the petitioner company is that even assuming such acknowledgment of debt or acquiescence exists, it will not prevent the petitioner from raising the basic dispute regarding entitlement of the 1st respondent to initiate proceedings u/s 13 of the SARFAESI Act. With respect to the above controversy, I am refraining from entering on any adjudication and from arriving at any conclusions, in view of the fact that, as already observed, I am proposing to reserve liberty of the petitioners to invoke remedy u/s 17(1) of the SARFAESI Act, if sustainable under law, on any of the grounds, other than the challenges raised regarding legality and validity of the transfer of security interest, which is held as valid herein above. For the reasons mentioned above I am of the considered view that these writ petitions deserve no merit. Challenge raised against the proceedings initiated under the SARFAESI Act on the ground that, assignment of debts and underlying securities of the petitioner company by M/s. ARCIL to the 2nd respondent and the subsequent assignment by the 2nd respondent to the 1st respondent in WP(C).27021/10 (3rd respondent in WP(C).25000/10) is illegal and invalid, is hereby negatived. I hold that those transactions are legal and valid under the provisions of the SARFAESI Act, RDB Act and BR Act, and it is not violative of the guidelines or norms prescribed by

the RBI. Accordingly the writ petitions are dismissed. However, rights if any available to the petitioner to challenge the proceedings initiated under the SARFAESI Act, on any other grounds, are left open to be agitated before the appropriate forum u/s 17(1) of the said Act.