

(2011) 03 DEL CK 0527

In the Delhi High Court

Case No : Writ Petition (C) No. 1147 of 2011

Creative Home Fashions Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 03-03-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 21, 226
Customs Act, 1962 — Section 129E
Finance Act, 1980 — Section 129
Income Tax Act, 1961 — Section 72A
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 20, 20(1), 20(2)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(10), 13(2), 13(3A), 13(4)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 15(1), 15(3), 22, 3

Citation : (2012) 1 AD 140 : AIR 2011 Delhi 140 : (2011) 102 CLA 163 : (2011) 164 CompCas 422 : (2011) 122 DRJ 316 : (2011) 106 SCL 343

Hon'ble Judges : Dipak Misra, C.J.; Sanjiv Khanna, J

Bench : Division Bench

Advocate : Jayant Bhushan and Aditya Tiwari, for the Appellant; Sunil Kumar and Rajiv Ranjan Mishra, for the Respondent

Final Decision : Dismissed

Judgement

Dipak Misra, C.J.—By this writ petition preferred under Article 226 of the Constitution of India, though many a relief has been sought, yet in the course of hearing, we have made it clear that we would only address the first two prayers and it would be open to the Petitioner to seek the other reliefs by way of an independent writ petition, if so advised. The first two prayers read as under:

(i) Proviso III to Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 be declared, unconstitutional, ultra vires the Constitution of India and/or null and void;

(ii) Provisos II & III to Section 18 of the Securitisation and Reconstruction of

Financial Assets and Enforcement of Security Interest Act, 2002 be declared unconstitutional, ultra vires the Constitution of India and/or null and void.

2. First, we shall take up the second prayer. At the very outset, we may note with profit that in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, barring Section 17(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act"), the entire Act was held to be constitutionally valid. After the said decision was rendered certain amendments were carried out in Sections 13, 17 and 18 of the Act.

3. The unamended Section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 reads as follows:

18. Appeal to Appellate Tribunal--(1) Any person aggrieved by any order made by the Debts Recovery Tribunal u/s 17, may prefer an appeal

to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made there under.

4. Section (sic) 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 deals with the procedure with regard to appeal to the Appellate Tribunal. The said section reads as follows:

20. Appeal to the Appellate Tribunal--(1) Save as provided in Sub-section (2), any person aggrieved by an order made, or deemed to have been made, by a Tribunal under this Act, may prefer an appeal to an Appellate Tribunal having jurisdiction in the matter.

(2) No appeal shall lie to the Appellate Tribunal from an order made by a Tribunal with the consent of the parties.

(3) Every appeal under Sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made, or deemed to have been made, by the Tribunal is received by him and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an appeal under Sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the

parties to the appeal and to the concerned Tribunal.

(6) The appeal filed before the Appellate Tribunal under Sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

5. Section 18 of the SARFAESI Act after the 2004 amendment reads as under--

18. Appeal to Appellate Tribunal--(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal u/s 17, may prefer an appeal along with such fee, as may be prescribed to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal:

Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:

Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:

Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent of debt referred to in the second proviso.

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made there under.

6. Thus, the amended section imposes certain conditions as is perceivable from the 2004 amendment.

7. Mr. Jayant Bhushan, learned senior counsel appearing for the Petitioner, assailing the validity of Section 18 of the SARFAESI Act has contended that the said provision is violative of Article 14 and Article 19(1)(g) of the Constitution of India as it has not kept in view that in the event of an illegal and erroneous order passed by the Debts Recovery Tribunal, the physical possession of the factory premises is taken over by the Respondent No. 1-Bank and the said factory premises is sold. It is further contended that the second proviso imposes onerous condition and only confers power on the appellate Tribunal to reduce the amount, not less than 25 per cent of the debt, referred to in the second proviso thereby restricting the power of the Tribunal and making the remedy of appeal totally inefficacious and illusory.

8. In *Mardia Chemicals Ltd.*'s case (*supra*) all the provisions of the SARFAESI Act as it existed then were challenged. Section 17 deals with the right of appeal. The relevant part of the original version which has been reproduced in paragraph 40 of the decision read as under:

17. Right to appeal--(1) Any person (including borrower), aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this Chapter, may prefer an appeal to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken.

(2) Where an appeal is preferred by a borrower, such appeal shall not be entertained by the Debts Recovery Tribunal unless the borrower has deposited with the Debts Recovery Tribunal seventy-five per cent of the amount claimed in the notice referred to in Sub-section (2) of Section 13:

Provided that the Debts Recovery Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.

(3) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made there under.

9. While dealing with the validity of the condition of pre-deposit, as prescribed in the said provision the Apex Court, after noting the rivalised submissions, held thus:

59. We may like to observe that proceedings u/s 17 of the Act, in fact are not appellate proceedings. It seems to be a misnomer. In fact that it is the initial action which is brought before a Forum as prescribed under the Act, raising grievance against the action or measures taken by one of the parties to the contract. It is the stage of initial proceeding like filing a suit in Civil Court. As a matter of fact 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 in the present case. We may refer to a decision of this Court reported in Smt. Ganga Bai Vs. Vijay Kumar and Others, , where in respect of original and appellate proceedings a distinction has been drawn as follows:

... There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of civil nature and unless one's choice. It is no answer to a suit, howsoever frivolous to claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and, therefore, an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute.

60. The requirement of pre-deposit of any amount at the first instance of proceedings is not to be found in any of the decisions cited on behalf of the Respondent. All these cases relate to appeals. The amount of deposit of 75 per cent of the demand, at the initial proceeding itself sounds unreasonable and oppressive more particularly when the secured assets/the management thereof

along with the right to transfer such interest has been taken over by the secured creditor or in some cases property is also sold. Requirement of deposit of such a heavy amount on basis of one sided claim alone, cannot be said to be a reasonable condition at the first instance itself before start of adjudication of the dispute. Merely giving power to the Tribunal to waive or reduce the amount, does not cure the inherent infirmity leaning one-sidedly in favour of the party, who, so far has alone been the party to decide the amount and the fact of default and classifying the dues as NP As without participation/association of the borrower in the process. Such an onerous and oppressive condition should not be left operative in expectation of reasonable exercise of discretion by the concerned authority. Placed in a situation as indicated above, where it may not be possible for the borrower to raise any amount to make the deposit, his secured assets having already been taken possession of or sold, such a rider to approach the Tribunal at the first instance of proceedings, captioned as appeal, renders the remedy illusory and nugatory.

Thereafter, their Lordships further proceeded to express thus:

62. As indicated earlier, the position of the appeal u/s 17 of the Act is like that of a suit in the Court of the first instance under the Code of Civil Procedure. No doubt in suits also it is permissible, in given facts and circumstances and under the provisions of the law to attach the property before a decree is passed or to appoint a receiver and to make a provision by way of interim measure in respect of the property in suit. But for obtaining such orders a case for the same is to be made out in accordance with the relevant provisions under the law. There is no such provision under the Act.

63. Yet another justification which has been sought to be given for the requirement of deposit is that the secured assets which may be taken possession of or sold may fall short of the dues therefore such a deposit may be necessary. We find no merit in this submission too. In such an eventuality the recourse may have to be taken to Sub-section (10) of Section 13 where a petition may have to be filed before the Tribunal for the purpose of making up of the short-fall.

64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that (i) it is imposed while approaching the adjudicating authority of the first instance, not in appeal (ii) there is no determination of the amount due as yet (iii) the secured assets or its management with transferable interest is already taken over and under control of the secured creditor (iv) no special reason for double security in respect of an amount yet to be determined and settled (v) 75 per cent of the amount claimed by no means would be a meager amount (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75 per cent of the undetermined demand. Such conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, Sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution.

[Emphasis supplied]

10. After the said decision was rendered, the Parliament as stated earlier amended Section 17 and also carried out certain amendments in Section 18. We have already reproduced the amended Section 18. The second proviso to Section 18 stipulates that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal 50 per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. The third proviso adds a stipulation that the Appellate Tribunal, for reasons to be recorded, can reduce the amount to not less than 25 per cent of the debt, as referred to in the second proviso.

11. On a studied scrutiny of the aforesaid two provisos, it is clear as crystal that the Appellant is required to deposit 50 per cent of the amount due as claimed by the secured creditors or as determined by the Debts Recovery Tribunal. The words "whichever is less" have their own signification. If the Debts Recovery Tribunal's determination is less, the same shall prevail. Thus, there is mechanism of adjudication and that becomes the foundation of pre-deposit. That apart, the Appellate Tribunal has been conferred the power to reduce the amount to not less than 25 per cent of the amount due.

12. In this context, we may refer with profit to certain citations in the field which pertain to conditions imposed while providing an appeal as a statutory remedy. In *The Anant Mills Co. Ltd. Vs. State of Gujarat and Others*, , the Apex Court has opined thus:

... The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the Legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or Constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid.

13. The Constitution Bench in *Seth Nand Lal and Another Vs. State of Haryana and Others*, , while dealing with the conditions imposed in preferring an appeal or revision, has ruled thus:

It is well-settled by several decisions of this Court that the right of appeal is a creature of a statute and there is no reason why the Legislature while granting the right cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory (vide the latest decision in *The Anant Mills Co. Ltd. Vs. State of Gujarat and Others*, . Counsel for the Appellants, however,

urged that the conditions imposed should be regarded as unreasonably onerous especially when no discretion has been left with the appellate or revisional authority to relax or waive the condition or grant exemption in respect thereof in fit and proper cases and, therefore, the fetter imposed must be regarded as unconstitutional and struck down. It is not possible to accept this contention for more than one reason. In the first place, the object of imposing the condition is obviously to prevent frivolous appeals and revision that impede the implementation of the ceiling policy; secondly, having regard to Sub-sections (8) and (9) it is clear that the cash deposit or bank guarantee is not by way of any exaction but in the nature of securing mesne profits from the person who is ultimately found to be in unlawful possession of the land; thirdly, the deposit or the guarantee is correlated to the land holdings tax (30 times the tax) which, we are informed, varies in the State of Haryana around a paltry amount of Rs. 8 per acre annually; fourthly, the deposit to be made or bank guarantee to be furnished is confined to the land holdings tax payable in respect of the disputed area i.e., the area or part thereof which is declared surplus after leaving the permissible area to the Appellant or Petitioner. Having regard to those aspects, particularly the meagre rate of the annual land tax payable, the fetter imposed on the right of appeal/revision, even in the absence of a provision conferring discretion on the appellate/revisional authority to relax or waive the condition, cannot be regarded as onerous or unreasonable. The challenge to Section 18(7) must, therefore, fail. [Emphasis supplied]

14. In *Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay*, , the Apex Court was dealing with the provisions contained in Section 129E of the Customs Act, 1962 wherein the said provision provided that a person desirous of preferring an appeal was required to deposit, with the proper officer, the duty demanded or the penalty levied. There was also a stipulation that in any particular case, if the Collector (Appeals) or the appellate Tribunal is of the opinion that the deposit of the duty demanded or the penalty levied would cause undue hardship to such person, the appellate authority may dispense with such deposit, subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of the revenue. While dealing with the said provision, their Lordships have opined thus:

The aforesaid section provides a conditional right of appeal in respect of an appeal against the duty demanded or penalty levied. Although the section does not expressly provide for rejection of the appeal for non-deposit of duty or penalty, yet it makes it obligatory on the Appellant to deposit the duty or penalty, pending the appeal, failing which the Appellate Tribunal is fully competent to reject the appeal. See, in this connection, the observations of this Court in respect of Section 129 prior to substitution of Chapter XV by the Finance Act, 1980 in *Navinchandra Chotelal Vs. Central Board of Excise and Customs and Others*, . The proviso, however, gives power to the Appellate Authority to dispense with such deposit unconditionally or subject to such conditions in cases of undue hardships. It is a matter of judicial discretion of the Appellate Authority.

Thereafter, their Lordships, while dealing with the right of appeal, have opined thus:

Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant.

15. The submission of Mr. Jayant Bhushan, learned senior counsel, is that the condition imposed is totally onerous and, hence, illusory. In *Mardia Chemicals Ltd.*'s case (supra), their Lordships, while drawing a distinction between a proceeding at the first instance and an appeal, have also taken note of the fact that 75 per cent of the amount claimed by no means would be a meagre amount and the same was stated in the backdrop that there was no determination of the amount due by that stage and further the secured assets or its management with transferable interest had already taken over and under the control of the secured creditors.

16. At this juncture, we may refer to Sub-section (3A) of Section 13 of the SARFAESI Act which is as follows:

13. Enforcement of security interest.--(1) to (3)** ** *

(3A) If, on receipt of the notice under Sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal u/s 17 or the Court of District Judge u/s 17A.

It is apt to note here that Sub-section (3A) was inserted in the statute book with effect from 11-11-2004.

17. Sub-section (2) of Section 17 was substituted in place of the earlier Sub-section which imposed the condition of deposit of 75 per cent of the amount claimed. The substituted provision reads as follows:

17. Right to appeal--(1)** ** *

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made there under.

18. On a scrutiny of the anatomy of the aforesaid amended provisions, it is

luculent that there is earlier determination at various stages and thereafter, there is provision of appeal to the Appellate Tribunal. The condition that is imposed is 50 per cent of the amount of debt due. The debt due comes into existence only after determination by the Debts Recovery Tribunal. The condition of pre-deposit is also reducible to 25 per cent. In our considered opinion, in the scheme of things and regard being had to the statement of objects and reasons and the purpose of the legislation, we are inclined to think that the condition pertaining to pre-deposit does not invite the frown either of Article 14 or Article 19(1)(g) of the Constitution of India.

19. Presently, we shall proceed to deal with the constitutionality of the third proviso to Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 ("the 1985 Act"). In the writ petition, the grounds that have been urged to challenge the said provision are that the said proviso is arbitrary and unreasonable and violative of Articles 14 and 19(1)(g) of the Constitution of India inasmuch as it confers unguided power on the secured creditors to deprive a sick company of its valuable rights under the said Act without reference to the statutory authority who is under obligation of ensuring the proper application of the provision of the said Act to give such unilateral powers to the secured creditors merely because they control more than 75 per cent of the secured debt of a sick, company. It is also contended that the proviso abrogates the entire policy and the purpose of the statute by conferring full discretion on the question of rehabilitation on one category of stakeholders, namely, the creditors, in exclusion of all others including the statutory authority. It is also urged that the said provision offends Article 14 of the Constitution as there is no intelligible differentia in the classification and the object to be achieved inasmuch as it runs counter to the object and reasons of the Act. The further stand in the writ petition is that by introduction of the said proviso, the protection of Section 22 of the 1985 Act is taken away which could have been adequately addressed to by the expert body but after introduction of the said proviso, the said provision becomes nugatory in respect of the said companies affecting the facet of classification as well as the right to revival. It is also put forth that the proviso (3) to Section 15 also violates Article 21 of the Constitution of India as it takes away the livelihood of the workers of a sick company.

20. To have a complete picture, it is apposite to reproduce Section 15(1) which reads as follows:

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

Provided that if the Board of Directors had sufficient reasons even before such finalization to form the opinion that the company had become a sick industrial

company, the Board of Directors shall, within sixty days after it has formed such opinion, make a reference to the Board for the determination of the measures which shall be adopted with respect to the company:

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

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

21. To appreciate the stand and stance put forth in the writ petition and the submissions canvassed by Mr. Jayant Bhushan, learned senior counsel supporting the said stand, it is appropriate to understand the purpose of the said Act being brought into existence. The relevant part of the statement of object and reasons of the 1985 Act reads as follows:

The ill effects of sickness in industrial companies such as loss of production, loss of employment, loss of revenue to the Central and State Governments and locking up of investible funds of banks and financial institutions are of serious concern to the Government and the society at large. The concern of the Government is accentuated by the alarming increase in the incidence of sickness in industrial companies. It has been recognized that in order to fully utilize the productive industrial assets, afford maximum protection of employment and optimize the use of the funds of the banks and financial institutions, it would be imperative to revive and rehabilitate the potentially viable sick industrial companies as quickly as possible. It would also be equally imperative to salvage the productive assets and realize the amounts due to the banks and financial institutions, to the extent possible, from the non-viable sick industrial companies through liquidation of those companies.

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

considered appropriate with utmost practicable dispatch.

22. The preamble of the Act states that the enactment has been brought into force in the public interest with special provisions with a view to securing the timely detection of sick and potentially sick industrial companies owning an industrial undertaking and the speedy determination by board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined and for matters connected therewith or incidental thereto. Section 3(d), which defines sick industrial company, reads as follows:

3. Definitions.--(1)&(2)** ** ** 3(a) to (n)** ** ** 3(o) "sick industrial company" means an industrial company (being a company registered for not less than five years) which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth.

Explanation.--For the removal of doubts, it is hereby declared that an industrial company existing immediately before the commencement of the Sick Industrial Companies (Special Provisions) Amendment Act, 1993, registered for not less than five years and having at the end of any financial year accumulated losses equal to or exceeding its entire net worth, shall be deemed to be a sick industrial company.

23. Chapter III provides for references, inquiries and schemes. Section 15 deals with reference to the Board. Section 22 stipulates suspension of legal proceedings, contracts, etc. Section 32 reads as follows:

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

(2) Where there has been under any scheme under this Act an amalgamation of a sick industrial company with another company, the provisions of Section 72A of the Income Tax Act, 1961 (43 of 1961), shall, subject to the modifications that the power of the Central Government under that section may be exercised by the Board without the Central Government under that section may be exercised by the Board without any recommendation by the specified authority referred to in that section, apply in relation to such amalgamation as they apply in relation to the amalgamation of a company owning an industrial undertaking with another company.

24. It is apt to note that the SARFAESI Act was enacted to regulate securitization and reconstruction of financial assets and enforcement of security interests or matters connected therewith or incidental thereto. Section 2(b) defines "asset

reconstruction". It means acquisition by any securitisation company or reconstruction company of any right or interest of any bank or financial institution in any financial assistance for the purpose of realisation of such financial assistance. Sections 2(c), 2(d), 2(f), 2(k), 2(l), 2(m), 2(v), 2(z), 2(za), 2(zc) and 2(zf) define "bank"; "banking company"; "default"; "financial assistance"; "financial asset"; "financial institution"; "reconstruction company"; "securitisation"; "securitisation company"; "secured asset" and "security interest" respectively.

25. Section 35 of the SARFAESI Act deals with the effect of the Act. The said provision reads as follows:

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

26. Section 41, which deals with amendments of certain enactments, is as follows:

41. Amendments of certain enactments.--The enactments specified in the Schedule shall be amended in the manner specified therein.

27. In the Schedule, two provisos have been added. Thus, it is clear that proviso (3) to Section 15 was introduced by Act 54 of 2002 with effect from 21-6-2002.

28. In *Mardia Chemicals Ltd.*'s case (supra), the Apex Court, after framing the question to be answered, took note of the justifiability of the SARFAESI Act being enacted. In paragraph 34, their Lordships have stated thus:

34. Some facts which need be taken note of are that the banks and the financial institutions have heavily financed the Petitioners and other industries. It is also a fact that a large sum of amount remains unrecovered. Normal process of recovery of debts through Courts is lengthy and time taken is not suited for recovery of such dues. For financial assistance rendered to the industries by the financial institutions, financial liquidity is essential failing which there is a blockade of large sums of amounts creating circumstances which retard the economic progress followed by a large number of other consequential ill-effects. Considering all these circumstances, the Recovery of Debts Due to Banks and Financial Institutions Act was enacted in 1993 but as the figures show it also did not bring the desired results. Though it is submitted on behalf of the Petitioners that it so happened due to inaction on the part of the Governments in creating Debt Recovery Tribunals and appointing Presiding Officers, for a long time. Even after leaving that margin, it is to be noted that things in the concerned spheres are desired to move faster. In the present day global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues. Hence, in our view, it cannot be said that a step taken towards securitisation of the debts and to evolve means for faster recovery of the NP As was not called for

or that it was superimposition of undesired law since one legislation was already operating in the field namely the Recovery of Debts Due to Banks and Financial Institutions Act. It is also to be noted that the idea has not erupted abruptly to resort to such a legislation. It appears that a thought was given to the problems and Narasimham Committee was constituted which recommended for such a legislation keeping in view the changing times and economic situation where after yet another Expert Committee was constituted then alone the impugned law was enacted. Liquidity of finances and flow of money is essential for any healthy and growth-oriented economy. But certainly, what must be kept in mind is that the law should not be in derogation of the rights which are guaranteed to the people under the Constitution. The procedure should also be fair, reasonable and valid, though it may vary looking to the different situations needed to be tackled and object sought to be achieved.

We have quoted the said paragraph in entirety only for the purpose that it was thought necessary by the Legislature to introduce the SARFAESI Act to have healthy and growth oriented economy. It is also to be noted that their Lordships have observed that the procedure has to be fair, reasonable and valid.

29. Regard being had to the aforesaid exposition, the third proviso to Section 15(1) of the 1985 Act has to be scrutinized to see whether the same invites the wrath of Article 14 or Article 19(1)(g) of the Constitution of India. As has been stated earlier, the said proviso was amended in 2002 when the SARFAESI Act came into force. By virtue of the said proviso, a reference, which is pending before the Board for Industrial and Financial Reconstruction, shall abate if the secured creditors representing not less than three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under Sub-section (4) of the Section 13 of the SARFAESI Act. The submission of Mr. Jayant Bhushan, learned senior counsel, is that the unbridled and unfettered power has been conferred on the secured creditors without any guidance. It is also urged that the said proviso creates a classification between the two categories of industrial companies, which avail the benefit of the 1985 Act and which are deprived of such benefit.

30. In this context, we may refer with profit to *Maganlal Chhaganlal (P) Ltd. Vs. Municipal Corporation of Greater Bombay and Others*, wherein it has been held thus:

Where a statute providing for a more drastic procedure different from the ordinary procedure covers the whole field covered by the ordinary procedure, as in *The State of West Bengal Vs. Anwar Ali Sarkar*, and *Suraj Mall Mohta and Co. Vs. A.V. Visvanatha Sastri and Another*, without any guidelines as to the class of cases in which either procedure is to be resorted to, the statute will be hit by Article 14. Even there, as mentioned in *Suraj Mall Mohta's* case, a provision for appeal may cure the defect. Further, in such cases it from the preamble and surrounding circumstances, as well as the provisions of the statute themselves

explained and amplified by affidavits, necessary guidelines could be inferred as in *Kathi Raning Rawat Vs. The State of Saurashtra*, and *Jyoti Pershad Vs. The Administrator for The Union Territory of Delhi*, the statute will not be hit by Article 14. Then again where the statute itself covers only a class of cases as in *Kangshari Haldar and Another Vs. The State of West Bengal*, and *Kedar Nath Bajoria Vs. The State of West Bengal*, the statute will not be bad. The fact that in such cases the executive will choose which cases are to be tried under the special procedure will not be bad. The fact that in such cases the executive will choose which cases are to be tried under the special procedure will not affect the validity of the statute. Therefore, the contention that the mere availability of two procedures will vitiate one of them, that is the special procedure, is not supported by reason of authority.

16. The statute itself in the two classes of cases before us clearly lays down the purpose behind them, that is that premises belonging to the Corporation and the Government should be subject to speedy procedure in the matter of evicting unauthorized persons occupying them. This is a sufficient guidance for the authorities on whom the power has been conferred.

31. In *State of Mysore and Others Vs. M.L. Nagade and Gadag and Others*, , the Apex Court has opined that guidelines need not be found in the impugned provision. The same may be collected from the setting in which the provision is placed, the purpose for which the Act is enacted and even the preamble of the statute in which the provision is incorporated. A legislation or statute is enacted to achieve some public purpose and the policy of law and the object sought to be achieved can furnish reliable guidelines for the exercise of discretionary power.

32. In *M.J. Sivani and Others Vs. State of Karnataka and Others*, , their Lordships have held that the guidelines, even if not *ex facie* found, can be gathered on wholesome reading of the statute and the rules, regulations, orders or notifications issued there under.

33. There can be no dispute that the 1985 Act was brought into force to secure the timely detection of sick and potentially sick industrial companies owning an industrial undertaking and the speedy determination by board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies. The purpose of the enactment was expeditious enforcement of the measures so determined and for matters connected therewith or incidental thereto. There was also the object to fully utilize the productive industrial asset by affording maximum protection of employment and optimising the use of the funds of the bank and financial institution. The purpose was to revive and rehabilitate the potentially viable sick industrial companies as quickly as possible and to salvage the productive assets and realize the amount due to the banks and the financial institutions to the extent possible from the non-viable sick industrial companies through liquidation of those companies. Protection was granted to the said category of industrial companies u/s 22 under certain conditions. After the SARFAESI Act came into force, especially the second proviso

divests the jurisdiction of the BIFR. The Legislature in its wisdom incorporated the said condition. On a reading of the proviso in a purposive manner, it cannot be said that this power conferred on the secured creditors is totally unfettered or unguided. The reference to the board was abated only if the secured creditors representing not less than three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower of the secured creditors have taken any measures to recover the secured debt under Sub-section (4) of Section 13 of the SARFAESI Act. The condition precedent is that the secured creditors must have three-fourth value of the amount outstanding against the financial assistance and must have taken action under Sub-section (4) of Section 13 of the SARFAESI Act. If we understand the object and reasons and the purpose of the SARFAESI Act, as has been stated by their Lordships in *Mardia Chemicals Ltd.*'s case (*supra*) and the conditions imposed, it is difficult to accept the submission of the learned Counsel for the Petitioner that the provision is without any guidance. While dealing with the constitutionality of a piece of economic legislation, the Court is required to see the economic policy and the legislative judgment. In this context, we may refer with profit to the decision rendered in *Bhavesh D. Parish v. Union of India* AIR 2000 SC 2047 : 26 SCL 454 wherein the Apex Court has observed thus:

23. It was further submitted that the amendments were introduced after taking into account the recommendations of successive committees, appointed by the Bank and Government of India, which had studied the functioning of these bodies. The question of restricting such financial activity by unincorporated bodies, is a question of economic policy as it involves regulation of economic activities by different constituents. In such matters of economic policy, this Hon"ble Court does not interfere with the decision of the expert bodies which have examined the matter. The following observations of this Hon"ble Court made in *R.K. Garg v. Union of India* 1982 (1) SCR 947 :AIR 1981 SC 2138 are appropriate:

Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J. that the Legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight-jacket formula and this is particularly true in case of Legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with greater play in the joints has to be allowed to the Legislature. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in *Morey v. Doud* [1957] 354 US 457 where Frankfurter, J. said in his inimitable style:

In the utilities, tax and economic regulation cases, there are good reasons for

judicial self-restraint if not judicial deference to legislative judgment. The Legislature after all has the affirmative responsibility. The Courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the Judges have been overruled by events self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.

The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry" that exact wisdom and nice adaptation of remedy are not always possible and that "judgment is largely a prophecy based on meagre and uninterrupted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and, therefore, it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid.

At page 988 (of SCR): (at p. 2157 of AIR) it is further held:

That would depend upon diverse fiscal and economic considerations based on practical necessity and administrative expediency and would also involve a certain amount of experimentation on which the Court would be last fitted to pronounce. The Court would not have the necessary competence and expertise to adjudicate upon such an economic issue. The Court cannot possibly assess or evaluate what would be the impact of a particular immunity or exemption and whether it would serve the purpose in view or not.

26. The services rendered by certain informal sectors of the Indian economy could not be belittled. However, in the path of economic progress, if the informal system was sought to be replaced by a more organised system, capable of better regulation and discipline, then this was an economic philosophy reflected by the legislation in question. Such a philosophy might have its merits and demerits. But these were matters of economic policy. They are best left to the wisdom of the Legislature and in policy matters the accepted principle is that the Courts should not interfere. Moreover in the context of the changed economic scenario the expertise of people dealing with the subject should not be lightly interfered with. The consequences of such interdiction can have large scale ramifications and can put the clock back for a number of years. The process of rationalisation of the infirmities in the economy can be put in serious jeopardy and, therefore, it is necessary that while dealing with economic legislations, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all.

34. If the validity of the present proviso is tested on the touchstone of aforesaid enunciation of law, it is noticed that Legislature in its wisdom legislated that the reference shall abate if a representation is made by particular number of secured creditors. If the creditors, who are three-fourth in value, make a representation, the reference abates. The industrial company, if such an application is not filed, would not come under the purview of the proviso. The contention of Mr. Jayant Bhushan as to the discriminatory classification in our considered opinion, is unsustainable inasmuch as there is an intelligible differentia as the representation of three-fourth creditors in value itself qualifies to be an intelligible differentia. The purpose behind the legislation was to remedy a situation wherein the financial institutions and banking sector was confronted with not realizing their amount and not being allowed a level playing field. The legislative intention is also clear from the language employed in Section 35 of the SARFAESI Act. To avoid inconsistency, the amendment was brought in the 1985 Act. It has a sacrosanct purpose which subserves the cause of economic growth. That apart it serves a public purpose. Therefore, the challenge on the bedrock of Article 14 of the Constitution is untenable.

35. As far as the challenge on the bedrock of Article 19(1)(g) and Article 21 of the Constitution are concerned, we really fail to fathom how the said provision really affects the right to carry out any trade or profession or creates a dent in the right to life. If an industrial company becomes sick, it cannot claim as a matter of right to carry on trade or profession by not paying back the loan. Trade and scruples and the purity of the economic principle cannot be divorced from each other. A sick company cannot claim as a vested right that it has to carry on its trade at its own whim and fancy despite not paying back the amount to the secured creditors. As far as the Article 21 is concerned, there is no pleading at all except mentioning of the Article. Hence, the said ground is bereft of any substance.

36. In view of the aforesaid analysis, we do not perceive any merit in the writ petition and the same is, accordingly, dismissed.